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NO. 51371-4-II

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

ANA LIZA GARCIA; CARMEN PACHECO-JONES; and NATALYA
SEMENENKO,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH
SERVICES,

Respondent.

DEPARTMENT'S RESPONSE BRIEF

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I. INTRODUCTION

The Department of Social and Health Services (DSHS), in managing its records, is answerable to the clients it serves, to the public, and to the Legislature. This accountability, and at least one tragedy involving the death of a child in foster care, drove the Department to recommend that the State Records Committee increase the minimum retention period for founded findings of child abuse and neglect to that which was consistent with its minimum retention of foster care licensing records.

Several years before Appellants initiated this case, the Department had found each Appellant to have abused or neglected a child for whom she was responsible, and afforded each a meaningful opportunity to challenge that determination.

Appellants disagree with the Legislature's policy determination that their findings disqualify them from jobs involving unsupervised access to vulnerable adults. However, they do not challenge the validity or constitutionality of the statute that disqualifies them. Instead, they challenge the Department's retention of the records. They label the Department's recommendation to increase the minimum retention period for founded findings as a "rule" for purposes of state law, and they assert that rulemaking procedures should therefore have been followed.

Ultimately, the Department's actions at issue show its endeavor to ensure the wellbeing of the vulnerable people it serves and to follow a statutory mandate prohibiting certain persons from employment involving unsupervised access to vulnerable adults while showing due consideration for those who systemically were not previously afforded due process. Its actions are not in violation of the APA. Its actions are not arbitrary or capricious or unconstitutional. Appellants' challenges must therefore fail.

II. COUNTER STATEMENT OF THE ISSUES

1. In 2009, DSHS submitted a proposal to the State Records Committee to increase the minimum retention period for founded findings of child abuse and neglect. It did so upon consideration of its business needs and statutory obligations. In making its recommendation, it did not use the procedures for adopting an agency rule.
 - a. Is the Department's recommendation invalid under the APA as a "rule" as defined by law, when it was not adopted as such?
 - b. Does the Department's recommendation violate Appellants' rights vis-à-vis the Privileges and Immunities Clause of the Washington State Constitution?
2. On October 1, 1998, Washington implemented the Child Abuse Prevention and Treatment Act of 1996, which set federal standards for investigating allegations of child abuse and neglect and required states to establish a procedural mechanism for challenging the merits of investigative findings. Appellants challenge three rules applicable to them because of how the rules treat individuals with findings of child abuse and neglect issued before 1999 from individuals with findings of child abuse and neglect issued after 1999.

- a. Is the difference in treatment between these two classes of individuals, as articulated in the Department's rules, arbitrary and capricious, rendering the rules invalid under the APA?
 - b. Does the difference in treatment violate Appellants' constitutional right to equal protection, rendering the rules invalid under the APA?
3. Did the superior court properly dismiss Appellants' claim for injunctive relief under 42 U.S.C. § 1983, when that claim is time barred, and Appellants failed to show that the Secretary of DSHS deprived them of a federal right?
4. Are Appellants entitled to attorney fees or costs, when the Department's recommendation and rules were all reasonable and in good faith in light of its obligations under state law, and Appellants have not obtained relief under 42 U.S.C. § 1983?

III. COUNTER STATEMENT OF THE CASE

A. Overview of the Department

The Department administers multiple programs that serve Washington's most vulnerable residents through several administrations within the Department. The Aging and Long-Term Support Administration (AL TSA) administers programs for older adults. *See generally* WAC 388-71 through -114; *see also* Supplemental Record (SR) at 307-31. The Children's Administration, which houses Child Protective Services (CPS), administers programs that serve and support families and protect the safety and well-being of runaway, dependent, and neglected children. RCW 74.13.031, *see also* WAC 388-15 through -39A; *see also* SR at 3-78. The Developmental Disabilities Administration (DDA) administers

programs that promote individual worth, self-respect, and dignity of individuals with developmental disabilities. *See generally* WAC 388-823 through -850; *see also* SR at 252-59. Programs administered by the various administrations adhere to unique policies designed to comply with differing federal laws and achieve unique program objectives.

B. Access to Vulnerable Populations

Many Department programs involve contact with vulnerable persons. SR at 282. For example, the Department provides services to “functionally disabled persons.” RCW 74.39A.240. A person is “functionally disabled” if he or she is “impaired to the extent of being dependent on others for assistance with activities of daily living and instrumental activities of daily living, such as eating or using the toilet. RCW 74.39A.009(12), .240. Thus, service providers would be performing very intimate tasks for these vulnerable individuals, including toileting and hands-on care, with very little supervision or state oversight—as infrequently as once per year. SR at 282.

As a result, programs that serve vulnerable populations frequently implement statutes and rules designed to protect these vulnerable individuals. These statutes and rules include limitations on who can have unsupervised access to vulnerable persons in an employment setting. *E.g.*, RCW 74.39A.056. The specific requirements vary by program. *Compare,*

e.g., RCW 74.39A.056 (concerning employment involving unsupervised access to vulnerable adults), *with* RCW 74.13.700 (concerning unsupervised access to children in the Department’s care, custody, and control).

C. The Children’s Administration’s Issuance and Retention of Investigative Findings

The CPS program within the Children’s Administration is responsible for responding to allegations of abuse or neglect of a child. RCW 26.44.030. Once the investigation is complete, the assigned investigator issues a finding. If the investigator determines that the alleged abuse or neglect occurred on a more likely than not basis, he or she issues a “founded finding.” RCW 26.44.020(11). Otherwise, the allegation is determined to be “unfounded.” RCW 26.44.020(26). The Department is authorized to provide services to an abused or neglected child and to a child who is at imminent risk of harm due to the action or inaction of the child’s caretaker. RCW 74.13.031(3).

When the Children’s Administration issues a founded finding of child abuse or neglect, the subject of the finding may request administrative review to contest it. RCW 26.44.125(1). The Children’s Administration provides three opportunities for administrative review. RCW 26.44.125(4)-(5); WAC 388-15-135; WAC 388-02-0530;

WAC 388-02-0575. If the founded finding is upheld following an administrative review, the subject may seek judicial review. RCW 34.05.570(3). The minimum period of time that the Children's Administration retains its findings depends on whether the finding was unfounded or founded. RCW 26.44.031; WAC 388-15-077.

For findings of child abuse or neglect that are founded, the mandatory minimum retention period changed in 2008 and 2009. Prior to December 2008, the minimum retention period of founded findings of child abuse or neglect was six years. SR at 231. Pursuant to the records retention schedule set by the State Records Committee, the Children's Administration now retains founded findings for at least 35 years. SR at 230. The Children's Administration's current policy is to destroy founded findings once the minimum retention period has passed. SR at 229-30. This is subject to change, however, as DSHS is authorized but not required to destroy them. SR at 17, 117.

The change to the minimum retention schedule occurred around the time that the Children's Administration transitioned to FamLink, the current version of its electronic records database. SR at 10, 22. From 2008 to 2009, a Children's Administration project advisory group developed business rules and procedures in connection with implementation of FamLink. SR at 10, 20. As part of that process, the group evaluated DSHS's records

retention practices and schedules and recommended an increase in the minimum number of years the Children's Administration would be required to retain records of founded findings of child abuse and neglect from six years to 35 years. SR at 22-23 The group's primary reason for its recommendation was child safety, and it's discussion specific to child safety occurred after at least one fatality of a child in foster care, and involved foster parents with a founded finding that was unknown to the Department. SR at 24, 454-55.

