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NO. 63362-7-I

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

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KHURSHIDA ISLAM,

Appellant,

v.

STATE OF WASHINGTON  
DEPARTMENT OF EARLY LEARNING,

Respondent.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

The Department of Early Learning summarily suspended Khurshida Islam's child care center license after a 7 month old infant at the center sustained facial injuries. The Department then conducted a full review of Ms. Islam's licensing history and revoked her license based upon a multitude of licensing violations over a period of years that compromised the safety and well-being of children.

The legislature has decreed that the health, safety, and well-being of children in child care is paramount over the right of any person to provide care. RCW 43.215.005(3)(c). In child care licensing suspension and revocation actions, due process requirements are satisfied by application of the preponderance of evidence standard of proof. A child care center license is more in the nature of an occupational license than a professional license.

The Review Judge had the authority to review the Initial Order, make changes to the findings of fact and conclusions of law, and reverse the Administrative Law Judge's ruling on the summary suspension issue.

The Department's decision to summarily suspend and revoke Ms. Islam's license is supported by substantial evidence. Ms. Islam was not entitled to an opportunity to correct her deficiencies prior to the revocation.

## **II. ISSUES**

- A. Is due process satisfied by application of the preponderance of evidence standard of proof in a child care center license suspension and revocation case?
- B. Does a Department of Early Learning Review Judge have the authority to reverse the Administrative Law Judge's ruling on summary suspension when the Appellant only petitioned for review of the revocation ruling?
- C. Was the summary suspension and revocation of the child care center license supported by substantial evidence?
- D. Should Appellant's request for attorneys' fees be denied, because her request is premature and because the Department of Early Learning's actions were substantially justified?

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

From 1994 or 1995 until mid January 2007, Khurshida Islam was licensed to operate a child care center by the Department of Early Learning (Department) and its predecessor, the Department of Social and Health Services. AR 9 n. 4; AR 206.<sup>1</sup>

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<sup>1</sup> The Administrative Record was transmitted to the Court of Appeals by the superior court as Clerk's Sub 8, without clerk's page numbers assigned. This document is 310 pages long. Accordingly, citations to the Administrative Record will be to "AR" followed by the bates-stamped number appearing on the lower right corner of each page.

On January 8, 2007, Department Licensor Charlotte Jahn made an unannounced visit to Ms. Islam's child care center at approximately 9:00 a.m. Only one staff member, Salina Begum, was present. Ms. Jahn observed five children in the child care center. About five minutes into her visit, Ms. Jahn asked Salina<sup>2</sup> how many children were present. Salina went to the infant room and returned with a sixth child, an infant who had been unattended. AR 14, 224; CP 560-61. Ms. Jahn then observed some of the children climbing up on a table and one child climbing up on a windowsill. Salina did not respond to the children's behavior, so Ms. Jahn helped the children get down off the table and stood next to the child on the windowsill. AR 15, 224; CP 563-64. Salina did not know the ages of the children in her care, and she did not know all of their names. When asked, Salina was unable to locate the first aid kit, the children's files, or the staff files, and she was unable to produce documentation that she had completed CPR and first aid training. AR 15, 224; CP 565-67.

Ms. Jahn observed soiled Kleenex and cereal on the floor of the child care center. AR 15, 224; CP 565-66. She also observed some infant bottles containing liquid that were uncovered, unlabeled, and unrefrigerated. AR 15, 224; CP 568-69.

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<sup>2</sup> Ms. Islam employed two staff members with the same last name: Salina Begum (Ms. Islam's niece), and Saida Begum (Ms. Islam's sister). For clarity, these two staff members will be referred to by their first names. AR 13; CP 127-28.

The Appellant, Khurshida Islam, and another staff member, Saida Begum, arrived at the child care center approximately 15-25 minutes after Ms. Jahn arrived. AR 15, 224; CP 567-68. Salina had been the only child care provider present at the center with five children and an infant for approximately 30 minutes. AR 14; *see* CP 568.

After Ms. Islam and Saida arrived, Saida took three toddlers into the toddler room. Ms. Jahn observed Saida come out of the toddler room and go into the kitchen on two separate occasions, leaving the toddlers unsupervised. Saida could not see those children from the kitchen. AR 15, 224; CP 574-76. Ms. Jahn also saw Ms. Islam go into the kitchen and leave preschool age children unattended. AR 224; CP 576.

At Ms. Jahn's request, Ms. Islam produced the children's files and staff files. In reviewing the children's files, Ms. Jahn noted that one child had asthma and an allergy to eggs, but there was no individual health plan in the child's file. AR 15-16, 224; CP 572-73. Ms. Jahn also reviewed the staff files and noted that Salina's file did not contain documentation that she had completed first aid and CPR training. AR 15; CP 570-71.

Later that day, Ms. Jahn documented on a Facility Licensing Compliance Agreement the WAC violations that she observed at Ms. Islam's child care center. She had Ms. Islam write down her intended plan

of correction and sign the compliance agreement, also on January 8, 2007. AR 225-27; CP 573-74.

On January 13, 2007, the Department learned of a CPS referral regarding facial injuries sustained by a 7 month old infant at Ms. Islam's child care center on January 12, 2007. AR 16-17, 217-23; CP 448. Allegations of child abuse and neglect in licensed facilities are investigated by the Department of Social and Health Services, Division of Licensed Resources ("DLR" or "DLR/CPS"). See AR 217-23; CP 448. The Department of Early Learning determined that it was necessary to summarily suspend Ms. Islam's child care center license, because an infant was injured and infants have no ability to protect themselves from accidents or injuries. AR 17-18; CP 299-301, 448. Accordingly, a summary suspension letter was delivered to Ms. Islam on January 17, 2007. AR 18, 207-11; CP 447.

Ms. Islam timely requested an administrative hearing to challenge the summary suspension. AR 303-04.

On March 9, 2007, the Department of Early Learning issued an amended letter, informing Ms. Islam that, in addition to the summary suspension, the Department was revoking her child care license. AR 212-16. Subsequent to the infant's injury in January 2007, the Department reviewed Ms. Islam's entire licensing file and determined that she was no

longer able to provide a safe environment for young children. CP 302, 306, 308-09, 582-84. The decision to revoke was based on numerous WAC violations, including the violations Ms. Jahn observed on January 8, 2007, and violations found by the Department with regard to prior licensing and DLR/CPS complaints received against Ms. Islam between 2002 and 2005.<sup>3</sup>

The earlier WAC violations included inadequate supervision, lack of nurture/care, unsafe environment, poor business practices, and inadequate record keeping. AR 247.

For example, on December 30, 2003, DSHS received a complaint from Childhaven<sup>4</sup> staff, alleging that when Childhaven staff members go to the door of Ms. Islam's child care center, the door is opened by a child with no adult in sight. AR 10-11, 232; CP 480-81. Ms. Jahn went to Ms. Islam's child care center on February 3, 2004 to investigate this referral. When Ms. Jahn arrived, a preschool age child came to the door alone and opened it. Ms. Jahn observed the Ms. Islam inside the child care center, approximately 12 feet away from the door. AR 11, 233-34; CP 481-83. During this visit, Ms. Jahn observed an infant sleeping in a car seat placed

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<sup>3</sup> The March 9, 2007 letter included a date of 3/13/03 for a DLR/CPS complaint. AR 213. This date was corrected during the course of the administrative hearing to be 8/27/02 and was amended in the Department's second amended summary suspension and revocation letter dated June 27, 2007. AR 247.

