

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
7/11/2019 2:45 PM  
BY SUSAN L. CARLSON  
CLERK

NO. 97311-3

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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IN RE THE WELFARE OF:

D.H., S.T., L.L. and T.L.,

Minor Children.

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**ANSWER TO MOTION FOR DISCRETIONARY REVIEW**

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**TABLE OF CONTENTS**

I. INTRODUCTION, IDENTITY OF RESPONDENT, AND DECISION BELOW .....1

II. ISSUE PRESENTED FOR REVIEW .....1

Does substantial evidence support the trial court’s finding that the Department provided all necessary services, reasonably available, that were capable of correcting the mother’s parental deficiencies in the foreseeable future? .....1

III. COUNTERSTATEMENT OF THE CASE .....2

A. The Department Offered and Ms. B. Engaged in Mental Health Services During the Dependency Case .....2

B. Ms. B.’s Children’s Behavior Presents Significant Challenges That are Difficult for Even a Trained Care Provider to Manage.....5

C. The Mother Did Not Improve Her Parenting Ability Such That the Children Could be Safely Returned Home in the Foreseeable Future .....7

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED .....9

A. Review is Not Warranted Where Substantial Evidence Supports the Conclusion That the Department Timely Offered the Neuropsychological Evaluation and Ms. B. Had Sufficient Time to Comply With Its Recommendations.....10

B. Review is Not Warranted Where Substantial Evidence Supports the Trial Court’s Finding That the Department Provided all Necessary and Reasonably Available Services .....14

C. Review is Not Warranted Where Substantial Evidence Supports the Finding That the Department Offered Parenting Education Specifically Tailored to the Mother’s Needs.....19

V. CONCLUSION .....20

## TABLE OF AUTHORITIES

### Cases

<i>In re Dependency of P.D.</i> , 58 Wn. App. 18, 792 P.2d 159, review denied, <i>In re Dependency of P.A.D.</i> , 115 Wn.2d 1019, 802 P.2d 1019 (1990).....	9
<i>In re Dependency of Ramquist</i> , 52 Wn. App. 854, 765 P.2d 30 (1989).....	11
<i>In re Dependency of T.R.</i> , 108 Wn. App. 149, 29 P.3d 1275 (2001).....	9
<i>In re Matter of I.M.-M.</i> , 196 Wn. App. 914, 385 P.3d 268 (2016).....	19
<i>In re Termination of S.J.</i> , 162 Wn. App. 873, 256 P.3d 470 (2011).....	12, 13
<i>In re the Matter of K.M.M.</i> , 186 Wn.2d 466, 379 P.3d 75 (2016).....	12, 15, 17, 18
<i>In re Welfare of Hall</i> , 99 Wn.2d 842, 664 P.2d 1245 (1983).....	9
<i>State v. Bunker</i> , 169 Wn.2d 571, 238 P.3d 487 (2010).....	16, 17

### Statutes

Laws of 2017, 3rd Spec. Sess., ch. 6, § 321-22 .....	1
RCW 13.34.020 .....	17
RCW 13.34.180(1).....	8
RCW 13.34.180(1)(d).....	10, 15, 16, 17
RCW 13.34.190 .....	8

**Rules**

RAP 13.4(b) ..... 1, 20

## **I. INTRODUCTION, IDENTITY OF RESPONDENT, AND DECISION BELOW**

The mother of D.H., S.T., L.L. and T.L. moves for discretionary review by this Court, but she fails to establish a justification for review under RAP 13.4(b).<sup>1</sup> Over the course of a three-year dependency proceeding, the Department of Social and Health Services (Department) provided, and Ms. B. participated in, services tailored to her particular needs. The trial court found that the Department proved all necessary elements and terminated the mother's parental rights. The Court of Appeals upheld termination. *Matter of Welfare of D.H., S.T., L.L., and T.L.*, Nos. 52350-7-II, 52360-4-II, 52370-1-II, 52380-9-II (Wash. May 7, 2019) (unpublished) (Appendix at 14).

