No. 937678-1

COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON

State of Washington, DSHS
Respondent

v.

Holly R. Snyder,
Petitioner.

Appeal from the Court of Appeals Division III

PETITION FOR REVIEW

Attorney for Petitioner Holly Snyder:
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. IDENTITY OF PETITIONER

COMES NOW, Holly Snyder, Petitioner, brings this Petition for Review pursuant to RAP 13.4, and respectfully requests this court to accept review of the published Court of Appeals decision terminating review designated in Part II.

II. COURT OF APPEALS DECISION

The above captioned matter was brought before the Court of Appeals on a motion for discretionary review from a Spokane County Superior Court decision upholding the Department of Social and Health Services (DSHS) Board of Appeals dismissal of the Petitioner's hearing request for "lack of jurisdiction" based upon an "untimely hearing request." The Court of Appeals upheld the lower court's rulings in a published decision on June 2, 2016. Appendix A. The Petitioner filed a Motion for Reconsideration and the motion was denied on August 30, 2016. Appendix B.

The Petitioner contends that DSHS failed to comply with RCW 26.44.100 and RCW 26.44.125, which requires increased protection of parent's and children's due process rights. As the legislature expressed a desire to ensure parents and children are advised orally and in writing "of their basic rights" pursuant to the legislative intent.

The Supreme Court should accept review of this decision because it conflicts with Supreme Court decisions, involves a significant question of law under the Constitution of the State of Washington and the United States, involves a question of statutory interpretation, and involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4 (b)(1,3-4).

III. ISSUES PRESENTED FOR REVIEW

A. **Does the Due Process Clause of United State Constitution require actual notice to parents who are the subject of Department of Health and Social Services (DSHS) actions?**

B. **Does statutory construction mandate that RCW 26.44.100 and RCW 26.44.125 be interpreted to require actual notice, not constructive notice, to parents in a DSHS action?**

IV. STATEMENT OF THE CASE

On April 1, 2013, the Petitioner requested an administrative hearing by certified mail which was received by Office if Administrative Hearings (OAH) on April 4, 2013. (Appendix C p. 3). The Department of Social and Health Services (DSHS) filed a Motion to Dismiss for Lack of Jurisdiction alleging that Petitioner did not request the hearing within 30 days of the April 12, 2011 decision. (Appendix C p. 1). A motion hearing was scheduled and heard on August 27, 2013 and the decision to grant

DSHS's motion was handed down on September 10, 2013. (Appendix C p. 1).

The Petitioner then filed a Petition for Review of Initial Decision on September 20, 2013 where DSHS's Motion to Dismiss for Lack of Jurisdiction was upheld. The Petitioner appealed to Spokane Superior Court which upheld the Board of Appeals decision and rendered an opinion on August 08, 2014. The Petitioner filed a Motion for Discretionary Review and. review was granted December 4, 2014. CP 65-67. The Court of Appeals upheld the lower court's rulings in a published decision on June 2, 2016. The Petitioner filed a Motion for Reconsideration and the motion was denied on August 30, 2016. The Petitioner now seeks review from the Washington Supreme Court.

V. ARGUMENT

A. The Washington State Supreme Court should accept review in this case because the Court of Appeals opinion violates Constitutional due process rights as well as the requirements of RCW 26.44.100 and RCW 26.44.125 which establish a necessity of actual notice to parents who are the subject of departmental action.

The Supreme Court should accept review of this decision because the due process and Constitutional implications involve a significant question of law under both the State of Washington and the United States Constitutions. RAP 13.4 (b)(4).

Moreover, a parent being provided actual notice of departmental actions involves an issue of substantial public interest that should be determined by the Washington Supreme Court. RAP 13.4 (b).

The primary due process requirement at issue here is that a deprivation of life, liberty or property must be preceded by notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 657 (1950). In RCW 26.44.100 the legislature used language encouraging notice in writing and orally if feasible of parents' and childrens' rights under the chapter. Ms. Snyder maintains that the language of the statute creates a heightened duty of notice, as the use of the word "orally" makes it clear that mere mailed notice or other constructive notice will not suffice. In fact, this issue has been addressed previously. In *Jones v. Flowers*, Mr. Jones was mailed notice of a tax sale of his real property via certified mail. *Jones v. Flowers*, 547 U.S. 223 (2006). That notice was returned as unclaimed. *Id.* at 224. The Court ultimately held that "when notice of a tax sale is mailed to the owner and returned undelivered, the government must take additional reasonable steps to provide notice before taking the owner's property." *Id.* at 223. This is an almost precisely analogous situation to the case at bar – Ms. Snyder was mailed notice, that notice was returned to DSHS, and DSHS failed to take any additional steps to provide notice.

It is nevertheless Ms. Snyder's position that the legislature has established an even higher duty of DSHS to notify parents and children of their due process rights. RCW 26.44.100 (4) requires that DSHS "shall exercise reasonable, good-faith efforts to ascertain the location of persons entitled to notification under this section." Then, RCW 26.44.125 (5) reads: "The request for an adjudicative proceeding must be filed within thirty calendar days after receiving notice of the agency review determination." The language requires that the receipt of the notice establishes the time frame during which an adjudicative review can be requested. The request for adjudicative review comes within 30 days of receiving the notice of agency review determination. Here, Ms. Snyder had not received notice, nor had DSHS exercised reasonable, good-faith efforts to ascertain her location. DSHS had her telephone number, yet no attempts were made even to contact her via telephone before making the Department's decision final and denying Ms. Snyder her opportunity to be heard. It is important to note as well that the "department review" was merely an internal document review and not an opportunity to present or adjudicate her case.

