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

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IN RE KATHLEEN HARDEE,

Appellant,

v.

STATE OF WASHINGTON,

DEPARTMENT OF EARLY LEARNING,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal arises from an adjudicative proceeding conducted under the Administrative Procedures Act (APA), chapter RCW 34.05, and Department of Early Learning¹ statutes (RCW 43.215) and rules. A preponderance of the evidence showed that licensed family home child care provider Kathleen Hardee violated Department of Early Learning (Department or DEL) regulations and a specific safety plan to protect child care children from unsupervised contact with William Hardee, a young man with a history of assault, unstable behavior, and mental illness. The evidence also showed how Ms. Hardee's actions demonstrated that she lacked personal characteristics necessary for operating a child care facility, as required by WAC 170-296-140(2).² The final order upheld revocation of her family home child care license. CP 249-282.

Ms. Hardee challenges the use of the preponderance of the evidence standard and a two tiered administrative review process in her revocation proceedings. Her challenge necessarily asks this court to find

¹ Prior to July 1, 2006, the Department of Social and Health Services, Division of Child Care and Early Learning, licensed child care facilities. The Department of Early Learning succeeded to the Division of Child Care and Early Learning as the licensing agency for all such facilities as of July 1, 2006. The agency action complained of in this case commenced on July 6, 2006, and the agency appeal took place thereafter. The DEL is therefore the only appropriate agency respondent in this appeal.

² WAC 170-296 was created on July 13, 2006 to implement the conversion of DSHS DCCCEL to DEL. WSR 06-15-075. Prior to that time, the provisions of WAC 170-296 were found in WAC 388-296. No substantive changes to the regulations were made during the recodification process.

RCW 43.215.300(2) unconstitutional where it sets forth the standard of proof for hearings on child care licensing matters. The Court should conclude that the preponderance of evidence burden of proof complies with due process, that the review judge properly exercised statutory authority when entering a final decision, and that the findings and conclusions of law in that final decision are supported by substantial evidence. The order revoking Appellant's license should therefore be affirmed.

II. ISSUES PRESENTED

1. The legislature declared that the safety and well being of children in licensed child care is paramount over the right of any person to provide such licensed care and expressly provided that a licensing action shall be upheld when the factual basis for an action is demonstrated by a "preponderance of the evidence." RCW 43.215.300(2).

(a) Does application of the preponderance of the evidence standard deny procedural due process when a licensee receives a full adjudicative proceeding and judicial review under the APA?

(b) Should the court decline to extend *Ongom v. Dep't of Health*, 159 Wn.2d 132, 104 P.3d 29 (2006), and *Nguyen v. Dep't of Health*, 144 Wn.2d 516, 1029 P.3d 689 (2001), because the rights created by a home child care license are limited and the legislature can reasonably ensure protection of children using a preponderance of evidence standard?

(c) If *Ongom* and *Nguyen* are applicable, should those cases be overruled because a preponderance of evidence standard for licensing actions protects children without creating a significant risk of an erroneous decision and is therefore consistent with the Due Process Clause?³

³ The Department recognizes that the court of appeals cannot overrule a decision of the supreme court and this is stated here to clearly preserve it if the supreme court reviews this case.

2. Does the Administrative Procedures Act, RCW 34.05.464(4), authorize an agency review judge to exercise all powers vested in the initial hearing officer, including the right to make appropriate findings and conclusions to resolve the issues raised in an adjudicative proceeding, when the review judge gives consideration to the initial hearing officer's opportunity to observe witnesses? Does application of RCW 34.05.464 demonstrate an appearance of fairness or illegal bias by the review judge?

3. Does substantial evidence support the findings and are the conclusions consistent with the law where review judge finds and concludes: (a) that the "Department has proven that [Ms. Hardee] violated her 2003 safety agreement and the terms of her 2004 waiver" by allowing her son "William to have unsupervised access to a child under her care;" and (b) that the "Department has proven that the Appellant lacks the personal characteristics an individual needs to provide care to children" as required by WAC 170-296-140(2).

4. Was the Department arbitrary and capricious for revoking a family home child care license based on the evidence that a licensee had allowed a demonstrably dangerous person to have unsupervised contact with child care children contrary to express licensing requirements, and where the licensee had demonstrated she lacked important characteristics needed for such a license?

5. Ms. Hardee seeks attorney fees.

(a) Are fees justified if Ms. Hardee does not prevail or only obtains a remand that might not lead to a decision in her favor?

(b) Should fees be denied because the Department's action was substantially justified for purposes of RCW 4.84.350?

Finally, the Court need not reach one argument made by Ms. Hardee. She argues that the Department is "equitably estopped" from relying on allegations that she provided unlicensed care. Appellant's Br. (AB) at 41. The Court does not need to address that argument because the final order on review does not rely on Ms. Hardee's one day of unlicensed care as a basis for revocation. Moreover, the Department is not claiming

that revocation should be affirmed because Ms. Hardee provided a day of unlicensed care during the period when her license was first suspended.

III. COUNTERSTATEMENT OF CASE

A. The Department Issues Orders Suspending And Revoking Ms. Hardee's License

The State of Washington, Department of Early Learning (hereinafter DEL or Department) summarily suspended the family home child care license of Kathleen Hardee on July 6, 2006 after receiving a report that her son William, who lived at the child care home, had sexually molested a young child he was babysitting. Finding of Fact (FF) 2 and 3 (App. A at 16).⁴ CP 834-835. The Department's investigation showed that the molestation had not involved a child at the child care, but it also showed William had been left unsupervised with child care children, contrary to specific plans submitted and agreed to by Ms. Hardee. CP 824-844, 847, 860, 884.

⁴ The Final Order is attached as Appendix A. The first 15 pages of the final decision simply reprint the argument of counsel for the record and do not reflect a decision. The review judge's Findings of Fact cited in this Statement begin on page 16.

Ms. Hardee does not assign error to individual findings, but her arguments do imply that some of the findings are erroneous. See AB at 9 (Assignment of Error 4, assigning error to findings that Ms. Hardee left William unsupervised, that there was an unauthorized person living at the home, and regarding Ms. Hardee's one day of unlicensed daycare). See also AB at 42-45 (making argument regarding lack of substantial evidence for those findings). Findings 2 and 3 and several others are not specifically disputed and do not fall within the scope of Ms. Hardee's assignment of error or arguments claiming a lack of substantial evidence.

On November 9, 2006, the Department ordered revocation of Ms. Hardee's license. FF 5 (App. A at 17). In addition to details of the licensing history that documented the need to prevent William from having unsupervised contact with the children, the revocation letter cited Ms. Hardee's failure to adhere to her safety plan and failure to notify the Department or conduct proper background checks on individuals with access to the child care children. The Department concluded from the violations cited that Ms. Hardee did not have the character necessary to continue as a child care provider.

B. Administrative Adjudication Of Ms. Hardee's Appeal

Ms. Hardee contested the licensing action. An initial hearing occurred May 7-10, 2007, before Administrative Law Judge (ALJ) Rynold Fleck. CP 324. An initial order was entered on August 14, 2007, which would reverse the Department action. CP 324-333. Pursuant to the APA and agency rules, the initial decision by the ALJ was subject to a petition for review to an agency review judge. *See* RCW 34.05.461 and.464; WAC 170-03-0570. Review Judge Christine Stalnaker entered final decision affirming the license revocation. App. A.

The final order found two reasons for affirming the license revocation. First, it found and concluded that "Department has proven that [Ms. Hardee] violated her 2003 safety agreement and the terms of her

2004 waiver. The Department has proved that [Ms. Hardee] allowed William to have unsupervised access to a child under her care.” CL 11 (App. A at 31). Second, the “Department has proven that the Appellant lacks the personal characteristics an individual needs to provide care to children” as required by WAC 170-296-140(2). CL 10 and 11 (App. A at 31). Based on this, the final order revoked the Family Home Child Care license. App. A at 32.

1. The Violation Of The Safety Agreement And Waiver By Allowing William Unsupervised Access To Children

Ms. Hardee’s son William has suffered with learning disabilities and disciplinary problems in school. FF 7 (App. A, pp 16); CP 604-613. By seventh grade, William had psychotic symptoms that were “pretty severe.” FF 7 (App. A, pp 16); CP 994. When he was 13, in 2001, he showed a child care child how to start a fire with an aerosol can. FF 8 (App. A, pp 16); CP 608, 658. In August 2001, William was convicted of harassment, intimidating a student, and assault for threatening a person with a knife at school. FF 8 (App. A, pp 16); CP 661-662. He was receiving mental health services and taking a regimen of drugs for ADHD and bi-polar disorder, and receiving other therapy. FF 9 (App. A, pp 17); CP 992-996.

As of November 2001, the Department notified Ms. Hardee that William could not be on the licensed premises during child care hours. FF 10 (App. A, pp 17); CP 422. The Department emphasized that this was a serious requirement and a violation would result in “an immediate revocation” of her license. *Id.* Ms. Hardee responded by providing a supervision plan for William to the Department’s licensing representative. FF 10 (App. A, pp 17); CP 423, 660-661. The Department received numerous referrals regarding family violence during 2000-02 related to William. FF 11 (App. A, pp 17-18); CP 424-433, 590.

By 2002, the Department had revoked Ms. Hardee’s license, citing numerous episodes of violence between William and Ms. Hardee, William’s behavior and volatility, including William’s threats to other children in school, and his interaction with child care children. FF 12 (App. A, pp 18); CP 424-433. The 2002 revocation was withdrawn when William left the home to receive treatment in a home providing psychiatric care and schooling. CP 614, 670-671.

When William returned to live at Ms. Hardee’s child care in March 2003, the Department immediately informed her that she was required to prevent William from having unsupervised contact with the child care children. FF 13 (App. A, pp 18); CP 441, 670-671. Ms. Hardee agreed to and submitted a safety plan where William would “not be allowed any

unsupervised contact with the child care children.” FF 14 (App. A, pp 18-19); CP 442-445.

In May 2004, the Department’s representative again communicated with Ms. Hardee about the importance of not allowing William unsupervised access. FF 15 (App. A, pp 19); CP 707-708. In October 2004, Ms. Hardee asked the Department for a waiver of the regulations that disqualified William from bring present in the home during child care hours (based on his earlier conviction). FF 16 (App. A, pp 19-20); CP 448-449, 622-625, 927. Again, Ms. Hardee proposed, and the Department accepted, terms where William would not have any unsupervised contact with child care children, and that the waiver be “ongoing”. FF 16; (App. A, pp 20) CP 448-449, 626-627.

On July 5, 2006, charges of child molestation led to investigations by the King County Sheriff and CPS investigator, Mack Junior. FF 19 (App. A, pp 20) CP 470-476, 483, 831-834. The CPS investigation led to statements by several child care parents who reported seeing William unsupervised and watching children without Ms. Hardee present. FF 20; (App. A, pp 20) CP 471-472, 479-481, 638-639, 643, 656. For example, one mother reported to the investigator about three or four occasions where William was alone with child care children and Ms. Hardee was running errands. *Id.*

Another incident involved William diapering a young girl. A father testified that when arrived to pick up his child, Ms. Hardee told him his daughter was being changed. When he went to the changing room, he found William alone, changing his two and a half year old daughter's diapers. FF 25 (App. A, pp 22); CP 684-686. When Ms. Hardee saw the father going to the changing area, she rushed to the room ahead of him. *Id.* The father was very concerned to see a teen boy changing his daughter. FF 25 (App. A, pp 22); CP 690.

In finding and concluding that William had had unsupervised contact with the child care children, the Review Judge determined that the father's version of the incident was more credible than Ms. Hardee's explanation denying that William had been alone with the child. FF 29 (App. A, pp 24). The Review Judge provided specific reasons for rejecting the ALJ's finding that Ms. Hardee had William in her view at all times. First, the Review Judge recognized from the record that Ms. Hardee's account was impossible; she could not both see the father enter the home and have William under direct supervision. CL 4 (App. A, pp 26). The Review Judge also acknowledged her obligation to consider the ALJ's opportunity to observe witnesses, but noted that the ALJ did not address the two different accounts of William having unsupervised contact

while diapering the child, necessitating findings on that point. FF 29, CL 6 (App. A, pp 24, 27).⁵

2. The Violation Of WAC 170-296-140(2) Showing That Ms. Hardee Lacked Important Personal Characteristics Necessary To Providing Child Care

The Review Judge also affirmed license revocation based on findings and conclusions that Ms. Hardee had demonstrated a lack of important personal characteristics necessary for a child care licensee. This related in part to the finding, made by both the Review Judge and the ALJ, that unknown persons had been seen at the child care home. FF 20-23, CL 8-9 (App. A, pp 20-21; 27-28); CP 327, 331.

As the Review Judge noted in her findings and conclusions, many individuals had reported unknown persons observed in the child care, and Ms. Hardee herself provided some verification of this. FF 20-23, CL 8-9 (App. A, pp 20-21; 27-28), CP467, 470-476, 479-481, 638-639, 643, 656. Parents Mr. S, Ms. E, and Ms. B all reported to Investigator Junior that unknown males were seen in the child care home, during child care hours. *Id.* Mr. S and Ms. E also testified about this at the hearing. FF 21-22 (App. A, pp 21); CP 470-476, 479-481, 683, 691, 789-790. Individuals seen by the parents included a couple of older gentlemen, a man Ms.

⁵ William's unsupervised contact with the child during the diapering was further supported by reasonable inferences from the evidence that other parents had reported seeing William alone with the children in the past.

Hardee told Ms. E was “staying” there, and a person Ms. B. remembered as “Joe”. *Id.* Ms. Hardee identified “Joe” in her testimony as a friend of her son’s, but denied Joe was ever in the home during child care hours. FF20 (App. A, pp 20-21); CP 470-476, 479-481, 603, 1008-1009.

Both the Review Judge and the ALJ acknowledged that people were seen on the premises, but while the ALJ attached no legal significance to those facts, the Review Judge engaged in an analysis. She concluded that these facts were a problem for a child care provider, compared to a person making typical use of their residence. CL 8-9 (App. A, pp 28-30). The Review Judge explained that it was the distraction of these visitors and the focus on the provider’s, rather than the children’s, needs that was concerning and showed a lack of consideration for the children. *Id.*

The Review Judge’s finding that Ms. Hardee lacked the appropriate characteristics to be a child care provider was also based on the uncontested fact that William was present for large portions of the child care day and provided extensive hands on care for the children. CL 9 (App. A, pp 29-30). This was despite William’s long-standing mental health history and disturbing behaviors, the clear indications from the Department that William was not qualified to have unsupervised access to children, and the lack of approval for him to be a child care assistant. *Id.*

The Review Judge concluded that Ms. Hardee's consistent choice to meet her own needs rather than those of the children by having William and unknown others in close proximity demonstrated that Ms. Hardee lacked the personal characteristics required of child care providers. *Id.*

C. Superior Court Proceeding

Ms. Hardee sought judicial review at the superior court, making arguments similar to the arguments presented to this Court. CP 1-152. The superior court affirmed the Review Judge's final decision. CP 1199-1200. Ms. Hardee filed a timely notice of appeal. CP 1219-1222.

IV. ARGUMENT

A. Standard of Review

RCW 34.05.570(3) governs this appeal.⁶ Under this statute, the appellate court directly reviews the final agency action, giving deference to agency findings of fact and affirming them when based on substantial

⁶ The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

- (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; or
- * * * ; or
- (i) The order is arbitrary or capricious.

evidence, and applying de novo review to questions of law. *E.g. Heinmiller v. Dept. of Health*, 127 Wn.2d 595, 601, 903 P.2d 433 (1995).

The burden is on Ms. Hardee to show that the *final* agency action is invalid. *See* RCW 34.05.570(1)(a) (burden is on party claiming invalidity of agency action). Here, the final agency decision is by Review Judge Stalnaker, who issued a Review Decision and Final Order on January 18, 2008. *Heinmiller*, 127 Wn.2d at 601 (where there are changes in an ALJ's findings and conclusions, "the review judge's findings and conclusions are relevant on appeal."); *see also* RCW 34.05.464(2) and (7) (authorizing "final orders" by reviewing officers); WAC 170-03-0660(1); WAC 170-03-0020(10); RCW 34.05.542(2) (judicial review of an adjudicative proceeding must occur 30 days after the "final order.").⁷

Under the error of law standard, the court may substitute its conclusions for that of the agency, but the court affords substantial weight to an agency interpretation of a statute it is charged with administering:

⁷ In passing and with no analysis, Ms. Hardee claims that *Ongom v. Dep't. of Health*, 159 Wn.2d 132, 104 P.3d 1029 (2006) requires this court to review the ALJ's initial order. AB at 28. She is incorrect. As a practical matter, the Court must review the final order because it is the final order that revokes her license. Second, Ms. Hardee simply mischaracterizes *Ongom*. That case reviewed an order by the Department of Health under WAC Chapter 246-10. Presiding officers were authorized to issue final orders subject to judicial review. *See* WAC 246-10-102; WAC 246-10-605. The presiding officer entered such a final order, which the Court described as a "Findings of Fact, Conclusions of Law and *Final Order*." *Ongom*, 159 Wn.2d at 136. There was no final order by a Review Judge and thus *Ongom* provides no authority for Ms. Hardee's assertion that judicial review defers to factual findings in an initial order.

Where the legislature charges an agency with the administration and enforcement of a statute, we give the agency's interpretation of the statute, as well as the agency's own rule, "great weight in determining legislative intent."

Waste Mgmt. of Seattle, Inc. v. Util. & Transp. Comm'n, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994). Here, the Department's interpretation of its licensing requirements should be given weight. The Department is charged with providing comprehensive licensing and regulation of child care operations in Washington. RCW 43.215.200-370. DEL has the agency expertise to apply and interpret RCW Ch. 43.215 and the regulations promulgated in support of that chapter, found at WAC Ch.170.

