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

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RHONDA CROCKETT,

Appellant,

v.

DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES  
(fka Department of Social and Health Services, Child Protection Services),

Respondent.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

Rhonda Crockett has failed to meet her burden of showing that the Department<sup>1</sup> misunderstood or violated the law, entered findings not supported by substantial evidence, or acted arbitrarily and capriciously. Even if this Court were to reweigh the evidence or re-examine the evidence for credibility determinations—which it should not do in this case—the Board of Appeals (BOA)’s findings of negligent or maltreatment and physical abuse, including its underlying credibility findings, are based upon substantial evidence. Further, the BOA applied the correct law to uphold Ms. Crockett’s founded finding of physical abuse.

On Thanksgiving Day in 2008, then thirteen year-old M.L. reported to her mother, Ms. Crockett, that her stepfather, James Crockett, was molesting her. Ms. Crockett failed to respond with appropriate protective action to protect M.L.’s physical and psychological safety. Immediately following M.L.’s disclosure, Ms. Crockett took M.L. into a private room with Mr. Crockett and made M.L. recount the basis for her allegations. Mr. Crockett admitted to inappropriately touching M.L. and offered to turn himself in to police; however, Ms. Crockett decided to keep the abuse within

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<sup>1</sup> As of July 1, 2018, the Department of Social and Health Services’ duties related to child welfare services transferred to the Department of Children, Youth, and Families (DCYF). Laws of 2017, 3rd Spec. Sess., ch. 6, §§ 321-22. Herein, both will be referred to as “the Department.”

the family and refused to allow him to call the police. Mr. Crockett continued to live in the home. M.L. was instructed not to ride in the front seat of the car with Mr. Crockett, and was told to look after her little sister.

On August 18, 2013, Ms. Crockett initiated a verbal confrontation with then seventeen year old M.L. Ms. Crockett escalated the confrontation to physical violence. Ms. Crockett hit M.L. on the back of the head and neck, face and body with a closed fist. Ms. Crockett grabbed M.L. by the wrist and threw her to the ground causing soreness, swelling and bruising to M.L.'s wrist that lasted for over a week.

On August 29, 2013, M.L. reported both the August 18, 2013 attack and Mr. Crockett's sexual abuse to the Tacoma Police. On, September 13, 2013, the Department issued founded findings of negligent treatment or maltreatment for Ms. Crockett's failure to take appropriate protective action following M.L.'s disclosure of sexual abuse, and founded findings of physical abuse for Ms. Crockett's August 18, 2013 attack. Mr. Crockett was convicted of four counts of rape of a child on December 19, 2014.

This Court should affirm the administrative Final Order and deny the requested relief.

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## **II. RESTATEMENT OF ISSUES**

1. Whether the Court should examine the fact-finder's credibility findings where the fact-finder had the opportunity to observe the witnesses and weigh conflicting testimony, and if so, whether substantial evidence supports these findings.

2. Whether substantial evidence supports the finding that the Appellant was aware her husband had sexually molested M.L. and substantial evidence supports the finding that the Appellant's subsequent actions constituted a serious disregard for M.L.'s health, safety and welfare.

3. Whether substantial evidence supports the finding that Ms. Crockett threw M.L. to the ground and caused M.L. injury that was more than transient pain and minor marks in a violent attack instigated by Ms. Crockett.

## **III. RESTATEMENT OF FACTS**

### **A. NARRATIVE FACTS**

The Department's findings of abuse and neglect stem from two separate incidents. The first occurred on Thanksgiving Day in 2008, and the second on August 18, 2013, both were reported to the Tacoma Police Department on August 29, 2013.

On Thanksgiving Day in 2008, then thirteen year-old M.L. reported to her mother, Ms. Crockett, that her stepfather, Mr. Crockett, was molesting her. Verbatim Report of Proceeding, Vol. 1, July 6, 2016 (RP1), at 46. Ms. Crockett stopped cooking and took Mr. Crockett and M.L. into another room. *Id.* at 47. In front of Mr. Crockett, M.L. recounted to Ms. Crockett that Mr. Crockett had touched her breasts and private area.

*Id.* at 66. Initially, Mr. Crockett denied that he had touched M.L., but upon further questioning by Ms. Crockett he began to cry and admitted that he had. *Id.* at 47.

When Mr. Crockett admitted to touching M.L., Ms. Crockett initially proposed calling the police, but instead sent M.L. out of the room after M.L. stated to Ms. Crockett that she wanted Mr. Crockett to go to jail. Verbatim Report of Proceedings, Volume 2, July 7, 2015 (RP2), at 23 and 228; RP1, at 47. Mr. Crockett offered to call the police and turn himself in, but Ms. Crockett stopped him. RP2, at 218. When M.L. was called back into the room, Ms. Crockett informed her that the decision was made to get through it as a family and pray. RP1, at 47. Ms. Crockett told M.L. that the family was going to keep Mr. Crockett's abuse quiet and between the family. *Id.* at 67; RP2, at 221-23.