The Children's Administration submitted its recommendation to the Records Committee, an independent state entity. SR at 221-22; *see also* RCW 40.14.050. The Records Committee considered and approved the recommendation during a public meeting in 2009. SR at 222, 226-27. Meetings of the Records Committee are open to the public and are advertised on the Secretary of State's website and in the Washington State Register. SR at 226-27.

The Children's Administration maintains investigative records of founded findings in FamLink. SR at 10, 33-34. However, the fact that it issued a founded finding as to an individual may also appear in the DSHS Background Check Central Unit's database and in files maintained by the Department's ATSA and DDA programs.

D. The Children’s Administration’s Use of Founded Findings of Child Abuse or Neglect

The Children’s Administration uses founded findings of child abuse and neglect for a variety of purposes. The most important purpose is to enable it to assess individuals who seek to become licensed foster parents or to have unsupervised access to children in the Department’s care, custody, and control. SR at 12, 30, 264-65, 451, 454. The Children’s Administration also keeps investigative records for case management and safety planning purposes and for use as needed in defending legal challenges, such as tort lawsuits and challenges to administrative actions. SR at 23-24. If the Children’s Administration works with the same family over time, then past investigative findings of child abuse and neglect are important to inform its assessment of child safety and future investigations. SR at 15.

E. Use of Final Founded Findings of Child Abuse or Neglect by Other Department Programs

Both AL TSA and DDA consider founded findings of abuse or neglect of a child as part of their background check process. SR at 259, 276-77. This is facilitated through the DSHS Background Check Central Unit, the “BCCU,” which accesses data from within DSHS and from the Washington State Patrol, the Administrative Office of Courts, the Department of Health, and individuals’ disclosures regarding their history,

and provides notification of background check results. SR at 259, 269, 343-44.

The Background Check Central Unit completes background checks on individuals if required under federal or state law. SR at 339. The process begins with a DSHS program, hiring authority, or external provider submitting a request to the Background Check Central Unit, which must include a completed DSHS Background Check Authorization form. SR at 342-43, 436. The individual whose background is to be checked must complete a portion of this form. SR at 344-45, 436. This portion includes answering “yes” or “no” to the following: “Has a court or state agency ever issued you an order or other final notification stating that you have sexually abused, physically abused, neglected, abandoned, or exploited a child, juvenile, or vulnerable adult?” SR at 435-37. If the individual answers “yes” to this inquiry, or if the final founded finding otherwise appears in the individual’s CPS history, then the Department automatically issues notice of the disqualification to the requestor if the founded finding is an automatic disqualifier. SR at 268, 278-79, 350-53, 357, 405.

Investigative findings of child abuse or neglect issued before 1999 are treated differently from founded findings issued after 1999. *See* WAC 388-71-0540(5)(d)(ii); *see also* WAC 388-825-(2)(b); *see also* WAC 388-825-645. For findings issued before 1999, two DSHS programs

(ALTSA and DDA) conduct character, competence, and suitability reviews before determining if a person is disqualified. *Id.*; SR at 300-02. This is because once Washington State implemented the Child Abuse Prevention and Treatment Act of 1996 (CAPTA), the Department began issuing its founded findings pursuant to higher investigative standards, and it also provided the opportunity for timely administrative review of founded findings, which had previously been unavailable. SR at 68-71. Washington achieved compliance with CAPTA requirements on October 1, 1998. 42 U.S.C. § 5106a; Laws of 1998, ch. 314, § 9; SR at 19.

In contrast, before 1999, subjects of investigative CPS findings were unable to seek administrative review of founded or substantiated findings. SR at 19. Further, the Department could potentially issue a finding of child abuse or neglect even if the fact of abuse or neglect by a parent or person acting *in loco parentis* was not supported by a preponderance of the evidence. SR at 19, 21.

F. Appellants

Each Appellant is the subject of a final founded finding of child abuse or neglect issued after 1999. Each had the opportunity to seek administrative and judicial review of that finding. Each was later denied or removed from employment under RCW 74.39A.056(2) as a result of their past abuse or neglect of a child. Clerk's Papers (CP) at 387, 389-91.

Ms. Garcia received a founded finding of child neglect in 2009, which an administrative law judge upheld following a hearing on the merits. SR at 526-32; CP at 75-77, 387-88. The Department issued this finding after Ms. Garcia was arrested for driving under the influence with her disabled son, in his wheelchair, in the vehicle. SR at 527. In 2012, Ms. Garcia applied to become a paid caregiver for her son, but her application was denied based on the founded finding. CP at 387.

Ms. Pacheco-Jones received a founded finding of child neglect in 1999, which she did not challenge until 2009. SR at 533-41; CP at 82-83, 89-90, 388. The Department issued this finding after drugs were found in her home and her child was left without a caretaker. SR at 533. She was terminated from a position at Catholic Charities when the founded finding appeared on a background check in 2009. CP at 389.

Ms. Semenenko received a founded finding of physical abuse of a child in 2009, after a camera recorded her standing over and kicking her child, who had been knocked to the floor by the child's father. SR at 542-45; CP at 91-93. Ms. Semenenko was terminated from her job as a caregiver when a periodic background check disclosed the finding in 2010. CP at 390-91. Ms. Semenenko filed an untimely request for review of the finding, and Division I of this Court upheld the dismissal of her untimely

request for review. *Semenenko v. Dep't of Soc. & Health Servs.*, No. 70354-4-I, at *7, 182 Wn. App. 1052 (Aug. 11, 2014) (unpublished).

G. The Proceedings Below

On September 9, 2015, Appellants filed a Petition for Declaratory Judgment and Complaint for Declaratory and Injunctive Relief under the Administrative Procedures Act (APA) and 42 U.S.C. § 1983. CP at 5-23. The original petition sought invalidation of ten provisions of the Washington Administrative Code (WAC), including WAC 388-15-077, on the basis that those provisions violated the APA and the Washington Constitution. CP at 8, 22. The original petition also sought a declaration that the retention and disclosure of CPS findings for at least 35 years is a rule and that the Department and/or Secretary of State failed to comply with the APA. CP at 8.

On December 16, 2016, the Thurston County Superior Court granted partial summary judgment to the Department, dismissing with prejudice the following: (1) all of Appellants' claims brought under 42 U.S.C. § 1983; (2) all of Appellants' claims against the Secretary of State (3) all of Appellants' challenges to the records retention schedule set by the Records Committee; and (4) all remaining challenges except for the Department's recommendation to increase the retention period and Appellants' challenge to WACs 388-71-0540(5)(d); 388-825-645; and 388-

825-640(2)(b). CP at 375-77. The superior court also dismissed the Secretary of State and Kevin Quigley as parties. CP at 375-77.

On February 13, 2017, Appellants amended their petition to bring their constitutional challenges under the purview of the APA. CP at 383-400. The Department objected to the inclusion of previously dismissed parties and claims in Appellants' amended petition. CP at 401-03.

