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

DARLENE A. TOWNSEND, PH.D.,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF HEALTH,

Respondent.

**BRIEF OF RESPONDENT, WASHINGTON STATE
DEPARTMENT OF HEALTH**

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF THE CASE.....	2
	A. The Uniform Disciplinary Act (UDA).....	2
	B. Appellant’s Practice and Treatment of Client A and Her Family.....	3
	C. Appellant’s Disciplinary Proceeding.....	4
III.	STATEMENT OF ISSUES.....	5
IV.	STANDARD OF REVIEW.....	5
V.	ARGUMENT.....	7
	A. Substantial Evidence Supports the Findings of Unprofessional Conduct Against Townsend.....	9
	1. Treating multiple family members contraindicated.....	12
	2. Recommending medication for Client B to his physician.....	14
	3. Violation of Client B’s confidentiality.....	15
	4. Violation of Client A’s confidentiality.....	16
	5. Crossing therapist-client boundaries.....	18
	6. Failure to define and update Client A’s treatment plan.....	19
	B. Townsend’s Claims That the Department Engaged in Unlawful Procedure Are Without Merit.....	21
	1. Townsend’s argument regarding her failure to file is without merit.....	23

2.	The record does not support Townsend’s contentions regarding the conduct of her hearing.....	26
a.	The Department responded to Townsend’s requests for accommodation	26
b.	Townsend’s claim of bias is without merit	28
VI.	CONCLUSION	29

TABLE OF AUTHORITIES

Cases

<i>Affordable Cabs, Inc. v. Emp't Sec.</i> , 124 Wn. App. 361, 101 P.3d 440 (2004).....	6
<i>Aguilar v. State</i> , 77 Wn. App. 596, 892 P.2d 1091 (1995).....	10
<i>Amunrud v. Bd. of Appeals</i> , 158 Wn.2d 208, 143 P.3d 571, (2006).....	22
<i>Arco Prods. Co. v. Utils. & Transp. Comm'n</i> , 125 Wn.2d 805, 888 P.2d 728 (1995).....	6
<i>Brown v. State, Dep't of Health, Dental Disciplinary Bd.</i> , 94 Wn. App. 7, 972 P.2d 101 (1998).....	7
<i>Brownfield v. City of Yakima</i> , 178 Wn. App. 850, 316 P.3d 520 (2014).....	23
<i>Callecod v. Wash. State Patrol</i> , 84 Wn. App. 663, 929 P.2d 510 (1997).....	7
<i>Christian v. Tohmeh</i> , 191 Wn. App. 709, 366 P.3d 16 (2015).....	11
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	23
<i>Crosswhite v. Wash. State Dep't of Soc. & Health Servs.</i> , 197 Wn. App. 539, 389 P.3d 731 (2017), review denied, 188 Wn.2d 1009, 394 P.3d 1016 (2017).....	7, 10
<i>Haley v. Med. Disciplinary Bd.</i> , 117 Wn.2d 720, 818 P.2d 1062 (1991).....	9
<i>Holland v. City of Tacoma</i> , 90 Wn. App. 533, 954 P.2d 290 (1998).....	9

<i>Housel v. James</i> , 141 Wn. App. 748, 172 P.3d 712 (2007).....	11
<i>In re Marriage of Akon</i> , 160 Wn. App. 48, 248 P.3d 94 (2011).....	10
<i>In re Marriage of Olson</i> , 69 Wn. App. 621, 850 P.2d 527 (1993).....	23
<i>Kelsey v. Kelsey</i> , 179 Wn. App. 360, 317 P.3d 1096, <i>review denied</i> , No. 90006–0 (Wash. June 4, 2014)	23
<i>King Cty. Pub. Hosp. Dist. No. 2 v. Wash. State Dep’t of Health</i> , 178 Wn.2d 363, 309 P.3d 416 (2013).....	24, 25
<i>Kittitas County v. E. Wash. Growth Mgmt. Hearings Bd.</i> , 172 Wn.2d 144, 256 P.3d 1193 (2011).....	6
<i>Magula v. Dep’t of Labor & Indus. of State of Wash.</i> , 116 Wn. App. 966, 69 P.3d 354 (2003).....	28, 29
<i>Milligan v. Thompson</i> , 110 Wn. App. 628, 42 P.3d 418 (2002).....	9
<i>Morse v. Antonellis</i> , 149 Wn.2d 572, 70 P.3d 125 (2003).....	10
<i>Nationscapital Mortgage Corp. v. State Dep’t of Fin. Insts.</i> , 133 Wn. App. 723, 137 P.3d 78 (2006).....	28
<i>Org. to Preserve Agric. Lands v. Adams County</i> , 128 Wn.2d 869, 913 P.2d 793 (1996).....	29
<i>Pederson v. Emp’t Sec. Dep’t</i> , 188 Wn. App. 667, 352 P.3d 195, 198 (2015).....	6
<i>Phoenix Dev., Inc. v. City of Woodinville</i> , 171 Wn.2d 820, 256 P.2d 1150 (2011).....	7