B. The Preponderance Of Evidence Standard Does Not Violate Due Process Rights Of A Home Child Care Licensee

RCW 43.215.300(2) states:

In any adjudicative proceeding regarding the denial, modification, suspension, or revocation of any license under this chapter, the department's decision shall be upheld if it is supported by a *preponderance of the evidence*. [Emphasis added.]

Appellant argues that conclusion in *Ongom* regarding the burden of proof for agency actions under the Uniform Disciplinary Act for health care providers should apply to her DEL revocation action. AB at 29. Her argument necessarily asks this Court to conclude that the statutory burden of proof in RCW 43.215.300 is unconstitutional.

RCW 43.215.300(2) is presumed constitutional and should not be overturned without a showing that the statute is unconstitutional beyond a reasonable doubt. *Retired Pub. Employees Council of Wash. v. Charles*, 148 Wn.2d 602 , 623, 62 P.3d 470 (2003). Ms. Hardee has not met her burden to show that the legislation denies her due process.

1. The Preponderance Burden Is Constitutional In Light of the Interests Involved And The Minimal Risk Of An Erroneous Licensing Decision

Due process is a flexible standard designed to ensure fairness to all litigants and balance the competing interests of the parties. *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 18 (1976). As outlined in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), the procedures required by the constitution are not rigidly set, but reflect the nature of the proceeding.⁸ To guide the evaluation of due process claims in the administrative setting, *Mathews v. Eldridge* described a balancing test that is regularly used by Washington courts:

First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest,

⁸ Ms. Hardee makes no argument that procedural rights would be different under the state constitution. In any event, Washington courts have consistently used the federal standard in analyzing due process claims and held that the state constitution provides no higher level of protection in the area of due process. *State v. Manussier*, 129 Wn.2d 652, 679, 921 P.2d 473(1996); *City of Bremerton v. Widell*, 146 Wn.2d 561, 579, 51 P.3d 733 (2002).

including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Matthews, 424 U.S. at 334-335. When these considerations are applied, the Court should hold application of the preponderance of evidence standard does not deny due process.

a. A Family Home Child Care License Creates Limited And Conditional Interests In The Licensee

The first prong of *Matthews* analyzes the private interest affected. Here, it is Ms. Hardee's interest in the license approving her family home child care facility. The private interest in such a license is limited by the nature and extent of the privilege it conveys.

The United States Supreme Court has required a higher standard of proof under the Due Process Clause only when the private interest involved liberty (such as avoiding confinement) or involved a fundamental right (such a parental rights). See e.g. *In re Winship*, 397 U.S. 358 (1970) (declaration that juvenile delinquent and subject to detention, "complete loss of personal liberty" required proof beyond a reasonable doubt); *Addington v. Texas*, 441 U.S. 418 (1979) (commitment to psychiatric hospital requires clear and cogent evidence); *Santosky v. Kramer*, 455 U.S. 745 (1982) (termination of parental rights, complete destruction of fundamental right of parent to raise child, requires clear and convincing

evidence). For private interests that are not fundamental rights and liberty interests, the Court sustains use of the preponderance standard.

For example, in *Rivera v. Minnich*, 483 U.S. 574 (1987), the Court upheld a state statute requiring a preponderance of the evidence when establishing paternity. The private interest was significant: “avoiding the serious economic consequences that flow from a court order that establishes paternity and its correlative obligation to provide support for the child.” *Rivera*, 483 U.S. at 580. The Court, however, rejected the argument that the “social stigma resulting from an adjudication of paternity” should compel a higher standard of proof. *Id.* at 585 (Brennan, J., dissenting).

Vance v. Terrazas, 444 U.S. 252, 100 S. Ct. 540, 62 L. Ed. 2d 461 (1980) also confirms that very important private interests do not compel a higher standard of proof. *Vance* arose after the U.S. Supreme Court had first determined that clear, cogent, and convincing evidence was required for expatriation proceedings, in the absence of a specific burden of proof. See *Nishikawa v. Dulles*, 356 U.S. 129, 133, 78 S. Ct. 612, 2 L. Ed. 2d 659 (1958). Congress subsequently specified a preponderance of evidence standard for expatriation. *Vance* found that the preponderance standard met due process. “[E]xpatriation proceedings are civil in nature and do not threaten a loss of liberty.” *Vance*, 444 U.S. at 266. A home child care

license is undeniably a *less weighty* private interest compared to expatriation. *See Schneiderman v. United States*, 320 U.S. 118, 122 (1943) (United States citizenship is “the highest hope of civilized men.”)

Ms. Hardee’s argument fails to confront the relevant precedent. She simply urges the Court to expand *Nguyen* and *Ongom* case to her case. *Ongom* and *Nguyen*, however, involve distinguishable private interests. The home child care license in question is not a medical license allowing a person to practice a profession statewide. Instead, it is a premises license that may be issued with only minimal training for the child care provider. *See* WAC 170-296-1410(5)(d)(requiring 20 hours of training within 6 months of licensure). The license is dependent on the facility and its equipage; it does not transfer to a new address if the licensee moves. *See* RCW 43.215.205; WAC Ch. 170-296. RCW 43.215.260; WAC 170-296-0020. The license can also be denied if another person in the home, not the applicant, is unsuitable for contact with children. WAC 170-296-0215. The home child care license is thus limited and supervised.

A second striking difference between a home child care license and the licenses in *Nguyen* and *Ongom* is the statute requiring a preponderance of evidence standard, RCW 43.215.300(2). The legislature specifically states an intent “[t]o safeguard and promote the health, safety, and well-being of children receiving child care and early learning assistance, which is

paramount over the right of any person to provide care”. RCW 43.215.005(3)(c). *See also* pp 21-23, below (discussing state interests advanced by the preponderance standard).

Under this precedent, the preponderance of evidence should not be overturned based on the private interest of Ms. Hardee in her home child care license. The regulatory scheme creates only a limited and conditional interest in such a license; an interest subordinate to safety of children in the facility. *Ongom* and *Nguyen* do not require this Court to assign a weight to the private interest that compels a higher standard of proof.

b. Ample Procedural Safeguards Make An Increased Burden Of Proof Unnecessary

The second *Matthews* factor examines the risk of erroneous deprivation by the procedures used. Here, a home child care licensee enjoys significant due process protections that are sufficient to guard against wrongful revocation. Providers receive a *de novo* hearing before an impartial quasi-judicial hearing officer; they are able to have counsel or other representation on their behalf; they may introduce evidence, cross-examine witness, and present argument; they receive a written decision stating the basis in law and fact for the decision; and the decision is on the record subject to further administrative review and then judicial review. WAC Ch. 170-03; RCW 34.05.

If this *Mathews* factor asked only whether the additional process sought might incrementally protect against erroneous deprivation of the private interest, it always would favor greater procedural protection. However, the second factor requires a *comparison of probable* outcomes, asking the probable value of the *additional* procedural protection compared to existing procedural safeguards. *Matthews*, 424 U.S. at 343-349. Here, all Ms. Hardee does is speculate that a higher burden of proof is more protective of licensees. She cannot show that anything added by a higher burden of proof is particularly valuable in terms of avoiding erroneous views of the facts, because she cannot show that the existing procedures create a risk of an erroneous decision.

c. A Higher Standard Of Proof Makes It More Likely That Children Will Be Subjected To Inadequate Home Child Care Providers

The third *Mathews* factor examines the governmental interest at stake. The governmental interest is not merely the administrative costs associated with a particular procedure, but the interest in the function involved. *Matthews*, 424 U.S. at 334-335.

A standard of proof serves to distribute the risks of a decision. In the licensing scheme of RCW Ch. 43.215, the legislature specifically declared its intent:

To safeguard and promote the *health, safety, and well-being of children receiving child care* and early learning assistance, which is *paramount over the right of any person to provide care*;

RCW 43.215.005(3)(c) (Emphasis added). This purpose is consistent with the generally understood power of a state government to regulate health, safety, and welfare concerns within its borders, and it is a concern accorded great weight in balancing the interests of the state. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975). In furtherance of this purpose, the legislature has adopted a preponderance of evidence standard because it is both fair to the licensee and it protects children from inadequate licensees.

The legislature's choice is reasonable in this context. Children requiring child care are too young to meet their own needs without supervision and too young to display the judgment required of adults. Children may witness improper conduct at a child care, but be unable to provide testimony due to their age, inability to retain and recall facts, and their vulnerability in a hearing setting. Providers might be the only adults on site capable of providing reliable information concerning compliance with regulations or the safety of children in care. Thus, children in care are even more vulnerable than the nursing home patients in *Ongom*, where other adult professionals are in the facility. Children thus rely for their safety on a

system that can take licensing action based on the preponderance of evidence. The preponderance standard allows the Department to pursue worthy cases of license violations without concern that the lack of competent adult eyewitnesses will compromise effective protection of children.

Again, Ms. Hardee does not confront this aspect of *Matthews* except to cite *Nguyen*. AB at 30. Based on *Nguyen*, she could suggest that the state simply needs to spend more money to meet a higher standard.⁹ Her private interest cannot mandate that the state use its limited fiscal resources. Child care licensors will regularly monitor child care homes every 10-18 months, but use complaints and investigations to focus the limited staff to facilities requiring the greatest attention. CP 648-649, 912-914. Moreover, money does not necessary address the issue. More staff visits would not make children more capable witnesses or overcome the fact that the providers are typically the only adults on-site.

In the end, an increased burden of proof would result in fewer licensing actions against inadequate providers and create a higher risk that children will be subjected to inadequate care. The interest of the state in

⁹ The language in *Nguyen* that purports to say the third *Matthews* factor examines only fiscal considerations is inconsistent with the clear language of *Matthews* and other cases, and departs from the typical analysis performed by Washington courts both before and after that decision. See, e.g., *City of Bremerton v. Hawkins*, 155 Wn.2d 107, 110, 117 P.3d 1132 (2005); *Born v. Thompson*, 154 Wn.2d 749, 755-56, 117 P.3d 1098 (2005); *In re Harris*, 98 Wn.2d 276, 286-87, 654 P.2d 109 (1982). This is one more reason that *Nguyen* and *Ongom* should not be followed.

protecting its most vulnerable citizens fully justifies the Legislature's decision to adopt a preponderance of evidence standard. The preponderance of evidence standard of RCW 43.215.300(2) does not deny due process.

2. *Nguyen And Ongom Are Wrongly Decided And Should Be Reversed*

Ms. Hardee relies entirely on *Nguyen* and *Ongom* to claim that due process requires a clear, cogent, and convincing standard of proof for child care licensing. For the above reasons, the Due Process Clause does not require a higher standard of proof when the *Matthews* factors are applied to this type of license. In the alternative, the Court should recognize that *Nguyen* and *Ongom* do not represent sound constitutional analysis and should be repudiated.

While the doctrine of *stare decisis* ensures stability in case law, Washington courts will abandon a previously established rule upon a clear showing that the rule is incorrect and harmful. *See e.g. Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004). Here, the salient reasons for abandoning *Nguyen* and *Ongom* are set forth in dissents. *See Ongom* 159 Wn.2d at 151 (dissent by Owens, J.)¹⁰ As Justice Owens and Justice Madsen both explain, the rule articulated in *Nguyen* (and then *Ongom*) is at odds with due process and with the state's

¹⁰ The majority in *Ongom* did not squarely reject the invitation to overrule *Nguyen*; it instead did not reach that question because it was not properly raised in the petition for review. 159 Wn.2d at 137, n. 3.

power and duty to protect citizens from incompetent or abusive practitioners.

The continuing harm from such cases is addressed by Justice Madsen:

As a result of this court's decision in *Bang Nguyen v. Department of Health*, 144 Wn.2d 516, 29 P.3d 689 (2001), some of this state's most vulnerable citizens are now even more at risk for abuse. Alzheimer's patients like the victim in this case, along with the developmentally disabled, mentally ill, and the elderly depend for their care on people licensed under chapter 18.88A RCW. Many of these citizens lack the ability to speak out or be heard when they suffer abuse from caregivers. Instead of protecting these vulnerable citizens, the majority of the court tips the balance of protection in favor of the licensee and against these vulnerable citizens.

Ongom 159 Wn.2d at 144 (dissent by Madsen, J.) This ongoing harm would be rectified by reversal of the decisions and affirmation that the Legislature can authorize a preponderance of evidence standard in medical licensing and discipline cases.

a. *Nguyen* And *Ongom* Mistakenly Equate The Licensing Privilege With Liberty Interests Cases

A primary difficulty with *Nguyen* and *Ongom* is those cases place a professional license on par with such fundamental rights as reproduction, association, and religious practice, rather than with the more mundane property interests in a business license under a regulatory system. Ms. Hardee cites *Conn v. Gabbert*, 526 U.S. 286, 291-292, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999) for the proposition that the Supreme Court recognized the right to an occupation as a full-fledged liberty interest

deserving a high level of due process protection. Ms. Hardee fails to quote the Court's statement in full, blurring the Court's statement,

In a line of earlier cases, this Court has indicated that the liberty component of the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment, *but a right which is nevertheless subject to reasonable government regulation. . . .*

Id. (Emphasis added). In no case does the Court hold that there is a liberty interest in engaging in a business without reasonable regulation. Instead, the rational basis test is consistently been applied to regulations impacting the right to choose a profession or operate businesses, confirming that such interests are not fundamental rights for constitutional purposes.¹¹

¹¹ As summarized in Justice Madsen's dissent: "[T]he Supreme Court has made clear that 'rational basis review' is the appropriate standard for reviewing such government licensing regulations. *Barry v. Barchi*, 443 U.S. 55, 61-62, 67-68, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979) (applying "rational basis" test in the equal protection and due process context to licenses for horse trainers). *See also Medeiros v. Vincent*, 431 F.3d 25, 29 n.3 (1st Cir. 2005) (it is "well settled" that there is no fundamental right to pursue a livelihood or occupation, and "legislation or regulation impinging upon such a right therefore is subject only to 'rational basis' review, rather than 'strict scrutiny' "); *Cornwell v. Cal. Bd. of Barbering & Cosmetology*, 962 F. Supp. 1260, 1271-72 (S.D. Cal. 1997) (substantive due process challenges to regulations of occupations are "subjected to rational basis review," and "[t]he regulation may only be struck down if there is no rational connection between the challenged statute and a legitimate government objective"); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313-14, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976) (no fundamental right to government employment and applying rational basis review to restrictions on government employment); *Schwartz v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232, 238, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957) (no fundamental right to practice law); *Nebbia v. New York*, 291 U.S. 502, 527-28, 54 S. Ct. 505, 78 L. Ed. 940 (1934) (the right to work in a particular profession or trade is a protected right and subject to rational regulation); *Dittman v. California*, 191 F.3d 1020, 1031 (9th Cir. 1999) (applying rational basis review to requirements for acupuncture license); *Meyers v. Newport Consol. Joint Sch. Dist. No. 56-415*, 31 Wn. App. 145, 639 P.2d 853 (1982) (holding that the right to employment is not fundamental and applying rational basis review); *In re Revocation of License to Practice Med. & Surgery of*

b. *Nguyen* And *Ongom* Err By Undervaluing The Governmental Interest In The Preponderance Standard

Both *Nguyen* and *Ongom* err in analyzing the governmental interests in the preponderance standard. The error skews the entire *Mathews* balancing in favor of a higher burden than required by due process. As Justice Owens wrote:

The third factor of the *Mathews* test is “the Government’s interest, *including the function involved* and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Id* . (emphasis added) (citing *Goldberg v. Kelly*, 397 U.S. 254, 263-71, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970)). The *Nguyen* majority held that this third factor only “relates to practical and financial burdens to be imposed upon the government were it to adopt a possible substitute procedure” and “does *not* relate to the interest which the government attempts to vindicate through the procedure itself.” 144 Wn.2d at 532 (emphasis added). In other words, the *Nguyen* majority limited the scope of the third *Mathews* factor to administrative and pecuniary concerns. Such a limitation is contrary to the language used in *Mathews*, in which the Court described the third factor as “the Government’s interest, *including the function involved*.” 424 U.S. at 335 (emphasis added).

Ongom, 159 Wn. 2d at 152 (dissent by Owens, J.). Further, as noted in footnote 9, above, the *Nguyen* majority approach to the third factor is contrary to precedent before and after *Nguyen*. It is also significant that the Washington Supreme Court stands alone. In our research, we have found

Kindschi, 52 Wn.2d 8, 319 P.2d 824 (1958) (applying rational basis review to license revocation). *Ongom*, 159 Wn.2d at 146-47.

no other decision holding that the preponderance standard violates the Due Process Clause in this context.¹²

c. *Nguyen* Was Not Supported By The Cases It Cites

Nguyen held that due process requires clear and convincing proof for medical licensing actions based on cases decided on peculiar state constitutional grounds rather than the Due Process Clause. See *Nguyen*, 144 Wn.2d at 521 n.3. In *Johnson v. Board of Governors of Registered Dentists*, 913 P.2d 1339, (Okla. 1996), the court explained: “Because of the penal nature of disciplinary proceedings involving a professional license, the Oklahoma Constitution requires that the clear-and-convincing standard be applied in such disciplinary proceedings.” *Johnson*, 913 P.2d at 1346. In *Painter v. Abels*, 998 P.2d 931 (Wyo. 2000), the court stated: “As a result, we hold [the preponderance standard] is also unconstitutional on due process grounds. This holding arguably gives Wyoming licensees greater due process protection than is required by the United States Constitution.” *Painter*, 998 P.2d at 941 (citation omitted).¹³

¹² See Appendix B, listing national cases.