Ms. Snyder urges the Court to accept review in this case, noting that DSHS did not follow even basic due process requirements and certainly not the heightened requirements provided for in RCW 26.44.100. This is in direct

violation of the State and Federal Constitutions and involves an issue of substantial public interest in being notified of DSHS findings.

B. The Washington State Supreme Court should accept review because the Court of Appeals failed to follow statutory construction which mandates that RCW 26.44.125 (5) be interpreted to require actual notice, not constructive notice, of departmental actions.

The Supreme Court should accept review because the decision of the Court of Appeals conflicts with Supreme Court opinions. Legislative intent must be derived, where possible, from the plain language of the statutes enacted by the legislature, considering the text of the specific provision at issue, the context of the statute in which that provision is found, any related provisions, and the statutory scheme as a whole. *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010).

Here, the text of the provision at issue reads: "If, following agency review, the report remains founded, the person named as the alleged perpetrator in the report may request an adjudicative hearing to request the finding ... The request for an adjudicative proceeding must be filed within thirty calendar days after **receiving** notice of the agency review determination." RCW 26.44.125(5) (emphasis added). Taken alone, the plain language demands actual receipt of the notice before the thirty day clock begins to tick. This position is bolstered by the language used in another subsection of the statute. In RCW 26.44.125(2), the language reads: "Within

thirty calendar days after the department has **notified** the alleged perpetrator ... he or she may request that the department review the finding." (emphasis added).

The statutes here are not ambiguous. "Notified" and "receiving" are clear and specific terms that are utilized to denote what event triggers the thirty day clock for a person – here, Ms. Snyder – to request Department review or adjudicative hearing. Furthermore, "statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Davis v. Department of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). The Courts "may not delete language from an unambiguous statute." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Here, the Court cannot replace "received" with "notified" in RCW 125.44.125(5), because that would be not simply ignoring the language the legislature used in drafting the statute, but actively changing it, which pursuant to *J.P.* and *Davis*, is not allowed.

Ms. Snyder urges the Court to accept review in her case, to interpret the plain language of this unambiguous statute, which requires actual notice rather than constructive notice consistent with U.S. Supreme Court holdings previously noted.

VI. CONCLUSION

The Petitioner, Holly R. Snyder, respectfully requests the court accept review of COA#: 32748-III, holding that the 30-day appeal period commences on constructive notice, and not actual notice, of DSHS's determination letter. The plain language of the statute supports that the 30-day appeal period commences only upon actual notice in order to protect parents and children from a denial of due process in these matters. Due process considerations support the necessity of actual notice rather than constructive notice because of the nature of the rights lost by government action.

Respectfully submitted this 11th day of October, 2016.

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Appendix A

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BOARD OF APPEALS

In Re:	)	Docket No. 04-2013-L-0617
	)	
HOLLY SNYDER (RAY)	)	REVIEW DECISION AND FINAL ORDER
	)	
Appellant	)	Children's Administration – CPS Review

I. NATURE OF ACTION

1. Administrative Law Judge Robert M. Murphy received oral argument regarding a Department *Motion to Dismiss for Lack of Jurisdiction* on August 27, 2013, and mailed an *Initial Order* on September 10, 2013. In this ruling, the Administrative Law Judge (ALJ) determined that the Appellant had failed to timely request an adjudicative procedure. The ALJ granted the Department's *Motion* and dismissed the Appellant's hearing request.

2. The Appellant filed a *Petition for Review of Initial Decision* on September 20, 2013.

II. FINDINGS OF FACT

The undersigned has reviewed the record of the hearing, the documents admitted as exhibits, the *Initial Order*, and the Appellant's *Petition for Review*. The following necessary findings of fact were relevant and supported by substantial evidence in the record.

1. The Appellant is a 25-year-old female.

2. On **March 19, 2010**, the Department of Social & Health Services Children's Administration/Child Protective Services (Department) received a report alleging that the Appellant had abused or neglected a child in her care.

3. On **March 21, 2011**, the Department sent to the Appellant, by certified mail, a letter advising her that the allegations as to "Faith and Natalie only" were "Founded" for "negligent treatment or maltreatment" of a child.

4. Specifically, the letter referenced an investigation denominated, "Intake number

2214260." A brief description (who, what, and where) of the investigation that led to the finding reads:

> During the course of the investigation, the mother admitted that she used a towel to lock the older children in their bedroom at night. Although the mother states that she did so in order to protect the child from getting out of bed and injuring herself in the apartment or wandering out of the apartment, this action created a serious risk of substantial harm to the child, especially in case of an emergency.

5. The Appellant received and signed for the letter on **March 31, 2011,** at 9:09 A.M. The Appellant received the letter at her address at 412 W. Longfellow in Spokane, Washington.

6. The letter further advised the Appellant that she could request an internal review of the Founded findings of child neglect by filling out a "Review Request Form" (RRF).

7. The Appellant formally requested an internal review by completing the RRF on **April 6, 2011.** The Department received the RRF on **April 8, 2011.**

8. The Appellant requested that notice of the outcome of the internal review be mailed to her Longfellow address.

9. Thereafter, the Appellant shortly left the Longfellow address and moved in with her mother on Cleveland Street in Spokane. The Appellant did not leave a change of address with the United States Postal Service (USPS). The Appellant did not advise the Department of her change of address.

10. The Department acknowledged receipt of the RRF. An internal review concluded that the finding of neglect was correct. The Department sent the review outcome to the Appellant by certified mail at the Longfellow address on **April 12, 2011.** This notice advised the Appellant that she could challenge the determination by sending a written request for administrative hearing to the Office of Administrative Hearings (OAH) within 30 calendar days from the date she received the letter. The notice cited RCW 26.44.125.