Mr. Crockett continued to live with Ms. Crockett and M.L. RP1, at 48. In subsequent conversations, Ms. Crockett put the burden on M.L. to protect herself and her little sister from Mr. Crockett. *Id.*; RP2, at 221; Administrative Record (AR) at 163. For a time following the incident, Ms. Crockett did not allow M.L. to go anywhere with Mr. Crockett unless Ms. Crockett was present. RP1, at 64. After a time, Ms. Crockett relaxed the rule and Mr. Crockett again had unsupervised access to M.L. *Id.*, at 68. Ms. Crockett required M.L. to ride in the backseat when alone in the car with

Mr. Crockett. RP2, at 222. By 2011, M.L. was riding in the front seat alone with Mr. Crockett, and Ms. Crockett instructed M.L. that she was not to ride in the front seat, but M.L. continued to do so. *Id.* at 225.

The August 18, 2013 attack occurred following a particularly stressful and unsuccessful driving lesson, while then seventeen year-old M.L. had her driving learner's permit. Verbatim Report of Proceedings, Vol. 3, July 15, 2015 (RP3), at 11. Upon returning home, M.L. informed her stepfather that she would not be taking Ms. Crockett to Ms. Crockett's doctor's appointment in the morning because M.L. was uncomfortable driving with Ms. Crockett. RP1, at 70.

Upon learning of this conversation, Ms. Crockett confronted M.L. *Id.* at 42 and 71. Ms. Crockett instigated a verbal altercation and began yelling at M.L. *Id.* at 71; RP3, at 20. Ms. Crockett became violent, striking M.L. on the back of the head and neck and attempting to strike M.L. in the face. RP1, at 42; RP1, at 21. Ms. Crockett began punching M.L. in the face and body with a closed fist when M.L. attempted to use her arms to prevent Ms. Crockett from striking her in the face. AR at 169; RP3, at 21. Ms. Crockett yelled at M.L. to "Hit me. Hit me." RP1, at 42. M.L. did not hit Ms. Crockett. *Id.* M.L. attempted to hold Ms. Crockett's arm and hands to prevent Ms. Crockett from continuing to striking her. *Id.* at 55; RP3, at 27. In response, Ms. Crockett grabbed M.L. by the wrists and hair and threw

M.L. to the ground. RP3, at 27-28. The act of grabbing M.L. by the wrists caused soreness, swelling and bruising to M.L.'s wrist, which lasted for over a week. AR at 5 and 169; RP2, at 17 and 146.

On August 29, 2013, M.L. reported both incidents to the Tacoma Police Department. AR at 165-71. Mr. Crockett was convicted of four counts of rape of a child for his abuse of M.L. AR at 214-27.

## **B. PROCEDURAL HISTORY**

On September 13, 2013, the Department issued founded findings of negligent treatment or maltreatment and physical abuse as to Ms. Crockett.<sup>2</sup> AR at 134-40.

Ms. Crockett sought agency review of the founded finding on October 14, 2013. AR at 142. On December 14, 2013, Area Administrator, Sandy Duran sent Ms. Crockett written notification that she had, upon review, decided to uphold the founded finding. AR at 143.

On December 23, 2013, Ms. Crockett requested an administrative hearing. AR at 76. The hearing concluded on July 17, 2015, and on September 29, 2015, Administrative Law Judge (ALJ) Michael Brown affirmed the Department's founded findings in his Initial Order. AR at 29-44. On February 25, 2016, BOA Review Judge Thomas L. Sturges agreed

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<sup>2</sup> The Department also issued separate founded findings as to Ms. Crockett's husband and M.L.'s stepfather, James Crockett; however, he is not a party to this appeal.

with ALJ Brown, affirming the Department's founded findings via a Final Order. AR at 1-15.

Ms. Crockett filed a Petition for Judicial Review on March 25, 2016. Clerk's Papers (CP) at 1-2. On May 11, 2018, the Thurston County Superior Court denied Ms. Crockett's petition for review. CP at 68. This matter now comes before this Court for hearing on Ms. Crockett's appeal.

#### **IV. ARGUMENT**

Ms. Crockett has failed to meet her burden of showing that the Department misunderstood or violated the law, entered findings not supported by substantial evidence, or acted arbitrarily and capriciously. Even if this Court were to reweigh the evidence or re-examine the evidence for credibility determinations—which it should not do in this case—the record shows that the Department's findings, including its credibility findings, are based upon substantial evidence and are neither arbitrary nor capricious. Further, the evidence presented by the Department fully supports its decision to uphold Ms. Crockett's founded finding of physical abuse. In its findings, the BOA correctly applied the applicable law. Overall, a review of the record shows that the Final Order is correct and this Court should therefore uphold it.