There is no basis for review where the decision of the Court of Appeals correctly affirmed the trial court order terminating the mother's parental rights, and this decision does not conflict with relevant appellate case law nor gives rise to a significant question of constitutional law.

## **II. ISSUE PRESENTED FOR REVIEW**

If discretionary review were granted, the issue would be:

Does substantial evidence support the trial court's finding that the Department provided all necessary services, reasonably available,

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

that were capable of correcting the mother's parental deficiencies in the foreseeable future?

### **III. COUNTERSTATEMENT OF THE CASE**

The Department of Social and Health Services has been involved in the mother, Ms. B.'s, life for many years. The Department has received fifteen intakes regarding Ms. B. and her children, dating back to 2009. RP at 185.

The Department filed dependency petitions as to nine-year-old D.H., seven-year-old S.T., five-year-old T.L., and three-year-old L.L. Exs. 5-7, 27. Ms. B. agreed to a finding of dependency and agreed to participate in the following services: (1) psychological evaluation and follow recommendations; (2) parenting education; (3) mental health treatment: individual counseling. *Id.* at 7. Additional services ordered included a neurological evaluation, which recommended Dialectical Behavior Therapy (DBT). Exs. 40-42. DBT was never court-ordered. Exs. 20-22, 32, 34-37, 39-42, 46-53, 124-26.

#### **A. The Department Offered and Ms. B. Engaged in Mental Health Services During the Dependency Case**

Ms. B. engaged in mental health counseling with Cynthia Dyrness. Ex. 87. Ms. Dyrness was familiar with Ms. B.'s needs; she had a preexisting professional relationship with Ms. B. RP at 73-74. Issues with Ms. B.'s insurance caused this service to lapse between September 2015 and

April 2016. Ex. 87, RP at 84. Ms. B. was continuously engaged in counseling with Ms. Dyrness from April 2016, through the date of trial. RP at 84, 290.

Ms. Dyrness engaged Ms. B. in Cognitive Behavioral Therapy (CBT). RP at 78. The therapy focused on helping Ms. B. with techniques for reducing her stress and anxiety, and improving her focus, concentration, and organizational ability. *Id.* The main focus was on treating the post-traumatic stress disorder which was the foundation for all her symptoms. *Id.* When Ms. B. feels anxious, her cognitive ability drops to a lower level and Ms. B. will shut down. RP at 78-79.

Ms. Dyrness coordinated with Ms. B.'s Behavioral Health Resources (BHR) team to regulate her medication. RP at 88, 90. Ms. Dyrness estimated that Ms. B. had been operating at her fully medicated potential for nine months at the time trial commenced. RP at 92-93.

The Department referred Ms. B. to Dr. Mark Whitehill for a psychological evaluation. Ex. 56. During the evaluation, Ms. B. denied the Department's concerns in their entirety. RP at 446. During the parent-child observation portion of the evaluation Ms. B. demonstrated an inability to safely monitor the children that she displayed during visits throughout the dependency. RP at 451, 453. Dr. Whitehill determined that Ms. B. had

cognitive capability, but had a deficit in willingness or motivation to use her capability to effectively parent. RP at 449. Dr. Whitehill recommended a neuropsychological evaluation to further investigate that disconnect. RP at 460. Dr. Whitehill determined that it was currently unsafe for the children to return to mother's care. RP at 458.

The Department offered Ms. B. all of the services recommended by Dr. Whitehill. Exs. 62-66. A change in assigned social worker delayed the referral for the neuropsychological evaluation by several months, but a referral was made on February 12, 2016, over twenty-four months before the commencement of the termination trial. Ex. 62, RP at 669-70. The Department made a second referral on June 22, 2016. Ex. 63. On her attorney's advice, Ms. B. did not attend her neuropsychological evaluation appointment on June 30, 2016. Ex. 87. The social worker again referred for the neuropsychological evaluation on July 19, 2016. Ex. 64. After the third referral, Ms. B. participated in the neuropsychological evaluation with Dr. Tatyana Shepel. Ex. 78.