11. The USPS attempted, unsuccessfully, to deliver the review notice to Appellant on **April 14, 2011, and April 29, 2011.** The USPS returned the letter to the Department on

May 4, 2011. The returned envelope only reads "Return to Sender" it did not state that the addressee was no longer at this address or had moved.

12. The Department did not attempt to further contact the Appellant via personal service, regular mail, or by telephone.

13. The Department did not know that the Appellant had moved from the Longfellow address.

14. After the Appellant moved, she continued to return to the Longfellow address to see if any mail had been received. She did not receive any mail from the new occupants or the owner of the dwelling.

15. The Appellant did not receive actual notice of the review determination.

16. Approximately two years later, the Appellant began an internship at Spokane Community College. She was dismissed from the program during her internship, because there had been a founded finding against her for child neglect.

17. The Appellant contacted attorney, Douglas J Phelps. Attorney Phelps had the Appellant request a copy of her file from the Department. Upon review of the file, the Appellant learned of the Department's decision to uphold the founded finding.

18. On **April 1, 2013**, the Appellant requested an administrative hearing by certified mail, pursuant to RCW 26.44.125. OAH received the request in Olympia on **April 4, 2013.**

III. CONCLUSIONS OF LAW

1. The petition for review was timely filed and is otherwise proper.[1] Jurisdiction exists to review the *Initial Order* and to enter the final agency order.[2]

2. ALJs and Review Judges must first apply the Department of Social and Health Services (DSHS) rules adopted in the Washington Administrative Code (WAC). If no DSHS rule applies, the ALJ or Review Judge must decide the issue according to the best legal

[1] WAC 388-02-0560 through -0585.
[2] WAC 388-02-0215, -0530(2), and -0570.

authority and reasoning available, including federal and Washington State constitutions, statutes, regulations, and court decisions.[3]

3. In an adjudicative proceeding regarding a founded CPS report of negligent treatment or maltreatment of a child, the undersigned Review Judge has the same decision-making authority as the ALJ to decide and enter the *Final Order,* in the same way as if the undersigned had presided over the hearing.[4] This includes the authority to make credibility determinations and to weigh the evidence. Because the ALJ is directed to decide the issues *de novo* (as new), the undersigned has also decided the issues *de novo.* In reviewing the Findings of Fact, the undersigned has given due regard to the ALJ's opportunity to observe the witnesses, but has otherwise independently decided the case.[5] The undersigned reviewing officer does not have the same relationship to the presiding officer as an Appellate Court Judge has to a Trial Court Judge; and the case law addressing that judicial relationship does not apply in the administrative hearings forum.

4. The Washington Administrative Procedure Act directs Review Judges to personally consider the entire hearing record.[6] Consequently, the undersigned has considered the adequacy, appropriateness, and legal correctness of all initial Findings of Facts and Conclusions of Law, regardless of whether any party has asked that they be reviewed.

5. An ALJ has jurisdiction to conduct a hearing only when granted such authority by law. Every decision maker must first determine whether he/she has jurisdiction to decide a matter before proceeding to hear and render a decision on the merits of a case. Jurisdiction cannot be waived and can be raised at any time.[7] "Even in the absence of a contest, where there is a question as to jurisdiction, [the] court has a duty to itself raise the issue."[8] Without

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[3] WAC 388-02-0220.
[4] WAC 388-02-0217(3).
[5] WAC 388-02-0600, effective March 3, 2011.
[6] RCW 34.05.464(5).
[7] *J.A. v. Dep't of Soc. & Health Servs.*, 120 Wn. App. 654, 657, 86 P.3d 202 (2004).
[8] *Riley v. Sturdevant*, 12 Wn. App. 808, 810, 532 P.2d 640 (1975).

jurisdiction, a court or administrative tribunal may do nothing other than enter an order of dismissal.[9]

6. Any person named as an alleged perpetrator in a founded CPS report made on or after October 1, 1998, may challenge that finding.[10] CPS has the duty to notify the alleged perpetrator in writing of any such child abuse or neglect finding,[11] at least in part so the alleged perpetrator can challenge that finding. WAC 388-15-069(1), which has two sentences, authorizes two separate and distinct methods by which CPS may notify alleged perpetrators of a child abuse or neglect finding entered against them.[12]

7. WAC 388-15-069(1) states as follows:

> CPS notifies the alleged perpetrator of the finding by sending the CPS finding notice via certified mail, return receipt requested, to the last known address. CPS must make a reasonable, good faith effort to determine the last known address or location of the alleged perpetrator.

8. The first sentence in WAC 388-15-069(1) establishes one notification method CPS may use, which is to mail its notice to the alleged perpetrator by certified mail, return receipt requested, to the alleged perpetrator's last known address. If CPS is successful in getting its notice to the alleged perpetrator via this method, then CPS can prove that fact by producing a postal certified mail receipt signed by the alleged perpetrator acknowledging that she received that notice.[13] Proof of service via this certified mail, return receipt requested method, is crucial for the Department as well as for the alleged perpetrator because the alleged perpetrator's 20-day period in which to appeal the CPS finding begins to run with the date she

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[9] *Inland Foundry Co. v. Spokane County Air Pollution Control Auth.*, 98 Wn. App 121, 124, 989 P.2d 102 (1999).
[10] WAC 388-15-081.
[11] WAC 388-15-065.
[12] WAC 388-15-069(2) authorizes another method, personal service, which is irrelevant to this proceeding: "In cases where certified mailing may not be either possible or advisable, the CPS social worker may personally deliver or have served the CPS finding notice to the alleged perpetrator."
[13] WAC 388-02-0065, How does a party prove service, states: "A party may prove service by providing any of the following: (1) A sworn statement; (2) **The certified mail receipt signed by the recipient**; (3) An affidavit or certificate of mailing; (4) A signed receipt from the person who accepted the commercial delivery service or legal messenger service package; or (5) Proof of fax transmission.". (Emphasis added).

receives that notice.[14] Because the alleged perpetrator's appeal period is specifically tied to the date she "receives the CPS finding notice," the undersigned concludes that perfected service under the first sentence of WAC 388-15-069(1) requires that the alleged perpetrator actually receive CPS' notice.

