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**SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,  
DEPARTMENT OF EARLY LEARNING

Respondent,

v.

KATHLEEN HARDEE,

Petitioner.

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**DEPARTMENT OF EARLY LEARNING  
SUPPLEMENTAL BRIEF**

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## I. INTRODUCTION

The legislature expressly selected the preponderance of the evidence standard in adjudicative proceedings involving a license to operate a family home child care facility. RCW 43.215.300(2) provides:

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). As part of selecting the preponderance of evidence standard, the legislature explained that “safety, and well-being of children receiving child care . . . is paramount over the right of any person to provide care[.]” RCW 43.215.005(3)(c).

In July 2006, the Department of Early Learning (Department) received a report that Kathleen Hardee's son, William, who lived at the child care home she operated, had sexually molested a young child he was babysitting. This led to an investigation of the facility, a suspension, and, eventually, a revocation of Ms. Hardee's license. CP at 265 (FF 2, 3). The investigation revealed that Ms. Hardee violated Department regulations and an agreed safety plan by allowing unsupervised contact between child-care children and her son, a young man who lived at the home, but who had a history of assault, unstable behavior, and mental illness. CP at 265–71 (FF 5–20).

After an adjudicative hearing, the Department upheld the revocation for two reasons. First, Ms. Hardee “violated her 2003 safety agreement and the terms of her 2004 waiver.” CP at 281 (CL 11). “[Ms. Hardee] allowed William to have unsupervised access to a child under her care.” CP at 281 (CL 11). Second, Ms. Hardee “lacks the personal characteristics an individual needs to provide care to children” as required by WAC 170-296-0140(2).<sup>1</sup> See CP at 281 (Final Decision (CL 10, 11) (copy attached to [State’s] Brief Of Respondent below)).

The petitioner raises two issues to challenge the Department’s final decision. First, she argues that the preponderance standard in RCW 43.215.300(2) does not provide procedural due process. Second, she argues that the final administrative decision was based solely on hearsay and exceeded the authority of the review judge. See *Petition For Review* (Pet.) at 1–2.

With regard to the first issue, the statute ensures procedural due process. The licensee receives an adjudicative hearing with trial-like procedures. Under the preponderance standard, the fact finder must be persuaded, considering all the relevant evidence, that a proposition is “more probably true than not true.” 6 *Washington Practice: Washington*

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<sup>1</sup> WAC 170-296 was adopted on July 13, 2006, to implement the conversion of a DSHS division into the Department of Early learning. WSR 06-15-075. These provisions were previously in WAC 388-296 and were not changed by recodification.

*Pattern Jury Instructions: Civil 21.01*, at 221 (2005) (WPI). In light of United States Supreme Court precedent, this Court should uphold the statute, as the Court of Appeals appropriately did in its decision.

Furthermore, the Court should overrule *Nguyen v. Department of Health*, 144 Wn.2d 516, 29 P.3d 689 (2001), and *Ongom v. Department of Health*, 159 Wn.2d 132, 148 P.3d 1029 (2006). Answer To Petition For Review (Answer) at 2. As Ms. Hardee's argument illustrates, borrowing the higher burden of proof from those two cases directly increases the likelihood that children will be exposed to an inadequate or unsafe provider. Due process does not compel the legislature to place that risk on children. *See generally* Brief Of Respondent (Br. Resp't) at 15–29.

With regard to the second issue in the petition, RCW 34.05.464(4) expressly authorizes a review judge to make final decisions, and the review judge here exercised that authority. She reviewed the entire record, did not rely solely on hearsay, and made a final decision with findings supported by substantial evidence. The review judge did not err in exercising this express statutory authority and rejecting the initial decision.

## II. STANDARD OF REVIEW

Ms. Hardee argues that the legislature violated the constitution by selecting a preponderance of evidence standard for adjudicative

proceedings affecting Department of Early Learning licensees. “Constitutional challenges are questions of law subject to de novo review.” *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006). Statutes are presumed constitutional and the party challenging the constitutionality of a statute has a heavy burden to establish that the statute is unconstitutional beyond question. *Amunrud*, 158 Wn.2d at 215. Ms. Hardee does not meet this standard.