<i>Pub. Hosp. Dist. No. 1 of King Cty. v. Univ. of Wash.</i> , 182 Wn. App. 34, 327 P.3d 1281 (2014).....	23
<i>Raven v. Dep't of Soc. & Health Servs.</i> , 177 Wn.2d 804, 306 P.3d 920, 926 (2013).....	5
<i>State v. Dominguez</i> , 81 Wn. App. 325, 329, 914 P.2d 141 (1996).....	29
<i>State v. Olson</i> , 126 Wn.2d 315, 893 P.2d 629 (1995).....	9
<i>State v. Post</i> , 118 Wn.2d 596, 826 P.2d 172, 837 P.2d 599 (1992).....	29
<i>Swoboda v. Town of La Conner</i> , 97 Wn. App. 613, 987 P.2d 103 (1999).....	29
<i>Tapper v. Emp't Sec. Dep't</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	6
<i>UWMC v. Wash. State Dep't of Health</i> , 164 Wn.2d 95, 187 P.3d 243 (2008).....	24
<i>Wash. Med. Disciplinary Bd. v. Johnston</i> , 99 Wn.2d 466, 663 P.2d 457 (1983).....	28

Statutes

RCW 18.130	2
RCW 18.130.010	2
RCW 18.130.040(2)(a)	2
RCW 18.130.040(2)(a)(x).....	2
RCW 18.130.050(10).....	2
RCW 18.130.090	2

RCW 18.130.100	2
RCW 18.130.160	2
RCW 18.130.180(1).....	2
RCW 18.130.180(4).....	4, 7
RCW 34.05	2, 5
RCW 34.05.452(5).....	7
RCW 34.05.570(1)(b).....	5, 22
RCW 34.05.570(3).....	5
RCW 34.05.570(3)(c)	22
RCW 34.05.570(3)(e)	6
RCW 34.05.570(1)(a)	5
RCW 34.05.570(1)(d).....	5

Rules

ER 702	10
RAP 1.2(a)	9
RAP 10.3(a)(4).....	9
RAP 10.3(a)(6).....	9, 22
WAC 246-10-404(6).....	8, 24
WAC 246-10-404(7).....	8, 24

I. INTRODUCTION

Respondent Department of Health (Department) licenses and disciplines Washington marriage and family therapists to protect public health and safety. Appellant Darlene A. Townsend, a licensed marriage and family therapist, challenges the Department's Final Order disciplining her for "unprofessional conduct" for practicing below the standard of care in treating Client A and her family members. Townsend denies any wrongdoing.

The record shows Townsend demonstrated an inability to maintain appropriate boundaries with her clients or safeguard their privileged information. Over the course of four years of treatment, Townsend developed an obvious animus towards Client A. Townsend's decision to treat multiple members of Client A's family was clearly contraindicated. Her failure to adhere to the required standard of care expected for licensed marriage and family therapists harmed Client A.

The Final Order suspending Townsend's marriage and family therapist license was a proper exercise of the Department's discretion. Its findings of fact are supported by substantial evidence, and the findings of fact support its conclusions of law.

II. STATEMENT OF THE CASE

A. The Uniform Disciplinary Act (UDA)

The disciplinary process under the Uniform Disciplinary Act (UDA), Revised Code of Washington (RCW) 18.130, exists “to assure the public of the adequacy of professional competence and conduct” of the state’s health care practitioners. RCW 18.130.010. RCW 18.130.040(2)(a) designates the secretary of health as the disciplining authority for the professions listed in that subsection, which includes marriage and family therapists.

As the disciplining authority, the Department has jurisdiction to investigate complaints against marriage and family therapists. RCW 18.130.040(2)(a)(x). The Department may issue a Statement of Charges against practitioners if an investigation reveals professional misconduct. RCW 18.130.090. A Statement of Charges alleges “unprofessional conduct” by a licensee. RCW 18.130.180(1).

A licensee can request an adjudicative proceeding under RCW 34.05 to contest charges alleging professional misconduct. RCW 18.130.100. The Department may “use a presiding officer . . . to conduct hearings.” RCW 18.130.050(10). If a presiding officer determines a practitioner has committed unprofessional conduct, the Department may impose sanctions against the licensee under RCW 18.130.160.

B. Appellant's Practice and Treatment of Client A and Her Family

The Department issued Townsend a marriage and family therapist license on July 22, 2001. Administrative Record (AR) at 385 (Findings of Fact [FF] 2.1). Townsend practiced as a self-employed therapist out of her home in Spokane. AR at 386 (FF 2.4), 1249:25. She treated Client A, her son Client B, and Client B's father for approximately four years starting in 2008. AR at 386-87 (FF 2.5, 2.8-2.11), 410-13, 1263:7-10, 1273:15-25, 1274:1-4.

Townsend provided therapeutic treatment to Client A's family through individual, marriage, and family counseling sessions. AR at 386-87 (FF 2.8-2.11), 410-13, 1273:15-25, 1274:1-4. Townsend's treatment of Client A had little structure or boundaries. AR at 387 (FF 2.11-2.12), 1283, 1398:17-21, 1399:5-24, 1400:1-12, 1438:1-10. Townsend influenced Client A's care of Client B. AR at 388-89 (FF 2.13-2.15), 417-18, 421-22, 425-26, 430-32, 1474:2-7, 1518:15-18, 1520:2-5, 1562-64, 1571-72, 1628-34.

Townsend's disposition towards Client A changed over time. AR at 386, 390 (FF 2.7, 2.17), 1413-14, 1420:3-7, 1538:21-25. Her contempt for Client A became manifest at the end of their treatment relationship when she improperly disclosed Client A's confidential treatment information. AR at 388-89 (FF 2.14), 391-92 (FF 2.21), 393 (FF 2.24.D), 421, 430-31.