During the evaluation, Ms. B. was extremely anxious. RP at 112. Ms. B. minimized the severity of the case, and denied the Department's concerns. RP at 111. Dr. Shepel determined that Ms. B. was cognitively capable of understanding complex concepts, such as learning and understanding the developmental needs of her children, but that she may

not be able to apply the knowledge to real life situations. Ex. 78. at 16, RP at 116, 149. Dr. Shepel opined that Ms. B.'s inability to control symptoms of anxiety was her main impairment. RP at 137. Dr. Shepel recommended that Ms. B. engage in DBT and a psychiatric evaluation for medication. Ex. 78 at 17.

Social worker Doug Willman referred Ms. B. to DBT through the local behavior health service provider when he received Dr. Shepel's report. RP at 598, 671-72, 693. At the time of the referral, the service provider did not have a therapist qualified to provide DBT. RP at 693. Both Ms. B. and Mr. Willman understood that when a qualified therapist was hired, the provider would set Ms. B. up with DBT without further referrals from the Department. RP at 598, 672, 693, 694. Mr. Willman explored all other potential DBT providers in the area and discovered the service was not available. RP at 693. When DBT became available at the local behavioral health service provider, Ms. B. engaged in the service. RP at 598, 694.

**B. Ms. B.'s Children's Behavior Presents Significant Challenges That are Difficult for Even a Trained Care Provider to Manage**

Ms. B.'s children's behavior is very difficult to control. T.L. has a behavioral Individual Education Plan (IEP) at his pre-school. RP at 157, Ex. 113. He is very angry and his temper escalates quickly. RP at 157, 330. His behavior is not typical of children in his class. RP at 160-61.

S.T. also has an IEP at her school, though her issues are more social/emotional. RP at 163, 755, Ex. 114. She is emotionally fragile, quiet and withdrawn, and she cries with little provocation. RP at 163, 754. She lacks boundaries, and does not have a sense of “stranger danger.” RP at 307. She is at risk of being exploited by adults, and requires more supervision than an average child to keep her safe. RP at 163, 340.

D.H. had an IEP at his school before his move to Texas. RP at 305-06. Prior to his relative placement in Texas, he was placed in a behavior rehabilitation foster home to account for his severe behavioral issues. *Id.* He was often asked to leave school early due to behavior issues. RP at 752.

Ms. B. does not recognize that her children have special needs or behavior issues that require special attention. RP at 476, 480, 555-56.

Throughout the history of this case, the visits between Ms. B. and the children have been loud, stressful, and extremely chaotic. RP at 22, 65, 768. An experienced visitation supervisor testified that this family is the most difficult assignment that they have had. RP at 48.

Ms. B. continued to have difficulty keeping the children safe and under control. RP at 793. Ms. B. continued to rely on the visit supervisors and the parenting instructor to help meet the children’s needs. RP at 262, 303, 767, 772, 774.

**C. The Mother Did Not Improve Her Parenting Ability Such That the Children Could be Safely Returned Home in the Foreseeable Future**

Dr. Shepel advised that Ms. B. would benefit from individual parenting education and parenting classes that included one-on-one assistance, repetition, rehearsal, role-modeling, multiple reviews, and dividing information into small pieces. Ex. 78 at 17; RP at 119, 127, 144, 149. The Department offered Ms. B. several parenting education courses that presented information to Ms. B in the forms recommended by Dr. Shepel.

The Department offered Ms. B. Triple P parenting instruction with Noel Villarivera. RP at 197, Ex. 65. Triple P is a one-on-one parenting instruction program that, incorporates practice sessions and rehearsal. RP at 196. Triple P's curriculum is divided into smaller sections, so that in each lesson a different skill is taught. *Id.*, Ex. 90-95. Ms. B. engaged in eighteen weeks of Triple P instruction because Mr. Villarivera determined that additional review and repetition of a skill was necessary. RP at 196, 198, 209-10.