On May 25, 2017, the superior court held a hearing on the merits of all claims that survived its December 2016 partial summary judgment order. CP at 922. Following that hearing, the court dismissed all of Appellants' remaining claims and denied their petition and request for attorneys' fees and costs. CP at 922-27. The superior court issued several findings of fact and conclusions of law based upon the administrative record and the supplemental record to which the parties agreed. CP at 901-06. It also considered the Declaration of Dee Wilson over the Department's objection but entered no findings specific to that declaration. CP at 902. Appellants timely appeal the superior court's order.

IV. ARGUMENT

Appellants' primary claim is that the Department violated the Administrative Procedure Act (APA) when it recommended an increase to the minimum records retention period for founded findings of child abuse and neglect but did not do so as a rule. This "failure-to-adopt-a-rule" claim

is premised on Appellants' theory that the Department's recommendation meets the statutory definition of a rule, that the Department has discretion to determine the length a person with a founded finding is disqualified from employment, that RCW 74.39A.056(2) does not mandate permanent disqualification, and that RCW 43.43.832 authorizes the Department to adopt rules regarding background checks.

Appellants also claim that the Department's recommendation and promulgated rules are arbitrary and capricious and invalid. In a related argument, they claim that the contents of Dee Wilson's declaration show that the Department's actions are unconstitutional. Finally, Appellants claim that the superior court improperly dismissed their request for injunctive relief brought under 42 U.S.C. § 1983 and that they are entitled to attorneys' fees and costs under state or federal law.

Appellants' APA claims are limited to review under RCW 34.05.570(2) (validity of rules). Appellants ask this Court to invalidate the Department's recommendation to increase the minimum records retention period for founded findings (as an unadopted rule) and/or to invalidate three properly promulgated rules. Br. of Appellant at 13. Appellants, however, do not assert any challenges to "other agency action" under RCW 34.05.570(4). Moreover, any challenge Appellants might bring as "other agency action," would be untimely. *See* RCW 34.05.542(3).

Further, Appellants do not challenge the records retention schedule set by the Washington State Records Committee, as the superior court dismissed the Secretary of State and all claims against the records retention schedule in December 2016, and Appellants have not assigned error to or proffered argument regarding the appropriateness of the court's dismissals. CP at 375-77; *compare* Br. of Appellant at 2-3; *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) (passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration).

A. Standard of Review

The Administrative Procedure Act (APA) establishes the exclusive means for obtaining judicial review of agency action in Washington. *New Cingular Wireless PCS, LLC v. City of Clyde Hill*, 185 Wn.2d 594, 603, 374 P.3d 151 (2016) (quoting RCW 34.05.510). The APA “sets out somewhat different standards for judicial review depending on whether the agency action being reviewed pertains to (1) rules, (2) adjudicative proceeding, or (3) other agency action, including inaction.” *Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 381, 932 P.2d 139 (1997). Agency *inaction* in terms of a failure to adopt a rule may be judicially reviewed by a petition filed pursuant to RCW 34.05.570(4)(b). Judicial review of the validity of rules is governed by RCW 34.05.570(2). *Id.*

Review of agency action by an appellate court is on the agency record without consideration of the findings and conclusions of the superior court. *Herman v. Wash. Shorelines Hearings Bd.*, 149 Wn. App. 444, 454, 204 P.3d 928 (2009), citing *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 633, 869 P.2d 1034 (1994). However, “where the superior court accepts additional evidence under RCW 34.05.562 and ‘information needed for review is contained in the superior court record of proceedings, not the agency record,’” appellate courts consider the superior court record. *Id.*, citing *Twin Bridge Marine Park, LLC v. Dep’t of Ecology*, 162 Wn.2d 825, 834, 175 P.3d 1050 (2008). Further, this Court is not obligated to completely disregard the superior court’s order but instead may review and issue its ruling affirming or reversing the superior court’s decision to deny Appellants’ petition for judicial review. *E.g.*, *Wash. Indep. Tel. Ass’n v. Wash. Utils. & Transp. Comm’n*, 148 Wn.2d 887, 910, 64 P.3d 606 (2003) (reversing the Court of Appeals’ decision and reinstating the superior court’s decision denying the petition for review).

The administrative record and supplemental record show that the superior court properly rejected Appellants’ challenges to the Department’s recommendation and rules. Further, the record and precedent support the court’s conclusions that the Department’s recommendation and rules are neither arbitrary nor capricious, nor do they violate Appellants’

constitutional rights. Additionally, the superior court properly dismissed Appellants' request for injunctive relief under 42 U.S.C. § 1983. For the reasons given below, this Court should affirm the superior court and deny Appellants' requests for invalidation and injunctive relief.

B. The Department Is Not Authorized to Set Its Records Retention Schedule, and Its Recommendation to do so Is Not a Rule

Appellants contend that the Department's recommendation to amend the minimum retention period for founded findings of child abuse and neglect meet the APA's definition of a "rule" and, therefore, that the recommendation is invalid because it was not adopted as a rule using the APA rulemaking procedures. Br. of Appellant at 14. This argument fails for two reasons. First, the Department cannot set its records retention schedule; that responsibility goes to the State Records Committee under RCW 40.14. Second, while the State Records Committee adopted the Department's recommendation to amend the records retention schedule, the recommendation itself has no independent legal effect and is not a rule. Therefore, the Department did not violate the APA by making a recommendation to change its minimum retention period without first completing formal rulemaking.

1. The Department is Not Authorized to Set Its Records Retention Schedule, and Appellants’ “Failure-to-Adopt-a-Rule” Claim Must Therefore Fail

As a threshold matter, Appellants’ “failure-to-adopt-a-rule” claim must fail because the Department lacks authority to set a retention period as a matter of law. The action about which Appellants complain is the “amend[ment of] the directive to retain CPS findings—and thereby increase the employment bar—from six to 35 years without engaging in public rulemaking.” Br. of Appellant at 15. But the record and law are clear that the Department did not amend, and could not have amended, the minimum retention period. Instead, the Department submitted a recommendation to the State Records Committee. SR at 124, 216-18, 221-22, 225-27, 237. The State Records Committee is the state entity that is responsible for making the final decision to approve, modify, or disapprove the recommendations to alter any retention schedule. RCW 40.14.050. Because the State Records Committee—and not the Department—amended the records retention schedule, the Department’s recommendation that it do so cannot violate APA rulemaking requirements as part of the State Records Committee action.¹

¹ The Records Committee accepted the recommendation in a public hearing setting. SR at 226-27. Thus, the public had opportunity to weigh in on the decisions leading to an increase to the minimum retention period. *Wash. Indep. Tel. Ass’n*, 148 Wn.2d at 902.

While it is true that the Department has adopted a regulation stating that it will “retain records relating to founded reports of child abuse and neglect as required by DSHS records retention policies.” WAC 388-15-077(5), that regulation is not before this Court. Appellants specifically challenge other rules, not that one. *See* Br. of Appellant at 38 (Appellants challenge is to WACs 388-71-0540, 388-825-640, and 388-825-645).

Because as a matter of law the Department is not the entity that amended the minimum retention period for founded findings, Appellants’ argument that the Department violated APA rulemaking requirements must fail, and this Court should affirm the superior court’s order and deny Appellants their requested relief.

C. The Department’s Recommendation Was Not a “Rule,” and APA Rulemaking Requirements Thus Do Not Apply

Alternatively, even if the Department is connected with the State Records Committee’s amendment of the records retention schedule, Appellants’ “failure-to-adopt-a-rule” claim would still lack merit because record retention actions are not a “rule.”