The second issue in the petition challenges the plain language of RCW 34.05.464(4). The meaning of that statute is a question of law reviewed de novo.

### III. ARGUMENT

As discussed below at pages 17 through 18, the Court of Appeals properly upheld the legislature’s power to adopt a preponderance standard in RCW 43.215.300(2). Ms. Hardee’s license related to her specific child care facility and it was appropriate to read the holdings in *Nguyen* and *Ongom* narrowly and to distinguish those cases from a child care license.

While the Court of Appeals was correct in distinguishing *Nguyen* and *Ongom*, the Court should take this opportunity to overrule those decisions and clarify that a legislative body may choose a preponderance of evidence standard to adjudicate licenses affecting a business or profession. As discussed below, procedural due process is met by a

preponderance burden for revoking a child care license or the health provider licenses at issue in *Nguyen* and *Ongom*. *Nguyen* and *Ongom* are wrongly decided and are a harmful precedent because they inappropriately restrict the legislative power to protect the public.

**A. A Higher Standard Of Proof Increases The Risk That Children Will Be Subjected To An Unsafe Child Care Provider**

A standard of proof for an administrative hearing reflects a legislative judgment assessing the interests at stake in a particular case. A standard of proof “serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.” *Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). “Because the standard of proof affects the comparative frequency of . . . erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.” *In re Winship*, 397 U.S. 358, 371, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (Harlan, J., concurring).

The Washington Legislature assessed the “comparative social disutility” of child care licensing decisions. It concluded that safeguarding “the health, safety, and well-being of children receiving child care and early learning assistance” was “paramount over the right of any person to

provide care[.]” RCW 43.215.005(3)(c).<sup>2</sup> Ms. Hardee, however, argues that due process compels every legislative body to select the clear, cogent, and convincing evidence standard, if a licensing action affects a person’s choice of a profession or business. Pet. at 5–10. She gives no weight to the important public interests that might be served by a license revocation. Like the decisions in *Nguyen* and *Ongom*, Ms. Hardee places the risk of unfit licensees on vulnerable populations and the general public.

**B. *Nguyen* and *Ongom* Are Wrongly Decided: When Adjudication Affects A License, Certificate, Or Registration, A Preponderance Of Evidence Satisfies Due Process**

**1. RCW 43.215.300(5) Ensures Due Process Consistent With *Mathews v. Eldridge*<sup>3</sup>**

Due process balances the needs of the public and the individual, and arrives at the minimum acceptable process which safeguards the interests of all involved. *E.g., Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). The United States Supreme Court has emphasized that when due process protects individual rights, it does not do so at the expense of the rights of others in litigation. *Mathews v. Eldridge*, 424 U.S. 319, 334–35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). In

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<sup>2</sup> Safeguarding the health, safety, and well-being of people is a recognized power of state government. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975).

<sup>3</sup> The Washington Constitution provides no more procedural due process protection than the federal constitution. *State v. Manussier*, 129 Wn.2d 652, 679, 921 P.2d 473 (1996). Ms. Hardee, moreover, has made no argument based on the Washington Constitution. *See* Br. Resp’t at 15 n.8.

*Mathews*, the Court set forth three considerations for evaluating arguments regarding procedural due process requirements:

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

*Mathews*, 424 U.S. at 335. These three considerations, fairly applied, demonstrate that an adjudication using the traditional and well-established preponderance of the evidence standard ensures procedural due process in connection with revocation of a license. *See* Br. Resp't at 15–23.