¹³ *Nguyen* also relied upon *Silva v. Superior Court*, 14 Cal. App. 4th 562, 17 Cal. Rptr. 2d 577 (1993); *Ettinger v. Board of Medical Quality Assurance*, 135 Cal. App. 3d 853, 185 Cal. Rptr. 601 (1982); *Rife v. Department of Professional Regulation*, 638 So. 2d 542 (Fla. Dist. Ct. App. 1994); *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987); *In re Zar*, 434 N.W.2d 598 (S.D. 1989); *Mississippi Board of Nursing v. Wilson*, 624 So. 2d 485 (Miss. 1993); and *Davis v. Wright*, 503 N.W.2d 814 (1993). *Nguyen*, 144 Wash. 2d at 522 n.3. However, none of these decisions involve the Due Process Clause. Rather, in the absence of a legislatively established standard of proof, these courts selected a

No other court has ruled that the Due Process Clause prevents a legislature from adopting a preponderance of evidence standard in the instant case, or in a case like *Nguyen* or *Ongom*. If those cases are read to require a higher burden of proof for revoking a home child care license, those cases should be revisited and overruled.

C. Ms. Hardee Does Not Demonstrate That Review By A Review Judge Demonstrated Bias Or Violated The Appearance Of Fairness Doctrine

Ms. Hardee attacks the final decision by arguing that the review judge violated the appearance of fairness doctrine or exhibited bias. AB at 32-33. Her argument that the Review Judge was biased, however, consists primarily of an assertion that bias is shown because the Review Judge entered findings against her, which she argues are not supported by the record. AB at 34. She also argues that the appearance of fairness is violated by the Review Judge's "decision to ignore the ALJ's findings" and because the Review Judge is an employee of the Department. These arguments regarding bias and appearance of fairness are without merit.¹⁴

standard of proof based on their views of appropriate public policy, not the Due Process Clause.

¹⁴ Ms. Hardee's argument also includes a statement that the two-tiered review set forth in RCW 34.04.464(4) is unconstitutional. She does not support her assertion of unconstitutionality with any citation to relevant authority and therefore there is no constitutional argument to address.

1. No Bias Claim Is Preserved

A litigant's failure to assert a timely objection concerning a judge's or administrative tribunal's qualifications to hear a matter precludes consideration of the issue on appeal. *Hill v. Dep't of Labor & Indus.*, 90 Wn.2d 276, 279–280, 580 P.2d 636 (1978). The *Hill* court explained:

The same common-law rules of disqualification for conflict of interest as apply to judges also apply to administrative tribunals, but the objection must be raised or it will be deemed waived.

Id. (citations omitted) This rule applies whether disqualification of the judge is sought under statute or based upon due process grounds. *Brauhn v. Brauhn*, 10 Wn. App. 592, 597, 518 P.2d 1089 (1974). The reason underlying this rule was explained in *Brauhn*:

Were the rule otherwise a litigant, notwithstanding his knowledge of the disqualifying factor, could speculate on the successful outcome of the case and then, having put the court, counsel and the parties to the trouble and expense of the trial, treat any judgment entered as subject to successful attack.

Brauhn, 10 Wn. App at 597–598. Ms. Hardee's arguments are not properly preserved.

2. Ms. Hardee Does Not Demonstrate Violation Of The Appearance Of Fairness

Ms. Hardee may respond that until the Review Judge ruled, she was not aware of bias or an appearance of fairness problem. This,

however, merely helps illustrate that her arguments lack merit, being rooted in her dissatisfaction with the ruling.

The appearance of fairness doctrine applies to quasi-judicial proceedings, and addresses concerns of a biased or potentially interested decision maker. *Hill*, 90 Wn.2d at 279; *State v. Post*, 118 Wn.2d 596, 619, 837 P.2d 599 (1992). A judge must not just be impartial, but that judge must also *appear* to be impartial. *State v. Madrey*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). However, “[w]ithout evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit.” *Post*, 118 Wn.2d at 619 n. 8.

The doctrine looks to an objective standard: would “a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.” *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995); *In re Marriage of Davison*, 112 Wn. App. 251, 257, 48 P.3d 358 (2002). Ms. Hardee has produced no evidence to meet that standard.

In addition to criticizing the Review Judge’s decision, Ms. Hardee claims an appearance of fairness violation is shown because the Review Judge is employed by the State Department of Early Learning, but the ALJ was employed by the Office of Administrative Hearings. AB at 34. She cites no cases holding that administrative review by a reviewing officer

employed by an agency violates the appearance of fairness doctrine or results in an unconstitutional hearing. Instead, the law is to the contrary:

[T]he mere combination of adjudicative and investigation powers in one agency, without more, would not be viewed by a reasonably prudent and disinterested observer as denying any party a fair, impartial, and neutral hearing.

Medical Disciplinary Board v. Johnston, 99 Wn.2d 466, 479-80, 663 P.2d 457 (1983). See also *Nationscapital Mortgage Corp. v. Dep't. of Fin. Inst's*, 131 Wn. App. 723, 756-60, 137 P.3d 78 (2006) (agency head who previously investigated a case that was later appealed and recused himself from hearing the request for review could affirm appointment of an alternate review officer).

Recently, the Washington Supreme Court rejected an argument attacking the state energy facility siting agency because its members were appointed by a state agency that had a position on the underlying wind farm project. *Residents Opposed to Kittitas Turbines v. EFSEC*, __ Wn. 2d __, 197 P.3d 1153, 1172 (2008). The court held that “the fairness of a decision-making body is measured by how the legislature chose to structure the administrative body.” *Id.* When that is applied to the APA, it is clear that the legislature has allowed final decisions by agency heads and designees of agency heads. RCW 34.05.425(1)(a),(b) (agency head may preside or appoint presiding officer; RCW 34.05.464(2) (agency head

may appoint persons to review final orders). This choice makes sense because the whole purpose of the process is to achieve a final decision *of the agency itself*, prior to judicial review.

There is no merit to the claim that a review judge violates the appearance of fairness because she is appointed by the agency head. Nor is there any objective appearance of bias.¹⁵

D. The Review Judge Entered A Final Order Consistent With Authority Expressly Provided By Statute And Rule

Ms. Hardee makes a number of arguments regarding the actions of the reviewing officer that are inconsistent with the plain language of the statute that empowers a reviewing officer. Ms. Hardee shows no error based on the Review Judge's exercise of the authority allowed by statute and rule.

1. Ms. Hardee's Attacks On The Review Judge Procedure Are Contrary To RCW 34.05.464

RCW 34.05.464(4) expressly provides that a reviewing officer exercises the same power as the initial ALJ, giving deference to the ALJ's opportunity to observe witnesses:

¹⁵ Ms. Hardee also asks the Court to consider an argument that there was bias because of her advocacy for child care owners, her training work, or union work. AB at 35. Ms. Hardee attempts to go beyond the record on judicial review, contrary to RCW 34.05.562, which limits judicial review to issues presented below. Appellant has not met the burden for introducing new evidence on appeal. On the record, there is no merit to Ms. Hardee's unsupported allegation of bias. Her argument is simply a bald statement in a brief, raising a theory not presented below.

The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the reviewing officer upon notice to all the parties. In reviewing findings of fact by presiding officers, the reviewing officers shall give due regard to the presiding officer's opportunity to observe the witnesses.

The next subsection of .464 confirms the breadth of this review power: the “reviewing officer shall personally consider the whole record or such portions of it as may be cited by the parties.” RCW 34.05.464(5). The statute requires the reviewing officer’s final order to include all the matters required of an initial order. RCW 34.05.464(8), citing RCW 34.05.461(3).

This statutory language defeats Ms. Hardee’s major premise that “the review judge had no authority to reverse the ALJ and enter contrary findings based upon her own view of the evidence and of Ms. Hardee’s credibility.” AB at 35. The statute expressly authorizes the review judge to take such action requiring only “due regard” be given to the ALJ’s observation of witnesses. RCW 34.05.464(4). Thus, there is no merit to Ms. Hardee’s statements that Review Judge Stalnaker “ignored” the ALJ’s findings, and Ms. Hardee’s label of “de novo” is irrelevant. *E.g.* AB at 38. Her theory – that only the ALJ can weigh evidence, assess credibility, and find facts – is wrong. AB at 27, 38-41.

Ms. Hardee then misreads the Department of Early Learning rules addressing the ALJ's portion of the administrative review process, providing guidelines for ALJ conduct during a hearing. *See* WAC 170-03-0400(2). These regulations are focused on the first portion of review and do not address or limit the authority of the review judge. The power of a review judge in the DEL process is in WAC 170-03-0620. That regulation, consistent with RCW 34.05.464, gives the reviewing authority the same powers as the ALJ, requiring due regard to the ALJ's ability to observe witnesses.

No procedural or legal error is presented by Ms. Hardee's argument that the Review Judge evaluated the evidence differently and considered hearsay evidence. Neither RCW 34.05.464 nor WAC 170-03-0620(1) contain any strictures on the review judge's ability to consider evidence, including hearsay, previously admitted into the record.

Nor is the requirement that the judge give due regard to the ALJ's observation of witnesses a requirement that a reviewing officer never enter credibility findings of their own, or a bar on the rejection of credibility findings or other findings in an initial order. This is illustrated by *Regan v. Dep't of Licensing*, 130 Wn. App. 39, 49, 121 P.3d 731 (2005). The court held that a reviewing officer may reverse even explicit credibility findings of an ALJ:

As the reviewing officer, the Director has the ability and the right to modify or to replace an ALJ's findings, including findings of witness credibility. *See Tapper [v. Employment Security Dept.]*, 122 Wn.2d at 405-06 (holding that RCW 34.05.464(4) vests final authority in the agency head, including the decision making power of the hearing officer, and the agency head may modify or replace an ALJ's findings). We note that RCW 34.05.464(4) required reviewing officers to give "due regard" to the presiding officer's opportunity to observe the witnesses.

This rule did not mean, however, that the statute required the Director to defer the ALJ's credibility determinations. Rather, the statute authorized the Director to make his own independent determinations based on the record.

Regan, 130 Wn. App. at 59.

2. State Cases Cited By Ms. Hardee Do No Support Her Arguments To Limit A Review Judge's Statutory Authority

Ms. Hardee interprets the phrase "due regard" very broadly, citing *Costanich v. Dep't. of Social and Health Services*, 138 Wn. App. 547, 156 P.3d 232 (2007), *reversed in part by Costanich v. Dep't. of Social and Health Services*, 164 Wash.2d 925, 194 P.3d 988 (2008). AB at 38. *Costanich* found a *DSHS* review judge at fault for substituting his judgment for that of the ALJ in several credibility determinations. But *Costanich* applied a different legal standard, WAC 388-02-0600(2)(c). That *DSHS* hearing rule applies specifically to findings of child abuse/neglect under RCW 26.44, and it limits the *DSHS* reviewing

judge's authority more than the relevant DEL hearing rule applicable to this case, WAC 170-03-0620. The court expressly held that its ruling was based on the unique rule:

The review judge substituted his own view of the evidence for the ALJ's findings which are supported by substantial evidence. This is clearly error *under the deferential standard that applies to appeals from the ALJ's decision about abuse allegations.*

Costanich, 138 Wn. App. at 559 (emphasis added).

Ms. Hardee also cites two cases involving the Department of Labor & Industries (L&I), which does not operate under the APA, and thus do not provide guidance in interpreting RCW 34.05.464(4). AB at 38.¹⁶ In this case, review judge power is defined by RCW 34.05.464(4) and WAC 170-03-0620(1). Under the statute and the regulation, Review Judge Stalnaker, as the final agency decision maker and finder of fact, appropriately considered the evidence and rendered findings supported by substantial evidence. Ms. Hardee shows no legal error in this review.

¹⁶ The L&I cases, however, lend support to the Department's application of its hearing rules. The final L&I agency decision is made by the Board of Industrial Insurance Appeals (Board); an entity which does not take witness testimony. RCW 51.52.106; RCW 51.52.104. Judicial review is of the Board's decision, even though the Board does not hear witnesses. RCW 51.52.110. Thus, in *Boeing Co. v. Heidy*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002), the court explains: "The superior court is an appellate court in appeals from *the Board.*" *Boeing Co. v. Heidy*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002)(emphasis added). *Heidy* does not imply that the relationship between a review judge and an ALJ is analogous to an appellate court and trial court.

3. The Federal Cases Cited By Ms. Hardee Are Not Relevant

Ms. Hardee also relies on federal case law, but those cases do not bear on the authority of a state reviewing officer under RCW 34.05.464. Ms. Hardee relies primarily on *Andrzejewski v. FAA*, 548 F.3d 1257, 08 Cal. Daily Op. Serv. 14,692, 2008 Daily Journal D.A.R. 17,720 (2008). She points out that the federal court remanded a matter where the agency reversed the credibility findings of an ALJ. *Andrzejewski*, however, is based on the precedents of the agency involved in that case, the National Transportation Safety Board, which failed to follow its own agency decisions requiring deference to factual findings below. *Andrzejewski*, 548 F.3d at 1260-1261. The Court did not analyze the federal APA in *Andrzejewski*, and so the case provides no guidance here.¹⁷

E. Substantial Evidence Supports the Findings

1. The Final Order Provided Sound And Explicit Reasons For Not Following The Initial Order

Ms. Hardee's first argument is that substantial evidence does not support the Review Judge's conclusion that the ALJ had not properly considered and applied all evidence. AB at 37; 42. Ms. Hardee suggests that the Review Judge needed to show that the ALJ was dozing, sleeping,

¹⁷ Ms. Hardee's reliance on *J.P. v County School Board*, 516 F.3d 254, 261 (4th Cir. VA 2008) is similarly flawed. That case relates to a decision by the federal District Court, similar to this state's superior court, and not to a second-level administrative reviewer.

or not listening. AB at 42. As shown above, Ms. Hardee's argument is contrary to the statutory power of a review judge granted by RCW 34.05.464 and WAC 170-03-0620(1).

Additionally, Ms. Hardee's entire argument on this point is misdirected; she is attacking an argument from the Department's Petition for Review of Initial Decision, which the Review Judge reproduced in its entirety (along with Ms. Hardee's response). *See* App. A pp. 1-10. There is no need to seek substantial evidence for a Department argument that characterized the initial order as not addressing the entire record.

2. Ms. Hardee Does Not Show A Lack Of Substantial Evidence By Simply Pointing Out That Some Evidence Is Hearsay

Ms. Hardee's second argument is a blanket claim that the final order lacks substantial evidence because it relies on hearsay statements given to the CPS investigator. She does not attack specific findings with particularity. *See* RAP 10.3(g)(h). Her argument is a broad claim that there is not substantial evidence if it relies in any way on statements in the investigator's reports. AB at 27; 42-43.

If, as in this case, hearsay is admitted into the record as allowed under the DEL hearing rules, it can also be considered as part of the substantial evidence relied upon by Review Judge Stalnaker. WAC 170-03-0400(2); WAC 170-03-0620(1). This is consistent with the

administrative review process in general. RCW 34.05.452(1). The presence of hearsay is not, standing alone, error.

Ms. Hardee also appears to argue that the Review Judge cannot make reasonable inferences from the evidence or consider circumstantial evidence. To the contrary, inference is an accepted and common method of judicial reasoning employed as a matter of necessity by every trier of fact, even in criminal cases with a heightened burden of proof. *See e.g. State v. Bencivenga*, 137 Wn.2d 703, 708-709, 974 P.2d 832 (1999). Similarly, circumstantial evidence is authorized in all judicial proceedings, even criminal cases, and is given the same weight as direct evidence. *State v. Liden*, 138 Wn.2d 110, 118-119, 156 P.3d 259 (2007). There is no bar on use of circumstantial evidence.

3. Ms. Hardee Argues A Legally Erroneous View Of The Requirement That William Not Be Unsupervised

In challenging the findings regarding William's contact with child care children, Ms. Hardee argues that the final order misinterprets the prohibition on William's contact with child care children. Ms. Hardee relies on inapplicable authority which post dates the incident to argue that auditory supervision was sufficient for William on June 14, 2006. She cites the current version of the definition of unsupervised access, found in WAC 170-06-0020(10), which does reference being within auditory range.

AB at 39. This regulation was not in effect in June of 2006. When William was diapering the child, WAC 388-06-0020 provided that:

“Unsupervised access” means that an individual will or may be left alone with a child or vulnerable adult (individual with developmental disability) at any time for any length of time.

This definition was in effect from October 1, 2001 through July 2, 2006¹⁸, and applies to the Department’s requirement in 2003, 2004, and 2005 that William would not have unsupervised access to child care children. CP441-445, 448-452. A definition that came into existence after the events in question is not relevant.

Ms. Hardee next relies on WAC 170-296-1360, a child care regulation that relates to the required supervision of the children. AB at 39. WAC 170-296-1360 does not address supervision of individuals not cleared to have unsupervised access to children; it simply provides for how a child care provider should watch children in different circumstances. It does not alter the requirements found in WAC 388-06-0180(1), the regulation that disqualified William from unsupervised access.¹⁹

¹⁸ See WSR 6-14-084, in which the emergency rules replacing WAC 388-06 were filed. The emergency rules were effective on the date of filing, July 3, 2006.

¹⁹ The Department did allege that Ms. Hardee’s actions in leaving William alone with children were a violation of WAC 170-296-1360 as well as WAC 170-296-1410 (related to having qualified staff), but those allegations related to Ms. Hardee failing

Apart from the regulatory definitions, the licensing action here is rooted in Ms. Hardee's safety plan. That safety plan is based on the only applicable definition at the time, WAC 388-06-0020. The condition required that William not have unsupervised access. That condition was a narrow exception to the general requirement that William was barred from the home care facility. As an exception, it is proper to construe it narrowly, not to broadly allow William to have directly contact with children while alone in the changing room.

This is a case where the Department's view of this legal requirement should be given weight by a reviewing court. *King County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000). A construction of the safety plan which would allow William to be alone with the children subject to "auditory supervision" is not supported by the plain language of the prohibition, by the regulations, or by the history of Ms. Hardee's safety plan.