APA rulemaking requirements apply only if an agency enacts a “rule” as defined. *Faylor’s Pharmacy v. Dep’t of Soc. & Health Servs.*,

125 Wn.2d 488, 493, 886 P.2d 147 (1994). The APA defines a “rule,” in pertinent part, as:

[A]ny 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; (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 ... The term ... does not include (i) 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).

The Department’s recommendation to amend the minimum retention period for founded findings of child abuse or neglect was not a rule—and therefore was not subject to APA rulemaking requirements—for three reasons: (1) it is not an “order, directive, or regulation of general applicability;” (2) it does not affect any “requirement, qualification, or standard;” and (3) there is no relevant “benefit or privilege conferred by law” or impact on the issuance, suspension, or revocation of any license.

1. The Department’s recommendation is not an order, directive, or regulation of general applicability

Appellants do not argue that the Department’s recommendation is an “order” or “regulation” under RCW 34.05.010(16); instead, they call it a “directive.” Br. of Appellant at 16. “Directive” is not defined in the APA but is commonly understood to mean something that is authoritative in

nature. See *Webster's Third New International Dictionary of the English Language* 641 (2002). This common meaning is consistent with how this Court has interpreted the term: as an action that provides authoritative instructions and specific orders. See *Sudar v. Dep't of Fish & Wildlife Comm'n*, 187 Wn. App. 22, 31-32, 347 P.3d 1090 (2015).

The Department's recommendation is neither an authoritative instruction nor a specific order, and as such it is not a rule. The Department does not have authority to direct the Records Committee's decision making. See RCW 40.14.050. Instead, the Records Committee was authorized to accept or reject the Department's recommendation. RCW 40.14.050; RCW 40.14.060.

Further, an agency's minimum records retention period is not of general applicability to members of the public. Where an agency action is a guide to agency staff and does not govern the public, it is not a rule of general applicability. *Sudar*, 187 Wn. App. at 31. In *Sudar*, this Court held that the Washington Fish and Wildlife Commission's policy of phasing out certain types of gill-nets and transitioning their use to off-channel areas was not a rule. The policy's purpose was to guide staff tasked with promulgating rules but had no legally enforceable regulatory effect on the public. In its analysis, the court noted that the policy only reached staff and did not generally apply to commercial fishermen. *Id.* Similarly, in *Island Cty.*

Comm. on Assessment Ratios v. Dep't of Revenue, 81 Wn.2d 193, 202-03, 500 P.2d 756 (1972), the Washington State Supreme Court held that factors employed by the Department of Revenue in determining “true and fair value” under an apportionment statute were not a rule because they only reflected changes in the Department’s internal operations.

Like the agency actions at issue in *Sudar* and *Island County*, the Department’s recommendation to amend its minimum records retention period concerned only the internal management of the Department’s records and did not apply to the public. RCW 34.05.010(16); *Jamison v. Dep't of Labor & Indus.*, 65 Wn. App. 125, 129, 827 P.2d 1085 (1992) (rejecting argument that agency action met definition of rulemaking when it “can scarcely be characterized as a legislative activity”). It did not apply to the public because the mere fact that the Department retains a document does not have any independent legal effect, and as such it does not apply to the public. As discussed in greater detail below, any impact on the public—including Appellants—is a result of other statutes and regulations. The Department’s recommendation is therefore not a rule triggering APA rulemaking requirements.

2. The Department’s recommendation does not affect any requirement, qualification, or standard

Appellants overlook a critical distinction when they argue that “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.” Br. of Appellant at 17. The misunderstanding at the heart of the Appellants’ theory is that the records retention schedule disqualifies a person from employment. This is incorrect. The retention schedule simply defines the minimum period of time that the Department will retain a particular category of record. The retention of that record has no independent legal effect on a person’s ability to obtain employment. Any disqualification from employment (i.e., any “qualification”, “requirement,” or “standard”) comes from a separate statute or regulation, such as RCW 74.39A.056(2). This brings the retention schedule outside the definition of a rule.

The thrust of Appellants’ argument is that, but for the amendment to the retention schedule, their disqualification period would have been 6 years but that, as a result of the amendment to the retention schedule, the disqualification period is now 35 years. Assuming, for the sake of argument, that this collateral consequence of recommending a change to the retention schedule could render it a rule, Appellants’ argument is still incorrect for

two reasons. First, the period of time that the Department retains founded findings does not affect the disqualification period because disqualification is dictated by statute. Second, the previous retention schedule required the Department to retain findings for *at least* six years. It did not prohibit the Department from retaining the findings beyond that time.

The employment disqualification is set forth in RCW 74.39A.056(2).² Under RCW 74.39A.056(2), it does not matter whether the Department retains a copy of the final founded finding. This statute disqualifies persons from employment in the care of, and with unsupervised access to, vulnerable adults if they have received a final founded finding of child abuse or neglect. RCW 74.39A.056(2). The statute identifies the types of determinations that will result in a disqualification. These include findings or conclusions by courts or disciplining authorities or “final substantiated finding[s]” of abuse or neglect that have been “entered into a state registry.” *Id.*

The statutory disqualification from employment involving unsupervised access to vulnerable adults is permanent and does not depend on record retention schedules. This is clear from the plain language of the statute, which provides as follows:

² Appellants are not contesting the issue of whether RCW 74.39A.056(2) was correctly applied in their circumstances; instead, they are challenging the retention of the Department’s records.

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) (emphasis added).

This language is unqualified and contains no expiration date. Once a person has been “entered into a state registry with a final substantiated finding of” child abuse or neglect, that person is permanently disqualified from employment that involves unsupervised access to vulnerable adults. When a statute is not ambiguous, only a plain language analysis is appropriate. *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006).

Even if RCW 74.39A.056(2) were ambiguous, the Legislative history, the intent of the statute, and the Department’s longstanding interpretation all confirm the permanence of the disqualification of persons who have previously been found to have abused or neglected a child pursuant to modern investigative standards.

The Legislative history supports a broad interpretation of the disqualification of persons who have committed child abuse or neglect.

The Senate Bill Report accompanying a predecessor to RCW 74.39A.056(2) described the effect of the provision:

Any caregivers with unsupervised access to vulnerable adults with a finding of abuse or neglect, exploitation or abandonment or [*sic*] a minor or vulnerable adult are prohibited from employment in these settings.

S.B. Rep. on Engrossed Second Substitute H.B. 1850, at 2, 55th Leg., Reg. Sess. (Wash. 1997). This description indicates that the Legislature intended for the disqualification to be permanent and automatic once the Department issues a final founded finding of child abuse or neglect.

The intent of RCW 74.39A.056(2), as expressed in the initiative passed by voters, is to protect vulnerable elderly people and people with disabilities. Laws of 2012, ch. 1, § 1 (Initiative 1163); *see also* RCW 74.39A.005 (“[M]any recipients of in-home services are vulnerable and their health and well-being are dependent on their caregivers.”). The people further provided that its language must be liberally construed to effectuate that intent. Initiative Laws of 2012, ch. 1, § 305. Again, this supports an interpretation that more expansively protects vulnerable adults from persons who have previously abused or neglected a child.