**a. A Home Child Care License Creates A Limited, Conditional Interest In Running A Facility Subject To Reasonable Regulation; It Does Not Involve Fundamental Liberty Interests**

Ms. Hardee's interest is in a regulatory license approving her child care facility. Operation of a "family home child care" is an activity that is subject to regulation related to the specific site, personnel, and equipment; the license does not transfer to a new address with the licensee. *See generally* RCW 43.215.205; WAC 170-296; RCW 43.215.260; WAC 170-296-0020. The license can be suspended or denied if *any person* in the home, not just the applicant, is not suitable for contact with children. RCW 43.215.215(2); WAC 170-296-0215.

The evaluation of this license under the first *Mathews* factor is controlled by two lines of United States Supreme Court decisions. In the first line, the Court consistently holds that due process requires a higher burden of proof *only* when the private interest at stake involves an important liberty, such as avoiding confinement, and important fundamental rights, such as a right to parent. See *In re Winship*, 397 U.S. 358 (subjecting juvenile delinquent to detention is “complete loss of personal liberty” that requires proof beyond a reasonable doubt); *Addington*, 441 U.S. 418 (commitment to psychiatric hospital requires clear and cogent evidence); *Dunner v. McLaughlin*, 100 Wn.2d 832, 676 P.2d 444 (1984) (recognizing that *Addington* controls in Washington); *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (termination of parental rights, complete destruction of fundamental right of parent to raise child, requires clear and convincing evidence). The loss of a family home care license does not confine a person or affect fundamental liberty interests. The licensee may pursue other lawful activities.

In the second line of cases, the Court has held that a preponderance of evidence satisfies due process for private interests that are more significant and serious than a license for a child care facility. For example, the preponderance standard meets due process when a party

seeks to establish a permanent parent/child relationship. In *Rivera v. Minnich*, 483 U.S. 574, 107 S. Ct. 3001, 97 L. Ed. 2d 473 (1987), the Court upheld a statute requiring a preponderance of the evidence when establishing paternity. The private interest was in “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 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).

Similarly, the preponderance standard satisfies due process when expatriating a person. In *Vance v. Terrazas*, 444 U.S. 252, 100 S. Ct. 540, 62 L. Ed. 2d 461 (1980), the Court upheld Congress’ selection of the preponderance standard for expatriation. “[E]xpatriation proceedings are civil in nature and do not threaten a loss of liberty.” *Vance*, 444 U.S. at 266.<sup>4</sup> Expatriation has a far greater impact than revoking a license. *Schneiderman v. United States*, 320 U.S. 118, 122, 63 S. Ct. 1333, 87 L. Ed. 1779 (1943) (United States citizenship is “the highest hope of civilized men.”). Thus, under United States Supreme Court precedent, loss of a

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<sup>4</sup> *Vance* superseded a prior holding that, in the absence of an express statute, clear, cogent, and convincing evidence was required for an expatriation proceeding. *Mitsugi Nishikawa v. Dulles*, 356 U.S. 129, 133, 78 S. Ct. 612, 2 L. Ed. 2d 659 (1958).

family home child care license does not rise to the level of any case where due process requires more than a preponderance of evidence.

Ms. Hardee has argued that her interest and experience in running a child care facility amounts to a fundamental right, or that she is stigmatized by an adverse decision that could affect future employment. There is, however, no fundamental right to pursue family home child care. Such a private interest is readily subject to regulation, contrary to the implications of Ms. Hardee's argument. The constitution does not protect or create a right to engage in a specific work activity:

[T]he 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.

*Conn v. Gabbert*, 526 U.S. 286, 291–92, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999). Numerous other cases affirm the power of government to regulate such activities or businesses without suggesting that it affects a fundamental right or requires a higher standard of proof. See *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313–14, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Dittman v. California*, 191 F.3d 1020, 1029 (9th Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000); *Medeiros v. Vincent*, 431 F.3d 25, 29 n.3 (1st Cir. 2005);

*Cornwell v. California Bd. of Barbering & Cosmetology*, 962 F. Supp. 1260, 1271 (S.D. Cal. 1997) (quoting *Greene v. McElroy*, 360 U.S. 474, 492, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959)). Furthermore, to the extent Ms. Hardee speculates that there is a stigma that might affect her reputation or future employment, the Court has rejected higher burdens of proof based on the incidental stigma in an adjudication of paternity or expatriation. *See Vance, Rivera*.