C. Appellant's Disciplinary Proceeding

Client A filed a complaint with the Department detailing the impact Townsend had on her. AR at 409-13. The Department conducted an investigation and subsequently issued a Statement of Charges against Townsend, alleging Townsend committed unprofessional conduct under RCW 18.130.180(4). AR at 1-6. Townsend denied the allegations. AR at 21-25.

The hearing lasted two days. AR at 110. The Department presented the testimony of six witnesses: Townsend, Mike McGinnis (Client B's school principal), Client A, Client B's father, and Harriet Cannon, the Department's expert witness. AR at 1246-1365, 1368-77 and 1706-12, 1378-1443, 1378-1505, 1510-42, 1544-1638. Townsend provided testimony on her own behalf. AR at 1649-79. She cross-examined the Department's witnesses and called Tony Pizzillo, a Department investigator, as a witness. AR at 1640-48.

The presiding officer found Townsend committed unprofessional conduct as defined in RCW 18.130.180(4). AR at 201-20 (Findings of Fact, Conclusions of Law and Initial Order). Townsend timely requested administrative review of the presiding officer's initial order. AR at 221-36. The reviewing officer issued the Findings of Fact, Conclusions of Law, and

Final Order (Final Order), upholding the findings and conclusions made by the presiding officer. AR at 371-402.

III. STATEMENT OF ISSUES

1. Were the Department's findings of Townsend's unprofessional conduct supported by substantial evidence in the record?

2. Did the Department engage in unlawful procedures in the administration of Townsend's adjudicative proceeding?

IV. STANDARD OF REVIEW

The Administrative Procedure Act (APA), RCW 34.05, guides an appellate court's review of an agency final order. *Raven v. Dep't of Soc. & Health Servs.*, 177 Wn.2d 804, 816, 306 P.3d 920, 926 (2013). An appellate court reviews the "validity of an agency action . . . in accordance with the standards of review provided in [RCW 34.05.570], as applied to the agency action at the time it was taken." RCW 34.05.570(1)(b).

The challenging party to an agency action has the burden to show its invalidity. RCW 34.05.570(1)(a). An appellate court can grant relief only if it determines that the agency action substantially prejudiced the challenging party. RCW 34.05.570(1)(d). An agency order may be invalidated only if one of the circumstances listed in RCW 34.05.570(3) is present. RCW 34.05.570(1)(d).

The appellate court reviews de novo an agency's conclusions of law and its application of the law to the facts. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). In addressing mixed questions of law and fact, appellate courts “give[s] the same deference to the agency’s factual findings as in other circumstances, but appl[ies] the law to the facts de novo.” *Pederson v. Emp't Sec. Dep't*, 188 Wn. App. 667, 675, 352 P.3d 195, 198 (2015), quoting *Affordable Cabs, Inc. v. Emp't Sec.*, 124 Wn. App. 361, 367, 101 P.3d 440 (2004).

Substantial evidence must support findings of fact. RCW 34.05.570(3)(e). Substantial evidence is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order. *Kittitas County v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 155, 256 P.3d 1193 (2011).

The substantial evidence standard is highly deferential to the agency fact finder, and requires a reviewing court to view evidence in the light most favorable to the prevailing party in the highest administrative fact finding forum below. *Arco Prods. Co. v. Utils. & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995).

Deference is given to the fact-finder regarding witness credibility or conflicting testimony and a reviewing court does not weigh the evidence or substitute its judgment. *Phoenix Dev., Inc. v. City of Woodinville*,

171 Wn.2d 820, 831–32, 256 P.2d 1150 (2011). An agency’s reviewing officer “may commit an error of law if he or she fails to give due regard to findings of the [presiding officer] that are informed by the [presiding officer’s] ability to observe the witnesses.” *Crosswhite v. Wash. State Dep’t of Soc. & Health Servs.*, 197 Wn. App. 539, 548, 389 P.3d 731 (2017), *review denied*, 188 Wn.2d 1009, 394 P.3d 1016 (2017).

The Court does not need to be “persuaded of the truth or correctness of an order”, only that “any fair-minded person could have ruled as” the agency did “after considering all of the evidence.” *Callegod v. Wash. State Patrol*, 84 Wn. App. 663, 676 n.9, 929 P.2d 510 (1997).

When finding unprofessional conduct, an administrative agency may use its experience and specialized knowledge to evaluate and draw inferences from the evidence. RCW 34.05.452(5); *Brown v. State, Dep’t of Health, Dental Disciplinary Bd.*, 94 Wn. App. 7, 13–14, 972 P.2d 101 (1998).

V. ARGUMENT

“Incompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed” is practice below the standard of care for a given profession and constitutes unprofessional conduct. RCW 18.130.180(4); *Brown*, 94 Wn. App. at 13. Townsend’s treatment of Client A and her family members was

below the standard of care for marriage and family therapists. AR at 392-93 (FF 2.24), 396-97 (Conclusions of Law [CL] 3.6).

Townsend contends she “conscientiously practiced within the standards of care” for her profession. Appellant’s Opening Brief at 4. However, substantial evidence clearly supports the Final Order’s findings of Townsend’s unprofessional conduct.

Townsend contends the Department engaged in unlawful procedures in the administration of her adjudicative proceedings, arguing the presiding officer erred by not admitting her untimely proffered exhibits and witnesses; not accommodating her health conditions; and not giving her sufficient deference as a pro se litigant. Appellant’s Opening Brief at 6-7, 11, 13, 14, 16, 21, 35.