<sup>4</sup> Childhaven is an agency that provides care for children who are at high risk in the community. AR 10; CP 480.

inside a crib. AR 11; CP 487-89. She also observed piles of papers, books, and magazines stacked to the ceiling on multiple shelving units. The shelving units and a glass fish tank were not attached to the walls to prevent harm during an earthquake. AR 11, 233-34; CP 490-91. The outdoor play area had piles of broken equipment and an unused rabbit hutch that still contained feces. AR 11, 233. Two of the children in care did not have any enrollment records, so there was no information about allergies or how to reach the parents. AR 233-34; CP 486-87. On February 3, 2004, Ms. Jahn made valid licensing findings based on these observations, including an unsafe environment, poor recording keeping, and lack of supervision. She and Ms. Islam signed a Facility Licensing Compliance Agreement, in which Ms. Jahn noted that “[m]any of these concerns have been previously cited.” AR 11, 233-38; CP 486-91.

In addition to basing the March 2007 revocation decision on the violations observed in past years and in January 2007, the revocation decision was also based on the Department’s determination that Ms. Islam did not have the understanding, ability, good judgment, and personality to meet the needs of children in care. AR 214, 248.

Ms. Islam requested an administrative hearing to contest the license revocation. AR 307-08. In addition, she requested an expedited hearing to consider a stay of the summary suspension. AR 188-93.

Administrative Law Judge Wacker held a stay hearing on March 21, 2007. On March 26, 2007, the ALJ issued an order denying a stay. AR 172-78. Ms. Islam appealed to the Board of Appeals. AR 163-71. On April 27, 2007, the Review Judge denied the motion for a stay. AR 122-47.

A hearing on the summary suspension and revocation was held on June 25-27, 2007 and July 2, 2007. On January 4, 2008, ALJ Wacker issued an Initial Order, overturning the license suspension, but upholding the March 9, 2007 license revocation. AR 55-87. Ms. Islam appealed the portion of the Initial Order upholding the license revocation. AR 45-54.

On June 30, 2008, Review Judge Stalnaker issued a Review Decision and Final Order for the Department of Early Learning. AR 1-27. This final order held that “[t]he Initial Order is affirmed as to the revocation of the Appellant’s license. The Initial Order is reversed as to the summary suspension of the Appellant’s license.” AR 25. The Review Judge determined that the issue of whether the Appellant’s license should be summarily suspended became moot on April 27, 2007, when the Review Decision and Final Order Regarding Motion for Stay was issued. The April 27, 2007 order affirmed the ALJ’s prior order, which denied Ms. Islam’s request for a stay of the summary suspension. AR 23-24. Once the April 27, 2007 Review Decision was entered, “there no longer was any administrative remedy or relief the ALJ or the Review Judge

could grant the Appellant concerning the summary suspension of her license, and thus, the issue became moot.” AR 23-24.

After receiving the June 30, 2008 Review Decision and Final Order, Ms. Islam timely filed a Petition for Judicial Review in King County Superior Court. CP 1-65.<sup>5</sup> On March 27, 2009, the superior court denied Ms. Islam’s petition for judicial review and affirmed the June 30, 2008 Review Decision and Final Order.<sup>6</sup> Supp. CP \_\_\_\_ (Sub. No. 18).

#### IV. ARGUMENT

##### A. Standard Of Review

RCW 34.05.570(3) governs this appeal. The decision reviewed on appeal is the *final* agency action. Here, the final agency decision is contained in the Review Decision and Final Order issued on June 30, 2008. *Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 601, 903 P.2d 433, *cert. denied*, 518 U.S. 1006, 116 S. Ct. 2526, 135 L. Ed. 2d 1051 (1995) (where there are changes in an ALJ’s findings and conclusions, “the review judge’s findings and conclusions are relevant on appeal”); *see also* RCW 34.05.464(2) and (7) (authorizing “final orders” by reviewing

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<sup>5</sup> Appendix B to Ms. Islam’s Petition for Judicial Review purports to be a copy of the Administrative Law Judge’s Initial Order. CP 2, 39. However, only the first page of the Initial Order is attached, followed by pages 2-25 of the Review Decision and Final Order and information on how to request reconsideration of the Review Decision and Final Order or file a Petition for Judicial Review. CP 40-65. This means that CP 40-65 are duplicates of CP 12-37. A correct copy of the Initial Order is contained at AR 55-89.

<sup>6</sup> A copy of the superior court order is attached to Ms. Islam’s Notice of Appeal.

officers); RCW 34.05.542(2) (a petition for judicial review of an adjudicative proceeding must be filed within 30 days after service of the “final order”); WAC 170-03-0660(1); WAC 170-03-0020(10). Ms. Islam has the burden of proving that she has been “substantially prejudiced” by the final agency decision. RCW 34.05.570(1)(d); *Ass’n of Wash. Bus. v. Dep’t of Revenue*, 121 Wn. App. 766, 770, 90 P.3d 1128 (2004).

Questions of law are reviewed under the "error of law" standard. *See Shoreline Comty. Coll. v. Employment Sec. Dep’t*, 120 Wn.2d 394, 401, 842 P.2d 938 (1992). The court reviews the agency’s legal conclusions *de novo*, giving substantial weight to the agency’s interpretation of the statute it administers. *E.g., King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000).

The Review Decision and Final Order contains 49 findings of fact. CP 9-21. Ms. Islam has not challenged any of the findings.<sup>7</sup> Accordingly, the unchallenged findings of fact are verities on appeal. *E.g., Tapper v. Employment Sec.*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993). If the Court permits appeal of the findings, despite the lack of a challenge, the findings of

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<sup>7</sup> Appellant claims the Review Judge made findings regarding incidents in 2002, 2003, 2005, and 2006 that the ALJ disregarded. Br. of App. at 35. This is incorrect. The Review Judge “reorganized, expanded, and modified the Initial Order’s findings of fact to improve readability and to protect confidentiality. However, no substantive changes to those findings have been made.” AR 22. Comparison of the ALJ’s findings of fact in the Initial Order (AR 56-68) with the Review Judge’s findings of fact in the Review Decision and Final Order (AR 9-21) shows that the ALJ made findings regarding the events of 2002, 2003, 2005, and 2006 and the Review Judge essentially reiterated them.

fact are subject to review under the “substantial evidence” standard. RCW 34.05.570(3)(e); *Terry v. Employment Sec. Dep’t*, 82 Wn. App. 745, 748, 919 P.2d 111 (1996). The court is to review the whole record and if there are sufficient facts in the record from which a reasonable person could make the same finding as the agency, the agency’s finding should be upheld. This is so even if the reviewing court would make a different finding from its reading of the record. *Callecod v. Washington State Patrol*, 84 Wn. App. 663, 675-76 and n. 9, 929 P.2d 510, *review denied*, 132 Wn.2d 1004 (1997).

**B. Due Process Rights Of A Child Care Center Licensee Are Satisfied By The Preponderance Of The Evidence Standard.**

The legislature has considered the health and safety needs of children and determined that the appropriate standard of proof for suspension or revocation of a child care center license is a preponderance of the evidence. RCW 43.215.300(2) states:

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

Consistent with the statute, WAC 170-03-0490(2) provides that “the standard of proof in a hearing is a preponderance of the evidence.”

Appellant argues that the standard of proof for revocation of a child care center license should be clear, cogent, and convincing evidence. She encourages this Court to extend the State Supreme Court rulings in *Ongom v. Dep't of Health*, 159 Wn.2d 132, 104 P.3d 29 (2006), and *Nguyen v. Dep't of Health*, 144 Wn.2d 516, 1029 P.3d 689 (2001), regarding the burden of proof for agency actions under the Uniform Disciplinary Act for health care providers, and apply that higher burden of proof to her Department of Early Learning revocation action. Br. of App. at 13-17 and 20. She further asks this Court to conclude that the statutory burden of proof (preponderance) in RCW 43.215.300 and WAC 170-03-0490(2) is unconstitutional. Br. of App. at 20.