Despite Triple P meeting the teaching elements suggested by Dr. Shepel, Ms. B. was still unable to internalize and apply the parenting skills she was taught in Triple P. RP at 199. When Ms. B. became overwhelmed while attempting to apply the parenting skills, Mr. Villarivera

would intervene and coach Ms. B. on the skills she was to apply. RP at 200, 212. Mr. Villarivera would repeat the same instructions to Ms. B. several times during the course of a session. RP at 201, 209.

The Department also referred Ms. B. to two separate hands-on parenting classes with Brenda Sullens: Promoting First Relationships and Family Preservation Services. RP at 247-48. The Family Preservation Services curriculum allowed Ms. Sullens to tailor the lessons to Ms. B.'s needs and goals. RP at 249. Family Preservation Services consisted of twice-weekly sessions working specifically on the issues that arose during a visit. RP at 252. In both Promoting First Relationships and Family Preservation Services, Ms. Sullens instructed Ms. B. on her childrens' developmental and social-emotional needs. RP at 254-55. Ms. Sullens modeled skills for Ms. B. throughout the visits. RP at 260-61. Ms. Sullens testified that even in a best-case scenario it would take Ms. B. a year to remedy her parental deficiencies such that the children could be returned to her care. RP at 272.

After a 7 day termination trial, the trial court concluded the elements in RCW 13.34.180(1) and .190 had been met and entered an order terminating the mother's rights to the children. CP at 176. The mother appealed, and the Court of Appeals' Commissioner concluded that the order was supported by substantial evidence. Appellant's App. at 12. The Court

of Appeals affirmed this ruling, and the mother now challenges this decision, seeking discretionary review.

#### **IV. ARGUMENT WHY REVIEW SHOULD BE DENIED**

Discretionary review is not warranted here because the Court of Appeals Commissioner's decision was consistent with well-settled case law, and does not present a significant question of constitutional law.

The State has an affirmative duty to offer or provide reasonably available services that are capable of correcting identified parental deficiencies within the foreseeable future. *In re Welfare of Hall*, 99 Wn.2d 842, 850, 664 P.2d 1245 (1983); *In re Dependency of P.D.*, 58 Wn. App. 18, 26, 792 P.2d 159, review denied, *In re Dependency of P.A.D.*, 115 Wn.2d 1019, 802 P.2d 1019 (1990). A parent who claims he received insufficient services, must point to evidence demonstrating how the service, if offered, would have corrected parental deficiencies. *In re Dependency of T.R.*, 108 Wn. App. 149, 163, 29 P.3d 1275 (2001). In other words, "even where the State inexcusably fails to offer a service to a willing parent, which is not the case here, termination is appropriate if the service would not have remedied the parent's deficiencies in the foreseeable future." *Id.* at 164.

**A. Review is Not Warranted Where Substantial Evidence Supports the Conclusion That the Department Timely Offered the Neuropsychological Evaluation and Ms. B. Had Sufficient Time to Comply With Its Recommendations**

Ms. B. argues that the Court of Appeals Commissioner's decision contradicted established case law when he found that the Department provided all reasonably available, necessary services as required under RCW 13.34.180(1)(d), because she did not complete her court-ordered neuropsychological evaluation until November of 2016. Br. of App. at 8-9. This argument fails for three reasons. First, Ms. B. was responsible for a substantial portion of the gap between the completion of the psychological evaluation and completion of the neuropsychological evaluation. Second, following receipt of the neuropsychological evaluation report Ms. B. was able to engage in over fifteen months of services recommended by the neuropsychological evaluation. Third, the Department referred Ms. B. for, and Ms. B. engaged in, mental health treatment during the period between receiving the recommendations of the psychological evaluation and receiving the recommendations of the neuropsychological evaluation.

The Department is required to offer Ms. B. "all necessary services, reasonably available, capable of correcting [her] parental deficiencies within the foreseeable future." RCW 13.34.180(1)(d). "[A] parent's unwillingness or inability to make use of the services provided excuses the

state from offering extra services that might have been helpful.”  
*In re Dependency of Ramquist*, 52 Wn. App. 854, 861, 765 P.2d 30 (1989).