4. Substantial Evidence Supports The Conclusion That William Was Allowed Unsupervised Access To Child Care Children

In this case, direct testimony shows that William had unsupervised access to a child care child. Mr. S testified that Ms. Hardee left his daughter alone with William in a different part of the home from where

to supervise the children in her care. The regulation does not speak to her violation of the prohibition against William having unsupervised contact with the children.

she was sitting with other child care children. CP 685-688. William was alone with the child when Mr. S arrived. *Id.* The area of the house where William was located was around the corner and two walls away from where Ms. Hardee was sitting. *Id.* From her position on the living room couch, Ms. Hardee could not see William, or the child alone with him, when Mr. S. entered the child care. *Id.* This is a significant, unsupervised contact, and it is consistent with Ms. Hardee's reported behavior of rushing ahead to assume a proper supervisory role, as she should have from the start. FF 25 (App. A, pp 24-25) CP 685-688.

While appellant has challenged the Review Judge's findings that Ms. S was credible, there is no evidence that even the ALJ questioned his credibility. Also, as noted above, the Review Judge was fully empowered to make credibility determinations per RCW 34.05.464(4) and WAC 170-03-0620(1). Given the lack of any negative finding attached to Mr. S's testimony, the Review Judge was entitled to give it full weight. As such, it provided substantial and direct evidence that Ms. Hardee allowed William to have significant unsupervised access to a child

Licenser Harriett Martin testified that petitioner did not follow her safety plan, which said William was not to be left alone with children and that William would not have unsupervised access. CP 442-445, 448-452,

672-679, 701-708, 716, 731-732. Similar testimony was provided by licensing supervisor Patricia Eslava Vessey. CP 615-616. This testimony meets the requirements of substantial evidence when applied to the definition of unsupervised access in place at the time of the incident.

5. Substantial Evidence Supports The Findings That Numerous Individuals Were In And Around The Child Care Home

Ms. Hardee also disputes the findings that there were unapproved individuals in her home. AB at 22, 27, 38, 43. Several live witnesses testified to matters that support these findings. These witnesses include Ms. E, who testified not only to seeing unknown persons at the child care home, but to being introduced to a person who Ms. Hardee said would be “staying with” her for a period of time. CP 789-790.

Mr. S testified that he had seen Ms. Hardee’s older son and daughter in law “kind of hanging around” at the home, and they would “come and go”. He also described two other people “working on the car or doing something” from time to time. CP 683-684, 691. Even Ms. Hardee herself discussed a friend of her older son and others who would come over to visit. CP 603, 1008.

Licenser Harriet Martin testified that she did not clear anyone other than family members of Ms. Hardee to be on the child care premises. CP 826. The direct evidence that such other individuals were

present is consistent with the numerous reports from parents testified to by Investigator Mack Junior. CP 470-476, 478-481, 843-844. Taken together, the hearsay and non-hearsay evidence presented is a substantial support to the review findings that uncleared individuals were in and out of the home.

6. The Conclusion That Petitioner Did Not Have The Character To Care For Children Was Factually And Legally Appropriate

Ms. Hardee challenges conclusion of law 10 that, based on the findings, she did not have the character to be a child care provider. This conclusion does contain elements of fact finding, but it is for the most part a conclusion of law, in that it applies the facts to WAC 170-296-140. Therefore, the standard of review looks for substantial evidence as to the factual findings contained in conclusion of law 10, and error of law as to the legal conclusions.

a. The Record Supports A Finding That William Was Allowed Daily Intimate Contact With Child Care Children

Conclusion of law 10 explains that Ms. Hardee allowed William to have “extensive and intimate contact with children under her care”. CL 10 (App. A pp 30). This finding is supported by substantial evidence in the record from both Ms. Hardee and from Mr. S. CP 627-628, 685-690, 837-838. As discussed above, the evidence supports the finding that

William had unsupervised access to Mr. S's two year old daughter on June 14, 2006. Mr. S testified to those details himself. CP 685-688.

Other parents had reported during the investigation that William had even more unsupervised access while Ms. Hardee left to run errands. CP 470-476, 478-481, 843, Furthermore, Ms. Hardee herself testified that William had contact with her child care children on a daily basis, and would play with them, help them with hand-washing, and at least assist with diapering if not actually diaper himself. CP627-628. As Investigator Junior testified at hearing, Ms. Hardee's told him that William made children's lunches. CP 478, 634. Thus, a variety of evidence supports CL 10, including the considerable evidence in the record of William's unsuitability for child care work.

b. Review Judge Stalnaker Correctly Found That There Were Many Unknown Adults In And Around The Child Care Home

Conclusion of law 10 notes on the fact that Ms. Hardee made a choice to "allow a steady stream of unidentified adults through her home during child care hours". This is also supported by substantial evidence in the record. The testimony of Ms. Hardee, Mr. S, Ms. E, and Investigator Junior showed adult traffic in the home. CP 470-476, 603, 683-684, 789-790, 843-844, 850-854, 1008. Again, it was this lifestyle choice, and its incompatibility with child care regulations and the

attention needed to properly supervise children and unauthorized adults, that supported the Review Judge's finding on character.

c. The Legal Conclusion Contained Within Conclusion Of Law 10 Is Not An Error Of Law

As shown above, there is a sound evidentiary basis for the ultimate conclusion that Ms. Hardee did not demonstrate the proper character required under WAC 170-296-0140 to remain a licensed child care provider. Again, this is a situation where a reviewing court should give weight to the Department's interpretation of its rules. Ms. Hardee's arguments to the contrary miss the mark.

When determining whether someone has an understanding of child development and a disposition that is respectful toward children's needs, as required by WAC 170-296-0140(2)(a) and (f), a decision maker must look to the record as a whole and the actions of the licensee at issue. While there is no case law interpreting WAC 170-296-0140 or its predecessor, the expertise of the agency can be relied upon in establishing the boundaries for analysis.

Licensors Martin, an experienced child care licenser, testified that exposure to William's behavior as described over the years could be detrimental to a child. CP 670-673. She also indicated that Ms. Hardee had used poor judgment in allowing William to "be around young

vulnerable children at any time while in her home.” CP 795. Similarly, child care licensing supervisor Patricia Eslava Vessey testified that family violence in the home such as was reported between Ms. Hardee and William would be “traumatic to children, and we can’t assure the safety of children in care or that decisions are made appropriately.” CP 912. She further explained that Ms. Hardee had violated her agreement in allowing William unsupervised access to children, and could not be trusted to keep children safe. CP 936-937.

Ms. Hardee’s decisions, applied to the standard of WAC 170-296-0140(2)(a) and (f), show that Ms. Hardee, regardless of her positive characteristics, was focused on the needs of herself and her own family, and did not have the specific character required to be a child care licensee. Ms. Hardee exposed her child care children to her son, who was known to have dangerous behaviors in the past around children. CP 424-433, 604-613, 627-628, 670-673. She agreed to a specific safety plan to minimize those dangers and then failed to follow it, creating a serious risk of harm to the children. CP 442-445, 448-452, 620-627, 672-679, 716, 728, 795-796, 936-937. Moreover, a similar risk existed for the contact with other unapproved individuals of unknown history and risk. Finally, adult traffic in the facility was not in the best interest of the

children, who should have been the focus of petitioner's attention. CP 936-937.

The Review Judge thus had a sound legal and factual basis for applying WAC 170-296-0140(2)(a) and (f) to this conduct of Ms. Hardee and finding her unsuitable to continue as a child care provider.

F. The Review Judge's findings and conclusions were not arbitrary and capricious

Appellant claims that the final order is arbitrary and capricious. Overall, there is no showing that the order is arbitrary and capricious. An assertion that a decision is arbitrary and capricious must be based on more than mere disagreement with findings. Instead, the decision must be in willful and unreasonable disregard of the facts and circumstances. *Heinmiller*, 127 Wn.2d at 609-610; *Pierce County Sheriff v. Civil Serv. Comm'n*, 98. Wn.2d 690, 695, 658 P.2d 648 (1983). Appellant has not met her heavy burden to show arbitrary and capricious action.

G. If This Court Finds That The Matter Must Be Proved By Clear, Cogent, And Convincing Evidence, The Case Should Be Remanded

If appellant should prevail on her argument that she was entitled to a weighing of the evidence under a clear, cogent, and convincing evidence standard, she still would not be entitled to a direct reversal of the revocation. The agency has not had the opportunity to apply this standard

because of the constraints of WAC 170-03-0220 and -0230, which required the agency to apply the preponderance of the evidence standard found in RCW 43.215.300(2) and WAC 170-03-0350(5). In the *Nguyen* case, when faced with these circumstances, the court remanded to the agency for further proceedings. *Nguyen*, 144 Wn.2d at 534. Here, as in *Nguyen*, the agency has not applied the clear, cogent, and convincing standard to the evidence. *See also* RCW 34.05.574 (when issuing a remedy under the APA, a court should not exercise authority assigned to agency).

H. Appellant Should Not Be Granted Attorney Fees By This Court

Appellant requests attorney fees. However, the bulk of her argument would lead only to a remand. As such, attorney fees should not be considered unless and until such time as there is a final order showing Ms. Hardee prevailing on judicial review. RCW 4.84.340; 350; *See, e.g. Perez v. Garcia*, ___ Wn. App. ___, 198 P.3d 539, 546 (January 6, 2009) (Appellant securing a remand sought attorney's fees as prevailing party, but was denied until the merits were addressed on remand)

Second, RCW 4.84.350(1) does not allow for an award of fees and costs if the agency action "was substantially justified." The Court should reject Ms. Hardee's invitation to "send a message," AB at 46, because the

standard is objective. A court must examine the agency action to determine whether it is justified to a degree that would satisfy a reasonable person, or, in other words, has a reasonable basis both in law and fact. *E.g. H & H P'ship v. State*, 115 Wn. App. 164, 171, 62 P.3d 510 (2003) (citing *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988)).

In this case, the DEL action of revoking Appellant's license was justified to a degree that would satisfy a reasonable person. DEL obtained information from several parent witnesses that Appellant was improperly allowing unsupervised contact between child care children and an individual known to have disturbing behaviors and assaultive criminal history, despite a promise not to do so. CP 442-445, 448-452, 684-686. The Department was justified in acting to protect children in care in accordance with its legislative mandate. RCW 43.215.0005(3)(c) (formerly found in the intent section of RCW 74.15, *Intent - 1995 c. 302 sec. 1.*) Its actions have been consistent with express statutory provisions regarding the burden of proof and the authority of a reviewing judge. As such, the Department meets the substantially justified standard.

V. CONCLUSION

The Department requests that the final agency order be affirmed.

RESPECTFULLY SUBMITTED this 6th day of February, 2009.

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STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BOARD OF APPEALS

FOR THE DEPARTMENT OF EARLY LEARNING

MAILED
JAN 18 2008
DSHS
BOARD OF APPEALS

In Re:) Docket No. 07-2006-L-0410
)
KATHLEEN HARDEE) REVIEW DECISION and FINAL ORDER
)
)
Appellant) Child Care Agencies -Day Care

I. NATURE OF ACTION

1. The Department of Early Learning (the Department)¹ revoked the Family Home Child Care license of Kathleen Hardee (the Appellant). The Appellant objected. Administrative Law Judge (ALJ) Rynold Fleck conducted an administrative hearing and issued an Initial Order on August 14, 2007. The Initial Order reversed the Department's revocation action.

2. On August 30, 2007, the Department filed a Petition for Review of the Initial Order and argued as follows:

Comes now the Department of Early Learning (Department or DEL), by and through Patricia L. Allen, Assistant Attorney General, and petitions for review of the Initial Decision entered on August 14, 2007, by Administrative Law Judge Rynold Fleck in the above-referenced action. (Copy attached as Exhibit A). The Department respectfully requests that the initial decision be reversed and that the Department's revocation of Appellant's family home child care license be upheld.

I. Introduction

This matter came before the Office of Administrative Hearings (OAH) on [the Appellant's] request for an administrative hearing regarding the Department's revocation of her family home child care license. A hearing was held before the Honorable Rynold Fleck on May 7-10, 2006.

II. Issues on Review

Whether the Administrative Law Judge (ALJ) erred in determining that the Department did not establish licensing violations sufficient to revoke Appellant's license.

¹ That part of the Department of Social and Health Services (DSHS) responsible for regulating child care agencies was transferred to the Department of Early Learning in July 2006 pursuant to the Laws of 2006, Chapter 265 § 301. In this Review Decision and Final Order, the term "Department" means DSHS prior to July 2006 and the Department of Early Learning after that date. DSHS continues to provide administrative appellate review of Initial Orders under RCW 34.05.464 for the Department pursuant to an interagency agreement.

Appendix A

III. Assignments of error

A. The ALJ failed to consider a significant portion of the evidence presented by the Department in support of its allegations. ALJ Fleck did not mention the testimony of Investigator Junior at all in his findings and omits testimony of relevance to his determinations from [day care parent DE] and Harriet Martin.

B. The ALJ erred to make credibility determinations regarding the testimony of key witnesses at hearing. Finding of Fact 11, to which the Department assigns error, mentions conflicting testimony between [the Appellant] and [Lila's faather], but does not reconcile the conflict through use of a credibility determination of other means.

C. The ALJ erred in determining that [the Appellant] did not violate the waiver granted to her to allow her son [William] to reside in her home.

D. The ALJ erred in determining that [the Appellant] did not violate the minimum licensing requirements by violating her safety plan, allowing unauthorized individuals to stay in the home, and providing unlicensed care. Finding of Fact 13, to which the Department assigns error, misstates the testimony of witness [day care parent DE] regarding her knowledge of unknown persons staying in the child care home. Findings of Fact 15 and 16, to which the Department assigns error, fails to consider evidence in the record regarding [the Appellant's] unlicensed care of children, and is thus insufficient.

E. The ALJ erred in failing to address the Department's contention that [the Appellant's] actions showed a lack of the personal characteristics required of licensees under WAC 170-296-0140.

F. The Department assigns error to Conclusions of Law 8 and 12. In both of these Conclusions of Law, the ALJ erroneously states that there is no evidence in the record to support the allegations that [the Appellant's son William] was left unattended or unsupervised with children in violation of safety plans agreed to by [the Appellant]. The Department presented evidence by a witness to one instance of William being left, according to this witness, out of sight in another room with a child care child. ALJ Fleck determined, without explanation, that even if such conduct had occurred, it was not unattended because William was at least within hearing distance of [the Appellant]. It is unclear whether that finding is based on an assumption about the size of [the Appellant's] home or testimony, but in either case, this finding is not consistent with the wording of the agreements signed by [the Appellant]. Leaving a child in another room where he could not be observed should be considered as leaving him unattended, in violation of the safety plan in place.

G. The Department assigns error to Conclusions of Law 9 and 13. In both of these Conclusions of Law, the ALJ erroneously states that there is no evidence in the record to support the allegations that any unauthorized individuals resided in [the Appellant's] child care home. The ALJ does not take into account in any way the statements of DLR/CPS Investigator Junior, who testified that he spoke with two witnesses, [day care parent DE] and [day care parent BD], who reported to him that unknown individuals were living in the child care home. The ALJ also ignores without explanation the testimony of [day care parent DE] at hearing confirming that a person was introduced to her while she was using the child care, and [the Appellant] told her that this person would be staying with her. [Day care parent DE] assumed the person was living in the home. Finally, there is no mention in the ALJ's decision of testimony by Licensor Harriett Martin that she did not complete background checks on anyone other than [the Appellant] and her sons during the time period at issue in this case. The

evidence from Investigator Junior, [day care parent DE], and Licensor Martin was at least worthy of consideration and mention on the issue of whether any unauthorized persons were living in [the Appellant's] child care home.

H. The Department assigns error to Conclusion of Law 14. In this Conclusion of Law, the ALJ erroneously states that the one instance of unlicensed child care by [the Appellant] is insufficient to support revocation of her family home child care license. This finding is based on insufficient consideration by ALJ Fleck, who did not take into account Investigator Junior's report that [day care parent BD] had asked [the Appellant] to stop providing care in her home, and said [the Appellant] asked her not to tell CPS about the care. ALJ Fleck did not weigh this evidence against [the Appellant's] account to determine which was more credible. Had he done so, it is possible that the conclusion might have been different. [The Appellant] may have only provided one day of care, but evidence from Investigator Junior shows she was intending to provide more if a location was available for the care. This would support revocation of [the Appellant's] family home child care license.

IV. Statement of Facts

[The Appellant] has been a licensed family home child care provider for 22 years. Testimony of [the Appellant]. It was undisputed at hearing that the Department had had concerns about [the Appellant's] son [William] since approximately 2000. Exhibit 1-6; 10-11; Testimony of Harriett Martin [and] Testimony of [the Appellant]. There was also agreement between the parties as to some, but not all, of the conduct reported by the Department between William and his mother. Id. The areas of agreement show that William had aggressive behaviors towards his mother in 2002-2003. The Department was concerned that William's behavior could be observed or experienced by child care children. Testimony of Harriett Martin [and] Testimony of Patricia Eslava Vessey. One interaction between the Department and [the Appellant] occurred when William had been showing a child care child how to start a fire with an aerosol can. Exhibit 1. In 2002, a revocation action was initiated against [the Appellant] based on William's presence in the home, but this action was settled when William left the home for a period of time.

When William returned to his mother's home in 2003, the Department requested a safety plan to ensure that child care children would be safe if he were in the home. Testimony of Harriett Martin [and] Exhibit 6. The Appellant promised that "William has never, nor will be allowed any unsupervised contact with the child care children." Exhibit 7. The Department later executed two waivers to allow William to reside in [the Appellant's] home, even though he had a disqualifying crime. Testimony of Harriett Martin, Testimony of Patricia Eslava Vessey, [and Exhibits 10 and 11. The first waiver provided that "William is always supervised while children are present." Exhibit 10. The second indicated that "William is required to always be supervised and never left unattended with children in the child care home." Exhibit 11.