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**A. Standard of Review**

Judicial review of a final administrative decision is governed by the Washington Administrative Procedure Act. *Tapper v. Emp't Security Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). Relief can be granted in judicial review of adjudicative proceedings only if the following occurs:

- (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
- (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
- (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
- (f) The agency has not decided all issues requiring resolution by the agency;
- (g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;
- (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or
- (i) The order is arbitrary or capricious.

RCW 34.05.570(3).

Washington State case law has interpreted the requirements for judicial review of adjudicative agency proceedings to mean that a reviewing court may reverse an agency decision when “(1) the administrative decision is based on an error of law; (2) the decision is not based on substantial evidence; or (3) the decision is arbitrary or capricious.” *Scheeler v. Dep’t of Emp’t Sec.*, 122 Wn. App. 484, 487-88, 93 P.3d 965 (2004) (citing *Tapper*, 122 Wn.2d at 402 (citing RCW 34.05.570(3))).

Conclusions of law are reviewed under the error of law standard. *Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 390, 687 P.2d 195 (1984). This standard calls for “de novo” judicial review of the administrative decisions and allows the reviewing court to essentially substitute its judgment for that of the administrative determination, but substantial weight is accorded the agency’s view. *Id.* A reviewing court accords substantial deference to an agency’s interpretation, particularly in regard to the law involving the agency’s special knowledge and expertise. *Univ. of Wash. Med. Ctr. v. Wash. State Dep’t of Health*, 164 Wn.2d 95, 102, 187 P.3d 243 (2008). Further, the challenger carries the burden of showing that the Department misunderstood or violated the law. *Id.* at 103.

Factual determinations are sufficient if supported by evidence that is substantial when viewed in light of the whole record before the court.

*Bond v. Dep't of Soc. & Health Servs.*, 111 Wn. App. 566, 571-72, 45 P.3d 1087 (2002), citing *Tapper*, 122 Wn.2d at 402. This is often referred to as the “substantial evidence” standard. RCW 34.05.570(3)(e); *Terry v. Empl. Sec. Dep't*, 82 Wn.App. 745, 748, 919 P.2d 111 (1996). This standard is “highly deferential” to the agency fact finder. *ARCO Prods. Co. v. Wash. Utils. & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). In reviewing findings of fact, courts view the evidence in the light most favorable to the party who prevailed in the highest administrative forum to exercise fact-finding authority. *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). Further, they accept the fact finder’s determinations of witness credibility and the weight given to reasonable but competing inferences. *Id.* at 652.

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). Under this test, a court “will not set aside a discretionary decision [of an agency] absent a clear showing of abuse.” *ARCO Products Co.*, 125 Wn.2d at 812.

Here, Ms. Crockett objects to 50 separate findings of fact and conclusions of law in the final order, and lists 22 separate issues for this Court to consider upon review. Appellant’s Brief (App. Br.) at 1-5. However, Ms. Crockett concedes that “this appeal can be summarized as three dispositive issues” and that the crux of the issues before this Court concern the credibility findings of the Department regarding witness testimony presented during the administrative hearing. *Id.* at 9. The first two issues that she raises relate to Ms. Crockett’s contention that the BOA erred in finding M.L. credible in her description of Ms. Crockett’s negligent treatment or maltreatment of her, while the third issue relates to Ms. Crockett’s physical abuse of M.L. *Id.* Ms. Crockett’s challenges derive from her argument that the BOA erred in finding M.L.’s testimony credible. *Id.*

Chapter 26.44 RCW governs investigations of child abuse and neglect allegations. “Abuse or neglect means sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child’s health, welfare, or safety ... or the negligent

treatment or maltreatment of a child by a person responsible for or providing care to the child.” RCW 26.44.020(1). The Washington Administrative Code (WAC) defines “physical abuse” as

the nonaccidental infliction of physical injury or physical mistreatment on a child that harms the child’s health, welfare, or safety ... [including any act likely] to cause and that does cause bodily harm greater than transient pain or minor temporary marks or that is injurious to the child’s health, welfare or safety

WAC 388-15-009(1) and (1)(f)<sup>3</sup>. Physical discipline of a child, “including the reasonable use of corporal punishment, is not considered abuse when it is reasonable and moderate and is inflicted by a parent or guardian for the purposes of restraining or correcting the child.” WAC 388-15-009(2).

“Negligent treatment or maltreatment” means

an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child’s health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100.

RCW 26.44.020(16).

Child Protective Services conducts investigations of child abuse and neglect allegations, at the conclusion of which the assigned investigator determines whether the alleged abuse or neglect occurred on a “more likely

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<sup>3</sup> On July 1, 2018, WAC 388-15-009 was recodified to WAC 110-30-0030.

than not” basis. RCW 26.44.030 (authorizing investigations of child abuse or neglect allegations); RCW 26.44.020(11) (defining founded 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 as to the subject of the allegations. RCW 26.44.030(12)(a). Founded findings are subject to administrative review pursuant to RCW 26.44.125. If an ALJ determines that a preponderance of the evidence supports the founded finding, he or she is required to issue an initial order upholding it. WAC 388-15-129<sup>4</sup>. Such initial orders are subject to review by the BOA, which issues the final decision. WAC 388-15-135<sup>5</sup>; WAC 388-02-0530; WAC 388-02-0575.