The record does not support Townsend’s claims: she failed to comply with the requirements of WAC 246-10-404(6) and (7) that were stated in the scheduling orders; the presiding officer granted Townsend’s requests for accommodation; and the presiding officer held Townsend to the same standard as opposing counsel.

The overwhelming majority of Townsend’s factual assertions in her opening brief are not supported by references to the record. Her arguments are not supported by citations to relevant authority or meaningful argument. Failure to support a challenged finding or conclusion with appropriate

argument and citations to the record waives the assignment. RAP 10.3(a)(4), (6); *Milligan v. Thompson*, 110 Wn. App. 628, 635, 42 P.3d 418 (2002). *See also Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) (“[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration”).

The deficiencies in Townsend’s briefing arguably are sufficient to preclude review. However, to the extent possible, the Department has construed Townsend’s brief and addressed the core of her claims.¹

A. Substantial Evidence Supports the Findings of Unprofessional Conduct Against Townsend

Townsend does not assign error to any specific findings of fact in the Assignments of Error section of her brief. Appellant’s Opening Brief at 4-7. Uncontested findings of fact are verities on appeal. *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 728, 818 P.2d 1062 (1991).

Despite her failure to challenge specific findings of fact in the final order, Townsend apparently objects to the presiding officer’s credibility determinations and those identifying her unprofessional conduct, specifically Findings of Fact Nos. 2.8, 2.11-.12, 2.14-.17, 2.20, 2.23, and 2.24 A through F. Appellant’s Opening Brief at 4-7; AR at 386-93.

¹ Appellate courts will not determine cases or issues “on the basis of compliance or noncompliance [with the Rules of Appellate Procedure] except in compelling circumstances where justice demands” RAP 1.2(a); *State v. Olson*, 126 Wn.2d 315, 318–19, 323, 893 P.2d 629 (1995).

Townsend vehemently challenges the presiding officer's determination that Client A's testimony was credible. Appellant's Opening Brief at 4-5, 17-20. However, "credibility determinations are solely for the trier of fact [and] cannot be reviewed on appeal." *In re Marriage of Akon*, 160 Wn. App. 48, 57, 248 P.3d 94 (2011), citing *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). In this case, the Reviewing Officer deferred to and concurred with the Presiding Officer's credibility determinations and opportunity to observe the witnesses. AR at 376-77, 392. Townsend's challenge to Findings of Fact No. 2.23 as it applies to Client A cannot be reviewed on appeal. *Akon*, 160 Wn. App. at 57; *Crosswhite*, 197 Wn. App. at 548.

Townsend argues without citation to authority or the record that the HLJ erred in admitting the testimony of the Department's expert witness. Appellant's Opening Brief at 6. Whether expert testimony is admissible is within the sound discretion of the trial court. *Aguilar v. State*, 77 Wn. App. 596, 601-02, 892 P.2d 1091 (1995). An expert's opinion is admissible if the witness qualifies as an expert and her testimony would be helpful to the trier of fact. Evidence Rule (ER) 702. Expert testimony is required to establish the standard of care for a given profession and to explain how a practitioner departs from that standard. *Christian v. Tohmeh*, 191 Wn. App. 709, 731,

366 P.3d 16 (2015); *Housel v. James*, 141 Wn. App. 748, 172 P.3d 712 (2007).

Harriet Cannon, a licensed marriage and family therapist, appeared as the Department's expert witness. AR at 1544-1638. Cannon stated the standard of care for marriage and family therapists and explained how Townsend's treatment of Client A and her family members departed from that standard. AR at 1551, 1553-54, 1556-57, 1559-60, 1562-64, 1564-68, 1571-72, 1573-74, 1578-79, 1583, 1584:14-23, 1585:5-8, 1585-88, 1595, 1598.

Townsend's contention regarding the Department's expert witness is without merit. Cannon was qualified and her testimony was helpful to the Presiding Officer as trier of fact and necessary to establish the standard of care relevant to marriage and family therapists. AR at 392 (FF 2.24), 1546-1600.

Regarding the Final Order's conclusion that Townsend committed unprofessional conduct, substantial evidence supporting any one of the findings of practice below the standard of care is sufficient to sustain that conclusion. Substantial evidence supports all of the Final Order's findings of fact showing Townsend committed unprofessional conduct by practicing below the standard of care for a marriage and family therapist.

1. Treating multiple family members contraindicated

Townsend seems to assign error to Findings of Fact Nos. 2.3, 2.11, 2.16 and 2.24.A. Appellant's Opening Brief at 4, 17-20. Those findings address Townsend's practice below the standard of care by treating "multiple family members individually when their individual treatment needs were incongruous and conflicting, causing role confusion and undermining therapeutic objectivity." AR at 393 (Final Order).

The standard of care requires a thorough assessment to determine whether it is in the client's interest to treat multiple family members. AR at 1556:8-25, 1557:19-25, 1558:1-8, 1559:23-25, 1560:1-2. If a child in the family needs treatment, the standard of care calls for the child to have his own therapist. AR at 1558:9-20. Additionally, it is "never recommended to see two married people in individual therapy and marital therapy concurrently because . . . the therapist . . . [cannot] be totally objective to two people as a therapist, as an individual therapist, and then be a marital therapist at the same time." AR at 1598:15-20. The norm is to "see one person in the marital couple for an assessment, and then . . . the other person for an assessment, and then . . . bring them back together as a couple and . . . develop a treatment plan together based on the information . . . gathered about the couple's relationship, their sexual history, their emotional

history.” AR at 1598:22-25, 1599:1-5. The therapist would “then see them primarily as a couple, not as individuals.” AR at 1599:6-7.