On July 5, 2006, there was a report of sexual abuse of a child by [William]. That report was assigned to DLR/CPS because it was not clear whether or not the abuse happened on child care premises or during child care hours. DLR/CPS Investigator Mack Junior was assigned to the referral. Testimony of Mack Junior. The Department investigation of this referral included interviews with many people, including [the Appellant]; [BD], the Appellant's older son; [BN], fiancée of [BD]; [day care parent BD], mother of Lila, a child in the child care; [day care parent JS], father of Lila; and [day care parent DE], parent of another child at the child care. Testimony of Mack Junior, [and] Exhibits 17-19. After investigation, the Department determined that the

referral was not founded as to [the Appellant] because the incident with William did not happen with a current child care child or during child care hours. Exhibit 17. However, Investigator Junior noted in his Investigative Assessment (IA) that there were some licensing concerns that arose during the investigation, including the possibility that William had had unsupervised access to child care children in violation of the safety plan; unknown individuals residing in the home; and [the Appellant] providing unlicensed care after her license was summarily suspended on July 5, 2006. Exhibit 17.

Investigator Junior recorded his interviews with parents and other witnesses in his IA, but also in Service Episode Records (SERs) created near the time of each conversation. These SERs, admitted as Exhibit 19, reveal that both [day care parents DE and BD] reported to him that William had been left in charge of child care children in the morning and afternoon while [the Appellant] dropped off or picked up school age children. [Day care parents DE and BD] also recalled an unknown person living in the child care home. Exhibit 19. [Day care parent DE] further reported on attempts by [the Appellant] to provide child care after being summarily suspended. She told Investigator Junior that [the Appellant] wanted to provide more than one day of care, but [day care parent DE] would not allow it. Id. She also said that [the Appellant] had instructed her not to tell CPS about the one day of child care provided. Id.

The Department investigation into the licensing allegations, based on Inspector Junior's IA, resulted in valid licensing findings for Character, Supervision, and Other Issues. Exhibit 21. Accordingly, the Department revoked [the Appellant's] family home child care license. [The Appellant] timely appealed the Department's decision to the Office of Administrative Hearings. A hearing was held before Administrative Law Judge Rynold Fleck on May 7-10, 2007. The Appellant was personally present for the entire hearing, and was also represented by lay representatives Deborah Rosser and Cassandra Clemens of APRE.

[Day care] parents [JS and DE] both testified at the hearing. JS gave a clear account of finding [the Appellant] on a couch several rooms away from where he found [William] changing his daughter's diaper. Testimony of [JS]. [JS] stated he had a clear recollection of events and [the Appellant] was not in the room where William and his daughter were. Id. [DE] testified that she had met a man at [the Appellant's] home who was not one of [the Appellant's] sons, but was introduced to her by [the Appellant] as staying at the home. Testimony of [DE]. She did not repeat her statements to Investigator Junior that William had been left alone with child care children. Id.

The Department subpoenaed [day care parent BD], who had spoken to Investigator Junior about unlicensed care by [the Appellant] in her home, occasions when William was left unsupervised with child care children, and an unknown person residing in the child care home. [Day care parent BD] did not appear as scheduled during the hearing. It was later learned that [day care parent BD] had move to another part of the state. The Department did not pursue her further as a witness, in part due to the fact that her statements to Investigator Junior had been admitted into evidence through Investigator Junior's testimony and his notes, which were Exhibits 17 and 19 for the Department.

ALJ Fleck issued the Initial Decision in this case on August 14, 2007. The Initial Decision overturned the revocation of [the Appellant's] family home child care license. There was no mention of Investigator Junior's testimony in ALJ Fleck's decision beyond a note in the first paragraph that he was called as a witness. The decision recited the testimony of [day care parent JS] and [the Appellant] in Finding of Fact 11, but is silent on which of the two irreconcilable accounts regarding William's contact with Lila should be believed. The ALJ words

Conclusion of Law 8 in such a way that it is made regardless of which witness was correct about the incident. ALJ Fleck also left out information from the testimony of [day care parent DE] and Harriett Martin regarding un-cleared persons residing in [the Appellant's] child care home.

V. Argument

A. Standard of Review for Child Care License Revocations.

Review of Initial Orders is governed by RCW 34.05.464 and WAC 170-03-0550 through 170-03-0620. In child care licensing revocation matters, the review judge has the same decision-making authority as the ALJ, but the review judge must consider the ALJ's opportunity to observe the witnesses. WAC 170-03-0620910.

The review judge also has the authority to remand cases to the ALJ for further action. WAC 170-03-0610(50). In conducting the review, the review judge considers the petition for review, responsive pleadings, the initial order, and the evidence given at the original hearing. WAC 170-03-0570(4).

B. The Health, Safety, and Welfare of Child Care Children is Paramount in Licensing Actions.

A clear understanding of the legislative goals in the area of Child Care Licensing can be found in the intent clause of the 2006 legislature creating the Department of Early Learning, RCW 43.215, which provided:

- (3) The purpose of this chapter is:
 - (a) To establish the department of early learning;
 - (b) To coordinate and consolidate state activities relating to child care and early learning programs;
 - (c) **To safeguard and promote the health, safety, and well-being of children receiving child care and early learning assistance.**

RCW 43.215.005 (2006) (emphasis added)

This language was strengthened in 2007 to mirror the provisions which had been set forth for child care licensing in RCW 74.15.010 prior to July 1, 2006, when it was part of the Department of Social and Health Services. The revised version reads:

- (3) The purpose of this chapter is:
 - (a) To establish the department of early learning;
 - (b) To coordinate and consolidate state activities relating to child care and early learning programs;
 - (c) **To safeguard and promote the health, safety, and well-being of children receiving child care and early learning assistance, which is paramount over the right of any person to provide care.**

RCW 43.215.005(3) (2007 amendment in bold)

The language of the intent clause, especially as amended in 2007, shows that the Department must always act with the safety and well-being of the children in its care as the primary concern.

C: Burden of Proof.

With regard to administrative proceedings concerning revocation of a family home child care license, the Department's burden of proof is preponderance of the evidence. The specific language imposing this burden of proof is found in RCW 43.215.300(2), which reads:

In any adjudicative proceeding regarding the denial, modification, suspension, or revocation of any license under this chapter, the department's decision shall be upheld if it is supported by a preponderance of the evidence.

D. The Department's Revocation of Appellant's License Should Be Upheld.

1. The evidence as whole supports a finding that licensing violations occurred.

In the instant case, the facts presented support the Department's finding that licensing violations by the Appellant more likely than not did occur. The testimony of [the Appellant] herself, Licensor Martin, [day care parents DE and JS] provides direct evidence that [the Appellant] participated in unlicensed child care; that she left her son William in another room with a young child in violation of her safety plan; that there was an unidentified and un-cleared individual living in the child care home; and that [the Appellant] provided unlicensed care. This represents three licensing violations, only one of which was found by the ALJ. Through selective consideration of the evidence, the ALJ dismissed the Department's conclusions that [the Appellant] violated her safety plan and had an unauthorized person living in the home. These findings should be reversed on appeal.

a. Evidence shows that [the Appellant] left William unattended with child care children on more than one occasion.

ALJ Fleck found only one possible instance in which William could have been unattended with a child care child. This is despite significant evidence from Investigator Junior that two different parents, [day care parents DE and BD], both said to him that William was completely alone with child care children in mornings and afternoons when [the Appellant] would pick up and drop off school age children. [The Appellant] flatly denied those allegations.

ALJ Fleck did not consider the evidence from Inspector Junior, even to dismiss it with a finding that [the Appellant] was more credible. This evidence, coupled with [day care parent JS'] account of William being unsupervised with Lila, shows that three different individuals reported that William was being left with child care children. The weight of the evidence shows that William was unsupervised or unattended in violation of the safety plan, and that this likely happened many times, rather than just once. ALJ Fleck wrongly focused on only one incident with respect to this violation, and did not properly consider all of the evidence presented. A full reading of the evidence shows that [the Appellant] did violate her safety plan by leaving William unsupervised/unattended with child care children, and consequently violated WAC 170-296-0370(2)(c), WAC 170-296-1360, and WAC 170-296-1410.²

b. Evidence was presented that an unauthorized person was living in the child care home.

² The child care licensing regulations were re-codified in July of 2006 after DCCEL became DEL. The numbering remained the same except for the WAC Chapter, which changed from 388 to 170. For clarity, because the action against [the Appellant's] license occurred after July 1, 2006, all references will be to WAC 170.

ALJ Fleck's Finding of Fact 13 indicates that witness [day care parent DE] was aware of people other than [the Appellant] and William in the home, but was not aware of whether they were doing anything more than visiting. This finding ignores [day care parent DE's] statements in testimony regarding the man she was introduced to at the child care home. [Day care parent DE] testified that she did not know the man, but that he was introduced to her by [the Appellant] as staying there. She took from that that he was living in the home. This evidence in support of the Department's finding that a licensing violation took place was left out of the ALJ's decision for unknown reasons. However, on review, all evidence should be considered, and ALJ Fleck's erroneous Finding of Fact 13 should be revised to include all of [day care parent DE's] evidence.

Finding of Fact 13 is another finding in which the relevant testimony and evidence from Investigator Junior was disregarded in its entirety, and without explanation. According to Investigator Junior's testimony and SERs, [day care parents DE and BD] were clear in their statements to him that someone other than [the Appellant] and her sons was staying at the child care home. [Day care parent DE] reported that there was a "male friend" who had brown hair, was about 5'9," and was in his mid-20's staying at the home while he looked for work. Exhibit 19. [Day care parent DE] also said that a man in his mid-20's, possibly named Joe, was seen at the home. She reported that she "knew" a man other than [the Appellant's] sons was living in the child care home. Exhibit 19. This information, added to what [day care parent DE] said at the hearing, is sufficient to show that a person other than [the Appellant] and her sons had lived at the child care home. It was not included in Finding of Fact 13, even to be discounted as not credible in the face of [the Appellant's] denial. This was an error by the ALJ, and warrants reversal. Substantial evidence supports a finding that an unidentified male was living in [the Appellant's] home. Licensors Harriett Martin made it clear in her testimony that she had not authorized any such person to reside in the home. Consequently, this supports a finding that [the Appellant] violated licensing requirements.

c. Evidence showed one day of unlicensed care and an intent to provide further care in violation of licensing requirements.

The ALJ properly found that [the Appellant] violated licensing requirements by providing unlicensed care in the home of a parent, [day care parent BD]. However, the ALJ then went on to conclude that this one day of care was based entirely on a misunderstanding between [the Appellant] and her licenser, and as such, it did not support a license revocation. The ALJ's Findings of Fact 15 and 16 are void of any reference to the testimony and SERs of Investigator Junior, which again provide evidence that [the Appellant's] motivations may have been to continue providing care illegally. [Day care parent BD] was clear in her statements to Investigator Junior that she refused to allow [the Appellant] to continue providing care, although [the Appellant] was interested in doing so. Exhibit 19. [Day care parent BD] also said that [the Appellant] told her not to tell CPS about the care. Id. Neither of those statements, which were in direct conflict with [the Appellant's] testimony, was addressed in any form in ALJ Fleck's decision.

Findings of Fact 15 and 16 also failed to consider documentary evidence which seems to contradict [the Appellant's] version of events. [The Appellant] testified that her one day of unauthorized child care was the Friday of the week she was suspended, which would have been July 7, 2006. She said that after that, Licensors Martin called her and told her it was inappropriate, so she stopped. However, the SERs entered into the record by Licensors Martin and Investigator Junior show that the unlicensed care was discovered on July 19, 2007, more than a week later. Exhibit 19. This evidence was not explored by the ALJ in his finding, and it

tends to show that [the Appellant's] account is unreliable and self-serving. The evidence should have been discussed in the decision, if only to discredit it in some way. ALJ Fleck's Findings of Fact 15 and 16 omit evidence critical to the proper evaluation of the case, and should be overturned. In the alternative, the case should be remanded for entry of complete findings.

The ALJ erroneously discounted important Department evidence of licensing violations, even though hearsay is allowed into evidence per WAC 170-03-0400(20). This decision was partially responsible for the incorrect result in this case. Had all of the evidence been properly considered, the outcome of this case could have been different. When the evidence is considered appropriately, it supports the Department's allegations of licensing violations by the preponderance standard.

2. The licensing violations found by the Department support revocation.

The Department found, and the evidence supports, three different licensing violations by [the Appellant]. First, she left her son William, known to have mental illness and violent reactions, at least towards [the Appellant], unattended around child care children. Reports of parents indicated that this had happened more than once, but the testimony of [day care parent JS] shows a particular example of that behavior. [The Appellant's] disregard of a safety plan designated for her convenience to allow William to remain in her home is unacceptable. As shown by the testimony of Licensor Martin and Licensor Supervisor Eslava Vessey, the Department must be able to trust licensees to follow all licensing requirements, even when not monitored closely. [The Appellant] violated that trust, and licensing requirements, when she allowed William to have unsupervised contact with child care children.

[The Appellant] also violated licensing requirements, specifically WAC 170-296-0180 and WAC 170-296-0550, by allowing an unknown individual to live in the child care home without a background check. To this day, there is no way for the Department to know if the person reported in the home by [day care parents DE and BD] had any criminal or other history that would have posed a risk to children. [The Appellant] failed to properly ensure the safety of children in her care, another action warranting license revocation.

Finally, [the Appellant] participated in at least one day of unlicensed care after she was summarily suspended. She excuses her conduct as a misunderstanding, but as a 22-year licensee, [the Appellant] should have been well aware of the applicable licensing regulations. Furthermore, evidence offered by the Department tends to show that [the Appellant's] violation was not ongoing only because her attempts to continue to provide care were thwarted by [day care parent BD]. This licensing violation, supported by ALJ Fleck, supports revocation.

3. The standard of review is met to warrant reversal of the ALJ's finding on revocation.

a. The ALJ did not properly weigh and consider all of the evidence admitted.

The ALJ should have considered all of the evidence in this case when reaching a decision, nor did he properly determine credibility when required to reach a result. His failure to do so calls the result into question. Such questionable findings should not be allowed to stand on appeal. In the alternative, if the findings are not reversed, the case should be remanded to ALJ Fleck for full consideration of all evidence presented and a decision based on that evidence.

b. Finding of Fact 11 was not adequate due to a lack of credibility determination.

In Finding of Fact 11, ALJ Fleck addresses testimony at the heart of the controversy in this case, but fails to reach a conclusion as to which of two conflicting reports is more credible. WAC 170-03-0530(4) requires credibility findings in a case such as this. Instead, ALJ Fleck's finding merely recites an outline of the testimony from [the Appellant] and [day care parent JS] regarding what happened when he picked his child Lila up and found her with William, reaching no conclusion of any kind. This is inadequate for a case in which a primary allegation, whether William was unsupervised or unattended with Lila that day, can only be answered with a determination of which version of the story should be accepted. As noted below, Conclusion of Law 8 is unsupported without a credibility determination at this point. Accordingly, ALJ Fleck's Finding of Fact 11 is insufficient and should not be accepted on review.

In the absence of a credibility determination, the review judge may evaluate the evidence in the record as presented. ALJ Fleck clearly was unwilling to discount [day care parent JS]' testimony, and so it may be considered as of equal weight to [the Appellant's]. There is no indication that [day care parent JS] had a motive to lie about the incident he described, and his testimony was emphatic on the point that [the Appellant] was not near or within sight of William. Also, evidence not considered by the ALJ, in the form of statements to Investigator Junior from [day care parents DE and BD], support the notion that William was often left alone with child care children, consistent with what [day care parent JS] reported that he saw.

A full reading of the evidence shows that it is more likely than not that [the Appellant] was where she, by her own admission, often was at the end of a day of child care: on her couch, which was a considerable distance away from the changing area where William and Lila were. Finding of Fact 11 should be amended to find that William and Lila were alone in the changing area out of [the Appellant's] sight. In the alternative, this matter should be remanded to ALJ Fleck under WAC 170-296-0530(4) to supply the vital missing credibility determination on this issue. And additional omission in this case was the ALJ's failure to consider significant evidence from Investigator Junior, who interviewed many witnesses during his DLR/CPS investigation, supports the Department's allegations. This evidence was ignored entirely in ALJ Fleck's decision. The ALJ committed an error of law by not fully considering the evidence presented.

c. Conclusion of Law 8 was not supported by substantial evidence.

A key conclusion of law that was made by ALJ Fleck in the Initial Decision was not supported by substantial evidence based on the entire record. In Finding of Fact 8, ALJ Fleck discounted the safety plan developed by the Department for [the Appellant] with the comment that even if the child William had been out of sight while with the child Lila, he was within hearing, and so was not unattended with the child. The ALJ provides no further reasoning to support his view that the word "unattended" should be interpreted in this manner. Webster's Online Dictionary³ defines the word unattended as:

1. Unattended. a. Adjective.
 1. Not watched; "she dashed out leaving the bar unattended; "a fire left unattended."
 2. Lacking accompaniment or guard or escort; "unattended women;" "problems unattended with danger."

³ Definition found at <http://www.websters-online-dictionary.org/definition/Unattended>.

3. Lacking a caretaker; "a neglected child;" "many casualties were lying unattended."

This definition, applied to the ALJ's finding that William may only have been within hearing range, would lead to a conclusion that [the Appellant] had violated her safety plan.