Ms. B. completed the psychological evaluation, and Dr. Whitehill recommended that Ms. B. undergo a neuropsychological evaluation to determine levels of comprehension regarding her parenting. Ex. 77 at 17.

A change in assigned social worker contributed to a slight delay in the referral for the neuropsychological evaluation. RP at 669-70. On, June 22, 2016, the Department referred Ms. B. to Dr. Shepel for a psychological evaluation/neuro evaluation. Ex. 63. On her attorney’s advice, Ms. B. prioritized a visitation with her children and did not attend the scheduled neuropsychological evaluation on June 30 2016. Ex. 87. On July 19, 2016, the Department again referred Ms. B. for a neuropsychological evaluation with Dr. Shepel. Ex. 64.

The Department timely referred Ms. B. for her neuropsychological evaluation. Ms. B.’s decision to prioritize a visit with her children over engaging in the neuropsychological evaluation led to a delay in completion of the service.

The mother had 15 months after receiving the neuropsychological evaluation to benefit from offered mental health services, and she still made insufficient progress. Neither the termination statute, nor appellate court decisions interpreting it, prohibit a termination when the Department

initiated remedial services later than when dependency was established, but over a year before the parent's rights were terminated. In fact, in *In re the Matter of K.M.M.*, 186 Wn.2d 466, 486, 379 P.3d 75 (2016), the Washington State Supreme Court ruled that termination may be appropriate if a remedial service that was not offered to the parent would not remedy the parent's deficiencies in the foreseeable future.

A wait of 15 months from when the neuropsychological evaluation was provided, plus a minimum of another 12 months of parenting education would be necessary before the children could be returned home. RP at 860. This exceeds these children's foreseeable future.

Relying on *In re Termination of S.J.*, 162 Wn. App. 873, 256 P.3d 470 (2011), Ms. B. contends that the delay in accessing the neuropsychological evaluation prevented her from obtaining adequate mental health services. Br. of App. at 8-10. The Commissioner correctly found that the facts in *S.J.* are substantially different from the facts here. Appellant's App. at 10. In *S.J.*, the Department took a sequential approach to the mother's dual parental deficiencies of mental health and substance abuse. *In re S.J.*, 162 Wn. App. at 882. The Department referred the mother for substance abuse treatment before attempting to address the mother's mental health issues. *Id.* at 876. In *S.J.*, the Department did not refer the

mother to mental health services for the first seven months of the dependency case. *Id.* at 882.

Here, Ms. B. engaged in cognitive behavioral therapy and individual therapy, seven months before the neuropsychological evaluation report was issued, and nearly two years before the commencement of the termination trial. Ex. 87. During a lapse in mental health treatment, Ms. B. continued to work with her therapist in the therapist's capacity as an instructor of the Parenting Protection Group. Ex. 86. Ms. Dyrness describes this group as similar to group therapy. RP at 86.

Ms. B. worked with Ms. Dyrness to address anxiety and stress as well as focus, concentration, and organizational ability through this therapy. RP at 75. Ms. Dyrness reviewed Dr. Shepel's report with Ms. B. shortly after it was released, and by December 7, 2016, had devised a plan to incorporate Dr. Shepel's therapeutic recommendations into her treatment plan. Ex. 87. Also, by December 7, 2016, Ms. Dyrness had referred Ms. B. to psychiatric resources to further address Ms. B.'s neuropsychological issues. *Id.*

Another correct difference between this case and that in *S.J.* is that here the Department attended to the mother's mental health needs from the outset of its involvement. The mother engaged in substantial mental health services concurrent with her engagement in parenting education. Ms. B. was

provided mental health treatment services before and during the dependency cases, and had fifteen months from when she completed the neuropsychological evaluation to sufficiently progress in remedial services. Her failure to do so indicates she cannot remedy her deficiencies in the foreseeable future. Not because she was not provided sufficient timely services, but because she lacks the ability to do so.