**B. This Court Should Defer to the Agency Fact-Finder on its Credibility Determinations and Uphold the Final Order**

The evidence in this case should be viewed in the light most favorable to the Department, as “the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the fact-finder’s views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.” *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wash.App. 614,

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<sup>4</sup> On July 1, 2018, WAC 388-15-129 was recodified to WAC 110-30-0340.

<sup>5</sup> On July 1, 2018, WAC 388-15-135 was recodified to WAC 110-30-0360

618, 829 P.2d 217 (1992). Here, the BOA is the highest forum that exercised fact-finding authority.

Statute allows the BOA to substitute its credibility findings for those of the ALJ in issuing a final order, with the caveat that the BOA, in reviewing the ALJ's findings of fact shall give due regard to the presiding officer's opportunity to observe the witnesses. RCW 34.05.464(4). Ms. Crockett incorrectly suggests that in circumstances where the BOA may substitute its credibility findings for those of the ALJ, the Court should make its own credibility findings. App. Br. at 45-47. To support this suggestion, Ms. Crockett cites to a decision that interprets when it is appropriate for the BOA to substitute its findings for those of the ALJ. *Chandler v. State, Office of Ins. Com'r*, 141 Wn. App. 639, 173 P.3d 275 (2007). Ms. Crockett's interpretation of Chandler is directly rejected by the Court in the *Chandler* holding. *Id.* at 648. In *Chandler*, the Court explicitly states that a court will not weigh evidence or substitute its judgment regarding credibility determinations for those of the agency. *Chandler*, 141 Wn. App. at 280. The statutory authority that allows the BOA to substitute its findings for those of the ALJ do not extend to the courts. Thus, this Court should afford deference to the BOA's credibility findings.

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**C. Alternatively, Substantial Evidence Supports the Reviewing Judge's Finding That Ms. Crockett was Not Credible While M.L. was Credible, and this Court Should Uphold the Final Order on that Basis.**

Substantial evidence supports the BOA judge's credibility determinations for two reasons. First, Ms. Crockett's testimony conflicted with other evidence, and lacked credibility as a result. Second, M.L. reported abuse to several different entities, including her mother, law enforcement, and the Department social worker, and Mr. Crockett was convicted of abusing her; her testimony was credible because it was consistent with other evidence. These findings should be upheld.

The BOA found that Ms. Crockett's testimony conflicted with other evidence and resolved the conflict by finding that Ms. Crockett was not credible on the issue of whether she was aware that her husband, Mr. Crockett, had "molested" or engaged in inappropriate sexual contact with M.L., and that the pain suffered by M.L. during the physical altercation lasted longer than a week. AR at 5-6. The BOA went on to explain the substantial facts upon which his credibility finding was based. The BOA's reasoning is as follows:

(1) The Appellant is motivated to protect herself and James. The Appellant is still married to James and visits him in prison. She also testified on his behalf during the criminal trial and blames M.L. for ruining her family. Additionally, the Appellant will not be allowed to volunteer or work with minor children or vulnerable adults and be relicensed as a speech language pathologist if the Department's Founded Finding is affirmed.

(2) When M.L. reported to the Appellant that James had “molested” her, the Appellant chose to handle the matter at home instead of reporting it to the authorities as James had wanted to do. The Appellant had experience dealing with sexual abuse with M.L. In the previous instance, the Appellant reported M.L.’s allegations of sexual abuse by her former caretaker to the authorities. The allegations M.L. made previously were later founded. The Appellant did not have any personal connection to the previous abuser and no motivation to minimize or dismiss the allegations. In this case, the Appellant’s motivation to minimize or dismiss the allegations are clear, she was newly married for the first time and had recently began sharing a home with James. Reporting the allegations to the authorities would more than likely result in the destruction of her new family. Instead, the Appellant believed she could save her marriage, protect M.L. and keep her family together. The Appellant’s actions after M.L. disclosed the sexual abuse by James strongly indicate that the Appellant knew that James had engaged in inappropriate sexual contact with M.L.. The Appellant restricted contact between M.L. and James and told M.L. to hurt James if he touched her again.

(3) M.L. has no motivation to lie by reporting the molestation by James or the physical altercation she had with the Appellant. She disclosed to the Appellant that she was being molested by James who was later found guilty on multiple counts of child rape after a jury trial. M.L. has also lost her family over the allegations and resulting physical altercation. Also, she has been consistent when describing the injury resulting from the physical altercation. The Appellant believes M.L. is lying because she wanted to receive a social security benefit or wanted to reunite with her biological family. M.L. has remained consistent in her reports and has participated in a criminal trial related to the sexual abuse that resulted in multiple guilty verdicts. The Appellant provided no support for her contention M.L. is lying to serve her own needs.