Unfortunately, the lack of precision in ALJ Fleck's Conclusion of Law 8 makes the foregoing exercise nearly useless. In his efforts to avoid making a credibility determination between [the Appellant] and [day care parent JS], the ALJ has created a finding which may or may not support the Department's finding of a licensing violation, depending on which aspect is accepted. If William was, as [day care parent JS] described, several rooms away from [the Appellant] with a wall between, then he was unattended with Lila by the common definition quoted above. This is regardless of whether he was within hearing distance; a term not defined by the ALJ, which could include the ability to hear all sounds or might be limited only to a shout or scream, given the nature of [day care parent JS]'s description. If, on the other hand, [the Appellant's] testimony that William was within her sight when she dealt with [day care parent JS], then that incident might not be considered one in which William was unattended with Lila. At the least, a refinement of this finding, with a clear credibility determination, is necessary. However, given the clear testimony of [day care parent JS], a witness not discredited by the ALJ, Finding of Fact 8 should be reversed altogether and replaced with a finding that William was unattended, in violation of [the Appellant's] safety plan. This licensing violation provides support for the Department's decision to revoke [the Appellant's] family home child care license.

In addition to the incident described by [the Appellant] and [day care parent JS], there is evidence in the record that William was alone with children at other times when [the Appellant] was picking up or dropping off school-age children. Both [day care parents BD and DE] commented to Investigator Junior that William had been alone with child care children in the mornings and afternoons. Testimony of Investigator Junior, Exhibit 19. Investigator Junior wrote these conversations down in his SERs on the day each conversation took place, and also noted them in his testimony. *Id.* [Day care parent BD] did not come forward as a witness at the hearing, and [day care parent DE] did not repeat her statements about William when she testified. However, Investigator Junior's information was admitted at trial, and it was not considered in any way as the ALJ found only one possible incident where William could have been unattended with children in violation of the safety plan.

ALJ Fleck does comment that the one licensing violation he found did not warrant revocation. A full consideration of the record, including all licensing violations supported by the evidence, shows that [the Appellant] has demonstrated poor character in allowing her son William to be unattended around child care children, allowing unqualified individuals to live in her home, and providing unlicensed child care. Her decisions, any one of which could have resulted in harm to a child, show that she is not reliable and does not operate her child care business in an open and truthful way. WAC 170-296-0140 supports the revocation action taken by the Department. ALJ Fleck's decision to the contrary should be reversed, or at least remanded for entry of findings and conclusions on all allegations brought by the Department.

A full consideration of all evidence presented shows that the Department has met its burden of proving that there is reasonable cause to believe that [the Appellant's] family home care license should be revoked based on three separate licensing violations. Accordingly, the Department respectfully requests that the Review Judge uphold the revocation of the Appellant's family home child care license.

VI. CONCLUSION

ALJ Rynold Fleck erred when he overturned the Department's revocation of the Appellant's family home child care license as not supported by the evidence. The Department respectfully requests that the Review Judge reverse the Initial Decision [and] uphold the Department's revocation of the Appellant's license.

4. On September 11, 2007, the Appellant filed a response to the Department's petition for review and argued as follows:

Comes now the Appellant, by and through her Lay Representatives of Record, Deborah Rosser and Cassandra Clemens, and provides the Court with the following Memorandum in Opposition to the Department's Petition of the Initial Order entered in this matter on August 14, 2007, which rescinded the Department's revocation of the Appellant's family home childcare license.

This matter came before the Office of Administrative Hearings as a result of [the Appellant's] timely request for appeal of the Department's revocation action against her licensure. A full hearing on the merits of the case was held before ALJ Rynold Fleck on May 7 through May 9, 2007, and not on May 7 through the 10th; in the year 2006 as the Department's petition asserts.

ALJ Fleck heard and decided the issues de novo based on what was presented during the hearing. The hearing record will reflect that the ALJ's decision in this matter is not in error and the Department did not meet their burden.

RCW 43.125.300(2) In any adjudicative proceeding regarding the denial, modification, suspension, or revocation of any license under this chapter, the department's decision shall be upheld if it is supported by a preponderance of the evidence.

The Department's petition for review should be denied and the Initial Order affirmed.

**The undersigned will address each section of the Department's petition entitled:
Assignment of Error III.**

III. A. The Department's petition assigns error to the ALJ's consideration of Investigator Mack Junior's testimony. The hearing record and exhibits submitted by both the Appellant and the Department provides this Review Board evidence that Mack Junior's testimony was flawed and that any investigation performed by Mack Junior in this matter was deficient. The record will demonstrate that Licensor Martin testified that she relied on Mac Junior's investigation when imposing licensing findings against the Appellant. Ms. Martin also testified that no one from her agency, including herself, conducted an investigation. The record will reflect the inconsistencies in Mack Junior's testimony, as well as the characterization of his investigation. The record will provide this Review Board evidence that the Department's assignment of error to ALJ Fleck's consideration of [day care parent DE's] testimony is also without merit. The Department's objection to the ALJ's determination of [day care parent DE's] testimony does not make the ALJ's finding flawed.

III. B ALJ Fleck's *Finding of Fact 11* attached a credibility determination to [day care parent JS] and [the Appellant's] testimony. The ALJ's finding of fact stated that although there were differences in the testimony, William was in [the Appellant's] view at all times during this activity

thereby the ALJ found [the Appellant's] testimony credible. The record will support this finding of fact.

III. C. The Department's attempt to attach error to Judge Fleck's determination that [the Appellant] **did not** violate the waiver agreement is without merit. Just because the finding is contrary to the Department's opinion does not make the ALJ's finding flawed. The record will support this finding.

III. D. Attaching error to the ALJ's **Finding of Fact 13** regarding the ALJ's determination that [the Appellant] did not allow unauthorized individuals to stay in the home is without merit. The record will support the ALJ's determination. **Finding of Fact 15 and 16** are not in error as the Department asserts. The ALJ considered all the evidence de novo. Just because the finding is contrary to the Department's opinion does not make the ALJ's finding flawed. The record will support this finding of fact.

III. E. The ALJ had the opportunity to hear testimony, observe the witnesses, and review the evidence presented by the Department regarding their contention that [the Appellant] lacked the personal characteristics required of a licensee under WAC 170-296-0140 and found that the Department **did not meet their burden**. Just because the finding is contrary to the Department's opinion does not make the ALJ's finding flawed. The record will support this finding of fact.

III. F. The ALJ's **Conclusions of Law 8 and 12** are supported by the record. The ALJ had the opportunity to consider [day care parent JS] testimony as well as [the Appellant's] testimony, observe the witnesses as they testified, as well as review and consider the exhibits. Judge Fleck reviewed exhibits including a diagram of the Appellant's home, pictures of the location of sign in/sign out sheets, and where [the Appellant] was standing when [day care parent JS] arrived at the home. [The Appellant's] son, William, was not out of sight or hearing. Just because the finding is contrary to the Department's opinion does not make the ALJ's finding flawed. The record will support this finding of fact.

III. G. **Conclusions of Law 9 and 13** are not in error. The record will reflect [day care parent DE's] testimony supports the conclusions made by the ALJ. [Day care parent DE] stated that she saw other "older men" and that these "older men" were in their 20's. [Day care parent DE] also testified that these men were not caring for the children. [Day care parent DE] testified that she observed a friend in the home during day care hours 4-5 times a month. The Department erroneously states in their petition that [day care parent DE] testified that she was introduced to a man as living in [the Appellant's] home. [Day care parent DE] did not provide any such statement in her testimony. That statement was reported by Mack Junior to have been made by [day care parent BD] who failed to appear as a witness for the Department. Despite the Department's position, any person "assuming" something is not legally sufficient as fact.

The Department's contention that Ms. Martin did not perform background checks on anyone other than the Appellant and her sons is erroneous. Licensor Martin testified to doing a background check on the Appellant's assistant, [her son's fiancée BE].

III. H. The assignment of error to Conclusion of Law 14 is without merit. The record will reflect that [the Appellant] testified that she provided care in [day care parent BD's] home for one day. [The Appellant] also testified that she did not ask [day care parent BD] not to tell CPS, as [the Appellant] was providing care under the legally recognized license exempt care "family, friends, and neighbor care" (FFN). Licensor Martin testified that Licensor Martin had informed [the

Appellant] she would be able to provide care under "FFN." [Day care parent BD] did not testify to the contrary and in fact failed to testify at all as a witness for the Department and under subpoena. Mack Junior's testimony that [the Appellant] had *intended* to provide care for more than one day is irrelevant. Mack Junior testified that [the Appellant] provided care for one day only.

The Department's Statement of Facts appears to be their attempt to present their case in chief a second time. The Department had the same opportunity as the Appellant to present their case before Judge Fleck on May 7, 8, and 9, 2007. The fact that the ALJ ruled not to affirm the Department's action against this provider is not sufficient grounds for a review by this tribunal. The Department's case against the Appellant was flawed and deficient. Investigator Junior's testimony conflicted with his Investigative Report submitted as evidence through various exhibits. The Department's witnesses, Licensor Martin and Supervisor Elsalava-Vessey testified they had not conducted an investigation and relied on Mack Junior's investigation and conclusions to be thorough and accurate. The hearing identified the lack of a thorough investigation by DLR/CPS Investigator Mack Junior; therefore, DEL's reliance on Mack Junior's investigative assessment for subsequent adverse licensing findings/actions resulted in licensing findings/actions without a factual or legal basis.

The Department's petition states that they did not pursue [day care parent BD] as a witness, yet the record will reflect that the Department had [day care parent BD] scheduled as a witness, subpoenaed [day care parent BD] to appear as a witness, and inconvenienced the Appellant's witnesses by having witnesses reschedule their appearances to accommodate the expected arrival of [day care parent BD].

The Department did not prove that [the Appellant] left her son William unattended around child care children. The ALJ correctly found in favor of the Appellant.

The Department did not prove that [the Appellant] allowed an unknown individual to reside in the child care home without a background check. The ALJ correctly found in favor of the Appellant.

The Department did not prove that one day of Family Friends and Neighbor care (FFN) and an *intent* to provide further care is a violation of any licensing requirements. The ALJ correctly found in favor of the Appellant.

ALJ Fleck properly weighed and considered all evidence admitted. ALJ Fleck met the requirements of WAC 170-03-0530, which provides that:

An ALJ initial decision must:

- 1. Identify the hearing decision as a DEL case;*
- 2. List the name and docket number of the case and the names of all parties and representative;*
- 3. Find the specific facts determined to exist by the ALJ, based on the hearing record, and relied on by the ALJ in resolving the dispute;*
- 4. Explain why evidence is credible when the facts or conduct of a witness is in question;*

5. State the law that applies to the dispute;
6. Apply the law to the facts of the case in the conclusions of law;
7. Discuss the reasons for the decision based on the facts and the law;
8. State the result;
9. Explain how to request changes in the decision and the deadlines for requesting them;
10. State the date the decision becomes final; and
11. Include any other information required by law or DEL program rules.

There is no requirement that the ALJ include a credibility determination in his findings of fact unless a finding is based **substantially on credibility** of evidence or the demeanor of a witness.

RCW 34.05.461 provides:

(1) Except as provided in subsection (2) of this section:

- (a) If the presiding officer is the agency head or one or more members of the agency head, the presiding officer may enter an initial order if further review is available within the agency, or a final order if further review is not available;*
- (b) If the presiding officer is a person designated by the agency to make the final decision and enter the final order, the presiding officer shall enter a final order; and*
- (c) If the presiding officer is one or more administrative law judges, the presiding officer shall enter an initial order.*

(2) With respect to agencies exempt from chapter 34.12 RCW or an institution of higher education, the presiding officer shall transmit a full and complete record of the proceedings, including such comments upon demeanor of witnesses as the presiding officer deems relevant, to each agency official who is to enter a final or initial order after considering the record and evidence so transmitted.

(3) Initial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefor, on all the material issues of fact, law, or discretion presented on the record, including the remedy or sanction and, if applicable, the action taken on a petition for a stay of effectiveness. Any findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified. Findings set forth in language that is essentially a repetition or paraphrase of the relevant provision of law shall be accompanied by a concise and explicit statement of the underlying evidence of record to support the findings. The order shall also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief. An initial order shall include a statement of any circumstances under which the initial order, without further notice, may become a final order.

(4) Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. Findings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Findings may be based on such evidence even if it would be inadmissible in a civil trial. However, the presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. The basis for this determination shall appear in the order.

(5) Where it bears on the issues presented, the agency's experience, technical competency, and specialized knowledge may be used in the evaluation of evidence.

(6) If a person serving or designated to serve as presiding officer becomes unavailable for any reason before entry of the order, a substitute presiding officer shall be appointed as provided in RCW 34.05.425. The substitute presiding officer shall use any existing record and may conduct any further proceedings appropriate in the interests of justice.

(7) The presiding officer may allow the parties a designated time after conclusion of the hearing for the submission of memos, briefs, or proposed findings.

(8)(a) Except as otherwise provided in (b) of this subsection, initial or final orders shall be served in writing within ninety days after conclusion of the hearing or after submission of memos, briefs, or proposed findings in accordance with subsection (7) of this section unless this period is waived or extended for good cause shown.

(b) This subsection does not apply to the final order of the shorelines hearings board on appeal under RCW 90.58.180(3).

(9) The presiding officer shall cause copies of the order to be served on each party and the agency.

In this case the ALJ relied on the evidence admitted and testimony given.

The Department's case was frothed with inconsistent testimony, a lack of corroborative detail, conclusory statements, hearsay allegations, and decisions made by speculation and assumptions reliant on a flawed investigation.

The standard of review is governed under RCW 34.05.46. The standard of review is governed under RCW 34.05.464 and WAC 170-03-0550 through WAC 170-03-0620. If this Board grants the Department's request for review, a full consideration by this Review Board will show that ALJ Fleck's decision is not flawed and was properly rendered.

If this Board grants the Department's request for review, a full consideration by this Review Board will show that ALJ Fleck's decision is not flawed and was properly rendered.

The Appellant respectfully asks that the Review Judge deny the Department's Request for Review and uphold the ALJ's initial decision to rescind the revocation of the Appellant's license.

II. FINDINGS OF FACT

1. The Appellant has been providing in-home child care services since at least 2000 pursuant to a Family Home Child Care license issued by the Department. She was most recently relicensed in May of 2004 for the address 16434 Marine View Drive S.W., Burien, Washington, for a maximum of 12 children, with a maximum number of children under two years of age being four. This license was effective through May of 2007.⁴

2. On July 5, 2006, the Department received a referral from the King County Sheriff's Office reporting that William, the Appellant's 19-year old son who resided in her home, had been accused of engaging in oral sex with a three-year old child that he babysat. And on July 5, 2006, the Department was advised that William had confessed to having engaged in oral sex with a three-year old girl for whom he occasionally babysat outside of daycare hours and for whom he was paid pursuant to a separate arrangement. William was subsequently incarcerated and charged with two counts of Rape of a Child in the First Degree.⁵

3. On July 5, 2006, the Department served notice on the Appellant informing her that her license was summarily suspended.⁶ The Appellant objected, filed a request for hearing on July 7, 2007, and asked for a stay of the suspension. By Order on Motion to Grant Stay issued August 2, 2007, the ALJ stayed the summary suspension action.

4. The Department subsequently decided to revoke the Appellant's childcare license. The basis of that decision was the information the Department obtained in its investigation into the referral it had received from the King County Sheriff's office, the most significant of which was that the Appellant had allowed William to have unsupervised access to children in her care in violation of a safety agreement the Department had entered into with her. The Appellant's violation of the safety agreement was of great concern to the Department because of William's history of inappropriate behavior towards other children, because of his past violence, and because of his mental health diagnosis.⁷

⁴ Exhibit 9.

⁵ Exhibit 17, pp. 2 and 7.

⁶ Exhibit 12.

⁷ Testimony of Licensing Supervisor Patricia Eslava Vesse, Transcript of the Proceeding (TR), Vol. III, pg. 34.

5. On November 9, 2006, the Department served notice on the Appellant informing her that her Family Child Day Care Home license was being revoked. The notice referenced historical facts and interactions between the Appellant and the Department. The notice also cited various legal bases and rule violations in support of the revocation. These include: the Appellant's violation of her March 23, 2003, safety plan and the 2005 waiver; WAC 170-296-0370(2)(c) (requiring licensees to follow compliance agreements); WAC 170-296-1360 (requiring supervision by the Appellant or staff); [WAC] 170-296-1410 (setting forth requirements for staff members); WAC 170-296-0180 (allowing persons to live in the home without a criminal background check); WAC 170-296-1410 (allowing "Joe" to have unsupervised access to children under care without a background check); WAC 170-296-0550 (failure to report major changes of members of the household); WAC 170-296-0140 (lacking the specific characteristics necessary to be a child care provider); and WAC 170-296-0110 (operating a child care facility without a license).⁸

6. The Appellant objected to her license being revoked and filed a request for hearing on December 6, 2006.

7. The Appellant's adopted son William, born February 23, 1987,⁹ has had severe learning disabilities from a young age and was suspended from school and faced expulsion multiple times. When he was in the seventh grade, William was diagnosed with depression and started on Paxil. He also took Adderall at the time for Attention Deficit Hyperactivity Disorder (ADHD). However, his symptoms worsened. He began to have psychotic symptoms which worsened and were "pretty severe."¹⁰

8. In April 2001, William, then thirteen years old, had shown one of the Appellant's day care children how to start a fire using an aerosol can. The Appellant told the investigating licensor that William had been diagnosed as having ADHD, had been involved with conflicts at school, has learning disabilities, had attempted suicide in November 2000, and had been

⁸ Exhibit 22.

⁹ Exhibit 16, pg. 2.