Ms. Hardee also cites *Nguyen* and labels her revocation as “quasi-criminal.” Brief Of Appellant (Br. Appellant) at 30. This label merely obscures the private interests and is not accurate or useful. *See Nguyen*, 144 Wn.2d at 542 (Ireland, J. dissenting). Licensing advances vital public purposes by protecting parents and children, the consumers of child care services. Licensing does not involve any criminal penalty such as confinement. “Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment.” *Smith v. Doe*, 538 U.S. 84, 98, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003).

Under the first *Mathews* factor, the legislature may select a preponderance burden of proof to revoke a child care license.

**b. An Increased Burden Of Proof Is Not Needed To Avoid Erroneous Revocations**

The second *Mathews* factor examines how much the process sought by a party reduces the risk of an erroneous deprivation of a private interest. The second factor involves a comparison of probable outcomes, and the Court considers the value of the *additional* procedural protection. *Mathews*, 424 U.S. at 343–49.

A licensee receives an “adjudicative proceeding” under the APA. RCW 43.215.300(2), .305(3). This is a trial-type hearing with counsel or other representation. RCW 34.05.428. The fact finder must use reliable evidence and a licensee may call and cross-examine witnesses. RCW 34.05.452. A licensee may provide and respond to arguments. RCW 34.05.437. A licensee receives a written decision with findings, conclusions, and reasons. RCW 34.05.461(3), (4). The order is subject to judicial review to correct errors. RCW 34.05.570(3).

The majority opinions in *Nguyen* or *Ongom* do not impeach these processes as unreliable, but, nevertheless, hold that the preponderance standard is constitutionally inadequate. The preponderance burden, however, precludes revocation unless the state carries a substantial burden where the weight of evidence, taken as a whole, shows that a fact is more likely than not. WPI 21.01; *In re the Welfare of Sego*, 82 Wn.2d 736, 739

n.2, 513 P.2d 831 (1973). The preponderance of evidence standard, thus, does not create a significant or unreasonable risk of error for the private party.<sup>5</sup> The second *Mathews* factor does not support rejecting the legislative decision to use the preponderance burden.

**c. The Public Interest in Safe Child Care Facilities Strongly Supports The Legislative Decision To Use A Preponderance Of Evidence Standard**

The third *Mathews* factor examines the government interests affected by the procedure in question. The third factor requires a court to consider more than financial costs; a court must consider what is at risk. *Mathews*, 424 U.S. at 334–35 (examining “the function involved *and* the fiscal and administrative burdens that the additional or substitute procedural requirement would entail” (emphasis added)). Like *Mathews*, numerous Washington rulings consider the public interests at stake when evaluating due process claims.<sup>6</sup>

Here, the legislature is legitimately concerned with the safety of children. RCW 43.215.005(3)(c). A higher standard of proof, however, puts children at greater risk. As the dissent stated in *Ongom*, the net result

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<sup>5</sup> To illustrate the reliability of the preponderance standard, this Court might consider that if a parent sued Ms. Hardee for negligently allowing her son unsupervised access to a child, the preponderance of evidence standard applies. <sup>6</sup> *Washington Practice: Washington Pattern Jury Instructions: Civil* 21.02, at 222 (2005).