Townsend began treating Client A first after diagnosing her with an adjustment disorder, anxiety, depression and a borderline personality disorder. AR at 652, 1556:1-7. She did not update Client A’s diagnosis for almost four years nor did she define any treatment goals for Client A. AR at 1555:11-13, 1504:11-15. Regardless of that, Townsend began treating Client B, Client A’s minor son, focusing on developmental skills to address his Asperger syndrome. AR at 1264:2-10, 1268:10-21. Shortly thereafter, Townsend began sessions with Client B’s father, who at the time was married to Client A. AR at 1273:22-25, 1274:1-4. From 2010 onwards, Townsend was providing therapeutic treatment to Client A, Client B, and Client B’s father in individual, marriage, and family counseling sessions. AR at 1273:15-25, 1274:1-4.

The Department’s expert witness identified Client A’s vulnerability and trust issues as contraindicating concurrent treatment with her former spouse and Client B. AR at 1551, 1556-57, 1559-60, 1595, 1598. Cannon also testified that Townsend’s abrupt cessation of Client A’s treatment after four years was “very harmful”. AR at 1590, 1592.

Townsend's statements also support those findings to the extent she demonizes Client A rather than acknowledge her inability to treat Client A competently. AR at 421, 430-31, 1650-52, 1657, 1663, 1665-66.

Findings of Fact Nos. 2.3, 2.11, 2.16 and 2.24.A and their determination that Townsend's treatment of multiple members of this family was contraindicated, are supported by substantial evidence. AR at 421 430-31, 652, 1264:2-3, 1264:8-10, 1268:10-21, 1273:15-25, 1274:1-4, 1504:11-15, 1538, 1540, 1555:11-13, 1556:1-25, 1557:19-25, 1558:1-20, 1559:23-25, 1560:1-2, 1598:22-25, 1599:1-5, 1650-52.

2. Recommending medication for Client B to his physician

Townsend appears to challenge Findings of Fact No. 2.24.B. Appellant's Opening Brief at 5, 26-27. That finding concludes Townsend practiced below the standard of care by suggesting a specific medication regime to Client B's primary care physician. AR at 393.

If a marriage and family therapist has a concern about a client's medications, the standard of care is to relay relevant observations or concerns to a medical doctor. AR at 1564.

Townsend sent a letter to Dr. Thompson, Client B's primary care physician, informing him that she had diagnosed Client B with attention deficit hyperactivity disorder (ADHD). AR at 417-18. She provided specific

prescription and dosage recommendations for medications to treat his ADHD. AR at 417-18.

The Department's expert testified it was "most unusual" for a marriage and family therapist to suggest a specific medication to a physician because it "is not something that [marriage and family therapists] are trained or taught to do or is it considered acceptable even to suggest medication to a physician." AR at 1562. Client B's physician made a similar note regarding Townsend's departure from her scope of practice. AR at 421. The record provides substantial evidence to support Findings of Fact No. 2.24.B. AR at 417-18, 421, 425-26, 432, 1562-64, 1571-72, 1628-34.

3. Violation of Client B's confidentiality

Townsend finds error with Findings of Fact No. 2.24.C, which faults her for "[i]nappropriately and without warning" talking about Client B's masturbation at a meeting with Client B's teachers, a violation of the confidentiality requirements protecting Client B's health care information. Appellant's Opening Brief at 25-26; AR at 393.

Cannon testified that the standard of care is to protect client confidentiality regarding information shared in a treatment session. AR at 1565:3-5, 1565:15-16, 1565:24-25, 1566:1-5, 1567:3-9. In the case of a child, the therapist should first consult with the parents and seek their consent. AR at 1568:12-16.

Townsend accompanied Client A and Client B's father to Client B's parent-teacher meeting. AR at 1370:22-25; 1371:1-14. Without notice to or permission from Client A and Client B's father, Townsend raised the issue of Client B's "self-soothing" behavior of masturbation. AR at 1474:2-7, 1518:15-18, 1520:2-5. School staff had not noted Client B exhibiting that behavior. AR at 1373:2-21. Townsend's comment alarmed Client B's father and school staff members present at the meeting. AR at 1518:9-18; 1374:2-16. Client A was similarly startled and embarrassed because the comment was "out of the blue" and felt like a violation of trust. AR at 1411:4-20.

According to Cannon, Townsend's unprompted disclosure to school staff was irrelevant to Client B's treatment or school accommodation and below the standard of care for a marriage and family therapist. AR at 1564:17-1565:25. The testimony of Client A, Client B's father, Mike McGuinness, and the Department's expert provided substantial evidence to support Findings of Fact No. 2.24.C. AR at 393, 1371-74, 1411-12, 1473-76, 1518, 1520, 1525, 1564-68, 1573-74, 1712.

4. Violation of Client A's confidentiality

Townsend appears to question the validity of Findings of Fact No. 2.24.D. Appellant's Opening Brief at 5. That finding addresses Townsend's disclosures in a letter to Dr. Thompson, Client B's physician, about Client A's mental health. AR at 393.