AR at 6. Additionally, ALJ Brown, who made the initial finding of credibility, made the finding that based on his credibility determinations it is more likely than not that Ms. Crockett was aware that Mr. Crockett was molesting or inappropriately touching M.L. and that M.L. suffered pain

lasting more than one week after the physical altercation with Ms. Crockett.  
AR at 36-40.

Contrary to Ms. Crockett's contention, M.L.'s description of her abuse is consistent over the course of her disclosures. In each disclosure, M.L. testified that Mr. Crockett had molested her. She stated that he had touched her breasts and private area. AR at 169-70; RP1, at 66. It is not inconsistent that, as M.L. went on to tell her story to the social worker, the police, the prosecutor, and the criminal court, and she found that she was believed rather than silenced, she would elaborate and reveal the more significant abuse. The most consistent aspect of M.L.'s disclosures is that the abuse she disclosed to Ms. Crockett, the police, the social worker, the ALJ and the criminal court did in fact occur. Mr. Crockett was convicted of four counts of rape of a child for what he did to M.L. AR at 214-27. The fact that what M.L. claims to have disclosed to Ms. Crockett is demonstrably true is a significant indicator that her testimony is credible.

Moreover, the evidence that Ms. Crockett cites as proof of M.L.'s ulterior motive in disclosing the abuse supports the Department's credibility finding as to M.L. Ms. Crockett claims that M.L.'s text messages and Facebook postings during the weeks following her disclosures of physical abuse and rape, in which M.L. states her desire to leave home but that she would "weather the storm for 10 months," prove that she alleged abuse in

bad faith as a means to leave Washington. App. Br. at 7, 9, 11; AR at 97. However, these postings are more reasonably interpreted to reveal M.L.,’s anger and frustration over her living situation, in which she was traumatized by the recent physical abuse she had suffered at the hands of her mother and, as a result, was eager to escape her abusive home. AR at 94. This is further supported by evidence that following her eighteenth birthday, M.L. remained in Washington and did not leave for Tennessee to reside with her biological family. RP1, at 41.

Finally, Ms. Crockett’s testimony contradicts her assertion that the ALJ and BOA judge should not have believed M.L., and it contradicts Ms. Crockett’s position that she was not made aware of any abuse of M.L. by Mr. Crockett. Ms. Crockett testified that during a family meeting in 2008, Mr. Crockett admitted to touching M.L. and offered to turn himself in to the police. RP2, at 218. Ms. Crockett testified that Mr. Crockett picked up the phone to call the police before Ms. Crockett prevented him from doing so. *Id.* Ms. Crockett testified that she instated safety measures to ensure that Mr. Crockett would never be alone with her daughters. *Id.* at 225-26. She testified that she maintained these safety measures for a period of five years. *Id.* at 222-24. This testimony, and Ms. Crockett’s actions, directly contradict her assertion that M.L. had failed to disclose sexual touching by Mr. Crockett at that time, and they undermine her argument that M.L.

should not have been found credible. Thus, the BOA's credibility finding as to M.L. is based on substantial evidence, and this Court should uphold the Final Order.

In sum, this Court should accept the BOA's credibility determinations pursuant to well-established legal precedent. Alternatively, the BOA's credibility determinations are well-reasoned and based upon substantial evidence. Thus, this Court should uphold the Final Order.

**D. Substantial Evidence Supports the Department's Finding that Ms. Crockett was Aware that her Husband had Molested M.L. by Engaging in Sexually Inappropriate Contact with her**

Ms. Crockett's argument that the finding that she was aware of M.L.'s sexual abuse at the hands of her husband is arbitrary and capricious, relies on both her contention that the BOA erred in its credibility determinations, and a reading of the evidence in the light most favorable to Ms. Crockett, the non-prevailing party. Ms. Crockett's argument fails. As noted above, the BOA's credibility determination is not subject to review, and on review the evidence should be viewed in the light most favorable to the prevailing party.

Substantial evidence supports the BOA's finding that on Thanksgiving Day in 2008, M.L. told her mother that her stepfather had molested her. AR at 4. M.L. disclosed to the Tacoma Police Department on August 29, 2013, that she had informed Ms. Crockett about the sexual

abuse on Thanksgiving Day in 2008. AR at 169-70. M.L. testified to the same facts at the administrative hearing. RP1, at 46. M.L. went on to disclose both to the police on August 29, 2013, and at the administrative hearing, that following M.L.'s Thanksgiving Day 2008 disclosure, in Ms. Crockett's presence, Mr. Crockett began to cry, admitted to sexually abusing M.L., and offered to turn himself in to the police. AR at 170; RP1, at 47.