9. Because the Department cannot produce a certified mail receipt proving that the CPS finding notice was actually received by the Appellant, the Department was not successful in serving its finding notice to the Appellant pursuant to the certified mail, return receipt method authorized under the first sentence in WAC 388-15-069(1). The Appellant's 20-day period in which to appeal that finding under WAC 388-15-085(2) never began to run. This analysis is correct as far as it goes, but it does not go far enough. Deciding whether the Appellant received actual notice is not enough.

10. The second sentence in WAC 388-15-069(1) authorizes a second method the Department may use to get CPS' notice to an alleged perpetrator. This second method requires the Department to make a "reasonable, good faith effort" to get CPS' notice to the alleged perpetrator. This second-sentence method does not require that the Appellant actually receive the CPS notice. This second-sentence, good-faith-effort service method is separate and distinct from the first-sentence, actual-receipt-of-notice service method because there are two separate and distinct time periods during which the alleged perpetrator may appeal the CPS notice.

11. An alleged perpetrator has 20 days[15] from the date she actually receives the CPS notice, pursuant to the first sentence in WAC 388-15-069(1), to appeal it under

[14] WAC 388-15-085, Can an alleged perpetrator challenge a CPS finding of child abuse or neglect, states as follows: "(1) In order to challenge a founded CPS finding, the alleged perpetrator must make a written request for CPS to review the founded CPS finding of child abuse or neglect. The CPS finding notice must provide the information regarding all steps necessary to request a review. (2) The request must be provided to the same CPS office that sent the CPS finding notice **within twenty calendar days from the date the alleged perpetrator receives the CPS finding notice** (RCW 26.44.125)." (Emphasis added).

[15] WAC 388-15-089, What happens if the alleged perpetrator does not request CPS to review the founded CPS finding within twenty days, states as follows: "(1) If the alleged perpetrator does not submit a written request within twenty calendar days for CPS to review the founded CPS finding, no further review or challenge of the finding may occur."

WAC 388-15-085(2), but she has 30 days[16] to appeal it under WAC 388-15-089(2) if the Department has only made a reasonable, good faith effort to get the CPS notice to her, under the second sentence in WAC 388-15-069(1). Thus, while the Appellant's 20-day appeal period under WAC 388-15-085(2) never began to run, her 30-day period under WAC 388-15-089(2), did begin running and ran out before the Appellant filed her request for an administrative hearing on April 4, 2013, because the Department did in fact use reasonable, good faith efforts to serve her with the CPS notice.

12. These two different methods of service of a notice to an alleged perpetrator of child abuse or neglect operate concurrently. That is, if the Department is able to actually get the CPS notice into the hands of the alleged perpetrator by mailing it by certified mail, return receipt, then the Department has used the WAC 388-15-069(1) first-sentence method. However, if the Department attempts to get its notice into the hands of the alleged perpetrator by mailing it certified mail, return receipt requested, but fails, then that mailing by certified mail, return receipt requested can turn into good service under the WAC 388-15-069(1) second-sentence method if the Department's mailing efforts constitute a reasonable, good faith effort at putting the notice into the alleged perpetrator's hands. In this case, the Department was not able to serve the Appellant under the first- sentence method, but it was able to do so under the second-sentence method because the steps it took to get its notice into the Appellant's hands were both reasonable and undertaken in good faith.

13. The undersigned has concluded that the Department made reasonable, good faith efforts at getting its CPS notice into the Appellant's hands because the notice was sent to the Appellant's address of record. Furthermore, this was the same address provided by the Appellant on her Review Request Form less than one week earlier, and the Appellant did not change her mailing address with the Department or the USPS.

[16] (2) If the department has exercised reasonable, good faith efforts to provide notice of the CPS finding to the alleged perpetrator, the alleged perpetrator shall not have further opportunity to request a review of the finding beyond thirty days from the time the notice was sent.

14. The above analysis of the second sentence of WAC 388-15-069(1), wherein it is concluded that actual receipt of the CPS notice is not required before the 30-day period in which to appeal the notice under WAC 388-15-089(2) begins running where the Department has made reasonable, good faith efforts to serve the notice, is consistent with published case law in Washington State which establishes that a person who refuses to accept certified mail, return receipt requested, has constructively refused to accept notice.[17] In this matter, the U.S. Postal Service attempted delivery of the finding of negligent treatment or maltreatment of a child to the Appellant's address of record, on April 14, 2011, and on April 29, 2011. The Appellant failed to respond to each of these attempts and therefore constructively refused to accept the Department's notice of a founded finding of negligent treatment or maltreatment of a child.