The Department's expert witness, Harriet Cannon, stated that the only time a therapist may share client confidences is in a "life-threatening situation [a]nd this was not one of those life-threatening situations, so it doesn't apply that she can breach confidentiality." AR at 1573. Cannon stated the standard of care in communicating with another health care professional about a shared patient, would be to use general language focused on the problems of that patient. AR at 1574. Client A was not Dr. Thompson's patient. AR at 425-26.

In her letter to Dr. Thompson, Townsend maligned Client A by claiming "considerable marital problems created by [Client A] and her need to pursue feelings and failings in everybody but herself, generally accompanied by copious tears [a]nd her inability to accept responsibility for her actions has been highly stressful for [Client B]." AR at 430-31, 1574:1-5.

Townsend's remarks impressed Cannon: they were "so far below the standard of practice" to be "quite shocking." AR at 1574:6-7. "To call out specific behaviors on the part of one parent, and to really blame that parent for the problems, is quite shocking and something that would be . . . contraindicated in any situation." AR at 1574:19-22. Substantial evidence supports Findings of Fact No. 2.24.D in finding Townsend's practice below

the standard of care for violating Client A's confidentiality. AR at 421, 430-31, 1574, 1578, 1579:1-6.

5. Crossing therapist-client boundaries

Townsend seems to take issue with Findings of Fact Nos. 2.13 and 2.24.E., which conclude she practiced below the standard of care for her profession by providing small gifts and garments to Client A during the course of Client A's therapy. Appellant's Opening Brief at 31; AR at 393.

The Department's expert witness, Harriet Cannon, identified the standard of care as establishing a "professional relationship" through defined boundaries between the therapist and client. AR at 1584:14-23, 1584:4-13, 1585.

Client A testified Townsend gave her items such as Gypsy Cold tea, and a book of herbal remedies and loaned her items, such as boots and dresses. AR at 1398:17-21, 1399:5-24, 1400:1-12. Townsend confused Client A when she requested her to return a dress. AR at 1400:8-12.

Cannon concluded Townsend practiced below the standard of care by gifting and loaning items to Client A, because doing so sent a "mixed message about what the relationship is" between therapist and client. AR at 1583:18-20, 1585:5-8. The testimony and exhibits provide substantial evidence to support Findings of Fact Nos. 2.13 and 2.24.E. AR at 435, 1398-99, 1487-88, 1583:18-20, 1585:5-8.

6. Failure to define and update Client A's treatment plan

Townsend assigns error to Findings of Fact Nos. 2.8 and 2.24.F. Appellant's Opening Brief at 6. Those findings conclude Townsend's treatment of Client A was below the standard of care by failing "to clearly identify, define, and update a treatment plan and progress for Client A." AR at 393.

Cannon, the Department's expert, indicated that the standard of care requires a "good, thorough . . . checklist of history of problem" through gathering "information to find out how to make a good rational decision about going forward in the treatment process." AR at 1553:13-15, 1553:19-21. The therapist should develop the plan in the first "three or four visits." AR at 1554:22-23. The standard of care for an individual diagnosed with an adjustment disorder, as was the case with Client A, requires a determination of the event causing the adjustment disorder. AR at 1555:1-9. For that particular diagnosis, the standard of care requires follow up reviews of the client's progress and treatment "at the very least every four or five months." AR at 1555:2-9, 1555:13-20.

Townsend began treating Client A in April 2008. AR at 1252:21-23, 1253:4. The type of treatment indicated on the plan was "individual" and "marital" for depression and family problems. AR at 652, 1252. She did not create a treatment plan for Client A until June 1, 2008, six weeks into

treatment. AR at 1283, 1554:16-18. Townsend initially diagnosed Client A with a short-term diagnosis requiring re-assessment within six months. AR at 1556:1-7.

Townsend only updated Client A's diagnosis after she declined to further treat Client A after four years of treatment. AR at 1555:11-15. Townsend submitted a final claim to Client A's insurance company with her first diagnosis update for Client A in almost four years; diagnosis code 301.50 indicating histrionic personality disorder. AR at 1358:7-1359:14. Client A was shocked and upset when she later learned of this diagnosis. AR at 1438:1-10.

Cannon reviewed Client A's treatment records and observed they lacked a checklist of problems to address, contrary to the standard of care. AR at 1553:13-16. Townsend's intake only had a few lines of information on Client A's intake form. AR at 1553:13-16. Contrary to standard practice, Townsend only developed a "superficial" treatment plan for Client A six weeks later. AR at 1554:16-18. She did not update Client A's diagnosis for almost four years nor did she define any treatment goals for Client A. AR at 1555:11-15. Townsend did not seem to identify the event causing the adjustment disorder or update that diagnosis. AR at 1556:2-7. Her failure to document a review or follow up diagnosis for almost four years was "very

far below the standard of care which is normally expected.” AR at 1555:10-16.

Substantial evidence supports Findings of Fact No. 2.24.F: Townsend practiced below the standard of care by failing to develop or update a sufficient treatment plan for Client A during the course of a four-year treatment program. AR at 393, 1553:13-16, 1554:16-18, 1555:10-16, 1556:2-7.

B. Townsend’s Claims That the Department Engaged in Unlawful Procedure Are Without Merit

Townsend loosely uses the term “due process” to describe some of her grievances regarding her adjudicative proceedings.² Appellant’s Opening Brief at 11, 13, 14, 16, 21, 35. However, she fails to explain how she was denied due process and to cite to legal authority to support her position. Opening Brief at 11, 13, 14, 16, 21, 35.