¹⁰ Testimony of Catherine Stabio Fisher, TR, Vol. III, pg. 96.

admitted to Fairfax Hospital.¹¹ The Appellant further said that the medication William had been using to treat his ADHD had aggravated his behavior, he had finally been diagnosed with bipolar disorder in December 2000 and taken off the ADHD medication, his behavior had improved, and William and her family were in counseling. In August 2001, William was convicted of Harassment, Intimidation of a student, and Assault VI for an incident where he had threatened a student or a teacher with a knife at school.¹²

9. In 2001 William was receiving mental health services through Highline and West Seattle Mental Health facilities and through the Ruth Dykeman Children Family Services.¹³ He became a patient of Catherine Stabio Fisher, a Psychiatric Nurse Practitioner at Highline West Seattle Mental Health Center, in 2003 and was her patient for about three years. Ms. Fisher treated William's conditions of ADHD and bipolar disorder. At the time he became her patient, William was taking Depakote, Zyprexa, Tenex, Seroquel, and Lamictal for mood stabilizing. Ms. Fisher last saw William in early June of 2006 for a psychiatric evaluation. Ms. Fisher saw no indication during her relationship with William or in his history that he would act sexually inappropriate at any time.¹⁴ During the time William was being seen by Ms. Fisher, he was also receiving cognitive behavioral therapy.¹⁵

10. In a November 2001 letter, the Department notified the Appellant that William must be off the premises during daycare hours "due to the history of his many disturbing behaviors." This letter also told her that "this is a serious matter and the first time William is left on the premises will result in an immediate revocation of the child care home" license.¹⁶ The Appellant's response was to send her licenser, Harriet Martin, a supervision plan for William during the hours of her child care operation.¹⁷

11. William's behavior continued to escalate. The Appellant testified that in her 22

¹¹ Exhibit 1.

¹² Testimony of Licensor Martin, TR, Vol. I, pp. 84-85.

¹³ Testimony of the Appellant, Transcript of Proceedings (TR), Vol. 1, pp. 32, 35.

¹⁴ Testimony of Catherine Stabio Fisher, TR, Vol. III, pp. 94-96.

¹⁵ Testimony of Catherine Stabio Fisher, TR, Vol. III, pp. 98.

¹⁶ Exhibit 2.

¹⁷ Exhibit 3.

years of providing child care, there had never been a complaint made against her.¹⁸ However, the Department received eleven referrals of family violence during the period 2000-2002¹⁹ from Family Reconciliation Services, Child Protective Services, and the Appellant herself.

12. On January 15, 2002, the Department issued a notice to the Appellant revoking her Family Day Care license. The notice cited numerous episodes of violence between the Appellant and William that had occurred in 2000 and 2001, Williams' deteriorating behavior and volatility in school, reports from his psychiatrist about his extremely hard to handle behaviors his negative attention seeking behavior, his threats to other children in school, his interaction with the day care children, his lack of understanding of the consequences of his actions, the fact that he "has gouged the eyes out of all of his stuffed animals," his inappropriate conduct with the family cat, and so on.²⁰ The Department withdrew this notice when William left the Appellant's home in June 2002 to reside in a group home for children needing extensive psychiatric care and schooling. William returned to the Appellant's home at the end of March 2003.²¹

13. In a March 19, 2003, letter, Licensor Martin informed the Appellant that, "The department requires that you not allow your son William unsupervised contact with child care children." Licensor Martin further informed the Appellant that, "The department requires that you set up a safety plan to prevent risk to children and the steps you would take when a child is put at risk should something occur on the premises during child care hours. Please submit this plan in writing by March 24, 2003."²² The safety plan represented the Department's ability to trust the Appellant to keep the children safe. It was the Department's assurance that the situation would be handled and supervision of the children would be appropriate.²³

14. On March 23, 2003, the Appellant e-mailed²⁴ Licensor Martin as follows:

As per your request:

¹⁸ Testimony of the Appellant, TR, Vol. III, pg. 105.

¹⁹ Testimony of Supervisor Eslava Vesse, TR, Vol. III, pg. 13.

²⁰ Exhibit 4.

²¹ Testimony of the Appellant, TR, Vol. I, pg. 37.

²² Exhibit 6.

²³ Testimony of Supervisor Eslava Vesse, TR, Vol. III, pg. 28.

²⁴ Exhibit 7.

1. William has never, nor will be allowed any unsupervised contact with the child care children.
2. I will notify the department immediately, of any incident that puts the child care children at risk.

Safety Plan for prevention of risk to child care children:

1. Children will be removed from situation immediately. I have assistants that are with me throughout the day, the children will be removed to a safe area, i.e., separate room, outside (weather permitting), (with assistant present) and/or William will also be removed from the premises.
2. I will be responsible for removing William and if necessary 911 will be called for assistance. (I have been trained in passive restraint to deal with any risky behaviors from William.

My first responsibility is for the safety and well being of the children I care for; they will not be subjected to any form of risky behavior.

William leaves for school at 7:00 AM and does not return until 3:30 to 4:00 PM. William will probably be attending summer school. He is working after school for a family friend, participates in activities at The Purple Door (Burien teen center), attends counseling twice a week after school and participates in Youth group at our church. He is very active with outside interests. He is working hard to continue his success in the community and has great family and friend support.

15. The Appellant testified that she was not aware that the Department was still concerned about William being in her home after her license was renewed in May 2004 because the issue was never brought up when she was relicensed.²⁵ However, in May 2004 or shortly thereafter, Licensor Martin communicated with the Appellant about not allowing William to have unsupervised access to child care children. Because of the Department's continuing concerns regarding William being in the home and being unsupervised, this topic was an ongoing discussion between the Appellant and Licensor Martin. Licensor Martin wanted to ensure that the Appellant was following her safety plan.²⁶

16. In October 2004, the Appellant asked the Department to waive the regulation(s) that disqualified William from being present in her home while she provided child care because of his earlier assault conviction,²⁷ a conviction that disqualified him from being unsupervised

²⁵ Testimony of the Appellant, TR, Vol. I, pg. 45.

²⁶ Testimony of Licensor Martin, TR, Vol. I, pp 130-131.

²⁷ Testimony of Supervisor Eslava Vesse, TR, Vol. III, pg. 29.

around children.²⁸ In her waiver request the Appellant stated that William would never have unsupervised contact with the child care children. The Appellant further stated in her waiver request that the duration of her requested waiver was from "now" to "ongoing."²⁹ The Department did not immediately respond to the Appellant's request for waiver.

17. In April 2005, Licensor Martin renewed the Appellant's request that the Department waive the regulation(s) that disqualified William from being present in the Appellant's home while she provided child care. In May 2005, the Department granted the Appellant a waiver for the period May 2004 through May 2007 upon the condition that William was always supervised and never left unattended with children in the child care home.³⁰

18. In February 2006, the Appellant asked Licensor Martin to authorize William to be her day care assistant.³¹ Licensor Martin told the Appellant that she would need to staff this request with her supervisor and that the Appellant would need to check with the doctor about Williams' medication and what his behavior is like when he's not taking his medication. The Department never approved William to be an assistant for the Appellant.³²

19. CPS Investigator Mack Junior was assigned to the referral the Department received from the King County Sheriff's office on July 5, 2006. Investigator Junior interviewed the Appellant, the Appellant's son Davis, Davis' fiancé, and some of the parents of children in the Appellant's facility. The investigation also brought into question whether or not the Appellant had allowed William to have unsupervised contact with the day care children.

20. During the Department's investigation, several day care parents reported having seen William unsupervised and having seen him watching children without the Appellant present. DB, the mother of Lila, a three-year old child who attended the Appellant's day care, told Investigator Mack Junior that on three or four different occasions, she saw William left alone with the children in the morning and the afternoon while the Appellant was running errands.³³

²⁸ Testimony of the Appellant, TR, Vol. I, pp. 45-48.

²⁹ Exhibit 10.

³⁰ Exhibit 11.

³¹ Exhibit P.

³² Testimony of Licensor Martin, TR Vol. II, pp. 42-43; Exhibit J.

³³ Exhibit 17, pg. 3; Exhibit 13; and testimony of Investigator Junior, TR, vol. II, pg. 62.

DB reported that the Appellant's oldest son had had a male friend staying at the Appellant's home when Lila first started at the facility and that this male friend helped the Appellant watch the children. DB reported that the Appellant had told her this male friend was approved to be in the home³⁴ and that he was living in her home while he was looking for a job. DB reported that she thought this man's name was "Joe" but was not sure, that he was in his mid-twenties, and that she had seen him in the home during daycare hours four or five times per month.³⁵

21. DE, the mother of two children who attended the Appellant's day care, told Investigator Junior that in addition to the Appellant, the Appellant's son William, the Appellant's son Davis, and Davis' fiancé Brandy, there were two other older gentlemen that were at the Appellant's home occasionally in the morning when she dropped her children off or when she picked her children up after school. DE noted that these gentlemen were not caring for children.³⁶ DE reported that one man would be sitting on the couch with a cup of coffee when she dropped her children off. DE further reported that when she first signed up to use the Appellant's day care facility, she saw another gentleman in the home. The Appellant had told her at that time that the man had been approved by the state to be there and that he was staying with her for a while. DE's understanding was that the man lived there.³⁷

A witness, DE, whose two children were with the Appellant in her day care between April of 2005 and June or July of 2006, recalls observing people other than the Appellant and William at the residence on occasion. She would drop her children off at approximately 7:45 in the morning. Her son was there for the mornings; her daughter was there all day. She did not know the name of the other adult present, nor was she aware of whether that party was anything more than visiting for short periods of time.

22. JS, the father of Lila, a child in the Appellant's care, did not think that the Appellant's provision of child care seemed very professional because "...there was another young guy there" and because of "...people kind of hanging around. Her son was there, the

³⁴ Exhibit 17, pg. 3.

³⁵ Exhibit 13, Exhibit 17, pg. 3; and testimony of Investigator Junior, TR, Vol. II, pg. 63.

³⁶ Exhibit 15.

³⁷ Testimony of Dawn Eykel, TR Vol. II, pp. 8-9.

other son, I think, and the daughter-in-law would kind of come and go."³⁸

23. The Appellant denied that anyone other than her son William, her son Davis, Davis' girlfriend Brandy, and Davis' daughter Kaitlyn lived in her home between January 2006 and July 5, 2006.³⁹ The Appellant identified "Joe" as being a friend of her older son Davis who became a family friend. Joe would sometimes come over to the Appellant's home to visit. He was usually in the garage working on cars with Davis. Joe did come into the house but was not allowed in the house during daycare hours, he sometimes came for dinner during the week, and he sometimes would stay over the weekend. The Appellant denied that Joe ever had unsupervised access to children. The Appellant denied that she ever left the children under the sole supervision of any unidentified person while she ran errands.⁴⁰ The Appellant denied ever having left William alone in the daycare and denied having violated the 2003 safety plan. She denied that any other adult males ever lived in her house.⁴¹ The Appellant claims that William help with lunches⁴² but did not have unsupervised access to the children and that he did not change the children's diapers. She claimed that he has never changed a child's diaper,⁴³ he has never been a primary caregiver for the children, and he has never been unsupervised.⁴⁴

24. During this investigation, the Department became aware of an incident that occurred on June 14, 2006,⁴⁵ involving William and Lila, a two and one-half year old child in the Appellant's care. The testimony is in conflict regarding this incident.

25. Concerning this incident, JS, Lila's father, testified that when he came to pick up Lila in the evening, he saw something that struck him as odd, and it seemed even more odd and frustrating to him once the Appellant's facility was closed and he found out why. JS had entered the Appellant's house through the front door and gone into the living room. He saw the Appellant and a couple of other children she was attending to in the living room on the couch by

³⁸ Testimony of Joel Sexton, TR, Vol. I, pp 106-107.

³⁹ Testimony of the Appellant, TR, Vol. I, pg. 26.

⁴⁰ Testimony of the Appellant, TR, Vol. III, pp. 110-111; and Vol. I, pp. 26-27.

⁴¹ Testimony of the Appellant, TR, Vol. I, pg. 27.

⁴² Testimony of Inspector Junior, TR, Vol. II, pp. 56-57.

⁴³ Testimony of the Appellant, TR, Vol. I, pg. 25.

⁴⁴ Testimony of the Appellant, TR, Vol. I, pg. 50.

⁴⁵ Testimony of the Appellant, TR Vol. III., pg.118.

the window off to his right. Normally Lila would be playing and he would see her when he walked in. This time he could not see Lila. JS stood there, said hello, and asked the Appellant where Lila was. She answered that Lila was in being changed. JS wondered to himself who else worked there. JS said okay and started walking toward the changing room and found William changing Lila's diaper. JS did not really know William and was not comfortable with the idea of William or any teen age boy changing his daughter's diapers. It seemed strange to JS, and JS had a weird feeling about it at the time. As he went toward the changing room to find Lila, the Appellant immediately got up, rushed toward the changing area with him, and made it to the changing area before JS did. William immediately left and did not finish changing the diaper. William did not say hello. He did not say anything. He did not even look at JS. "It wasn't like he finished changing her diaper and handed her to me and goes 'your daddy's here.' It was just strange."⁴⁶ The Appellant finished putting the diaper on Lila. JS saw no other individual in the room where Lila was after William left or before the Appellant entered. As he left he told the Appellant he did not want his daughter being changed by a teen-age boy or by anyone else. She answered that it was not a problem and that she would make sure it didn't happen again. She reassured JS that William had had a background check and had been licensed by the state.⁴⁷ JS took Lila and left.

26. Concerning this incident, the Appellant testified that she, the children, and William had all just returned to the house from playing outside.⁴⁸ She had gone into the bathroom and was changing Lila's diaper and William was in the same room helping Kaitlyn, his niece, wash her hands. The dogs started barking, which meant someone was coming to the front door. She asked William to step over to the changing area so Lila would not fall off and because she had not done up the tabs yet on Lila's diaper, which was already under Lila. The Appellant stepped three feet out of the bathroom into the hall and then into the kitchen doorway to see who had come in the front door and saw that it was Mr. Sexton. He asked her where Lila

⁴⁶ Testimony of Joel Sexton, TR, Vol. I, pp. 107-109.

⁴⁷ Testimony of Joel Sexton, TR, Vol. I, pp. 109-114.

⁴⁸ Testimony of the Appellant, TR, Vol. III, pg. 120.

was. She said we're back here in the other room. The Appellant could see both Mr. Sexton and William. She never turned her back to William and Lila when she was talking to Mr. Sexton. Mr. Sexton went to the sign-in/sign-out sheet (in the dining room), joined her in the kitchen area. JS saw William do up the tabs on Lila's diaper, William pull up the diaper, stand her up, and pull up her pants.⁴⁹ Mr. Sexton told the Appellant he did not think any teenage boy should change a child's diaper and she agreed with him and told him that William was just trying to help out by doing up the tabs.⁵⁰ JS was extremely upset and expressed his concerns to her. The Appellant reassured JS that William had never changed any of the daycare children's diapers and never would. The Appellant told JS that William had done a day background check for the daycare and that she had submitted an application and all the credentials for him to be an assistant.⁵¹ JS seemed reassured and told the Appellant that he trusted her.⁵²

27. The Appellant further testified that after this incident, JS was so upset that she was afraid she might lose Lila as a day care child. So after JS and Lila left, the Appellant called Lila's mother BD to tell BD what had happened, to reassure BD that William had not been changing Lila's diaper, and to say that JS had misunderstood what he saw. BD responded by telling the Appellant that she was very comfortable with the Appellant caring for Lila and that she had already spoken to JS and reassured him.⁵³

28. During the King County Sheriff's interview⁵⁴ of the Appellant on July 5, 2006, the Appellant stated:

Kathleen [the Appellant] said that Kira [the girl William sexually abused] had come to their house on numerous occasions with her father, Anthony. Anthony is a good friend of Kathleen's oldest son, Davis Hardee. On all those occasions, but one, William was never alone with Kira. There were constantly other people around and in and out of the house. The one occasion William was left alone with Kira and his two-year old niece [Kaitlyn] was on Saturday, 06/24/06, from approximately 2100 hours to 2230 hours. When Kathleen returned at 2230 hours

⁴⁹ Testimony of the Appellant, TR, Vol. III, pg. 121.

⁵⁰ Testimony of the Appellant, TR, Vol. I, pp. 50-53.

⁵¹ Testimony of the Appellant, TR, Vol. III, pp. 124-125.

⁵² Testimony of the Appellant, TR, Vol. III, pg. 122.

⁵³ Testimony of the Appellant, TR, Vol. III., pp. 119-120.

⁵⁴ Exhibit 16, pg 8.

she found Kira asleep on the sofa, William asleep on the sofa, and Kaitlyn in her crib in the bedroom.

29. Because there is a conflict in the testimony presented by the Appellant and that presented by JS, Lila's father, regarding the incident with Lila and William, a credibility finding is necessary. Based on the totality of the evidence, the reasonableness of the parties' versions of events, and logic, it is found that the Appellant's version of the events is not credible. And it is found that the Appellant allowed William unsupervised access to Lila on June 14, 2006.

JS' description of William's reaction at being found alone with Lila rings true. As described by JS, William responded as a guilty person would or as a person with deep shame would respond. He would not speak to JS nor look JS in the eye. He exited the room immediately. William's behavior is indicative of William engaging in something he knew he should not be doing. Given that William sexually abused another girl of the same age only ten days later the very first time he was left alone with this girl, it is possible that William was either touching Lila inappropriately or thinking of doing so when he was discovered alone with Lila unexpectedly by JS.

JS' description of the Appellant racing ahead of him to get to the bathroom first also rings true. The degree to which JS was upset by the incident is more consistent with his having observed or experienced something greater than just William diapering his daughter. It is consistent with JS having seen the Appellant outrace him to the bathroom in order to conceal William's presence alone with his child or in order to conceal her own behavior in allowing William to be alone with Lila. It is consistent with JS having observed William acting guiltily or shamefully. And given that William had just had a psychiatric evaluation, it would be consistent with JS having seen overt symptoms of mental illness or decompensation in William. The Appellant herself acknowledges that JS was so upset that she called Lila's mother to persuade the mother that JS had misunderstood what he had seen in order to prevent Lila's parents from removing her from the Appellant's facility. The Appellant testified that had JS left her home saying that he trusted her, but it is apparent that JS called Lila's mother immediately and

reported his concerns. It is more likely than not that the Appellant left William alone with Lila to change her diaper.