Ms. Crockett testified that, following the Thanksgiving Day 2008 meeting she told M.L. to protect herself and her little sister from Mr. Crockett. RP2, at 221. Ms. Crockett also implemented inadequate rules to attempt to keep Mr. Crockett away from the girls without breaking up the family. *Id.* at 222. While these measures fall well short of reasonable means of protecting a child from further sexual abuse, they do demonstrate that Ms. Crockett came away from the 2008 Thanksgiving Day family meeting with knowledge that Mr. Crockett had sexually abused M.L.

Ms. Crockett has consistently disbelieved M.L. and has continued to blame M.L. for M.L.'s rape. Ms. Crockett testified that she could not recall M.L. ever being alone with Mr. Crockett during the period that the rapes occurred. RP2, at 211-12. She testified that M.L.'s relationship with Mr. Crockett was pleasant and peaceful during the time that Mr. Crockett

was repeatedly raping M.L. *Id.* 2, at 208. She testified that she believed that Mr. Crockett only touched M.L. at M.L.'s invitation. *Id.* at 128.

When M.L. disclosed that Mr. Crockett had molested her, Ms. Crockett's response was not to take M.L. aside where she could talk privately, or to involve the appropriate authorities, but instead she placed M.L. in a room with Mr. Crockett. RP2, at 213. When Mr. Crockett began to cry, admitted to touching M.L. and offered to turn himself in to police, Ms. Crockett stopped him and made the decision that the family would do "something else." *Id.* at 217-18. Ms. Crockett testified that her takeaway from the Thanksgiving Day conversation was: "I don't know that he touched her. I didn't see it. And, by my opinion he has just as much right to say he didn't as she had to say that he did." *Id.* at 220. Ms. Crockett stated in her testimony that if she had reason to believe that Mr. Crockett had sexually abused her daughter she would be in jail for hurting him. *Id.* at 234. However, Ms. Crockett testified on Mr. Crockett's behalf in his criminal trial for rape of a child. RP3, at 80. Following Mr. Crockett's conviction on four counts of rape of a child, Ms. Crockett continued to visit him in Clallam Bay prison four times per month. *Id.* at 81. Further, at the time of the administrative hearing, Ms. Crockett had still failed to legally separate from Mr. Crockett. *Id.* at 80.

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These are not the statements and actions of a person who had not been told by her daughter that her daughter had been sexually abused by her stepfather. These are the statements and actions of someone who has consistently ignored overwhelming evidence that her husband sexually abused her daughter. This evidence began when M.L. disclosed sexual abuse on Thanksgiving Day in 2008, and ended when Mr. Crockett was convicted of these crimes five years later.

Ms. Crockett testified that she became concerned about M.L. and Mr. Crockett's relationship in 2011 when M.L. began riding to church with Mr. Crockett. RP2, at 223. Ms. Crockett testified that the safety rules she put in place following M.L.'s disclosure of sexual abuse put the responsibility on M.L. to keep from being alone with Mr. Crockett. *Id.* at 225. Ms. Crockett introduced into the record photos of M.L. in states of undress that serve no relevant purpose to the issues at hand. AR at 121-24. These are not the statements and actions of a mother who is protecting her daughter from a sexual predator; these are the statements and actions of a wife who blames her daughter's sexuality for her husband's criminal actions and the breakup of her family.

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**E. The Measures Taken by Ms. Crockett Following M.L.'s Disclosure of Sexual Abuse Demonstrated a Serious Disregard for M.L.'s Mental and Physical Health and Welfare, and Created a Clear and Present Danger to M.L.'s Safety**

The BOA applied the correct legal standard when it determined that Ms. Crockett neglected her daughter by failing to protect her from sexual abuse by Mr. Crockett. This finding is also supported by substantial evidence. The finding should therefore be upheld.

**1. The BOA applied the correct serious disregard standard to determine that Ms. Crockett neglected M.L.**

Ms. Crockett argues that the BOA applied the common law definition of negligence rather than the appropriate definition of serious disregard when making the finding that Ms. Crockett's treatment of M.L. in the minutes, hours and years after M.L.'s disclosure of sexual abuse by Mr. Crockett amounted to negligent treatment or maltreatment of M.L. by Ms. Crockett. App. Br. at 43. The specific findings of the BOA, cited in the Ms. Crockett's brief just two pages earlier, clearly contradict this argument. App. Br. at 41. The BOA explicitly found that Ms. Crockett's failure to take appropriate action "clearly demonstrated a serious disregard for her child's health and welfare, and created a clear and present danger to her child's safety." AR at 12. The record provides substantial evidence to support the BOA's finding.

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2. **After M.L. told her mother that her stepfather was molesting her, Ms. Crockett demonstrated a serious disregard for her daughter's health by taking insufficient measures to protect her from abuse, such that M.L. was in clear and present danger of further sexual abuse**

Ms. Crockett's argument that she took appropriate protective measures following M.L.'s disclosure of sexual abuse at the hands of her husband relies on her contention that the BOA erred in its credibility determinations and a reading of the evidence in a light most favorable to Ms. Crockett, the non-prevailing party. Ms. Crockett's argument fails. As noted above, the BOA's credibility determination is not subject to review, and on review the evidence should be viewed in the light most favorable to the prevailing party.