15. The above analysis of the second sentence of WAC 388-15-069(1) is also consistent with the statutory scheme set out in chapter 24.44 RCW, wherein the Department's foremost obligation is the protection of children and where its obligation to serve alleged perpetrators with notice of its actions is of lesser priority. For example, the Department is required under RCW 26.44.115 only to take "reasonable steps" to notify parents that their children have been taken into protective custody; the Department is required under RCW 26.44.120 only to make "reasonable efforts" to notify non-custodial parents of the same information; and the Department is required under RCW 26.44.030 only to make "reasonable efforts" to identify the person alleging that child abuse or neglect has occurred. Notwithstanding the published case law's preference for merits adjudication versus default orders under Civil Rule 60(b), the Department's regulations do not require actual service of the CPS notice in all instances and the undersigned must apply those regulations as the first

[17] *City of Seattle v. Foley*, 56 Wn. App. 485, 784 P.2d (1990); *McLean v. McLean*, 132 Wn.2d 301, 937 P.2d 602 (1997); and *State v. Baker*, 49 Wn. App. 778, 845 P.2d 1335 (1987).

source of law.[18]

16. As stated above, an alleged perpetrator must request a review of a finding of abuse or neglect in writing, within twenty calendar days after receiving notice of the finding from the Department, or within thirty calendar days after the Department has made reasonable, good faith efforts at getting its CPS notice into the Appellant's hands. If a timely request for review is not made, the alleged perpetrator may not further challenge the finding and shall have no right to agency review or to an adjudicative hearing or judicial review of the finding.[19] This Appellant failed to timely request review of the finding of negligent treatment or maltreatment of a child after constructively refusing certified mail on April 14, 2011, and on April 29, 2011. Because this Appellant's request for hearing was not received by the Office of Administrative Hearings until after the regulatory and statutory time period for filing such a request, the founded incident of negligent treatment or maltreatment of a child became final and the ALJ lacked jurisdiction to hear the case on its merits. Therefore, the ALJ correctly dismissed this matter due to lack of subject matter jurisdiction.[20]

17. The undersigned has considered the *Initial Order*, the Appellant's *Petition for Review*, and the entire hearing record. The Initial Findings of Facts accurately reflected the evidence presented on this hearing record and they are adopted as findings in this decision, pursuant to the clarifying modifications outlined above. The initial Conclusions of Law cited and applied the governing law correctly and they are adopted and incorporated as conclusions for this decision.[21] The procedures and time limits for seeking reconsideration or judicial review of this decision are in the attached statement.

[18] WAC 388-02-0220.
[19] RCW 26.44.125.
[20] *Inland Foundry Co. v. Spokane County Air Pollution Control Auth.*, 98 Wn. App 121, 124, 989 P.2d 102 (1999).
[21] RCW 34.05.464(8).

IV. DECISION AND ORDER

1. There was no jurisdiction for the Administrative Law Judge to hold a hearing on the merits of this matter, because the Appellant failed to timely request an adjudicative hearing to contest the Department's founded finding of negligent treatment or maltreatment of a child.

2. The *Initial Order* on the Department's *Motion for Dismissal* is **affirmed**.

Mailed on the 5th *day of November, 2013.*

THOMAS L. STURGES
Review Judge/Board of Appeals

Attached: Reconsideration/Judicial Review Information

Copies have been sent to: Holly Snyder (Ray), Appellant
Douglas Phelps, Appellant's Representative
Mareen Bartlett, Department's Representative
Sharon Gilbert, Program Administrator, MS: 45710
Robert M. Murphy, ALJ, Spokane OAH

Appendix B

FILED
June 2, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. HOLLY E. SNYDER, Appellant.	)	No. 32758-2-III PUBLISHED OPINION

LAWRENCE-BERREY, J. — Holly Snyder appeals the superior court's order affirming the dismissal of her administrative appeal for lack of jurisdiction. The Office of Administrative Hearings (OAH) dismissed Ms. Snyder's April 2013 administrative appeal because Ms. Snyder failed to appeal the Department of Social and Health Services's (DSHS) April 2011 internal review determination within 30 days of receiving constructive notice of the determination. Ms. Snyder argues the legislature enacted a heightened due process standard in chapter 26.44 RCW, and this standard requires her to receive actual notice of DSHS's internal review determination. She further argues that because she did not receive actual notice of DSHS's determination, her appeal was timely. We hold the 30-day appeal period commences on actual or constructive notice of

DSHS's determination letter, and because Ms. Snyder received constructive notice of the determination letter in mid-June 2011, her April 2013 appeal was untimely and properly dismissed for lack of administrative jurisdiction.

FACTS

On March 19, 2010, Child Protective Services (CPS) received a report alleging that Ms. Snyder had abused or neglected children in her care. CPS investigated the report and found that the alleged abuse or neglect occurred. On March 21, 2011, DSHS sent Ms. Snyder a certified letter to her house on Longfellow Avenue informing her that the allegations of negligent treatment or mistreatment were founded. The basis of the finding was Ms. Snyder's admission that she used a towel to lock the older children in their bedroom at night, purportedly to prevent them from wandering in or out of the apartment and injuring themselves. The letter also stated that Ms. Snyder could request an internal management review of the CPS investigator's founded findings, and the internal review would be concluded about 60 days after the request.

Ms. Snyder, with the assistance of her mother, completed the review request form on April 6, 2011. Ms. Snyder testified that she recalls her mother assisting her because she was in the process of moving from her Longfellow address to her parents' house on Cleveland Street. Despite knowing that she would soon move, Ms. Snyder indicated on

the form that DSHS should mail its review decision to her Longfellow address. Ms. Snyder mailed the review request form to DSHS, and DSHS received it on April 8.

Shortly thereafter, Ms. Snyder moved out of her house on Longfellow Avenue and into her parents' house. Ms. Snyder never told DSHS that she moved, nor did she promptly complete a change of address form with the United States Postal Service (USPS). Ms. Snyder explained that she thought she had until the end of the month to move out, and did not anticipate a problem continuing to receive mail for the next few weeks at the Longfellow address.