Additionally, this Court should defer to the Department’s interpretation of the disqualification. “[I]f an ambiguous statute falls within the agency’s expertise, the agency’s interpretation of the statute is ‘accorded

great weight, provided it does not conflict with the statute.” *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004) (internal citation omitted). As the agency charged with administering programs designed to protect vulnerable adults, administering the statute intended to protect vulnerable adults falls squarely within the Department’s expertise. The Department has long interpreted the disqualification under RCW 74.39A.056(2) to apply in perpetuity due to the absence of a time limit in that statute. SR at 260, 264-65, 280-83, 297-98.

Contrary to Appellants’ contention, the Department’s interpretation is long-standing and was not adopted as a litigation strategy. The Department’s interpretation is reflected in several sections of the Washington Administrative Code that were in effect prior to this lawsuit, all of which Appellants initially challenged, and none of which reference the retention of Department records or a 35-year time-limit on employment disqualification. *See* WAC 388-71-0540(5)(d)³; WAC 388-825-640(2)(b); WAC 388-101-3090(2)(d); WAC 388-76-10120(3)(d)(iv); WAC 388-78A-2470(2)(d); WAC 388-97-1820(1)(b)(ii); WAC 388-107-1290(2)(d); *cf.* SR at 260, 264-65, 280-83, 297-98, 301-02 (explaining Department’s

³ Though a finding that is not retained would not appear on the BCCU report, the applicant would still be required to disclose *any* previous findings under penalty of perjury. SR at 344-45, 435-37. Under WAC 388-71-0540(5)(d)(ii), the disclosed finding is disqualifying whether or not the Department retained record.

interpretation of permanent disqualification almost one year before APA hearing).⁴ Thus, the Department's interpretation (i.e., that RCW 74.39A.056(2) permanently disqualifies persons who have committed child abuse or neglect) is entitled to deference.

Appellants argue that RCW 74.39A.056(2) does not compel the Department to permanently disqualify persons who have committed child abuse or neglect from employment involving access to vulnerable adults. Br. of Appellant at 23. This argument is inconsistent with a plain reading of RCW 74.39A.056(2). Appellants attempt to evade the plain meaning of RCW 74.39A.056(2) by citing to RCW 43.43.832 and RCW 26.44.031. This argument misses the mark. While RCW 43.43.832(2) generally does give the Department authority "establish rules and set standards to require specific action when considering" findings of child abuse or neglect, the specific action must still be consistent with other statutes, including RCW 74.39A.056(2). RCW 74.39A.056(2) is a more specific statute that determines the effect of a final substantiated finding of child abuse or neglect in the specific context of employment in the care of, and with unsupervised access to, vulnerable adults. Contrary to Appellants'

⁴ Appellants' challenges to WAC 388-101-3090, WAC 388-76-10120(3)(d)(iv), WAC 388-78A-2470(2)(d), WAC 388-97-1820(1)(b)(ii), WAC 388-101-3090 and WAC 388-107-1290(2)(d) were all dismissed due to Appellants' lack of standing on December 16, 2016. CP at 375-78.

argument, RCW 43.43.832(2) does not give the Department authority to ignore or alter the intended effect of RCW 74.39A.056(2). Similarly, RCW 26.44.031(3), which gives the Department authority related to the keeping of founded reports of child abuse or neglect, does not give the Department authority to ignore the mandatory disqualification set forth in RCW 74.39A.056(2).

Appellants' misreading of RCW 74.39A.056(2) stems from their incorrect assumption that, if the Department ceases to retain a record of the final founded finding, that person has no longer been "entered into a state registry with a final substantiated finding of" child abuse or neglect. But whether someone has been "entered into" a state registry is a historical fact that is not altered by retention or non-retention of records. *See Black's Law Dictionary* 10th ed. (2014) (defining "enter[ed]" as "[t]o put formally . . . on the record."); *Webster's* at 756 (defining "entered" as "to inscribe or make a record of"). Appellants would have this Court re-write RCW 74.39A.056(2) to limit its application to situations in which the person is "maintained in a state registry with a final substantiated finding." But that is not the language that the Legislature used. This Court should reject Appellants' invitation to re-write the statute. *State v. Larson*, 184 Wn.2d 843, 851-52, 365 P.3d 740 (2015) ("It is beyond [courts'] power

and function to ‘add words or clauses to an unambiguous statute when the legislature has chosen not to include that language.’”).

Appellants also argue that there is no “registry” for CPS findings and, therefore, RCW 74.39A.056(2) does not compel disqualification from employment. Br. of Appellant at 32-34. That could be relevant if the Appellants were challenging their disqualification, or application of RCW 74.39A.056(2) to their circumstances. But they are not. Rather, they are contending that the 2009 change to the DSHS record retention schedule is an “unpromulgated rule” because they claim record retention increases the period during which Appellants are disqualified from certain types of employment. Appellants’ argument illustrates the Department’s position: If RCW 74.39A.056(2) does not apply to Appellants, they are not disqualified from employment, no matter how long the Department retains the founded findings of child abuse or neglect. But in fact RCW 74.39A.056(2)—and not the retention schedule—is the relevant “requirement,” “qualification,” or “standard” that governs Appellants’ employment, and that precludes their challenge to the record retention schedules.⁵

⁵ The Department *does* maintain a registry. *See Black’s Law Dictionary* (defining “registry” as “[a] place where information used by an organization is kept, esp. the official records and lists”). RCW 74.04.056(2) requires only “a” registry, not a “central” registry; this is the distinction that Appellants miss. A “central registry” in the context of child abuse and neglect findings is a specific type of registry. *See* former RCW 26.44.070 (1987). The

Next, Appellants contend that the Department’s interpretation of RCW 74.39A.056(2) as requiring permanent disqualification is inconsistent with WAC 388-71-01275(3), which provides for removal of a final finding from the Department’s adult maltreatment registry. There is no such inconsistency. The regulation cited by Appellants specifically provides that such findings *are* permanent. WAC 388-71-01275(2). The narrow exceptions do not undermine this conclusion. Removing deceased persons from the adult maltreatment registry, *see* WAC 388-71-01275(3)(c), in no way undermines the permanence of the disqualification. Removing persons as required by federal law, *see* WAC 388-71-01275(3)(d), merely recognizes the supremacy of federal law. *See* 42 U.S.C. § 1396r(g)(1)(D). If, on administrative review, an initial finding is determined to be erroneous or is rescinded following judicial review, *see* WAC 388-71-01275(3)(a), (b), it was not a *final* finding to begin with. As a result, there is no inconsistency between the RCW 74.39A.056(2)’s requirement that a final substantiated finding be permanent and WAC 388-71-01275(3).

Legislature knows how to require a central registry. *See* former RCW 26.44.070 (1987) (“The department shall maintain a *central* registry of reported cases of child abuse” (emphasis added)). It did not do so here. Further, adoption of Appellants’ argument would lead to the absurd result that no finding of child abuse or neglect made since the abolishment of the central registry in 1987 would result in disqualification pursuant to RCW 74.39A.056(2) despite clear Legislative intent to the contrary.

3. Appellants have not identified any “benefits or privileges conferred by law” or any impact on licensing affected by the Department’s retention of records

The Court may also affirm the superior court because the Department’s recommendation did not alter any “qualification or requirement *relating to the enjoyment of benefits or privileges conferred by law,*” nor did it alter any “qualifications or standards for the issuance, suspension, or revocation of licenses” RCW 34.05.010(16)(d), (e).