<sup>6</sup> See *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).

is that populations of children become more vulnerable, because a higher standard enables violators to prevail even when the weight of evidence supports revocation. *Ongom*, 159 Wn.2d at 144–45 (Madsen, J. dissenting). Thus, as recognized by four justices, *Nguyen* erred by focusing on fiscal considerations while neglecting the broader public interests served by a regulation. *See Ongom* 159 Wn.2d at 148, 152 (Madsen, J., and Owens, J., dissenting).<sup>7</sup>

This case illustrates the stakes in child care licensing that justify the legislative choice. The Department’s decision enforced a requirement that Ms. Hardee not allow unsupervised contact between her son and the child-care children. The findings are supported by the direct testimony of a father who witnessed a violation, by statements from other parents, and by some of Ms. Hardee’s admissions. CP at 273–75 ( FF 25–27). If the preponderance standard violates due process, it makes it more likely that

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<sup>7</sup> The 2008 Washington Legislature illustrated this flawed premise in *Nguyen* by stating that regulation of the practice of medicine served public health and safety:

[The] constitutional recognition of the importance of regulating health care practitioners derives not from providers’ financial interest in their license, but from the greater need to protect the public health and safety by assuring that the health care providers and medicines that society relies upon meet certain standards of quality.

The legislature finds that the issuance of a license to practice as a health care provider should be a means to promote quality and not be a means to provide financial benefit for providers.

Laws of 2008, ch. 134, § 1.

children will be exposed to facilities that violate important safety regulations.

**2. *Nguyen* and *Ongom* Should Be Overruled Because They Are Incorrect And Harmful**

In *Ongom*, a five-justice majority did not confront the error in *Nguyen*, stating that the state's request to overrule *Nguyen* was not properly raised. *Ongom*, 159 Wn.2d at 137 n.3. The Department has preserved the issue in the response brief and the answer to the petition. The Court should now overrule *Nguyen* and *Ongom* as "incorrect and harmful" precedent. *In re the Determination of the Rights to the Use of the Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (describing when to reverse incorrect precedent).

As shown above, *Nguyen* and *Ongom* are irreconcilable with Supreme Court precedent applying the three *Mathews* considerations. Indeed, no other state concludes that the federal guarantee of due process precludes use of a preponderance standard of proof in a trial-type adjudication affecting a health professional license. Answer, App. A (listing cases from other states addressing procedural due process and the standard of proof); *Ongom*, 159 Wn.2d at 155–56 n.6 (Owens, J., dissenting) (collecting cases from "at least 21 other jurisdictions [that] have held that the preponderance standard is constitutionally appropriate

... in professional disciplinary proceedings”). As the Court stated when upholding a challenge to the preponderance standard for paternity actions:

A legislative judgment that is not only consistent with the “dominant opinion” throughout the country but is also in accord with “the traditions of our people and our law,” *see Lochner v. New York*, 198 U.S. 45, 76, 25 S. Ct. 539, 547, 49 L. Ed. 937 (1905) (Holmes, J., dissenting), is entitled to a powerful presumption of validity when it is challenged under the Due Process Clause of the Fourteenth Amendment.

*Rivera*, 483 U.S. at 578.

Furthermore, the Court may recognize that reversal of *Nguyen* and *Ongom* will not affect settled expectations or private interests. This does not involve a common-law rule that people might rely upon. Instead, overruling *Nguyen* and *Ongom* reestablishes the correct view of the legislative power to make law and decide how laws will be enforced. *State ex rel. Bloedel-Donovan Lumber Mills v. Savidge*, 144 Wash. 302, 310, 258 P. 1 (1927) (when the court detects constitutional error, the doctrine of stare decisis has less weight).

Ms. Hardee’s focus on her license to the exclusion of the public interest shows that the rule in *Nguyen* is harmful. It preempts state and local government decisions regarding the burden of proof in licensing decisions that affect both public and private interests. Her argument, moreover, shows how *Nguyen* and *Ongom* will continue to create

additional litigation. For example, a food-handler licensee can borrow Ms. Hardee's argument and point out the importance of his or her employment or the stigma associated with losing a food handler's license, and seek to strike down the preponderance standard of proof in WAC 246-217-070 and WAC 246-10-606(3).