30. On July 5, 2006, as indicated above, the Department issued a summary suspension, informing the Appellant that she needed to terminate her day care activities immediately. After having discussed this with Licensor Martin, the Appellant believed that she was able to provide family and friends in-home care at the family or friend's home itself. On July 7, 2006, the day following the closure of her day care facility, the Appellant provided one day of child care at the home of BD, a parent of one of the children normally under her care. On this date, the Appellant provided care to her granddaughter Kaitlyn, to Elias, who was another little boy, and to BD's daughter Layla.

31. The Appellant became aware that that was not what the Department had determined to be friends and family care and terminated that activity. She never provided any day care for pay thereafter until the summary suspension was lifted.

32. There is testimony that the Appellant was observed driving a van that had children in it. There is nothing that indicates that the Appellant was providing day care for those children she was transporting.

III. CONCLUSIONS OF LAW

1. The Appellant's petition for review was timely filed with the DSHS Board of Appeals and is otherwise proper. WAC 170-03-0570 through 0590. Jurisdiction exists for the undersigned DSHS Review Judge to review the Initial Order and to issue the Department's Review Decision and Final Order in this matter. RCW 34.05.464.

2. When making a decision, the ALJ and the Review Judge must first apply the DEL rules adopted in the Washington Administrative Code. WAC 170-03-0220(1). If no DEL rule applies, the ALJ and the Review Judge must decide the issue according to the best legal authority and reasoning available, including federal and Washington state constitutions, statutes, regulations, and published appellate court decisions. WAC 170-03-0220(1) and (2). The ALJ's authority is limited to determining whether the sanction imposed or taken by DEL was

warranted or justified under the evidence presented at the hearing. The ALJ does not have the authority to substitute or impose an alternative sanction, remedy, or action. WAC 170-03-0350(1). And the Review Judge has the same decision-making authority as an ALJ but must consider the ALJ's opportunity to observe the witnesses. WAC 170-03-0620(1).

3. In Finding of Fact 12 of the Initial Order, the ALJ found that, "Prior to the July 5, 2006, referral there had been no indication in William's behavior that he was a danger to young children." This is not an accurate statement of the evidence of record. There may have been no indication that William would act in sexually appropriate ways, but there is unequivocal evidence that he was a danger to young children. In August 2001, William was convicted of Harassment, Intimidation of a student, and Assault VI for an incident where he had threatened a student or a teacher with a knife at school. In 2001 William had endangered a child under the Appellant's care by showing that child how to start a fire with an aerosol can. And there was no evidence presented that the effects of William's bipolar disorder, his use of mind altering psychotropic drugs, and his psychotic episodes would only endanger adults and not children.

4. In Finding of Fact 11 of the Initial Order, the ALJ found that, "William was in her [the Appellant's] view at all times during this activity [changing Lila's diapers]. However, this is not an accurate statement of the evidence of record. If the Appellant's version of the diaper-changing incident were credible, and the undersigned has found it not credible, then at best, the Appellant's positioning herself in the hallway between the changing room and the kitchen would have allowed the Appellant to see William if she were looking in his direction. The Appellant could not physically have looked through the kitchen and seen JS come into the dining room, sign the in-out register, and come forward towards the changing room if she had kept her eyes on William at all times. The Appellant would have needed eyes in the back of her head to have been able to see both forward into the dining room and backward into the changing room at the same time.

5. In Finding of Fact 4 of the Initial Order, the ALJ found that, "None of the allegations in that [2002 license] revocation [action] arise out of activities associated with the

day care, but primarily out of the interaction between William and the Appellant.” This is not an accurate statement of the evidence of record. The January 15, 2002, license revocation notice cites to a vast list of incidents involving William’s disruptive behavior at school, his threats to other children in school, his interaction with the day care children, his overall volatility, his lack of understanding of the consequences of his actions, the fact that he “has gouged the eyes out of all of his stuffed animals,” his inappropriate conduct with the family cat, and so on.

6. The ALJ erred in failing to enter a finding as to which version of the diaper-changing incident was more credible, the Appellant’s or JS’. This is a critical failure because the testimony was in conflict and because the outcome of this case hinges, at least in part, on what happened during that incident. The undersigned has the same decision-making authority of the ALJ under WAC 170-03-0620(1) and has entered a credibility finding in this Review Decision and Final Order. The undersigned must consider the ALJ’s opportunity to observe the witnesses under WAC 170-03-0620(1). However, unless the ALJ translates that opportunity into findings as to witness credibility, witness demeanor, or witness conduct, the undersigned has no way of knowing what the ALJ’s opportunity to observe the witnesses afforded the ALJ.

7. The Initial Order’s Conclusion of Law 8, premised on the ALJ’s conclusion that, “There is nothing in the evidence that has been presented that indicates that the Appellant has ever allowed contact by William with the children in the day care that is unsupervised or unattended,” is factually inaccurate. The ALJ’s statement in Conclusion of Law 12 that the Department failed to establish that the Appellant violated her waiver or her security plan and the statement that William did not have any unsupervised contact with children under care are also factually inaccurate. The undersigned has specifically found that the Appellant allowed William unsupervised access to Lila on June 14, 2006. Because the Appellant did so, she violated her March 23, 2003, safety plan and the conditions of the waiver the Department granted her in 2005.

8. The Department did not prove that the Appellant had people living in her home that had not been cleared by the Department to be there. However, the Department did prove

that the Appellant allowed numerous unidentified people to be in and around the children she had under care on a more or less regular basis. Parents of the Appellant's day care children reported seeing numerous unidentified men in and about her home, and the Appellant herself acknowledged in her interview with the sheriff's office that her son Davis' friend Anthony came to her house on numerous occasions and that there were constantly other people around and in and out of her house. And clearly "Joe" was around the Appellant's home during child care hours, contrary to the Appellant's testimony, or the parents of her day care children would not have seen him or been able to report his presence to the Department. With her two sons coming and going, her son's fiancé and their child coming and going, and these various unidentified adults coming and going, it is reasonable to conclude that the Appellant's ability to adequately supervise and provide care to her day care children was compromised, as was her ability to constantly monitor William's whereabouts and activities. While there will undoubtedly be tension between a Family Home Child Care licensee's expectations of how she can use her own home to entertain family and friends and her obligation to comply with licensing regulations, the Appellant's allowing all this traffic through her home casts doubt on whether she has an understanding of how children develop socially, emotionally, physically, and intellectually.

9. Even more troubling than allowing a steady stream of adult visitors through her home during child care hours is the Appellant's apparent lack of understanding of the seriousness of William's mental health problems. The Appellant claimed that she was unaware that the Department had any concerns about William after it renewed her license in 2004, even though Licensor Martin was in constant dialog with her about William and even though the Appellant's application to have William approved as an assistant was not granted. The Appellant's testimony is either false, or it indicates that she was wearing blinders and could not acknowledge to herself the seriousness of William's problems. William has a psychotic mental illness. He takes mood-altering psychotropic drugs. He has had years of psychiatric treatment and cognitive and behavioral therapy up until the time he sexually abused a child. He has criminal convictions for assaultive conduct and a history of violent behaviors. William was not

an authorized care provider, so why was he, a 19- year old man, playing outside with the Appellant's day care children, preparing their lunches, washing their hands, and diapering them? Why did the Appellant allow William extensive and intimate contact with the children under her care? Why did she think it was in the children's best interests to have William constantly around? And why did she think he would be a good assistant child care provider?

10. The undersigned concludes that the Appellant lacks the personal characteristics an individual needs to provide care to children and that she does not meet the requirement of WAC 170-296-140(2)(a) and (f).⁵⁵ The Appellant lacks an understanding of how children develop socially, emotionally, physically, and intellectually, and she lacks a disposition that is respectful of a child's need for caring attention from a care giver. The choice the Appellant made to allow William extensive and intimate contact with the children under her care promoted William's wellbeing rather than the children's, and the choice she made to allow a steady stream of unidentified adults through her home during child care hours promoted her wellbeing and that of her family members rather than the children's.

11. The Department has proven that the Appellant violated her 2003 safety agreement and the terms of her 2004 waiver. The Department has proved that the Appellant allowed William to have unsupervised access to a child under her care. The Department has proven that the Appellant lacks the personal characteristics an individual needs to provide care to children. The Initial Order's conclusions of law are contrary to the evidence of record, are not supported by the findings of fact of this decision, and are not adopted. The Initial Order shall be reversed.

⁵⁵ WAC 170-296-0140, What personal characteristics does an individual need to provide care to children, states: (1) An individual must have specific personal characteristics to have a: (a) License; b) Certification; (c) Primary staff position; or (d) Assistant and volunteer position. (2) These characteristics are: (a) An understanding of how children develop socially, emotionally, physically, and intellectually; (b) The ability to plan and provide care for children that is based on an understanding of each child's interests, life experiences, strengths, and needs; (c) The physical ability to respond immediately to the health, safety and emotional well-being of a child; (d) Reliability and dependability; (e) Truthfulness; (f) A disposition that is respectful of a child's need for caring attention from a care giver; and (g) Ethical business practices with clients, staff, the department and the community.

12. The procedures and time limits for seeking reconsideration or judicial review of this decision are in the attached statement.

IV. DECISION AND ORDER

The Initial Order is reversed. The Appellant's Family Home Child Care license is revoked.

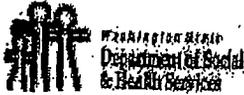
Mailed on January 18, 2008.



CHRISTINE STALNAKER
Review Judge

Attached: Reconsideration/Judicial Review Information

Copies have been sent to: Kathleen Hardee, Appellant
Deborah Rosser, Appellant's Representative
Cassandra Clemans, Appellant's Representative
Patricia Allen, AAG, Department's Representative
DEL Contact
Rynold C. Fleck, ALJ, Seattle OAH



STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
BOARD OF APPEALS
**PETITION FOR RECONSIDERATION OF
REVIEW DECISION**

See information on back.

Print or type detailed answers.

NAME(S) (PLEASE PRINT)		DOCKET NUMBER	CLIENT ID OR "D" NUMBER
MAILING ADDRESS	CITY	STATE	ZIP CODE
TELEPHONE AREA CODE AND NUMBER			

Please explain why you want a reconsideration of the Review Decision. Try to be specific. For example, explain:

- Why you think that the decision is wrong (why you disagree with it).
- How the decision should be changed.
- The importance of certain facts which the Review Judge should consider.

I want the Review Judge to reconsider the Review Decision because...

PRINT YOUR NAME	SIGNATURE	DATE
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MAILING ADDRESS BOARD OF APPEALS PO BOX 45803 OLYMPIA WA 98504-5803	PERSONAL SERVICE LOCATION Board of Appeals, DSHS Blake Office East Bldg 2nd Floor, W 4500 10th Ave SE, Lacey Washington
FAX 1-(360) 664-6187	TELEPHONE (for more information) 1-(360) 664-6100 or 1-877-351-0002

RECONSIDERATION REQUEST

Page _____ of _____

If You Disagree with the Judge's Review Decision or Order and Want It Changed,
You Have the Right to:

- (1) Ask the Review Judge to reconsider (rethink) the decision or order (**10 day deadline**);
- (2) File a Petition for Judicial Review (start a Superior Court case) and ask the Superior Court Judge to review the decision (**30 day deadline**).

DEADLINE for Reconsideration Request - 10 DAYS: The Board of Appeals must **RECEIVE** your request within ten (10) calendar days from the date stamped on the enclosed Review Decision or Order. The deadline is 5:00 p.m. If you do not meet this deadline, you will lose your right to request a reconsideration.

If you need more time: A Review Judge can extend (postpone, delay) the deadline, but you must ask within the same ten (10) day time limit.

HOW to Request: Use the enclosed form or make your own. Add more paper if necessary. You must send or deliver your request for reconsideration or for more time to the **Board of Appeals** on or before the 10-day deadline (see addresses on enclosed form).

COPIES to Other Parties: You must send or deliver copies of your request and attachments to every other party in this matter. For example, a client must send a copy to the DSHS office that opposed him or her in the hearing.

Translations and Visual Challenges: If you do not read and write English, you may submit and receive papers in your own language. If you are visually challenged, you have the right to submit and receive papers in an alternate format such as Braille or large print. **Let the Board of Appeals know your needs.** Call 1-(360)-664-6100 or TTY 1-(360) 664-6178.

DEADLINE for Superior Court Cases - 30 DAYS: The Superior Court, the Board of Appeals, and the state Attorney General's Office **must all RECEIVE** copies of your Petition for Judicial Review within thirty (30) days from the date stamped on the enclosed Review Decision or Order. **There are rules for filing and service that you must follow.**

EXCEPTION: IF (and only if) you file a timely reconsideration request (see above), you will have thirty days from the date of the Reconsideration Decision.

Refer to the Revised Code of Washington (RCW), including chapter 34.05, the Washington Administrative Code (WAC), and to the Washington Rules of Court (civil) for guidance. These materials are available in all law libraries and in most community libraries.

If You Need Help: Ask friends or relatives for a reference to an attorney, or contact your county's bar association or referral services (usually listed at the end of the "attorney" section in the telephone book advertising section). Columbia Legal Services, Northwest Justice Project, the Northwest Women's Law Center, some law schools, and other non-profit legal organizations may be able to provide assistance. **You are not guaranteed an attorney free of charge.**

1. *Snyder v. Colorado Podiatry Bd.*, 100 P.3d 496, 502 (Colo. Ct. App. 2004) (“There is no constitutional requirement of a standard of proof beyond preponderance of the evidence in civil proceedings, *see Addington v. Texas*, 441 U.S. 418 (1979); and the General Assembly has determined that the standard of proof for all violations of the Podiatry Practice Act is the standard applicable in civil proceedings.”)
2. *Sherman v. Comm’n on Licensure to Practice the Healing Art*, 407 A.2d 595, 601 (D.C. 1979) (“we hold that the preponderance of the evidence test adequately protected Dr. Sherman’s Fifth Amendment property interest in his license”)
3. *Eaves v. Bd. of Med. Exam’rs*, 467 N.W.2d 234, 237 (Iowa 1991) (“A preponderance of the evidence is all that is required. This standard is sufficient to satisfy due process.” (Citation omitted.))
4. *Rucker v. Michigan Bd. of Med.*, 138 Mich. App. 209, 211, 360 N.W.2d 154, 155 (1984) (Petitioner is wrong in claiming “that due process required that a more stringent standard of proof, the ‘clear and convincing’ standard, be applied in license revocation hearings.”)
5. *Petition of Grimm*, 138 N.H. 42, 50, 635 A.2d 456, 461 (1993) (“After weighing the [*Mathews*] factors set out above, we conclude that the application of the preponderance of the evidence burden of proof to psychologist disciplinary proceedings satisfies due process.”)
6. *In re the Revocation of the License of Polk*, 90 N.J. 550, 569, 449 A.2d 7,16–17 (1982) (“we conclude that the application of the burden of proof by a fair preponderance of the evidence standard in this case did not result in a deprivation of any rights guaranteed to Polk under . . . the Due Process clause of the Fourteenth Amendment”)
7. *In re Gould*, 103 A.D.2d 897, 897, 478 N.Y.S.2d 129, 129 (1984) (“we reject petitioner’s claim that the standard of proof in a professional license revocation proceeding must be ‘clear and convincing’ proof to comport with due process requirements”)
8. *North Dakota Bd. of Med. Exam’rs-Investigative Panel B v. Hsu*, 726 N.W.2d 216, 230 (N.D. 2007) (“Under the *Mathews* framework for analyzing due process claims, we conclude the preponderance of evidence standard satisfies due process.”)
9. *Gallant v. Bd. of Med. Exam’rs*, 159 Or. App. 175, 185, 974 P.2d 814, 819 (1999) (“Balancing the three [*Mathews*] factors, we conclude that the Due Process Clause requires no more than the preponderance of the evidence standard of proof in this case.”)
10. *Anonymous M-156-90) v. Bd. of Med. Exam’rs*, 329 S.C. 371, 378, 496 S.E.2d 17, 20 (1998) (“We find a preponderance of the evidence standard adequately protects a physician’s property interest in his license.”)
11. *Granek v. Texas Bd. of Med. Exam’rs*, 172 S.W.3d 761, 777 (Tex. App. 2005) (the court rejects the contention “that due process requires clear and convincing evidence in medical disciplinary actions”)

12. *In re Smith*, 169 Vt. 162, 172, 730 A.2d 605, 612 (1999) (“We conclude that these statutory procedures, together with the preponderance of evidence burden of proof placed on the State, afforded the constitutional process due to appellee.”)

13. *Gandhi v. Med. Examining Bd.*, 168 Wis. 2d 299, 303, 483 N.W.2d 295, 298 (1992) (the court rejected Gandhi’s argument that “due process mandates proof of the allegations against a physician by at least clear and convincing evidence”).

NO. 62436-9-I

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

IN RE KATHLEEN HARDEE

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF EARLY
LEARNING,

Respondent.

DECLARATION OF
SERVICE

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 FEB - 6 PM 12:31

I, Patricia A. Kelley, declare as follows:

I am a Legal Assistant employed by the Washington State Attorney General's Office. On February 6, 2009, I sent a copy of: **Brief of Respondent; and Declaration of Service** via ABC Legal Messenger to: Carol Farr, Law Offices of Leonard Moen, 947 Powell Avenue SW Suite 105, Renton, WA 98057-2975.

I declare under penalty of perjury, under the law of the State of Washington that the foregoing is true and correct.

DATED this 6th day of February, 2009, at Seattle, Washington.


PATRICIA A. KELLEY
Legal Assistant

ORIGINAL