Appellants attempt to conflate “benefits or privileges conferred by law” with the separate concept of “[p]roperty or liberty interests protected by due process.” Br. of Appellant at 19.

Appellants’ argument must fail because the “privilege or benefit” conferred by virtue of the Due Process Clause of the United States and Washington State Constitutions, at least in the context of employment, is procedural and not substantive. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 220–22, 143 P.3d 571 (2006). The Due Process Clause of the United States Constitution does not guarantee a person’s desire to perform work in the job of his or her choosing but instead confers procedural protections on government actions that would condition or limit employment. Then, the nature and extent of those procedural protections must meet the due process floor based upon on the weighing of factors outlined in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed.2d 18 (1976). *Bd. of*

Regents of State Colleges v. Roth, 408 U.S. 564, 569-70, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Paul v. Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155 (1976); *Hardee v. Dep't of Soc. & Health Servs.*, 172 Wn.2d 1, 15, 256 P.3d 339 (2011). To the extent that founded findings implicate any protected interest under the Due Process Clause, the three levels of administrative review and the opportunity for judicial review provide all the process due.

Appellants cite no precedent for their assertion that an agency's action that is tangentially related to a protected liberty or property interest is a rule within the meaning of RCW 34.05.010(16). This Court should decline to change the APA and adopt such a strained interpretation here. It is the fact that there has been a final determination of child abuse or neglect after opportunities for due process hearings that disqualifies a person under RCW 74.39A.056(2), not the maintenance of the Department's records.

Appellants' reliance on *Hillis v. Dep't of Ecology* is inapposite; the facts here are distinguishable from that case. In *Hillis*, the public "benefit or privilege" at issue was the right of the general public, expressly granted by statute, to apply and be considered under statutory criteria for a groundwater withdrawal permit. *Hillis*, 131 Wn.2d at 398-99. Due to budget constraints, the Department of Ecology set priorities for the applications it would process first and batch a person's application for this benefit, choosing to

evaluate groups of applications by watershed. *Id.* at 390-91. The Court ruled that the Department of Ecology’s decision was a rule because it changed the qualifications or requirements relating to the public’s express, statutory right to have their applications processed. *Id.* at 399. In contrast, Appellants cannot show that the DSHS recommendation affected a right expressly conferred by statute.

Appellants argue that courts have broadly construed “benefit conferred by law” to include receipt of Medicaid funds and tuition reduction in addition to the statutory right described in *Hillis*. Br. of Appellant at 19. However, like the court in *Hillis*, the courts in those cases Appellants cite were also addressing issues related to benefits expressly conferred by statute. *See Failor’s*, 125 Wn.2d 490-91 (Medicaid reimbursement payment schedules); *see also Hunter v. Univ. of Wash.*, 101 Wn. App. 283, 291-92, 2 P.3d 1022 (2000) (veteran tuition waivers under RCW 28B.15.910). But the Department’s recommendation did not alter any “qualifications or standards for the issuance, suspension, or revocation of licenses” RCW 34.05.010(16)(d), (e).

In contrast, the Legislature has passed multiple laws concerning standards for the issuance of licenses. *See, e.g.*, RCW 74.15.130 (license and qualification standards for foster homes); *see also* RCW 43.215.200 (license standards for child care and early childhood education facilities).

Similarly, the Department, as a licensing entity, has promulgated rules and regulations that establish or alter licensing standards and qualifications. *See, e.g.*, WAC 388-76 (adult family homes); WAC 388-78A (assisted living facilities); WAC 388-145 (group care facilities and services); WAC 388-147 (child placing agency and adoption services). When comparing the Department's recommendation to its regulations that do actually establish, alter, or revoke licensing qualifications and standards, the comparison reveals the stark difference between the recommendation and these types of licensing regulations and shows that the recommendation is not a rule under RCW 34.05.010(16)(e). In sum, the Department's recommendation is not a rule, and this Court should reject the claim that it violated the APA by failing to complete formal rulemaking before making this recommendation.

D. The Department's Regulations and Recommendation Are Neither Arbitrary Nor Capricious

The arbitrary and capricious test is a very narrow standard and the one asserting it "must carry a heavy burden." *Pierce Cty. Sheriff v. Civil Service Comm'n of Pierce Cty.*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983) "Arbitrary and capricious" has been defined as action that is willful and unreasoning in disregard of facts and circumstances. *Id.* "Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached." *Heinmiller*

v. Dep't of Health, 127 Wn.2d 595, 609, 903 P.2d 433 (1996). Whether the agency action was willful and unreasoning considers whether the action was taken without regard to attending facts and circumstances. *Wash. Indep. Tel. Ass'n v. Wash. Utilities & Transp. Comm'n*, 148 Wn.2d 887, 904, 64 P.3d 606 (2003).

Appellants make two separate “arbitrary and capricious” challenges here. First, they challenge the Department’s recommendation as arbitrary and capricious. Br. of Appellant at 36-37. Second, they challenge WACs 388-71-0540, 388-825-640, and 388-825-645 as arbitrary and capricious because they “allow character reviews for some, but not all,” persons with findings without any rationale. Br. of Appellant at 38-40. Both arguments must fail for the below reasons.

1. The Department’s recommendation is not a rule, nor is it arbitrary or capricious

The Department’s recommendation is not a rule, and to the extent that it is “agency action,” any arbitrary or capricious challenge would be untimely. RCW 34.05.570(4); RCW 34.05.542(3) (general 30-day limit for challenging other agency action). However, if this Court were to examine it, this Court should find that it was neither arbitrary nor capricious.

The Department carefully considered several factors in deciding to recommend an increase in the minimum retention period. The primary

factor was protecting children in its care. SR at 30, 451, 454. Recognizing a pre-existing 35-year retention period for denied and revoked foster care licensing records, a second one was consistency with that schedule. SR at 23. A third was its business need to retain investigative records for due process purposes or that may be relevant to other litigation. SR at 29-30. A fourth factor was children's potential desire to access their own records. SR at 30. The Department discussed the possible impact of its recommendation, if adopted, on employment, though its business needs for the records outweighed that consideration. SR at 23-25. That passing consideration cannot show, however, that the recommendation is arbitrary or capricious because the record does not specify whether the Department was referring to employment implicated by RCW 74.39A.056(2). *See* SR at 23-25, 477.

In short, the record shows that the Department's recommendation was not arbitrary or capricious but was the result of careful consideration of the Department's business needs and statutory obligations. This Court should therefore affirm the superior court's order.

2. The Department's rules are neither arbitrary nor capricious

As the basis for its assertion that the Department's rules are arbitrary and capricious, Appellants argue, "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.” Br. of Appellant at 38. As discussed in greater detail below, the record in its entirety provides ample explanation as to why the Department distinguished pre-1999 from post-1999 investigative findings in promulgating the rules that Appellants challenge.

Further, a review of the plain language of the rules show that they reflect the mandate of RCW 74.39A.056(2), which only applies to applicants *final* founded findings of child abuse and neglect. As a result, Appellants cannot show these rules, promulgated at least in part to implement RCW 74.39A.056(2), were willful, unreasoning or taken without regard to attending facts and circumstances.