This Court recently confronted this same situation in the case of *Hardee v. Dep't of Social and Health Serv. and Dep't of Early Learning*, \_\_\_ Wn. App. \_\_\_, 215 P.3d 214 (2009).<sup>8</sup> This Court expressly declined to extend the rule of *Ongom* and *Nguyen* to the revocation of Hardee's family home child care license and held that the Review Judge correctly applied the preponderance of the evidence standard. *Hardee*. In reaching its decision in *Hardee*, this Court noted that Ms. Hardee's family child care home license was more of a site license than an operator's license, and that it was "more in the nature of an occupational license than a

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<sup>8</sup> Ms. Hardee filed a Petition for Review in the State Supreme Court on approximately October 2, 2009.

professional license.” *Id. at 218*, citing *Brunson v. Pierce County*, 149 Wn. App. 855, 205 P.3d 963 (2006) (applying preponderance of the evidence standard to revocation of an erotic dancer’s license).

Like a family child care home license, a child care center license is issued by the Department of Early Learning pursuant to RCW 43.215. The requirements for obtaining the license are minimal. Specifically, the applicant must be at least 21 years of age, attend state approved orientation programs, and submit a completed application. WAC 170-295-0060. The licensee can be the director of the child care center or hire another person to be the director. WAC 170-295-1010. The training requirements for the child care center director are minimal. WAC 170-295-1060 and -1070. A child care center license is not transferable and is only valid for the address, person, and organization named on the license. RCW 43.215.260; WAC 170-295-7070; *see* RCW 43.215.205. Thus, for the same reasons adopted by this Court in *Hardee*, due process is satisfied by application of the preponderance of the evidence standard to the revocation of Ms. Islam’s child care center license.

RCW 43.215.300(2) is presumed constitutional and should not be overturned without a showing that the statute is unconstitutional beyond a

reasonable doubt. *Retired Pub. Employees Council of Wash. v. Charles*, 148 Wn.2d 602, 623, 62 P.3d 470 (2003). Ms. Islam has not met her burden to show that this statute denies her due process.

Similarly, where the legislature has delegated the power to make regulations to an agency, such regulations are presumed to be valid.<sup>9</sup> “The burden of overcoming this presumption rests on the challenger, and judicial review will be limited to a determination of whether the regulation in question is reasonably consistent with the statute being implemented. The wisdom or desirability of such rules is not before the court.” *St. Francis Extended Health Care v. Dep’t of Social and Health Servs.*, 115 Wn.2d 690, 702, 801 P.2d 212 (1990). Thus, WAC 170-03-0490(2) is presumptively valid; it is Ms. Islam’s burden to demonstrate otherwise.

**1. The preponderance standard is constitutional in light of the interests involved and the minimal risk of an erroneous licensing decision.**

Due process is a flexible standard designed to ensure fairness to all litigants and balance the competing interests of the parties. *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). The procedures required by the Constitution are not rigidly set. Rather, due

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<sup>9</sup> "The legislature affirms that all rule-making authority of state agencies and institutions of higher education is a function delegated by the legislature, and as such, shall be exercised pursuant to the conditions and restrictions contained in this [Administrative Procedure] act." Laws of Washington, 1981 c 324 § 1.

process “‘ calls for such procedural protections as the particular situation demands.’” *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (quoting *Morrissey*, 408 U.S. at 481).<sup>10</sup> The Supreme Court stated that the level of process required is determined by considering three factors:

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 334-335. When these factors are applied, use of the preponderance of evidence standard affords appropriate due process.

**a. A child care center license creates limited and conditional interests in the licensee.**

The first prong of *Mathews* analyzes the private interest affected. Ms. Islam’s private interest, the license approving her child care center facility, is limited by the nature and extent of the privilege it conveys.

The United States Supreme Court has held that a higher standard of proof is required by the Due Process Clause only when the private

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<sup>10</sup> Ms. Islam makes no argument that procedural rights would be different under the state constitution. In any event, Washington courts have consistently used the federal standard in analyzing due process claims and held that the state constitution provides no higher level of protection in the area of due process. *City of Bremerton v. Widell*, 146 Wn.2d 561, 579, 51 P.3d 733 (2002); *State v. Manussier*, 129 Wn.2d 652, 679, 921 P.2d 473(1996).

interest involves liberty (such as avoiding confinement) or involves a fundamental right (such as parental rights). *See, e.g., In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (declaration of juvenile delinquency and detention is a loss of personal liberty requiring proof beyond a reasonable doubt); *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979) (involuntary commitment requires clear and cogent evidence); *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (termination of fundamental parental rights requires clear and convincing evidence). For private interests that are not fundamental rights or liberty interests, the United States Supreme Court applies the preponderance standard.

For example, a state statute requiring a preponderance of the evidence when establishing paternity was upheld in *Rivera v. Minnich*, 483 U.S. 574, 107 S. Ct. 3001, 97 L. Ed. 2d 473 (1987). The private interest was significant: “avoiding the serious economic consequences that flow from a court order that establishes paternity and its correlative obligation to provide support for the child.” *Id.* at 580. The Court, however, rejected the argument that the “social stigma resulting from an adjudication of paternity” should compel a higher standard of proof. *Id.* at 585 (Brennan, J., dissenting).

*Vance v. Terrazas*, 444 U.S. 252, 100 S. Ct. 540, 62 L. Ed. 2d 461 (1980), also confirms that very important private interests do not compel a higher standard of proof. *Vance* arose after the U.S. Supreme Court determined that clear, cogent, and convincing evidence was required for expatriation proceedings, in the absence of a specific burden of proof. *See Nishikawa v. Dulles*, 356 U.S. 129, 133, 78 S. Ct. 612, 2 L. Ed. 2d 659 (1958). Congress subsequently specified a preponderance of evidence standard for expatriation. *Vance* found that the preponderance standard met due process. “[E]xpatriation proceedings are civil in nature and do not threaten a loss of liberty.” *Vance*, 444 U.S. at 266. A child care center license is undeniably a *less weighty* private interest than expatriation. *See Schneiderman v. U.S.*, 320 U.S. 118, 122, 63 S. Ct. 1333, 87 L. Ed. 1796 (1943) (United States citizenship is “the highest hope of civilized men”).

Ms. Islam’s argument fails to confront the relevant precedent. She simply urges the Court to expand the *Nguyen* and *Ongom* cases. *Ongom* and *Nguyen*, however, involve distinguishable private interests. The child care center license in question is not a medical license allowing a person to practice a profession statewide. Instead, it is a premises-based license that may be issued with only minimal training for the child care center director, who can be a separate person from the licensee. WAC 170-295-1010, -1060, and -1070. The license is not transferable and is valid only

for the address, person, and organization specified on the license. RCW 43.215.260; WAC 170-295-7070; *see* RCW 43.215.205.

A second striking difference between a child care center license and the licenses in *Nguyen* and *Ongom* is the statute requiring a preponderance of evidence standard, RCW 43.215.300(2). The legislature has specifically stated its intent “[t]o safeguard and promote the health, safety, and well-being of children receiving child care and early learning assistance, *which is paramount over the right of any person to provide care.*” RCW 43.215.005(3)(c) (emphasis added).

The preponderance of evidence standard should be upheld. The regulatory scheme creates only a limited and conditional interest in a child care center license--an interest subordinate to the safety of children in the facility. *Ongom* and *Nguyen* do not require this Court to assign a weight to Ms. Islam’s private interest that compels a higher standard of proof.