DSHS management reviewed its investigator's finding of negligent treatment and concluded that the finding was correct. DSHS sent the review outcome to Ms. Snyder by certified mail at the Longfellow address on April 12, 2011. The letter explained that the founded finding was correct. The letter also explained that Ms. Snyder could challenge the finding by requesting an administrative hearing, and that Ms. Snyder needed to send a written request to the OAH within 30 calendar days or she would have no further right to challenge the CPS finding.

Ms. Snyder's assumption that she could receive mail at the Longfellow house for the remainder of April proved wrong. Shortly after she moved out, her former landlord's sister moved in. Ms. Snyder testified about whether she returned to the Longfellow

address to check on her mail. Her testimony was unclear. She denied returning to the address to check on her mail, but also testified that her former landlord's sister said that all mail was returned to sender.

USPS attempted to deliver the April 12 review outcome letter to the Longfellow house on April 14, April 21, and April 29. On May 4, USPS returned the letter to DSHS stamped "return to sender." Admin. Record (AR) at 49. DSHS had Ms. Snyder's telephone number and her parents' telephone number, but made no further attempts to contact Ms. Snyder. By the end of April, Ms. Snyder completed a change of address form with USPS.

Two years later, Ms. Snyder applied for a nursing assistant internship, and the internship program denied her because of the prior CPS finding. Ms. Snyder asked DSHS for a copy of her DSHS file and discovered that DSHS management had upheld its investigator's original finding. Ms. Snyder then requested an administrative hearing on April 1, 2013. DSHS moved to dismiss Ms. Snyder's request, arguing that the OAH lacked jurisdiction to give Ms. Snyder a hearing on the merits, given that she did not request a hearing within the 30-day time frame as required by RCW 26.44.125(5) and WAC 388-15-105(3). At the hearing, Ms. Snyder argued that constructive notice of the outcome of the review determination was insufficient, and that RCW 26.44.100 and

RCW 26.44.125 require the alleged perpetrator to receive actual notice before the 30-day appeal period commences. The administrative law judge (ALJ) asked Ms. Snyder if she ever called DSHS to determine whether it ever responded to her review request. Ms. Snyder responded, "I did not, sir. . . . I really didn't know what was going on." Clerk's Papers at 36.

On September 10, 2013, the ALJ issued a decision granting DSHS's motion to dismiss for lack of jurisdiction. The ALJ found that it was reasonable for DSHS to attempt to serve Ms. Snyder at the address she had provided shortly before it mailed the review determination to her. Ms. Snyder appealed the ALJ's order to the Board of Appeals (BOA). The BOA held that the ALJ properly dismissed Ms. Snyder's request, given that Ms. Snyder failed to request an adjudicative hearing within the 30-day regulatory and statutory appeal period. The BOA reasoned that DSHS made a reasonable, good faith effort to serve Ms. Snyder, and Ms. Snyder had constructively refused to accept notice. Ms. Snyder sought judicial review in the superior court. The superior court affirmed the BOA's final order. Ms. Snyder appeals to this court.

ANALYSIS

1. *Standard of Review*

The Washington Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of agency actions. *Ryan v. Dep't of Soc. & Health Servs.*, 171 Wn. App. 454, 465, 287 P.3d 629 (2012). When reviewing an agency decision, this court applies the standards of chapter 34.05 RCW directly to the agency's record without regard to the superior court decision. *Goldsmith v. Dep't of Soc. & Health Servs.*, 169 Wn. App. 573, 584, 280 P.3d 1173 (2012).

Under the APA, Ms. Snyder must demonstrate the invalidity of the agency's actions. RCW 34.05.570(1)(a). The APA provides nine grounds for invalidating an agency decision. Ms. Snyder based her appeal to the superior court on two: the BOA "erroneously interpreted or applied the law," RCW 34.05.570(3)(d), and the BOA's decision was "in violation of constitutional provisions on its face or as applied." RCW 34.05.570(3)(a). On appeal from the superior court, Ms. Snyder confines her argument to one of statutory construction.

This court reviews the BOA's legal determinations de novo under an error of law standard. *Ryan*, 171 Wn. App. at 465. "Where a statute is within the agency's special expertise, the agency's interpretation is accorded great weight, provided that the statute is

ambiguous." *Id.* However, it is ultimately this court that determines the meaning and purpose of a statute, and this court may substitute its own interpretation of the law when the BOA's interpretation conflicts with the statute. *Id.*

2. *Whether RCW 26.44.125(5)'s "receiving notice" requirement is met by constructive receipt of DSHS's review determination*

Ms. Snyder argues that the BOA erred in dismissing her case and claims that language in RCW 26.44.100 and RCW 26.44.125 supports a heightened due process standard that requires her actual receipt of DSHS's determination letter.

The fundamental goal of statutory interpretation is to discern and implement the legislature's intent. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). When interpreting a statute, courts look first to the statute's plain meaning. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). "Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007).

When DSHS receives a report concerning a possible occurrence of child abuse or neglect, it must investigate the allegation. RCW 26.44.050. Once DSHS completes its investigation, it must notify the alleged perpetrator of its finding. RCW 26.44.100(2). When DSHS seeks to notify alleged perpetrators that the allegations are founded *at this*

stage of the process, DSHS must "exercise reasonable, good-faith efforts to ascertain the location of persons entitled to notification." RCW 26.44.100(4); *accord* WAC 388-15-069(1). The alleged perpetrator then has 30 days to request a DSHS internal management review. RCW 26.44.125(1)-(2); WAC 388-15-085(2).