The challenged rules apply to all subjects of final founded findings of child abuse and neglect issued after Washington’s implementation of CAPTA on October 1, 1998. SR at 19. The rational basis for affording subjects of pre-1999 founded findings character, competence, and suitability reviews is that the subjects of such findings faced a different investigative standard and no right to challenge the finding in an administrative hearing setting. Federal law now requires a process that includes notification and opportunity to challenge investigative findings as

well as a higher standard of evidence for investigations of child abuse and neglect allegations. Therefore, it makes sense that for final founded findings issued after 1999, which merit greater finality considerations, the Department does not complete character, competence, or suitability reviews.

In light of the above, this Court should decline to invalidate the Department's rules and should also decline to find that the Department's recommendation was arbitrary or capricious.

E. The Department's Regulations and Recommendation to the Records Committee are Constitutional

Appellants argue that the Department's rules are an unconstitutional violation of the Equal Protection Clause of the United States Constitution as applied to them under a "heightened rational basis" standard of review because they (1) burden Appellants' significant rights; and (2) reflect animus toward Appellants. Br. of Appellant at 40. Appellants' assertion that the Department has exhibited animus toward them is not supported by the record. Further, while heightened rational basis is not the applicable standard of review, the Department's distinction between CPS founded findings issued before and after Washington's implementation of CAPTA surpasses a heightened standard of rational basis review.

Appellants also argue that the Department's recommendation to

increase its minimum retention period is unconstitutional under the Equal Protection and Privileges & Immunities Clauses of the Washington State Constitution. Br. of Appellant at 40. Their basis for this argument is the Declaration of Dee Wilson that Appellants submitted to the superior court on November 21, 2016, to which the Department objected and concerning which the superior court issued no findings. CP at 442-44. This Court should decline to consider Ms. Wilson’s declaration. Further, it should find the Department’s recommendation to be constitutional under a traditional rational basis standard of review.

If a party alleges that a rule is unconstitutional, the party must prove unconstitutionality beyond a reasonable doubt. *Longview Fibre Co. v. Dep’t of Ecology*, 89 Wn. App. 627, 632-33, 949 P.2d 851 (1998) (citing *City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990)). Here, the record shows that the Department’s rules and recommendations are constitutional, that the Appellants have failed to prove otherwise, and this Court should therefore affirm the superior court’s order.

1. The Department’s rules do not violate Appellants’ right to equal protection

“Equal protection under the law is required by both the Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution,” and “all persons similarly situated should

be treated alike.” *Am. Legion Post No. 149 v. Wash. State Dep’t of Health*, 164 Wn.2d 570, 608, 192 P.3d 306 (2008) (internal citations and quotation marks omitted). “[N]o equal protection claim will stand unless the complaining person can first establish that he or she is similarly situated with other persons. . . . In other words, only after the defendant establishes membership in a class will a court engage in equal protection scrutiny.” *State v. Handley*, 115 Wn.2d 275, 289–90, 796 P.2d 1266 (1990) (internal citations omitted).

Courts have repeatedly held that the right to employment is a protected interest subject to rational basis review.” *Amunrud*, 158 Wn.2d at 220–22. Accordingly, the challenged rules are presumed valid, and Appellants have a “heavy burden” to prove their invalidity. *Yakima Cty. Deputy Sheriff’s Ass’n v. Bd. of Comm’rs for Yakima Cty.*, 92 Wn.2d 831, 835, 601 P.2d 936 (1979). The proper standard of review here is not heightened rational basis, as Appellants argue (although their arguments also fail under that approach).

Under a rational basis review, there are three potential issues by which to challenge the agency’s action: (1) whether the classification applied to Appellants applies alike to all members within the designated class; (2) whether some basis exists in reality for reasonably distinguishing between the designated class and others outside the class; and (3) whether

the challenged classification has any rational relation to the purpose of the challenged law. *See Yakima Cty. Deputy Sheriff's Ass'n*, 92 Wn.2d at 835-36; *Hale v. City of Seattle*, 48 Wn. App. 451, 453, 739 P.2d 723 (1987). If the court answers any of these in the negative, the regulation violates equal protection. *Wash. Pub. Emps. Ass'n v. State*, 127 Wn. App. 254, 263-64, 110 P.3d 1154 (2005). Parties challenging a classification under rational basis review bear an extremely high burden, and must negate “every conceivable basis which might support” the reasonableness of the classification. *See also Heller v. Doe by Doe*, 509 U.S. 312, 319-20, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993).

The difference between persons who received more extensive opportunities for due process hearings after Washington’s implementation of CAPTA, and those who did not, satisfies this test.

As discussed above, the challenged rules apply to all subjects of founded findings issued after the implementation of CAPTA. Thus, there is no inconsistent treatment of persons within Appellants’ class.

Subjects of founded findings issued before the implementation of CAPTA are not similarly situated to subjects of founded findings issued after the implementation of CAPTA. Thus, subjects of findings issued before CAPTA receive character, competence, and suitability determinations if they apply for a job regulated by the Department and

involving unsupervised access to vulnerable populations.

The second rationality inquiry is whether there is a basis in reality for the State to distinguish between subjects of founded findings issued after the implementation of CAPTA and others outside that classification. A classification does not violate equal protection if it is “neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy.” *Forbes v. City of Seattle*, 113 Wn.2d 929, 944, 785 P.2d 431 (1990) (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527, 79 S. Ct. 437, 441, 3 L. Ed. 2d 480 (1959)). “Where persons of different classes are treated differently, there is no equal protection violation.” *State v. Ward*, 123 Wn.2d 488, 515, 869 P.2d 1062 (1994).

Here, the rational basis for treating subjects of founded findings issued after the implementation of CAPTA differently from subjects of founded findings issued before the implementation of CAPTA is that as a result of the implementation of CAPTA, the former subjects have a clear statutory process for notice and an opportunity to seek review that the latter subjects did not have. *See* RCW 26.44.125; RCW 26.44.030(12); *see also Fed. Commc’ns Comm’n v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993).

Regarding the third factor—whether the classification bears any rational relation to the purpose of the challenged WACs— these WACs

give meaning to the term “final” in RCW 74.39A.056(2) in light of significant changes to the way that CPS investigations are conducted, due to the implementation of CAPTA. Because subjects of founded findings issued before implementation of CAPTA were not provided the same notice and opportunity to challenge a founded finding than the Petitioners received, and RCW 74.39A.056(2) prohibits applicants with “final” founded findings from certain job categories, the statute does not require these individuals to be automatically denied approval for employment in certain job categories.

In light of the above, Appellants’ equal protection challenge to the Department’s rules must fail. This Court should affirm the superior court’s finding as such and decline to invalidate these rules.

2. The Department’s recommendation violates neither the Equal Protection Clause Nor the Privileges and Immunities Clause

In contrast to the Equal Protection Clause of the United States Constitution, the “Privileges and Immunities Clause” of the Washington Constitution provides that “[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” Const. art. I, § 12. It requires a heightened rational basis standard of review, but such a standard only applies to

“special interest legislation—laws that confer a benefit on a privileged or influential minority.” *Schroeder v. Weighall*, 179 Wn.2d 566, 572, 316 P.3d 482 (2014). The heightened standard of review under the Privileges and Immunities Clause applies only where a challenged law implicates a “privilege” or “immunity”—terms that pertain alone “to those fundamental rights which belong to the citizens of the state by reason of such citizenship. *Am. Legion Post No. 149*, 164 Wn.2d at 607, quoting *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902). Even where important rights are implicated, they cannot be considered “privileges” or “immunities” triggering heightened rational basis review if they are not “fundamental rights” of state citizenship. See *Ockletree v. Franciscan Health System*, 179 Wn.2d 769, 779-80, 317 P.3d 1009 (2014).