**b. Ample procedural safeguards make an increased burden of proof unnecessary.**

The second *Mathews* factor examines the risk of erroneous deprivation by the procedures used. Child care center licensees enjoy significant due process protections that are sufficient to guard against wrongful revocation. Providers receive a *de novo* hearing before an impartial quasi-judicial hearing officer; they may have counsel or other

representation; they may introduce evidence, cross-examine witnesses, and present argument; they receive a written decision stating the basis in law and fact for the decision; and the decision is subject to further administrative review and judicial review. RCW 34.05; WAC 170-03.

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

**c. A higher standard of proof makes it more likely that children will be subjected to inadequate child care centers.**

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

A standard of proof serves to distribute the risks of a decision. The legislature specifically declared the intent of the licensing requirements:

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

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

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

Children must rely for their safety on a system that can take licensing action based on the preponderance of evidence. The preponderance standard allows the Department to pursue license violations without concern that a lack of adult witnesses will compromise effective protection of children.

Again, Ms. Islam does not confront this aspect of *Mathews* except to cite *Nguyen*. See Br. of App. at 13-14. Based on *Nguyen*, she could suggest that the state simply needs to spend more money to meet a higher standard.<sup>11</sup> However, her private interest cannot mandate that the state use its limited fiscal resources. Child care center licensors regularly monitor child care centers once every 12 months, and they visit more often if concerns are raised about the child care center. CP 436-37. Moreover, money does not necessarily address the issue. More staff visits would not make children more capable witnesses or overcome the fact that the licensee or their staff are typically the only adults on-site.

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

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<sup>11</sup> The language in *Nguyen* that purports to say the third *Mathews* factor examines only fiscal considerations is inconsistent with the clear language of *Mathews* and other cases and departs from the typical analysis performed by Washington courts, both before and after that decision. See, e.g., *City of Bremerton v. Hawkins*, 155 Wn.2d 107, 110, 117 P.3d 1132 (2005); *Born v. Thompson*, 154 Wn.2d 749, 755-56, 117 P.3d 1098 (2005); *In re Harris*, 98 Wn.2d 276, 286-87, 654 P.2d 109 (1982). This is one more reason that *Nguyen* and *Ongom* should not be followed.

protecting its most vulnerable citizens fully justifies the legislature's decision to adopt a preponderance of evidence standard. The preponderance of evidence standard affords the appropriate level of due process.

**2. *Nguyen and Ongom* are wrongly decided and should be reversed.**

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

While the doctrine of *stare decisis* ensures stability in case law, Washington courts will abandon a previously established rule upon a clear showing that the rule is incorrect and harmful. *See, e.g., Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004). Here, the salient reasons for abandoning *Nguyen* and *Ongom* are set forth in dissents. *See Ongom* 159 Wn.2d at 151 (dissent by Owens, J.)<sup>12</sup> As Justice Owens and Justice Madsen both explain, the rule articulated in *Nguyen* (and then *Ongom*) is at odds with due process and with the state's

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<sup>12</sup> The majority in *Ongom* did not squarely reject the invitation to overrule *Nguyen*; it instead did not reach that question because it was not properly raised in the petition for review. 159 Wn.2d at 137 n. 3.

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

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

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

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

**a. *Nguyen* and *Ongom* mistakenly equate the licensing privilege with liberty interests cases.**

A primary difficulty with *Nguyen* and *Ongom* is that those cases place a professional license on par with such fundamental rights as reproduction, association, and religious practice, rather than with the more mundane property interests in a business license under a regulatory system.

In *Conn v. Gabbert*, 526 U.S. 286, 291-292, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999), the United States Supreme Court stated as follows:

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

*Id.* (emphasis added; citations omitted). In no case does the Court hold that there is a liberty interest in engaging in business without reasonable regulation. Instead, the rational basis test has consistently been applied to regulations impacting the right to choose a profession or operate businesses, confirming that such interests are not fundamental rights for constitutional purposes.<sup>13</sup>

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<sup>13</sup> As summarized in Justice Madsen's dissent: "[T]he Supreme Court has made clear that 'rational basis review' is the appropriate standard for reviewing such government licensing regulations. *Barry v. Barchi*, 443 U.S. 55, 61-62, 67-68, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979) (applying 'rational basis' test in the equal protection and due process context to licenses for horse trainers). *See also Medeiros v. Vincent*, 431 F.3d 25, 29 n.3 (1st Cir. 2005) (it is 'well settled' that there is no fundamental right to pursue a livelihood or occupation, and 'legislation or regulation impinging upon such a right therefore is subject only to 'rational basis' review, rather than 'strict scrutiny' '); *Cornwell v. Cal. Bd. of Barbering & Cosmetology*, 962 F. Supp. 1260, 1271-72 (S.D. Cal. 1997) (substantive due process challenges to regulations of occupations are 'subjected to rational basis review,' and '[t]he regulation may only be struck down if there is no rational connection between the challenged statute and a legitimate government objective'); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313-14, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976) (no fundamental right to government employment and applying rational basis review to restrictions on government employment); *Schware v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232, 238, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957) (no fundamental right to practice law); *Nebbia v. New York*, 291 U.S. 502, 527-28, 54 S. Ct. 505, 78 L. Ed. 940 (1934) (the right to work in a particular profession or trade is a protected right and subject to rational regulation); *Dittman v. California*, 191 F.3d 1020, 1031 (9th Cir. 1999) (applying rational basis review to requirements for acupuncture license); *Meyers v. Newport Consol. Joint Sch. Dist. No. 56-415*, 31 Wn. App. 145, 639 P.2d 853 (1982) (holding that the right to employment is not fundamental and applying rational basis review); *In re Revocation of License to Practice Med. & Surgery of Kindschi*, 52 Wn.2d 8, 319 P.2d 824 (1958) (applying rational basis review to license revocation). *Ongom*, 159 Wn.2d at 146-47.

**b. *Nguyen* and *Ongom* err by undervaluing the governmental interest in the preponderance standard.**

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

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

*Ongom*, 159 Wn.2d at 152 (dissent by Owens, J.). Further, as noted in footnote 11 *supra*, the *Nguyen* majority approach to the third factor is contrary to precedent before and after *Nguyen*. It is also significant that the Washington Supreme Court stands alone. In our research, we have

found no other decision holding that the preponderance standard violates the Due Process Clause in this context.<sup>14</sup>

**c. *Nguyen* was not supported by the cases it cites.**

*Nguyen* held that due process requires clear and convincing proof for medical licensing actions based on cases decided on peculiar state constitutional grounds rather than the Due Process Clause. *See Nguyen*, 144 Wn.2d at 521 n.3. In *Johnson v. Bd. of Governors of Registered Dentists*, 913 P.2d 1339 (Okla. 1996), the court explained: “Because of the penal nature of disciplinary proceedings involving a professional license, the Oklahoma Constitution requires that the clear-and-convincing standard be applied in such disciplinary proceedings.” *Johnson*, 913 P.2d at 1346. In *Painter v. Abels*, 998 P.2d 931 (Wyo. 2000), the court stated: “As a result, we hold [the preponderance standard] is also unconstitutional on due process grounds. This holding arguably gives Wyoming licensees greater due process protection than is required by the United States Constitution.” *Painter*, 998 P.2d at 941 (citation omitted).<sup>15</sup>

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<sup>14</sup> See Appendix A, listing national cases.