There is no basis for discretionary review here because the Court of Appeals Commissioner's decision did not conflict with a decision of this Court or of the Court of Appeals when he concluded that substantial evidence supports the juvenile court's finding that the Department satisfied its burden in providing all necessary remedial services.

**B. Review is Not Warranted Where Substantial Evidence Supports the Trial Court's Finding That the Department Provided all Necessary and Reasonably Available Services**

Ms. B. argues that she was unable to participate in dialectical behavioral therapy (DBT) until a month before trial, and that the Court of Appeals Commissioner's decision to the contrary is inconsistent with appellate case law. Br. of App. at 10-13. This argument fails for two reasons. First, substantial evidence supports the finding that DBT was not reasonably available during the course of the dependency; thus, the Court of Appeals Commissioner's conclusion was consistent with appellate case law. Second, in light of the fact that the mother had made insufficient

progress in another form of behavioral therapy provided throughout the course of the dependency cases, the evidence does not indicate that provision of this additional service would have resulted in earlier remediation of her parental deficiencies.

RCW 13.34.180(1)(d) requires the Department to provide “all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future.” RCW 13.34.180(1)(d). A service is necessary if it is “needed to address a condition that precludes reunification of the parent and child.” *In re K.M.M.*, 186 Wn.2d at 480 (quoting *In re Dependency of A.M.M.*, 182 Wn. App. 776, 793, 332 P.3d 500 (2014)). The phrase “necessary services” is modified by two additional statutory terms: necessary services must be “reasonably available” and capable of correcting a parental deficiency “within the foreseeable future.” Thus, even where a service is necessary, the RCW 13.34.180(1)(d) element may still be satisfied if the service is not reasonably available or if the parent is unable to make use of the service to remedy his or her parental deficiencies in the foreseeable future.

The mother argues that DBT was a “court ordered” service. Br. of App. at 11-12. However, none of the court orders order her to participate in DBT. Exs. 20-22, 32, 34-37, 39-42, 46-53, 124-26.

In any case, DBT was not a reasonably available service. Ms. B. was in mental health treatment provided by local mental health provider Behavioral Health Resources (BHR) when Dr. Shepel recommended dialectical behavioral therapy (DBT). RP at 694. The social worker coordinated with this local mental health provider to provide DBT to Ms. B. However, the provider did not have a staff person able to provide DBT. RP at 672, 694.

After determining that DBT was not available at BHR, the social worker contacted all other mental health service providers on the Department's contracted provider list. RP at 672. None of the Department's contracted providers were able to provide this service. *Id.* Ms. B. began to participate in DBT as soon as this therapy was available. RP at 672, 694.

The mother argues that under RCW 13.34.180(1)(d) the term "reasonably available" in RCW 13.34.180(1)(d) only modifies "necessary services," and that the Department must therefore offer or provide all court-ordered services, regardless of whether they are reasonably available or not. Br. of App. at 12. Her argument fails because it ignores basic grammar rules that comport with the legislative intent of the termination statute. This Court applies "traditional rules of grammar in discerning the plain language of a statute." *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010). One of these grammar rules is "the last antecedent rule," under which qualifying or

modifying words and phrases refer to the last antecedent; “the corollary principle that the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one.” *Id.* This rule does not apply when context and language in related statutes indicate contrary legislative intent or if applying the rule would result in an absurd or nonsensical interpretation. *Id.*

Here, in RCW 13.34.180(1)(d) there is no comma between the terms “services ordered” and “necessary services” so the term “reasonably available” modifies both terms. This means that the Department must understandably offer or provide all *reasonably available* court-ordered or necessary services that are capable of correcting parental deficiencies within the foreseeable future. The stated legislative intent underlying the dependency and termination statutes is stated in RCW 13.34.020, and it prioritizes a child’s right to timely permanency over a parent’s procedural rights. This interpretation comports with the legislative intent of the dependency statutes and does not result in absurd results.