At least five state courts have now expressly rejected *Nguyen*. See *In re Miller*, 2009 VT 112, ¶ 19, 2009 WL 3681838; *Granek v. State Bd. of Med. Exam'rs*, 172 S.W.3d 761 (Tex. App. 2005); *Uckun v. State Bd. of Med. Practice*, 733 N.W.2d 778 (Minn. Ct. App. 2007); *State Bd. of Med. Exam'rs—Investigative Panel B v. Hsu*, 2007 ND 9, 726 N.W.2d 216 (2007); *Miulli v. State Bd. of Med. Exam'rs*, noted at 683 N.W.2d 126, 2004 WL 893934 (Iowa Ct. App.). No other state has followed *Nguyen* or *Ongom*.

The Court should, therefore, hold that due process does not prevent a legislative body from choosing the traditional preponderance of evidence standard for adjudicating sanctions affecting business, occupational, or professional licenses. *Nguyen* and *Ongom* should be overruled.

**C. The Court Of Appeals Properly Rejected Ms. Hardee's Analogy To A Health Care Providers' License**

The Court of Appeals properly recognized that *Nguyen* and *Ongom* should be read narrowly to preserve this statute. *Nguyen* and *Ongom*

“involved a professional license of a particular individual. Here . . . the license issued to Hardee was in the nature of a site license, obtainable by the licensee’s completion of 20 clock hours of basic training approved by the Washington State training and registry system.” *Hardee v. Dep’t of Soc. & Health Servs.*, 152 Wn. App. 48, 56, ¶ 14, 215 P.3d 214 (2009) (citing WAC 170-296-1410(5)(c)). The private interest here is, therefore, qualitatively different from a professional license, which is defined as “an individual, nontransferable authorization to carry on an activity based on qualifications which include: (a) Graduation from an accredited or approved program, and (b) acceptable performance on a qualifying examination or series of examinations.” *Hardee*, 152 Wn. App. at 77 n.18 (quoting RCW 18.118.020(8)).

In light of the compelling state interests in regulating for the protection of children and the highly regulated and limited interest conveyed by the family home child care license, the Court of Appeals reasonably refused to extend *Nguyen*. The Court may rely on this alternative basis to affirm the constitutionality of the statute.

**D. The APA Expressly Authorizes The Agency Review Judge To Review And Reject The Initial Decision**

The second issue in the petition for review asks whether the administrative review judge erred. Pet. at 1 (“[M]ay a review judge

reverse an ALJ's findings of fact and credibility determinations and substitute a new view of the evidences based solely on hearsay rejected by the ALJ?"). This second issue involves RCW 34.05.464(4), which governs an agency review judge's power in an administrative hearing.

That statute provides in relevant part:

*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.<sup>[8]</sup>*

RCW 34.05.464(4) (emphasis added).

The Court of Appeals properly rejected a variety of arguments raised by Ms. Hardee. *Hardee*, 152 Wn. App. at 57–63, ¶¶ 16–30. Ms. Hardee abandons these objections in favor of the single argument that the review judge exceeded her authority under RCW 34.05.464(4).<sup>9</sup> The plain language of the statute answers her argument. A review judge “shall

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<sup>8</sup> Department regulations also provide that 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).

<sup>9</sup> The petition makes a passing statement that the review judge substituted an “incorrect view of the law.” Pet. at 10. The petition did not identify how the review judge “incorrectly viewed the law.” The argument, like the issue statement, argues only that the review judge violated RCW 34.05.464. The petition, therefore, does not preserve any challenges to any legal conclusions by the review judge, because the Court does not address issues not specifically identified in a Petition. See RAP 13.7(b); *Ongom*, 159 Wn.2d at 137 n.3.

exercise *all* the decision-making power” she would have, had she presided over the hearing, except where limited by other law, giving “due regard to the presiding officer’s opportunity to observe the witnesses.” RCW 34.05.464(4). The review judge decision is consistent with this statutory power. *See generally* Br. Resp’t at 32–39.