In the context of an administrative proceeding, due process requires the opportunity to be heard at a meaningful time and in a meaningful manner. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 217, 143 P.3d 571,

² The Department’s inability “to discern and restrain Personality Disordered persons from targeting professionals and . . . not protecting the public thereby violating due process;” an alleged restraint on her ability “to look at her own materials” not admitted into evidence; listening to Client A and the Department’s expert witness testify at her hearing; the HLJ’s exercise of discretion on evidentiary issues; the Department’s investigation of her case; and alleged deficiencies in the hearing process. Appellant’s Opening Brief at 10-11, 13-14, 16-17, 20-21, 31, 34-35.

(2006). Townsend had the opportunity to be heard at a meaningful time and in a meaningful manner. AR at 16, 20, 21-29, 32-35, 37-50, 110, 1246-1365, 1376-77, 1454-1504, 1522-36, 1601-34, 1640-1679, 1706-10.

What Townsend describes as due process violations in her brief appear to be allegations of a deficient hearing environment and a contention that the Department failed to accommodate her medical conditions. Appellant's Opening Brief at 4-7. Townsend's arguments regarding these claims seem to imply the Department engaged in unlawful procedure. The Court should consider Townsend's contentions in the confines of RCW 34.05.570(3)(c) and the grounds for review of her case under RCW 34.05.570(1)(b).

Townsend provides only minimal citations to the record to support her statement of facts or her arguments regarding her failure to file and deficient hearing environment. Appellant's Opening Brief at 6-7, 11-21, 32-35. She provides no authority to support her arguments. Appellant's Opening Brief at 11-13, 20-21, 31. Because Townsend fails to adequately cite to the record to support her factual statements and arguments, and fails to cite to authority or provide substantive argument to support her assignments of error, the Court should not consider those issues. RAP 10.3(a)(6); *Brownfield v. City of Yakima*, 178 Wn. App. 850, 875-76, 316

P.3d 520 (2014); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Townsend’s assertions of due process violations are without merit: “naked castings into the constitutional seas are not sufficient to command judicial consideration and discussion.” *Pub. Hosp. Dist. No. 1 of King Cty. v. Univ. of Wash.*, 182 Wn. App. 34, 49, 327 P.3d 1281 (2014) (Citations omitted.)

1. Townsend’s argument regarding her failure to file is without merit

Townsend claims the HLJ abused his discretion by not admitting her witnesses and exhibits filed after the deadline set out in the scheduling order. Appellant’s Opening Brief at 11-13. She suggests the HLJ should have afforded her leeway in compliance with the procedural rules of her adjudicative proceeding because she represented herself. Appellant’s Opening Brief at 7, 12. However, pro se litigants are held to the same standard as attorneys and she provides no argument as to why the HLJ’s rulings were in error. *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993); *Kelsey v. Kelsey*, 179 Wn. App. 360, 368, 317 P.3d 1096, review denied, No. 90006–0 (Wash. June 4, 2014).

“Administrative law judges, such as HLJs, have considerable discretion to determine the scope of admissible evidence.” *King Cty. Pub.*

Hosp. Dist. No. 2 v. Wash. State Dep't of Health, 178 Wn.2d 363, 373–74, 309 P.3d 416 (2013), citing *UWMC v. Wash. State Dep't of Health*, 164 Wn.2d 95, 104, 187 P.3d 243 (2008).

The HLJ presiding over Townsend's hearing issued a scheduling order listing pre-hearing deadlines and the hearing date. AR at 26-29. The scheduling order also instructed the parties on how, when, and where to submit filings including evidence and witness lists. AR at 26-27. It specifically instructed them to file their Prehearing memoranda including witness and exhibit lists by June 19, 2015. AR at 27.

The HLJ excluded Townsend's exhibits and witnesses as untimely pursuant to WAC 246-10-404(6) and (7). Those subsections provide respectively:

(6) Documentary evidence not offered in the prehearing conference shall not be received into evidence at the adjudicative proceeding in the absence of a clear showing that the offering party had good cause for failing to produce the evidence at the prehearing conference.

(7) Witnesses not identified during the prehearing conference shall not be allowed to testify at the adjudicative proceeding in the absence of a clear showing that the party offering the testimony of such witness had good cause for failing to identify the witness at the prehearing conference.

WAC 246-10-404(6) and (7). There was no error in the HLJ's decision because Townsend had sufficient notice regarding the hearing and

procedures. AR at 7, 26-29, 32-33, 101-102, 114-15, 105-108, 119-20, 125-31. She simply failed to comply with the filing procedures clearly stated in the scheduling orders. AR at 7, 26-29, 32-33, 101-102, 114-15, 105-108, 119-20, 125-31.

Townsend seems to argue she was given erroneous instructions on who and where to send her prehearing memorandum. Appellant's Opening Brief at 11-12. However, that argument is inconsistent with her claim below that she had not finished her briefing because of computer and printer problems. AR at 101-102, 105-108, 114-20, 125-26.

Townsend does not deny receiving the Amended Scheduling Order, nor does she argue that she did not know the filing deadline. The record shows Townsend had the ability to file documents by fax and mail prior to the prehearing conference. AR at 16, 21-5, 36-92. Townsend simply ignored the scheduling order instructions and did not timely file her prehearing memorandum. AR at 16, 21-5, 36-92, 1354: 9-25, 1355:1-12.