Here, Ms. Crockett's failure to act following M.L.'s disclosure evidenced such as serious disregard for the consequences to M.L. as to create a clear and present danger to M.L.'s physical and emotional safety. Ms. Crockett had the opportunity to act appropriately to protect M.L. in the immediate aftermath of M.L.'s disclosure of sexual abuse. Ms. Crockett could have allowed Mr. Crockett to contact the police, as he began to do during the family meeting, RP2, at 218. Instead, Ms. Crockett commanded him not to call the police to report the sexual abuse to the proper authorities. *Id.* Ms. Crockett could have called the police herself, as M.L. was urging her to do. *Id.* at 228. Instead, Ms. Crockett came up with a plan to keep the

abuse quiet and deal with it inside the family. RP1, at 67; RP 2, at 221-23. Ms. Crockett could have kicked Mr. Crockett out to the home and ended all contact between him and M.L.

Ms. Crockett's testimony showed that her approach to addressing the sexual abuse consisted of: (1) Mr. Crockett relaying a watered down version of M.L.'s allegations to his children; (2) Ms. Crockett instructing M.L. that if Mr. Crockett attempted to touch her again, M.L. should physically protect herself; and (3) Ms. Crockett instituting a family rule preventing Mr. Crockett from entering M.L.'s room or being alone with M.L., a rule that M.L. was responsible for enforcing. Ms. Crockett testified that by 2011, M.L. was riding alone with Mr. Crockett in the front seat of his car to church because M.L. ignored the safety measures. RP2, at 223.

The end result of the measures Ms. Crockett put in place were that M.L. was forced to reside in the same home as the man who raped her for five years. M.L. was vulnerable to continued sexual assault, and M.L. thought about the sexual assault every day. AR at 169. The scant safety measures Ms. Crockett put in place following M.L.'s disclosures evidence such a serious disregard of the consequences to M.L.'s physical and psychological safety as to create a clear and present danger to her health, welfare, and safety. Thus, the Final Order upholding the founded finding of negligent treatment/maltreatment is correct and should be upheld.

**F. Substantial Evidence Supports the Finding that the Injury M.L. Sustained During the August 18, 2013 Altercation was more than Transient Pain and Minor Marks and Was not Inflicted During an Attempt to Administer Lawful Discipline**

Ms. Crockett's argument that the injury she inflicted on M.L. during the August 18, 2013 altercation was a result of reasonable and moderate corporal punishment relies on her contention that the BOA erred in its credibility determinations and a reading of the evidence in a light most favorable to Ms. Crockett, the non-prevailing party. Ms. Crockett's argument fails. As noted above, the BOA's credibility determination is not subject to review, and on review the evidence should be viewed in the light most favorable to the prevailing party.

While the reviewing court evaluates the BOA's decisions of law de novo, it gives substantial deference to an agency's interpretation, particularly in regard to the law involving the agency's special knowledge and expertise. *Univ. of Wash. Med. Ctr.*, 164 Wn.2d at 102. Here, the BOA is applying child welfare laws and Department rules to the facts of the case, and substantial deference should be given to its interpretation in light of the Department's special knowledge and expertise with regard to this area.

The record supports the finding that during the August 18, 2013 altercation, Ms. Crockett inflicted on M.L. injuries to her wrists that resulted in soreness and marks that lasted more than a week. While reasonable and moderate corporal discipline designed to restrain or correct a child is not

physical abuse, here the facts support the Department's founded finding of physical abuse. The injuries that Ms. Crockett inflicted upon M.L. were neither reasonable nor moderate under the circumstances, and the evidence does not support that they were inflicted during the course of restraining or disciplining M.L.

Instead, the record shows that Ms. Crockett inflicted M.L.'s injuries while aggressively confronting M.L. after she perceived that M.L. had disrespected her. The altercation occurred while M.L. had her learners permit, following a particularly stressful and unsuccessful driving lesson. RP3, at 11. Upon returning home M.L. informed Ms. Crockett's husband Mr. Crockett<sup>6</sup> that she would not be taking Ms. Crockett to the doctor's in the morning because she was uncomfortable driving with Ms. Crockett. RP1, at 70. Upon learning of this conversation, Ms. Crockett went downstairs to confront M.L. Ms. Crockett instigated a verbal altercation and began yelling at M.L. *Id.* at 71. Ms. Crockett became violent, striking M.L. on the back of the head and neck and attempting to strike M.L. in the face. *Id.* at 42; RP3 at 20-21. Ms. Crockett began punching M.L. in the face and body with a closed fist when M.L. attempted to use her arms to prevent Ms.