<sup>15</sup> *Nguyen* also relied upon *Silva v. Superior Court*, 14 Cal. App. 4th 562, 17 Cal. Rptr. 2d 577 (1993); *Ettinger v. Bd. of Med. Quality Assurance*, 135 Cal. App. 3d 853, 185 Cal. Rptr. 601 (1982); *Rife v. Dep’t of Prof’l Regulation*, 638 So. 2d 542 (Fla. Dist. Ct. App. 1994); *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987); *In re Zar*, 434 N.W.2d 598 (S.D. 1989); *Miss. Bd. of Nursing v. Wilson*, 624 So. 2d 485 (Miss. 1993); and *Davis v. Wright*, 503 N.W.2d 814 (1993). *Nguyen*, 144 Wn.2d at 522 n.3. However, none of these decisions involve the Due Process Clause. Rather, in the absence of a legislatively established standard of proof, these courts selected a standard of proof based on their views of appropriate public policy, not the Due Process Clause.

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

**C. The Review Judge Properly Exercised Her Authority In Reviewing The Initial Order.**

The State Administrative Procedure Act enables an agency to provide for administrative review of initial orders and sets forth the authority of the review officer or review judge:

(4) The officer reviewing the initial order (including the agency head reviewing an initial order) is, for the purposes of this chapter, termed the reviewing officer. *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.*

RCW 34.05.464 (emphasis added).

WAC 170-03-0620(1), which sets forth the authority of a review judge in Department of Early Learning cases, is consistent with RCW 34.05.464: “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); *see Hardee*, 215 P.3d 214.

**1. The review judge has the authority to make her own findings, including as to witness credibility.**

The Appellant argues that Review Judge Stalnaker was “required to accept the administrative law judge’s findings regarding the credibility of witnesses and the weight to be given to competing inferences.” Br. of App. at 33, *citing Costanich v. Dep’t of Social and Health Servs.*, 138 Wn. App. 547, 156 P.3d 232 (2007). However, Appellant is incorrect. The *Costanich* case dealt with DSHS administrative regulations that set forth two separate standards of review for different types of cases: one that mirrored the standard of review set forth in the APA, WAC 388-02-0600(2), and another that required the review judge to be highly deferential to the findings of the administrative law judge. WAC 388-02-0600(3). The applicable standard in *Costanich* was the highly deferential standard of review, which does not apply to Department of Early Learning licensing cases. As this Court found in *Hardee*, the review judge has the authority “to modify or replace an ALJ’s findings, including findings of witness credibility” and can “make his or her own independent determinations based on the record.” *Hardee*, 215 P.3d 214 *citing Regan v. Dep’t of Licensing*, 130 Wn. App. 39, 59, 121 P.3d 731 (2005). Thus,

in the instant case, the Review Judge acted within her authority under RCW 34.05.464(4) and WAC 170-03-0620(1) when she entered the Review Decision and Final Order dated June 30, 2008.

**2. The review judge appropriately reversed the ALJ's ruling regarding the summary suspension.**

Appellant argues that the Review Judge lacked authority to review the ALJ's ruling on the issue of the summary suspension, because no party expressly appealed that ruling. Br. of App. at 25-27. However, the Appellant fails to acknowledge the authority of the Review Judge, which is set forth in RCW 34.05.464 and is quoted below in relevant part:

(4) . . . 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, . . .

(5) The reviewing officer shall personally consider the whole record or such portions of it as may be cited by the parties.

...

(8) A final order shall include, or incorporate by reference to the initial order, all matters required by RCW 34.05.461(3).

RCW 34.05.464. Accordingly, the Review Judge had the authority to exercise the same decision-making power as the ALJ, and this includes the authority to decide whether Ms. Islam's license should have been summarily suspended. *See also* WAC 170-03-0620(1). "Since the ALJ

had the power to make findings of fact, the [reviewing officer] has the power to make his or her own findings of fact and in the process set aside or modify the findings of the ALJ.” *Tapper*, 122 Wn.2d at 404. Moreover, the final order must include all matters required by RCW 34.05.461(3), which provides as follows:

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

RCW 34.05.461(3) (emphasis added).

In her review of administrative hearing record, the Review Judge found that the ALJ erred in failing to apply WAC 170-03-0300(1) to the issue of the summary suspension. AR 23. The ALJ must apply the Washington Administrative Code provisions as the first source of law in deciding this case. WAC 170-03-0220; AR 23. In addition, the Review Judge found that the ALJ’s decision, that the license not be summarily

suspended effective January 16, 2007, “makes no sense, chronologically or legally.” AR 23. The Review Judge further held:

The issue of whether the Appellant’s license should be summarily suspension [sic] became moot with the issuance of the Review Decision and Final Order Regarding Motion for Stay on April 27, 2007, which order affirmed the ALJ’s March 26, 2006,<sup>16</sup> Order Denying Stay of Summary Suspension/Revocation. Once the Review Decision was issued, there no longer was any administrative remedy or relief the ALJ or the Review Judge could grant the Appellant concerning the summary suspension of her license, and thus, the issue became moot.

AR 23-24.

Appellant asserts that the matter is not moot. Br. of App. at 29.

However, a review of the chronology of events in this case shows that the issue is indeed moot:

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|------------------|---|
| January 16, 2007 | Department of Early Learning summarily suspended Ms. Islam’s child care license.  |
| March 9, 2007    | Department of Early Learning amended its summary suspension letter to include notice that it was also revoking Ms. Islam’s license. |
| March 21, 2007   | ALJ held a hearing on the issue of whether the summary suspension should be stayed.   |
| March 26, 2007   | ALJ issued an Order Denying Stay of Summary Suspension/Revocation.  |
| April 27, 2007   | Review Judge issued a Final Order denying Ms. Islam’s motion for a stay of the license suspension.                                  |

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<sup>16</sup> The correct date of the ALJ’s Order Denying Stay of Summary Suspension/Revocation was March 26, 2007. AR 172. It could not have been entered in 2006, because Ms. Islam’s license was summarily suspended in January 2007. AR 207.

January 4, 2008 ALJ issued his Initial Order, holding that Ms. Islam's license should not have been summarily suspended effective January 16, 2007, but that it should have been revoked effective March 9, 2007.

As of January 4, 2008, it was impossible for Ms. Islam to turn back the clock and reopen her child care center from January 16, 2007 to March 8, 2007. Thus, the Review Judge correctly determined the issue was moot.

Since this Court can no longer provide effective relief on the issue of whether Ms. Islam's child care license should have been summarily suspended for the period of January 16, 2007 through March 8, 2007, the issue is moot. *See, e.g., In Re Cross*, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983); *see also* Review Judge citations at AR 24, n. 31.

In addition, summarily suspending Ms. Islam's child care license was consistent with RCW 43.215. The ALJ erred when he found that the Department of Early Learning had not demonstrated sufficient "proof" to warrant summarily suspending Ms. Islam's child care license. *See* AR 69-71. The ALJ determined that the Department summarily suspended Ms. Islam's license solely on the basis of a DLR/CPS investigation and concluded that there was no proof of any violation. AR 70-71. In fact, the relevant statute provides as follows:

(1) An agency may be denied a license, or any license issued pursuant to this chapter may be suspended, revoked, modified, or not renewed *by the director upon proof (a)*

*that the agency has failed or refused to comply with the provisions of this chapter or the requirements adopted pursuant to this chapter; or (b) that the conditions required for the issuance of a license under this chapter have ceased to exist with respect to such licenses. RCW 43.215.305 governs notice of a license denial, revocation, suspension, or modification and provides the right to an adjudicative proceeding.*

RCW 43.215.200(1) (emphasis added). This statute sets forth the authority of the director of the Department of Early Learning to suspend or revoke a license. This action is taken prior to any administrative hearing. Thus, the Department of Early Learning director must be satisfied that there is proof that the agency has failed or refused to comply with the statutes or WACs *or* that the conditions required for issuance of the license have ceased to exist. This does not mean that the proof must be iron-clad or even that it must necessarily be legally admissible.