Additionally, there is no evidence that earlier provision of DBT would have remedied the mother’s parental deficiencies within the foreseeable future. “Necessary services” are those “needed to address a condition that precludes reunification of the parent and child.” *In re K.M.M.*, 186 Wn.2d at 480 (quoting *In re Dependency of A.M.M.*, 182 Wn. App. 776,

793, 332 P.3d 500 (2014). However, “[e]ven if the Department inexcusably fails to offer all necessary services, termination may still be appropriate if the service would not remedy the parent’s deficiencies within the foreseeable future.” *In re K.M.M.*, 186 Wn.2d at 486.

Ms. B. engaged in cognitive behavioral therapy (CBT) to treat her mental health issues throughout the course of the dependency case. RP at 99. The therapy focused on helping Ms. B. with techniques for reducing her stress and anxiety, and improving her focus, concentration, and organizational ability. RP at 78. Dr. Shepel opined that Ms. B.’s inability to control symptoms of anxiety was her main impairment. RP at 137. Ms. B.’s therapist integrated the recommendations of the neuropsychological evaluation into the treatment she was already providing in order to address Ms. B.’s neuropsychological issues. Ex. 87. Ms. B.’s therapy focused on helping her learn techniques to reduce her anxiety. RP at 86.

There was no evidence that DBT, rather than the therapy that Ms. B. actually received, would have corrected Ms. B.’s parental deficiencies in the foreseeable future. Thus, the Commissioner did not err in concluding that substantial evidence supported the trial court’s finding that the Department satisfied its burden of providing all necessary and reasonably available services to Ms. B.

**C. Review is Not Warranted Where Substantial Evidence Supports the Finding That the Department Offered Parenting Education Specifically Tailored to the Mother's Needs**

Ms. B. argues that the Commissioner's decision contradicted appellate case law by concluding that substantial evidence supports the finding that the Department tailored services to the mother's needs. Br. of App. 14. However, the Court of Appeals decision she relies on does not stand for the proposition she asserts, and merely requires that the Department investigate the parent's impairments and tailor remedial services in light of these impairments, as substantial evidence indicates occurred here.

The mother argues that the Court of Appeals Commissioner's decision here was inconsistent with *In re Matter of I.M.-M.*, 196 Wn. App. 914, 385 P.3d 268 (2016). In *I.M.-M.*, the Court of Appeals concluded that despite indications the mother was developmentally disabled the Department had not investigated this, and thus it had not offered all necessary services. In contrast, here, the Department did investigate Ms. B.'s cognitive ability by referring her to a neuropsychological evaluation, which revealed her ability to learn and understand information is not nearly as limited as that of the mother in *I.M.-M.* See Ex. 78 at 16; RP at 149. Further, unlike in *I.M.-M.*, the Department offered Ms. B. parenting education that implemented the methods of instruction suggested

in the neuropsychological evaluation. RP at 84, 195, 212. In short, *I.M.-M.* requires nothing more than what the Department actually did in this case.

The Commissioner's decision comports with appellate case law, and discretionary review should be denied.

## V. CONCLUSION

There is no basis for discretionary review under RAP 13.4(b). The Department requests that this Court deny discretionary review.

DATED this 11th day of July, 2019.

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**CERTIFICATE OF SERVICE**

I certify that on the date indicated below, I served a true and correct copy of the foregoing ANSWER TO MOTION FOR DISCRETIONARY REVIEW on all parties or their counsel of record as follows:

- US Mail Postage Prepaid
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- Via Facsimile *per agreement*
- Via E-service

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

EXECUTED this 11th day of July, 2019 at Tumwater, WA.



**CHRISTINE HAWKINS**

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**SOCIAL AND HEALTH SERVICES DIVISION, ATTORNEY GENERALS OFFICE**

**July 11, 2019 - 2:45 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 97311-3  
**Appellate Court Case Title:** In re the Termination of Parental Rights to: D.H., S.T., L.L., and T.L.  
**Superior Court Case Number:** 16-7-00211-2

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