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<sup>6</sup> That Ms. Crockett was not present when M.L. informed Mr. Crockett that M.L. would not be driving Ms. Crockett to the doctor is further evidence that the protective measures Ms. Crockett claims to have implemented, including a rule that M.L. and Mr. Crockett were not to be alone together, were ineffective and poorly enforced.

Crockett from striking her in the face. RP3, at 20-21; AR at 169. M.L. attempted to hold Ms. Crockett's hands and arm to prevent Ms. Crockett from further striking her. RP1, at 55; RP3, at 27. In response, Ms. Crockett grabbed M.L. by the wrists and hair and threw M.L. to the ground. RP3, at 28. The act of grabbing M.L. by the wrists caused soreness and swelling and bruising which lasted for over a week. AR at 39.

When viewing the altercation as a whole, it is clear that the injuries Ms. Crockett inflicted on M.L. were not inflicted during the course of administration of lawful corporal punishment. They were inflicted during a physical attack initiated by Ms. Crockett in response to M.L.'s attempt to protect herself.

Ms. Crockett was the first to escalate the situation by raising her voice. Ms. Crockett was the first to escalate the altercation from verbal to physical by striking M.L. on the back of her head and neck. Ms. Crockett continued her physical assault on M.L. by attempting to hit her in the face and M.L. only physically touched Ms. Crockett at this point in an attempt to restrain Ms. Crockett. M.L.'s attempt to shield herself and hold Ms. Crockett's arm and hands to prevent Ms. Crockett from hitting her enraged Ms. Crockett and at that time Ms. Crockett grabbed M.L. by her wrists and hair and threw M.L. to the floor. This is not a reasonable and moderate use of physical discipline, this is the culmination of a physical attack initiated

by Ms. Crockett in which Ms. Crockett was the aggressor and during which M.L. was never physically aggressive and only acted to protect herself.

Ms. Crockett attempts to focus the question of whether she abused M.L. on whether her action in taking M.L. to the ground was or was not a throw. This argument fails.

First, substantial evidence supports the finding that Ms. Crockett threw M.L. to the ground during the altercation. Ms. Crockett's contention that she acted precisely and calmly is contradicted by both Ms. Crockett's and M.L.'s description of the altercation. The finding that Ms. Crockett threw M.L. to the ground is supported by substantial evidence.

Second, because the BOA found that Ms. Crockett caused pain that lasted for longer than a week<sup>7</sup>, the determination that Ms. Crockett threw M.L. to the ground is not necessary for a finding of physical abuse. WAC 388-15-009(1)(a)<sup>8</sup> specifically lists throwing a child as child abuse, but in part (f) it also includes in the definition of child abuse "[d]oing any other act that is likely to cause and that does cause bodily harm greater than transient pain or minor temporary marks or that is injurious to the child's health, welfare or safety." WAC 388-15-009(1). While the record supports the finding that Ms. Crockett threw M.L. to the ground, in finding that when

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<sup>7</sup> AR at 6.

<sup>8</sup> Recodified on July 1, 2018 as WAC 110-30-0030.

Ms. Crockett intentionally grabbed M.L. by the hair and wrists and threw M.L. to the ground, Ms. Crockett caused pain and marks on M.L.'s arms and wrists that lasted for a few days after the incident, the BOA rendered it irrelevant whether Ms. Crockett threw, tossed or set M.L. to the ground. AR at 10. When non-transient pain and non-temporary marks result from an act likely to cause the same, it is irrelevant whether the act was throwing, it is abuse. The BOA correctly applied the appropriate WACs to the facts presented and its conclusion of law should be upheld.

**G. Attorney's Fees Should not be Awarded Because the Agency Action was Substantially Justified**

A prevailing party in a judicial review of an agency action is not entitled to attorney fees if "the court finds that the agency action was substantially justified or that circumstances make an award unjust." RCW 4.84.350(1). Here, the Department's findings were all reasonable and in good faith in light of its obligations under chapter 26.44 RCW to investigate allegations of child abuse and neglect, and to protect children from abuse and neglect. For the reasons stated above the Department's actions were substantially justified. This Court should not award the Ms. Crockett fees and costs.

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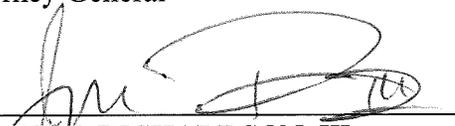
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**V. CONCLUSION**

For these reasons, the Department respectfully requests that this Court affirm the BOA's decision to uphold the ALJ's Initial Order and the Department's findings that Ms. Crockett abused and neglected M.L.

RESPECTFULLY SUBMITTED this 7th day of December, 2018.

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**CERTIFICATE OF SERVICE**

I certify that on the date indicated below, I served a true and correct copy of the foregoing document on all parties or their counsel of record 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.

EXECUTED this 7<sup>th</sup> day of December, 2018 at Olympia, WA.

  
Dawn Walker, Legal Assistant

**OFFICE OF THE ATTORNEY GENERAL**

**December 07, 2018 - 3:22 PM**

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