The ALJ ignored the possibility that the Department of Early Learning had relied upon RCW 43.215.200(1)(b) and focused solely on subparagraph (a). AR 69. The Department of Early Learning did not rely solely on the DLR/CPS investigation when it summarily suspended Ms. Islam's license. Rather, it relied on the fact that a 7 month old infant was injured while in Ms. Islam's care. This fact of injury, together with the allegation that the child suffered abuse or neglect while in Ms. Islam's care, justified a summary suspension to prevent harm to other children.

The ALJ asserted that the original summary suspension letter, dated January 16, 2007, did not identify any specific statutes or WACs that Ms. Islam had violated. In reality, the letter stated that Ms. Islam violated WAC 170-295-0100. AR 207-08. Again, this failure to recognize the facts in the record caused the ALJ to ignore the possibility that the Department relied on RCW 43.215.200(1)(b). The ALJ's restrictive reading of RCW 43.215.200 renders meaningless RCW 43.215.305(2)(b), which provides as follows:

(b) The department may make the date the action is effective sooner than twenty-eight days after receipt *when necessary to protect the public health, safety, or welfare*. When the department does so, it shall state the effective date and the reasons supporting the effective date in the written notice given to the licensee or agent.

The ALJ's interpretation of RCW 43.215.200(1) also ignores the legislature's intent in enacting RCW 43.215. The legislature declared that the purpose of establishing the Department of Early Learning was, in part, "[t]o safeguard and promote the health, safety, and well-being of children receiving child care and early learning assistance, which is paramount over the right of any person to provide care." RCW 43.215.005(3)(c).

When it issued the summary suspension letter on January 16, 2007, the Department did so because a 7 month old child had suffered facial injuries while in Ms. Islam's care. The Department further determined

that children were no longer safe in Ms. Islam's care and that the public health, safety, or welfare required it to take imminent action. Therefore, it summarily suspended her license, in accordance with the statutes and in accordance with WAC 170-03-0300(1), which provides:

(1) The department may immediately and summarily suspend a license when:

(a) It finds that conditions in the licensed facility constitute an imminent danger to a child or children in care; or

(b) The public health, safety, or welfare requires emergency action.

WAC 170-03-0300(1). Preventing summary suspension of a license when a child has been injured impermissibly elevates the provider's right to be licensed over the health, safety, and well-being of children receiving child care. This is directly contrary to RCW 43.215.005(3)(c).

**3. Appellant received due process with regard to the summary suspension of her license.**

Appellant implies that her due process rights were violated because she only received a hearing on the summary suspension after it had taken effect. *See* Br. of App. at 29. This argument suggests that a state agency could never act swiftly to suspend a license in order to protect the public health, safety, and welfare. This argument is contrary to RCW 43.215.305(2)(b), which provides that "[t]he department may make

the date the action is effective sooner than twenty-eight days after receipt *when necessary to protect the public health, safety, or welfare.*” RCW 43.215.305(2)(b) (emphasis added). It is also contrary to the legislature’s intent that the health, safety, and welfare of children in child care is paramount over the right of any person to provide care. RCW 43.215.005(3)(c).

Ms. Islam was accorded two separate administrative hearings to challenge the Department’s summary suspension of her license. First, she received an expedited hearing on her motion for a stay, which was denied by the Administrative Law Judge. AR 172-78. She then appealed that decision, and it was affirmed by the Review Judge. AR 122-47. Secondly, Ms. Islam received a full evidentiary hearing to contest the summary suspension, as well as the revocation of her license. This hearing extended over four days. This level of procedural protections is in accordance with the balancing test set forth in *Mathews*. See *Mathews*, 424 U.S. at 334-335. The important governmental interest at stake justified the summary suspension of Ms. Islam’s child care center license in advance of her receiving a hearing. Thus, Appellant’s due process rights were not violated.

**4. The review judge appropriately affirmed the revocation of Ms. Islam's child care license.**

The Appellant asserts that there were “only 2 proven incidents of license violations” and that these were insufficient to support revocation of Ms. Islam’s license. Br. of App. at 34-36. Although the licensing violations that the Review Judge relied upon primarily occurred on two particular days (February 3, 2004 and January 8, 2007), there were numerous WAC violations committed by Ms. Islam and multiple staff members on those dates. These violations were more than sufficient to support the Department’s action of revocation.

The February 3, 2004 WAC violations began with a complaint that the Department of Early Learning received from Childhaven on December 30, 2003, alleging that when Childhaven staff members went to the door of the child care center, it was opened by a child with no adult in sight. AR 10-11, 232; CP 480-81. Department Licensor Charlotte Jahn went to Ms. Islam’s child care center on February 3, 2004 to investigate the complaint. When Ms. Jahn arrived, a preschool age child came to the door alone and opened it. Ms. Jahn observed Ms. Islam inside, approximately 12 feet away from the child who answered the door, and too far away to be protective of the child. AR 11, 233-34; CP 481-83. Also on February 3, 2004, Ms. Jahn observed an infant sleeping in a car seat placed inside a

crib, which is unsafe. AR 11; CP 487-89. There were piles of papers, books, and magazines stacked to the ceiling on multiple shelving units. The shelving units and a glass fish tank were not secured to prevent injury in an earthquake. AR 11, 233-34; CP 490-91. The outdoor play area presented safety hazards in the form of piles of broken equipment and an unused rabbit hutch with rabbit feces. AR 11, 233. Moreover, when Ms. Jahn reviewed the children's files, she found that two children had no enrollment records or files, so there was no parent contact information or allergy information. AR 233-34; CP 486-87. Based on these observations, Ms. Jahn made valid licensing findings regarding the unsafe environment, deficient recording keeping, and poor supervision. She and Ms. Islam signed a Facility Licensing Compliance Agreement, itemizing the violations. AR 11, 233-38; CP 486-91. The compliance agreement noted that many of these concerns had been cited previously. AR 238.

Ms. Jahn also testified at great length regarding the numerous and highly concerning WAC violations she observed at Ms. Islam's child care center when she arrived unannounced on January 8, 2007. One caregiver, Salina Begum, was alone with six children, including an infant, which was a violation of the child-staff ratios set by WAC. Salina left an infant alone in the infant room and went to get the child only after Ms. Jahn asked how many children were in care. Salina had no control over the children and

took no action to protect or redirect them when they climbed up on tables and windowsills. Salina did not know where the first aid kit was or where the children's or the staff files were. Moreover, Salina did not know the names of all the children or their ages. Neither Salina nor Ms. Islam (when she returned to the child care center) were able to produce verification that Salina had completed CPR and first aid training. When Ms. Islam produced the children's files for Ms. Jahn's inspection on January 8, 2007, Ms. Jahn discovered that one child had asthma and an allergy to eggs, but there was no individual health plan in the child's file to instruct staff on what the allergic reaction looked like or what to do if the child was having a reaction. Baby bottles containing liquid were unrefrigerated, unlabeled and uncovered. Also of great concern to Ms. Jahn was the fact that another caregiver, Saida Begum, twice left children alone in the toddler room while she went into the kitchen. Ms. Jahn testified that Saida could not see the children from the kitchen. In addition, Ms. Islam walked out of the room where she was caring for two preschool aged children and left them unattended while she went to get some files. CP 560-77. Ms. Islam claimed Ms. Jahn agreed to watch the children while Ms. Islam stepped away, but Ms. Jahn testified that Ms. Islam did not ask her to watch the children and that it would have been inappropriate for the licensor to supervise the children. CP 576-77.

All of these WAC violations on January 8, 2007 led Ms. Jahn to prepare a Facility Licensing Compliance Agreement, on which she also noted that several of these violations had been previously cited. Ms. Islam then wrote her own proposed plan of correction on this agreement and signed it on January 8, 2007. AR 225-27.