**1. The Final Decision Fully Considers The Record And Makes Findings And Conclusions Supported By Substantial, Nonhearsay Evidence**

The record shows that the final decision did not “disregard wholesale” the initial decision or make findings based solely on hearsay or rejected hearsay. The review judge specifically explained that the initial order did not translate the opportunity to observe witnesses into findings or reasons that could be given any weight. FF 29; CL 6 (Pet., App. C at 24, 27, respectively). The review judge, therefore, exercised full decision-making power to find that Ms. Hardee’s son diapered a young girl at the childcare alone in a back room—findings that prove the violations. *See* FF 15,17, 18, 20–26; CL 4–7 (Pet., App. C at 20–24, 28–29, respectively). This is consistent with the express statutory power to exercise all the decision-making power of the presiding officer.

Furthermore, this review judge did not reject express credibility findings and the petition identifies no express credibility findings. *See Hardee*, 152 Wn. App. at 59, ¶ 20 (“the review judge had no credibility

determination to give ‘due regard to’ under RCW 35.05.464(4)”). The petition, however, argues that the initial order “implicitly” made credibility findings. Pet. at 14. The Court should reject the petitioner’s view because it would preclude any review judge from exercising the express statutory authority. This review judge addressed material facts and resolved contradictory evidence, as allowed by statute. *See Hardee*, 152 Wn. App. at 59, ¶ 20; CP at 279–80 (CL 4–6); Br. Resp’t at 39–43.

Ms. Hardee’s view of the review judge’s authority is also contrary to case law. The Court of Appeals cited *Regan v. Department of Licensing*, 130 Wn. App. 39, 121 P.3d 731 (2005). *See Hardee*, 152 Wn. App. at 59, ¶ 21. *Regan*, in turn, relied on this Court’s decision in *Tapper v. Employment Security Department*, 122 Wn.2d 397, 405–06, 858 P.2d 494 (1993). Under *Tapper* and *Regan*, “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[.]” *See Regan*, 130 Wn. App. at 59, ¶ 53.

Finally, the record does not support Ms. Hardee’s claim that the changes in the final decision were based solely on hearsay. With regard to unsupervised contact by William, the review judge relied on eyewitness testimony from parent J.S. and testimony from Ms. Hardee. The findings and conclusions in the decision confirm that the judge

reviewed the record. Of 51 footnotes in the findings, nine cite hearsay in part.<sup>10</sup> However, there are 31 citations to testimony of witnesses with direct knowledge, including 17 citations to Ms. Hardee's testimony. The review judge painstakingly reviewed and considered the evidence, consistent with RCW 34.05.452.

**2. The Review Judge's Statutory Authority Does Not Make An Initial Decision Meaningless**

RCW 34.05.464(4) does not make an initial order "superfluous." Pet. at 14. A review judge process has no filing fee and allows many parties to pursue arguments regarding the whole record which will be foreclosed on judicial review. RCW 34.05.570(3)(e) (findings not erroneous if based on substantial evidence). Further, a review judge provides finality without judicial review for many private parties. *See* WAC 170-03-0660(2) (Department cannot appeal review judge decision).

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<sup>10</sup> Instances of hearsay cited: page 16—for charges against William (not contested); page 17—for William's date of birth (not contested); page 18—for admission to Fairfax (not contested); page 18—for conviction (fact of conviction not contested); page 18—William's MH treatment (not contested); page—19 William's behavior with stuffed animals, etc. (partially admitted by appellant); page 21—reports of parents to Investigator Junior (contested info about leaving William alone); page 22—more parent reports (contested info re people on premises); page 23—report of Ms. Hardee to investigator that William helps with lunches (may be contested); page 25—police report that Ms. Hardee said people were constantly around the house (contested). In addition, some footnotes cited to documents or testimony of the investigator and are not included in these figures.

The legislature unambiguously authorized the review judge to exercise full decision-making authority. Ms. Hardee's arguments contradict the statute and should be rejected.

#### IV. CONCLUSION

The Department asks the Court to affirm the Court of Appeals, to affirm the constitutionality of RCW 43.215.300(2), and to reconsider and overrule *Nguyen* and *Ongom*.

RESPECTFULLY SUBMITTED this 9th day of April 2010.

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