After DSHS receives the alleged perpetrator's request for review, DSHS management must review its investigator's finding within 30 days. RCW 26.44.125(4); WAC 388-15-093(3). "Upon completion of the review, the department shall notify the alleged perpetrator *in writing* of the agency's determination. *The notification must be sent by certified mail, return receipt requested, to the person's last known address.*" RCW 26.44.125(4) (emphasis added); *accord* WAC 388-15-097. If the DSHS management review does not change its investigator's finding,

> the person named as the alleged perpetrator in the report may request an adjudicative hearing to contest the finding. . . . The request for an adjudicative proceeding must be filed within thirty calendar days *after receiving notice of the agency review determination.* If a request for an adjudicative proceeding is not made as provided in this subsection, the alleged perpetrator may not further challenge the finding and shall have no right to agency review or to an adjudicative hearing or judicial review of the finding.

RCW 26.44.125(5) (emphasis added); *accord* WAC 388-15-105.

Here, DSHS sent its internal review determination to Ms. Snyder in writing, as RCW 26.44.125(4) and WAC 388-15-097 expressly require. DSHS sent its determination

by certified mail, return receipt requested, to the address Ms. Snyder provided on her review request form just one week earlier, as the statute and regulation both required DSHS to do.

Nevertheless, Ms. Snyder argues that RCW 26.44.125(5), which gave Ms. Snyder 30 days to request an administrative hearing "after receiving notice of the agency review determination," means that the time period to request a hearing was tolled until she received *actual* notice. She bases her argument on language contained in RCW 26.44.100.

RCW 26.44.100 declares a legislative purpose and general notification procedures that DSHS is required to follow when investigating child abuse allegations against a parent, guardian, or legal custodian of a child. Subsections (2) through (4) of RCW 26.44.100 seek to ensure that the parent, guardian, or legal custodian is informed of his or her due process rights from when the investigation commences through the time he or she seeks review of a founded report. However, Ms. Snyder received actual notification of her due process rights from commencement of the investigation through the time she sought review of the founded finding. Ms. Snyder's concern is with DSHS's

communication of its review determination, which occurred *after* she sought review of the founded finding. RCW 26.44.100(2)-(4) is therefore not pertinent.[1]

Nevertheless, we do agree with Ms. Snyder that the legislative purpose contained in RCW 26.44.100(1) is pertinent. RCW 26.44.100 provides:

> **Information about rights—Legislative purpose— Notification of investigation, report, and findings.** (1) The legislature finds parents and children often are not aware of their due process rights when agencies are investigating allegations of child abuse and neglect. The legislature reaffirms that all citizens, including parents, shall be afforded due process, that protection of children remains the priority of the legislature, and that this protection includes protecting the family unit from unnecessary disruption. To facilitate this goal, *the legislature wishes to ensure that parents and children be advised in writing and orally, if feasible, of their basic rights and other specific information as set forth in this chapter*, provided that nothing contained in this chapter shall cause any delay in protective custody action.

(Emphasis added.) The italicized language in the above quote requires us to construe the act to protect the due process rights of parents and those in loco parentis. We, however, reject Ms. Snyder's argument that the only method of protecting these rights is to imply rights not explicitly given by the statute.

---

[1] For those notifications subject to RCW 26.44.100(4), explicit language therein supports a requirement for DSHS to do more than send notices by certified mail whenever there is reason for DSHS to believe that a last known address is not current. This requirement is not onerous in the age of cellular phones, texting, and e-mail.

Ms. Snyder's argument however exposes the ambiguity created when the legislature specifies a method of written notice, later refers to "receipt" of the notice, and then fails to address the situation created when the person does not actually receive the notice. *See State v. Vahl*, 56 Wn. App. 603, 607-08, 784 P.2d 1280 (1990). This exact situation happened in *Vahl*. In that case, the State charged Patricia Vahl with driving while adjudged a habitual traffic offender. *Id.* at 604. Ms. Vahl moved to dismiss, claiming she never received actual notice that the Department of Licensing (DOL) revoked her driver's license. *Id.* at 605. The controlling statute, former RCW 46.65.065(1) (1979), provided that

> [w]henever a person's driving record, as maintained by the department, brings him or her within the definition of an [sic] habitual traffic offender, as defined in RCW 46.65.020, the department shall forthwith notify such person of the revocation in writing *by certified mail at his or her address of record as maintained by the department*. . . . The person *upon receiving such notice* may, in writing and within ten days therefrom request a formal hearing: *Provided,* That if such a request is not made with the prescribed time the right to a hearing shall be deemed to have been waived . . . .

(Emphasis added.)

The State argued that "if the Legislature intended actual notice, it would have explicitly stated notice is ineffective unless received"—just as DSHS argues in this case. *Vahl*, 56 Wn. App. at 607. Ms. Vahl argued—just as Ms. Snyder argues here—that if the legislature intended notice to be sufficient regardless of whether the person actually

received it, the legislature would have expressly said so, and also would not have used the word "received." *Id.*

The *Vahl* court agreed with the State and held that constructive notice was sufficient, and adopted the constructive notice standards as set forth in *Black's Law Dictionary*. *Id.* at 608-09. Those standards are satisfied either:

> (a) Where there exists actual notice of matter, to which equity has added constructive notice of facts, which an inquiry after such matter would have elicited; [or] (b) where there has been a designed abstinence from inquiry for the very purpose of escaping notice.

Id. at 609 (emphasis omitted) (quoting BLACK'S LAW DICTIONARY 957 (5th ed. 1979)).