On January 13, 2007, the Department of Early Learning learned that a DLR/CPS referral was made regarding a 7 month old baby who sustained facial injuries at Ms. Islam's child care center the previous day. The infant's injuries and the risk to other children caused the Department to summarily suspend Ms. Islam's license. The Department then thoroughly reviewed Ms. Islam's licensing history and determined that it was no longer possible for her to provide safe care for young children. CP 582. Consequently, the summary suspension letter was amended to include notice of the license revocation on March 9, 2007.

Ms. Jahn testified that as of January 8, 2007, she was not contemplating revocation of Ms. Islam's license. CP 644. Ms. Islam has repeatedly asserted that the Department of Early Learning is precluded from taking any further licensing action once it has signed a compliance agreement with a provider. However, as the Review Judge noted, Ms. Islam has been unable to cite any legal authority for this proposition. AR 24. Moreover, the Review Judge held that "it would be contrary to public

policy to prevent the Department from doing the job the legislature directed it to do, which in this case is, in part, to safeguard and promote the health, safety, and well-being of children receiving child care and early learning assistance.” AR 24-25; *see* RCW 43.215.005(3). *See* Supp. CP \_\_\_\_ (Sub. No. 18) and Appendix B (March 27, 2009 superior court order).

A compliance agreement does not estop the Department of Early Learning from taking any subsequent licensing action. Rather, a compliance agreement is one of several tools the Department uses to try and reduce risk to children. As Ms. Jahn testified, the existence of a compliance agreement does not operate to prevent the Department from going back and reviewing a licensee’s history and taking further licensing action when necessary. CP 581. Ms. Jahn’s supervisor, Cynthia Davis, testified that part of the Department’s reason for revoking Ms. Islam’s license was that there had been prior compliance agreements regarding supervision and staffing issues, yet still these serious issues persisted. This demonstrated a pattern over several years. CP 302-04. Some of these prior compliance agreements were also admitted into evidence. AR 225-27, 235-38. Ultimately, the Department was not able to trust that Ms. Islam would maintain a safe environment for children. CP 308-09. This led to another basis for revocation, which was that Ms. Islam and her staff did not have the understanding, ability, good judgment, and personality

suited to meet the needs of children in care and they were unable to furnish the children with a healthy, safe, nurturing, supportive, and responsive environment, as required by WAC 170-295-0070. AR 248.

Cynthia Davis further testified that, given Ms. Islam's licensing history, Ms. Islam's license probably would have been revoked even if the infant had not been injured on January 12, 2007. CP 320.

**D. The Department Of Early Learning Was Not Obligated To Allow Ms. Islam To Demonstrate Compliance With The Compliance Agreement Before Revoking Her License.**

A Facility Licensing Compliance Agreement is a tool that licensors can use when they determine that a child care center is not in compliance with the licensing regulations. Licensor Charlotte Jahn signed multiple Facility Licensing Compliance Agreements with Ms. Islam over the years that Ms. Islam operated a child care center. *See, e.g.*, AR 225-27, 235-38.

The term "Facility Licensing Compliance Agreement" is not defined in WAC 170-295.<sup>17</sup> However, the term is referenced in two provisions, which require the child care center licensee to keep the most recent facility licensing compliance agreement on site and post notification advising parents that the compliance agreement is available for their review. WAC 170-295-7040; WAC 170-295-7080(9).

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<sup>17</sup> Appellant cites a definition of Facility Licensing Compliance Agreement that appears in WAC 170-296-0020. Br. of App. at 37. However, this WAC applies to family home child cares, not child care centers.

There is no statute or administrative regulation that requires the Department of Early Learning to give a licensee an opportunity to correct a licensing deficiency that is written on a Facility Licensing Compliance Agreement before taking further licensing action, such as revocation. In fact, the compliance agreements used by Ms. Jahn placed Ms. Islam on notice that she may be subject to further licensing action. The compliance agreements included this statement, which Ms. Islam acknowledged by signing: “I understand that the department may also take other licensing action for failure to meet licensing requirements.” AR 225; AR 235.

Appellant relies upon the case of *Valley View v. Dep’t of Social and Health Servs.*, 24 Wn. App. 192, 599 P.2d 1313 (1979), to support her argument for an opportunity to correct. However, the *Valley View* case is completely inapplicable to this case. *Valley View* involved a nursing home and a statute that expressly required the Department to grant the nursing home a reasonable time to correct cited deficiencies which could result in sanctions, such as revocation. *Id.* at 195-96 n. 5, 197, *citing* former RCW 18.51.007. There is not a comparable statute that applies to child care center licenses. Furthermore, the prior version of the Administrative Procedure Act that was in effect at the time nursing home license was revoked (1977) expressly required that “[n]o revocation . . . of any license is lawful unless, prior to the institution of agency proceedings, . . . the licensee

was given reasonable opportunity to show compliance with all lawful requirements for the retention of the license.” Former RCW 34.04.170(2), *cited in Valley View*, 24 Wn. App. at 195-96 n. 5. However, the current version of the Administrative Procedure Act, RCW 34.05, contains no such language to require an opportunity to show compliance before a license can be revoked. *Compare* former RCW 34.04.170(2) *with* the current statute, RCW 34.05.422.<sup>18</sup> Thus, *Valley View* provides no support for Appellant’s argument that she should have had an opportunity to correct her deficiencies before her license was revoked. Because there is no authority that provides Ms. Islam with an opportunity to correct her deficiencies prior to revocation, and because the legislature has stated that the children’s health and safety is paramount over Ms. Islam’s right to provide care, her argument for an opportunity to correct must fail.

**E. The Decisions To Summarily Suspend And Revoke Ms. Islam’s Child Care License Were Supported By Substantial Evidence.**

Substantial evidence in the record supports the decisions to summarily suspend and revoke Ms. Islam’s child care license. Ms. Islam violated many WACs between 2002 and 2007, including several that pertained to staffing levels and supervision of children. Thus, the

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<sup>18</sup> See <http://apps.leg.wa.gov/rcw/dispo.aspx?cite=34.04.170>, which provides:  
**34.04.170 Provisions applicable to licenses and licensing.**  
[1988 c 288 § 405; 1980 c 33 § 1; 1967 c 237 § 8.]  
Recodified as RCW 34.05.422 pursuant to 1988 c 288 § 706, effective July 1, 1989.

Department appropriately suspended and revoked her license. The Department met its burden of establishing proof by a preponderance of the evidence, and the revocation was affirmed by the ALJ and the Review Judge. The summary suspension was also upheld by the Review Judge.

There is no requirement that the Department prove that the injured infant was the victim of child abuse or neglect in order to justify the revocation. At the time of the administrative hearing, the DLR/CPS investigator still had not completed her investigation, so the outcome was unknown. In fact, the ALJ specifically did not rely on the DLR/CPS investigation in upholding the revocation. AR 87. Rather, the injury to the infant was the catalyst that caused the Department of Early Learning to take a closer look at Ms. Islam's licensing history. Ms. Islam's history of providing inadequate staffing levels and inadequate supervision for children, along with the other licensing violations, led the Department to conclude that children were no longer safe in her care and that she and her staff did not have the understanding, ability, good judgment, or personality to meet the needs of children and be able to furnish them with a healthy and safe environment as required by WAC 170-295-0070. Thus, revocation was the appropriate and necessary action.