If the challenged law implicates a “privilege” or “immunity,” then courts look to whether there is a “reasonable ground” for granting the privilege or immunity. *Schroeder*, 179 Wn.2d at 574. This “reasonable grounds” test is more exacting than rational basis review, and under this test a court cannot hypothesize facts to justify a legislative distinction. *Id.*, citing *City of Seattle v. Rogers*, 6 Wn.2d 31, 37-38, 106 P.2d 598 (1940). In other words, for a law to be upheld under this reasonable ground test, it must be justified in fact as well as in theory. *Id.* at 575. Traditional rational basis is the appropriate standard of review here. Appellants’ access to

specific jobs is not a fundamental right triggering heightened rational basis review under the Privileges and Immunities Clause. *See Amunrud v. Bd. of Appeals*, 158 Wn.2d at 220-22. That said, the Department's recommendation passes constitutional muster even under a heightened rational basis standard of review. The record shows that the Department carefully considered a variety of factors in deciding to make its recommendation to the Records Committee, the primary one being protection of children in its care, custody, and control. SR at 30, 451, 454. It chose to recommend an increase to 35 years because it was already required to maintain its foster care licensing records for a minimum of 35 years, and it knew based on at least one previous tragedy that it needed to maintain investigative records at least as long as it was required to maintain foster home licensing records. SR at 23, 453, *see also* 477. The record shows that the Department had a legitimate reason for recommending an increase of the minimum retention period for founded findings to 35 years, and its recommendation is thus not unconstitutional. This Court should affirm the superior court's order.

3. This Court should not consider Ms. Wilson's Declaration

A court considering a petition for judicial review may not generally admit new evidence. RCW 34.05.558, RCW 34.05.562; *Herman*, 149 Wn. App. at 454. It may receive evidence in addition to that contained

in the agency record “only if it relates to the validity of the agency action at the time it was taken *and* it is needed to decide disputed issues” enumerated in RCW 34.05.562. *Id.* at 454-55; *Neah Bay Chamber of Commerce v. Dep’t of Fisheries*, 119 Wn.2d 464, 474-75, 832 P.2d 1310 (1992) (superseded by statute); *Aviation West Corp. v. Dep’t of Labor & Indus.*, 138 Wn.2d 413, 419-23, 980 P.2d 701 (1999).

The information contained in Dee Wilson’s declaration was not before the agency at the time that it decided to recommend an increase to the minimum records retention period for founded findings of child abuse and neglect. Ms. Wilson is a purported expert in the field of child welfare. CP at 340. Her declaration summarizes proposed testimony concerning “social science research regarding the use of founded . . . findings of child abuse and neglect . . . *as an eligibility criterion for receiving post investigation services*” from the Children’s Administration. CP at 340 (emphasis added). In other words, her testimony, if she were called as an expert witness, would have concerned the appropriateness of child welfare services to parents after issuing a founded finding. *See* RCW 74.13.020(4) (defining “child welfare services”). It would not have concerned employment disqualification or retention of records. Further, Ms. Wilson’s declaration is not reliable, as there was no trial or evidentiary hearing during

which details of her expertise or opinions were examined. Thus, this Court should decline to consider it.

F. The Superior Court Correctly Dismissed Appellants' Claim for Injunctive Relief under 42 U.S.C. § 1983

Appellants' § 1983 claim is barred by the statute of limitations. The statute of limitations for a § 1983 claim is three years from the time the claimant knows or has reason to know of the injury that is the basis of the action. *Robinson v. City of Seattle*, 119 Wn.2d 34, 86, 830 P.2d 318 (1992); *see also Segaline v. Dep't of Labor & Indus.*, 169 Wn.2d 467, 476, 238 P.3d 1107 (2010). Appellants had reason to know of the alleged employment effects of a founded finding of neglect at the time they received notice of their founded findings. Ms. Garcia, Ms. Pacheco-Jones, and Ms. Semenenko received notice of their founded findings in August 2012, June 1999 (although she alleges she learned of it in 2009), and April 2010, respectively. They initiated this case in September 2015, which is past the three year deadline for all three Appellants. Because their § 1983 claim is time barred, the superior court was correct in dismissing this claim, and this Court should affirm that decision.

Further, even if the § 1983 claim is not time-barred, the Appellant's Opening Brief does not show how the Secretary's actions can be said to deprive Appellants of a federal right. They mention both Equal Protection

and Due Process. However, their Equal Protection theory fails for all of the reasons discussed above. Further, they fail to proffer argument regarding how the Department's recommendation or rules violate Appellants' constitutional right to due process. *See* Br. of Appellant. at 47. The superior court was correct in dismissing their claims, and this Court should affirm that decision.

G. Appellants' Request for Attorney Fees Should Be Denied

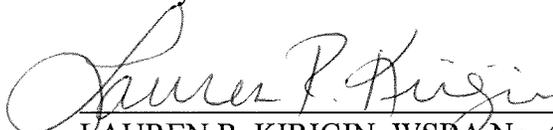
A prevailing party in a judicial review of an agency action is statutorily entitled to attorney fees "unless the court finds that the agency action was substantially justified or that circumstances make an award unjust." RCW 4.84.350. Here, the Department's regulations at issue and its recommendation were all reasonable and in good faith in light of its obligations under chapter 26.44 RCW and RCW 74.39A.056. In light of the circumstances in this case, the Department's actions are justified, and even if Appellants can obtain relief under the APA, they should not be awarded attorney fees or costs. With regard to attorneys fees under 42 U.S.C. § 1988, such fees are not available unless a party obtains meaningful and substantive relief, which Appellants have not done. *Sole v. Wyner*, 551 U.S. 74, 127 S. Ct. 2188, 167 L. Ed. 2d 1069 (2007). Thus, this Court should deny their request for attorneys' fees and costs.

V. CONCLUSION

RCW 74.39A.056(2) acts as a permanent bar to employment for individuals with final founded findings of child abuse or neglect who seek jobs involving unsupervised access to vulnerable adults. The Department's retention of records does not dictate the application of this statute, and its recommendation to increase the minimum retention period was not a rule. The Department's actions at issue in this case were not arbitrary or capricious, nor were they unconstitutional. The trial court properly dismissed Appellants' claims brought under 42 U.S.C. § 1983. Appellants are not entitled to attorney fees or costs in this matter. This Court should affirm the order of the superior court.

RESPECTFULLY SUBMITTED this 16th day of May, 2018.

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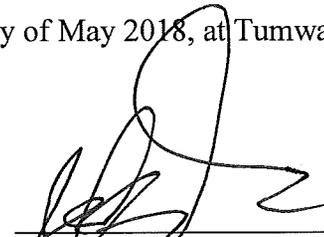
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I hereby certify that I served a true and correct copy of the foregoing document on the following via the COA e-filing portal on the date below as follows,

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

DATED this 16 day of May 2018, at Tumwater, Washington.



JEFFREY S. NELSON
Legal Assistant

SOCIAL AND HEALTH SERVICES DIVISION, ATTORNEY GENERALS OFFICE

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