In adopting a constructive notice standard, the *Vahl* court emphasized that the legislature would not have intended to require actual receipt of notice by persons who disrespect the law, such as habitual traffic offenders, who might thwart actual service by refusing to sign for certified mail. *Id.* at 608. The *Vahl* court held that Ms. Vahl had constructive notice of her license revocation, reasoning that there was no evidence that she lived anywhere other than where the DOL sent the notice, she had previously received two citations for driving with a suspended license, and she had also signed for two certified letters from the DOL. *Id.* at 609. Therefore, "she had actual notice of matters to which the law may equitably add constructive notice of facts which would have been discovered upon reasonable inquiry." *Id.*; *see also City of Seattle v. Foley*, 56 Wn. App.

485, 488, 784 P.2d 176 (1990) (holding that Ronald Foley received inquiry notice that his license was revoked, satisfying the ambiguously worded statute, because the arresting officer told Mr. Foley that refusal to submit to a breath test would result in revocation, the officer took Mr. Foley's license and gave him a temporary one, and the State sent notice to Mr. Foley's last known address).

Although *Vahl* justified a constructive notice standard on the basis of the lawless nature of habitual traffic offenders who might intentionally frustrate an actual notice standard, we adopt a constructive notice standard for RCW 26.44.125(5) for a slightly different reason. Here, the process RCW 26.44.125 outlines makes actual receipt of a properly addressed DSHS review determination all but assured, except in those situations where the recipient knowingly refuses to receive the certified mail. This is because DSHS completes its internal management review quickly and sends the review determination by certified mail to the address the alleged perpetrator has recently specified.[2] If DSHS does not send notice of its review determination to the correct address, the requirement of constructive notice is not met.

[2] DSHS's initial letter, which advised Ms. Snyder of her right to request an internal review, explained that DSHS management would send Ms. Snyder its internal review determination in "about 60 days" of its receipt of her request for a review. AR at 41. In 2012, the legislature amended RCW 26.44.125(4) to specify the precise time permitted for internal review—30 days. *See* LAWS OF 2012, ch. 259, § 11(4).

Here, Ms. Snyder knew that the allegation that she had neglected children in her care was founded. She knew that DSHS would mail her its review determination within about 60 days of receiving her April 6, 2011 request for a review. She also knew DSHS would mail its review determination to her Longfellow address, given that she specifically instructed DSHS to mail it there. Finally, the woman who replaced Ms. Snyder in the Longfellow house told Ms. Snyder that mail had come for her, and the mail had been returned to sender. Having actual knowledge of all of this, it is equitable to require Ms. Snyder to have called DSHS by mid-June 2011—about 60 days after she mailed her review request form—to inquire about her request, and to impute knowledge of what this inquiry would have elicited. For these reasons, Ms. Snyder had constructive notice around mid-June 2011 that DSHS had upheld its investigator's finding. Her April 2013 administrative hearing appeal was therefore untimely.

Affirmed.

Lawrence-Berrey, J.

WE CONCUR:

Fearing, C.J.

Korsmo, J.

Appendix C

Renee S. Townsley
Clerk/Administrator

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The Court of Appeals
of the
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Division III

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August 30, 2016

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CASE # 327582
Holly E. Snyder v. State of Washington, DSHS
SPOKANE COUNTY SUPERIOR COURT No. 132048943

Counsel:

Enclosed is a copy of the Order Denying Motion for Reconsideration and Granting Leave to File Memorandum of Amicus Curiae in Support of Motion for Reconsideration. A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review, an original and a copy of the Petition for Review in this Court within 30 days after the Order Denying Motion for Reconsideration is filed (may be filed by electronic facsimile transmission). RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:pb
Enc.

FILED
August 30, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 32758-2-III**
	)	
Respondent,	)	**ORDER DENYING**
	)	**MOTION FOR**
v.	)	**RECONSIDERATION AND**
	)	**GRANTING LEAVE TO FILE**
HOLLY E. SNYDER,	)	**MEMORANDUM OF AMICUS**
	)	**CURIAE IN SUPPORT OF**
Appellant.	)	**MOTION FOR**
	)	**RECONSIDERATION**

The court has considered Northwest Justice Project's motion for leave to file memorandum of amicus curiae in support of motion for reconsideration. The court has also considered appellant's motion for reconsideration. The court is of the opinion that Northwest Justice Project's motion for leave to file memorandum of amicus curiae in support of motion for reconsideration should be granted. The court is of the opinion that appellant's motion for reconsideration should be denied. Therefore,

IT IS ORDERED that the Northwest Justice Project's motion for leave to file memorandum of amicus curiae in support of motion for reconsideration is granted.

IT IS FURTHER ORDERED that appellant's motion for reconsideration of this court's decision of June 2, 2016, is denied.

PANEL: Judges Lawrence-Berrey, Korsmo and Fearing

FOR THE COURT:

Lawrence-Berrey

ROBERT LAWRENCE-BERREY
ACTING CHIEF JUDGE

ORIGINAL

COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DSHS Respondent	)	Cause No. 937678-1
Vs.	)	
HOLLY SNYDER, Appellant,	)	DECLARATION OF SERVICE

I, Amber Henry, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as an attorney in the office of Phelps & Associates, PS, served in the manner indicated below, an original of the Petition for Review and Motion for Extension of Time on October 12, 2016.

COURT OF APPEALS DIVISION III
500 N. CEDAR
SPOKANE, WA 99201

X Legal Messenger
__ U.S. Regular Mail

I further declare that I served in the manner indicated below a true and correct copy of the Petition for Review and Motion for Extension of Time on October 12, 2016.

ATTORNEY GENERAL
KATIE CHRISTOPHERSON
WASHINGTON STATE DEPARTMENT
1116 W. RIVERSIDE AVE.
SPOKANE, WA 99201

X Legal Messenger
__ U.S. Regular Mail

Signed at Spokane, WA on this 17th day of October, 2016.

AMBER F. HENRY