1. **Repeated violations of licensing regulations are not required to justify revocation of a child care center license.**

Appellant argues that her license should not be revoked, because the Department of Early Learning did not prove that Ms. Islam repeatedly violated licensing rules as the term “repeatedly” is defined in WAC 170-296-0020.<sup>19</sup> This argument is not well taken, because WAC 170-296 does not apply to child care *centers*. WAC 170-296 specifically applies to *family home child cares*, while WAC 170-295 applies to child care centers. “**Family home child care**’ means a facility licensed to provide direct care, supervision and early learning opportunities for twelve or fewer children, in the home of the licensee where the licensee resides and is the primary provider.” WAC 170-296-0020. Ms. Islam was licensed to operate Little Star’s Child Care Center and provide care for up to 15 children. AR 206. Little Star’s Child Care Center operated at a separate address from Ms. Islam’s residence. CP 114-17.

The rules that apply to child care centers do not include any requirement that there be repeated violations of a licensing regulation before a child care center license can be revoked. WAC 170-295. In fact, the word “repeatedly” does not appear anywhere in WAC 170-295.

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<sup>19</sup> “**Repeatedly**’ means a violation of a licensing regulation that is written on a facility licensing compliance agreement that occurs more than once during a twelve-month time frame.” WAC 170-296-0020.

**2. The Department's action in revoking Ms. Islam's license was not arbitrary or capricious.**

Appellant argues that revocation of her license was arbitrary and capricious, because she only had two proven incidents of WAC violations. Br. of App. at 35-36. However, as explained in detail above, Ms. Islam and her staff violated numerous WACs which justified the revocation.

The arbitrary and capricious test is a very narrow standard and the one asserting it "must carry a heavy burden." *Pierce Cy. Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). Arbitrary and capricious has been defined as willful and unreasoning action in disregard of facts and circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly upon due consideration, even though one may believe the conclusion reached was erroneous. *Heinmiller*, 127 Wn.2d at 609-10; *Pierce Cy. Sheriff*, 98 Wn.2d at 695. Under this test, a court will not set aside an agency's discretionary decision absent a clear showing of abuse. *ARCO Prods. Co. v. Util. & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995).

Harshness is not the test for arbitrary and capricious action. *Heinmiller*, 127 Wn.2d at 609 (court upheld agency's indefinite suspension of therapist's license upon a finding of unprofessional

conduct); *In re Discipline of Brown*, 94 Wn. App. 7, 16-17, 972 P.2d 101 (1999) (agency sanction that is challenged as harsh will be upheld if the sanction was imposed after party had an adequate opportunity to be heard). To be overturned, a discretionary agency decision must be manifestly unreasonable. *ITT Rayonier, Inc. v. Dalman*, 67 Wn. App. 504, 510, 837 P.2d 647 (1992), *aff'd*, 122 Wn.2d 801, 863 P.2d 64 (1993).

The Department's act of revoking Ms. Islam's license was based on numerous WAC violations that compromised the health, safety, and well being of children in care. This action was not arbitrary or capricious.

**F. Appellant Should Not Be Granted Attorneys' Fees By This Court.**

Appellant requests attorneys' fees and costs for this appeal pursuant to RCW 4.84.350. However, the bulk of her argument, if successful, would lead only to a remand. As such, attorneys' fees should not be considered unless and until such time as there is a final order showing that Ms. Islam prevailed on judicial review. RCW 4.84.350; *see, e.g., Perez v. Garcia*, 148 Wn. App. 131, 145, 198 P.3d 539 (2009) (appellant securing a remand sought attorney's fees as prevailing party, but was denied until the merits were addressed on remand).

In addition, RCW 4.84.350(1) does not allow for an award of fees and costs if the agency action "was substantially justified." A court must

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

Revocation of Ms. Islam's license was justified to a degree that would satisfy a reasonable person. In 2004 and 2007, Ms. Jahn observed Ms. Islam's and her staff's failure to provide adequate supervision for children and their failure to maintain a safe environment for children. *See, e.g.,* AR 11, 14-16, 224-27, 233-38; CP 481-83, 486-91, 560-76. The Department of Early Learning was justified in acting to protect children in care in accordance with its legislative mandate. RCW 43.215.005(3)(c). Its actions have been consistent with express statutory provisions regarding the burden of proof and the authority of a reviewing judge. Since the Department meets the substantially justified standard, Ms. Islam's request for attorneys' fees should be denied.

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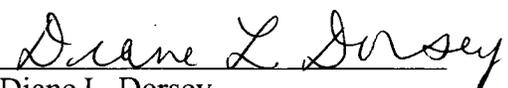
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**V. CONCLUSION**

For all of the foregoing reasons, the Review Decision and Final Order dated June 30, 2008 should be affirmed.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of October, 2009.

ROBERT M. MCKENNA  
Attorney General

  
Diane L. Dorsey  
Assistant Attorney General  
WSBN 21285  
Attorney for Respondent,  
Department of Early Learning

# APPENDIX "A"

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

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

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

14. *Uckun v. Minn. State Bd. of Med. Practice*, 733 N.W.2d 778, 785 (Minn. App. 2007) (“respondent did not violate appellant's right to due process by utilizing the preponderance of the evidence standard of proof for the temporary suspension of appellant's medical license”)

# APPENDIX “B”

**FILED**  
KING COUNTY, WASHINGTON

MAR 27 2009

SUPERIOR COURT CLERK  
BY DEBRA BAILEY TRAIL  
DEPUTY

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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8

KHURSHIDA ISLAM,

NO. 08-2-25347-3 SEA

9

Petitioner,

ORDER

v.

(Clerk's Action Required)

10

WASHINGTON STATE  
DEPARTMENT OF EARLY  
LEARNING,

11

12

Respondent.

13

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THIS MATTER, having come on before the court on Khurshida Islam's petition  
16 for judicial review, and the court having reviewed the Petitioner's Trial Brief, the  
17 Department's Brief of Respondent, and the Petitioner's Reply Brief (if any); having  
18 heard argument of the parties; and being familiar with the records and files herein, it is  
19 hereby:

19

20

**ORDERED, ADJUDGED and DECREED** that the caption of this case is  
21 hereby corrected to be Khurshida Islam, Petitioner, v. Washington State Department of  
22 Early Learning, Respondent. The Washington State Department of Social and Health  
23 Services is not a party to this action.

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ORDER  
Rev. 9-1-00 pp

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ATTORNEY GENERAL OF WASHINGTON  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
(206) 464-7744

ORIGINAL

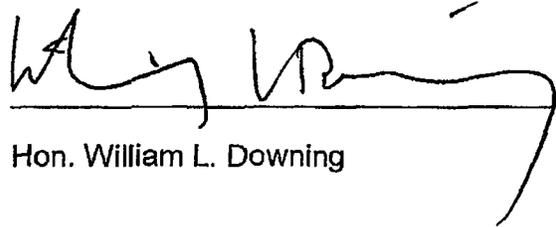
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Khurshida Islam's petition for judicial review is DENIED. The Review Decision and Final Order dated June 30, 2008 are hereby AFFIRMED.

Pursuant to RCW 34.05.461 and 464, all issues regarding the suspension/revocation were before the Board of Appeals Review Judge who, consistent with the law and the facts, found the revocation to have been justified. Thereafter, the challenge to the interim suspension became moot since there would be no available remedy in the administrative proceeding or this subsequent appeal.

Regardless of the ultimate determination of the mechanics of the child's injury that prompted the investigation, there is no reason in policy or law that should prevent the Department, based on a thorough reexamination of all their ongoing concerns about the staffing of the Petitioner's child care center, from concluding that a license revocation was called for. This is the determination it made and this was upheld on administrative appeal.

This Court concludes that the decision of the Board of Appeals Review Judge was supported by substantial evidence and was not arbitrary, capricious or contrary to law.

Dated this 27<sup>th</sup> day of March, 2009.

A handwritten signature in black ink, appearing to read "William L. Downing", is written over a horizontal line. The signature is stylized and cursive.

Hon. William L. Downing