Based on the foregoing, the HLJ did not abuse his discretion in denying her late motion to admit. *King Cty. Pub. Hosp. Dist. No. 2*, 178 Wn.2d at 373-74.

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2. The record does not support Townsend's contentions regarding the conduct of her hearing

a. The Department responded to Townsend's requests for accommodation

Townsend contends the building where the hearing took place was deficient and the HLJ restricted breaks. Appellant's Opening Brief at 6-7. Townsend suggests the Department did not comply with the ADA, but she does not specify how the Department failed to accommodate her. Appellant's Opening Brief at 6-7.

Townsend never specified the exact nature of her disability. AR at 20, 23, 36-37, 93, 95, 110, 120, 380. She handwrote "ADA accommodation required" in her Answer to the Statement of Charges, but she did not identify her disability or necessary accommodations. AR at 23. Townsend subsequently sent a letter to the Department Adjudicative Clerk's Office regarding scheduled medical procedures prior to her hearing date. AR at 36. However, she did not request any particular accommodation. AR at 36.

The HLJ granted Townsend's initial request for an extension to file an Answer to the Statement of Charges because of medical conditions and the loss of a family member. AR at 16. Townsend later requested Spokane as the hearing venue. AR at 37. The HLJ held a telephonic conference with Townsend and the Department's Assistant Attorney General to discuss the

request. AR at 95. The HLJ granted Townsend's request for the Spokane venue. AR at 95.

Eleven days prior to the hearing, Townsend sent some of her medical records that appeared to document an injury to her right wrist. AR at 120-24. She did not request any specific accommodation based on that injury. AR at 120-24.

Townsend referred to herself as "a very sick woman" during the hearing itself, but she did not ask for specific accommodation. AR at 1245. The HLJ allowed breaks throughout the proceeding and adjourned the proceeding when requested by Townsend. AR at 1301, 1356, 1439-41, 1509, 1579-80, 1638, 1681. There is no evidence Townsend asked for or was denied a specific accommodation based on a disability. The only request denied involved a one-minute extension of the afternoon break on the second day of hearing. AR at 1638.

The Reviewing Officer found Townsend was sufficiently accommodated based on her requests to the HLJ who served as the presiding officer. AR at 377-380. The record supports the Reviewing Officer's finding on this issue. AR at 20, 23, 36-37, 93, 95, 110, 120, 380, 1301, 1356, 1439-41, 1509, 1579-80, 1638, 1681. Townsend's arguments to the contrary are without merit and unsupported by citations to the record or legal authority.

b. Townsend’s claim of bias is without merit

Townsend seems to allege the HLJ presiding over her adjudicative hearing harbored bias against her. Appellant’s Opening Brief at 12, 34-35. Generally, under the appearance of fairness doctrine, proceedings before administrative tribunals acting in a quasi-judicial capacity are always valid where, as here “a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.” *Nationscapital Mortgage Corp. v. State Dep’t of Fin. Insts.*, 133 Wn. App. 723, 758–59, 137 P.3d 78 (2006), citing *Wash. Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 478, 663 P.2d 457 (1983).

In the context of administrative proceedings, the appearance of fairness doctrine exists in tension with the presumption that public officials will properly perform their duties. *See Wash. Med. Disciplinary Bd.*, 99 Wn.2d at 479. To overcome the presumption, a party asserting an appearance of fairness claim must show evidence of actual or potential bias to support that claim. *Magula v. Dep’t of Labor & Indus. of State of Wash.*, 116 Wn. App. 966, 972, 69 P.3d 354 (2003),

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citing *Swoboda v. Town of La Conner*, 97 Wn. App. 613, 628, 987 P.2d 103 (1999).³ “Prejudice is not presumed.” *State v. Dominguez*, 81 Wn. App. 325, 328, 329, 914 P.2d 141 (1996). Evidence of actual or potential bias is required. *Dominguez*, 81 Wn. App. at 329.

Here, Townsend does not provide evidence of the HLJ’s actual or potential bias. Clerk Papers (CP) at 21-28. She offers only speculation and presumed prejudice. CP at 2, 5-6. Townsend’s argument is without merit. Appellant’s Opening Brief at 12, 34-5; CP at 134-9.

VI. CONCLUSION

Townsend has a demonstrated inability to maintain appropriate boundaries with her clients or to safeguard their privileged information. Her failure to adhere to the standard of care expected of a licensed marriage and family therapist caused harm to Client A. The Final Order suspending Townsend’s marriage and family therapist license was a proper exercise of the Department’s discretion. Its Findings of Fact are supported by substantial evidence, and the Findings of Fact support its Conclusions of

³ See also *Org. to Preserve Agric. Lands v. Adams County*, 128 Wn.2d 869, 890, 913 P.2d 793 (1996) (evidence that commissioner received 63 phone calls during the prior year from a waste management company insufficient to demonstrate actual or potential bias because the commissioner had other matters pending with the company unrelated to the adjudicative proceeding); *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992) (no appearance of unfairness where presentence report was prepared by an allegedly biased person because there was no evidence of the judge’s actual or potential bias); *Magula*, 116 Wn. App. at 972-73 (no appearance of unfairness where six electricians are among the 13 voting members deciding whether electrical work must be performed by electricians rather than general contractors).

Law. Therefore, the Department respectfully requests the Court to affirm its
Final Order in this case.

RESPECTFULLY SUBMITTED this 29th day of March, 2018.

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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 29th day of March 2018, at Olympia, Washington.



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