

NO. 42283-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MELINDA MARCUM,

Appellant

v.

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent.

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APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Melinda Marcum appeals the Superior Court's order denying her petition for judicial review of the Washington State Department of Social and Health Services' decision that she neglected a child by accidentally leaving him unattended for approximately 10 minutes. On December 10, 2008, while she was operating Primetime Childcare LLC, Ms. Marcum unknowingly left a child alone in the facility while she loaded the other children in her care into a van and drove several blocks to pick up additional children from a local HeadStart program. As a result of this unfortunate but unintentional oversight: (a) the Washington State Department of Early Learning ("DEL") disqualified Ms. Marcum as a child care worker and revoked her facility's child care license; and (b) the Washington State Department of Social and Health Services ("DSHS," the "Department," or the "Agency") issued a founded finding of child neglect against Ms. Marcum.

Although Ms. Marcum originally challenged both the DEL and DSHS actions in administrative and judicial review proceedings, she no longer contests DEL's licensure decisions. She does, however, continue to dispute DSHS' finding that her inadvertent error constituted child neglect under Washington law. Specifically, Ms. Marcum asserts that her mistake, though regrettable, did not satisfy the statutory definition of child

neglect because it did not evidence “a serious disregard of consequences of such magnitude as to constitute a clear and present danger to the child’s health, welfare, or safety.” RCW 26.44.020(14).

Notably, in upholding DSHS’ finding of neglect against Ms. Marcum, the DSHS Board of Appeals (“BOA”) explicitly declined to consider whether her actions satisfied this “serious disregard” element of the statutory definition. Furthermore, the record did not contain substantial evidence that would have supported a finding that Ms. Marcum’s error demonstrated a “serious disregard” of consequences that posed a “clear and present danger” to the safety of the child at issue. As a result of these errors, Washington’s Administrative Procedures Act, RCW 34.05.010 *et seq.*, requires reversal of the finding of neglect. Finally, to the extent that DSHS’ child neglect regulation authorizes a finding of neglect without considering the statutory elements of “serious disregard” and “clear and present danger,” the regulation should be invalidated as outside the statutory authority of the Department.

B. ASSIGNMENTS OF ERROR

1. The Final Order issued in this matter is outside the statutory

authority or jurisdiction of the Department, conferred by any provision of law, entitling Ms. Marcum to relief under RCW 34.05.570(3)(b).

2. The Department erroneously interpreted or applied the law, entitling Ms. Marcum to relief under RCW 34.05.570(3)(d).
3. The Final Order is not supported by evidence that is substantial when viewed in light of the whole record before the Court, entitling Ms. Marcum to relief under RCW 34.05.570(3)(e).
4. The DSHS Board of Appeals Review Decision and Final Order is arbitrary or capricious, entitling Ms. Marcum to relief under RCW 34.05.570(3)(i).
5. As interpreted or applied in Ms. Marcum's case, WAC 388-15-009(5) interferes with and impairs Mr. Marcum's legal rights and privileges and is invalid under RCW 34.05.570(2) because that interpretation and application:
 - a. is outside the statutory authority and jurisdiction of the agency; and
 - b. is arbitrary and capricious.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the statutory definition of "negligent treatment or maltreatment" require the Department to consider and determine

whether there was a “serious disregard of consequences of such magnitude as to constitute a clear and present danger?”

2. Is Appellant Melinda Marcum substantially prejudiced by the Department’s failure to consider all the elements of the neglect statute before determining that she committed child abuse or neglect?
3. Does the Department’s determination that Ms. Marcum committed child neglect, under its interpretation and application of WAC 388-15-009(5), violate the clear intent and plain meaning of the governing child abuse and neglect statute in RCW 26.44.
4. Should WAC 388-15-009(5) be invalidated as outside the statutory authority of DSHS, to the extent it allows the Department to circumvent the requirements of the abuse and neglect statute?
5. Is it arbitrary and capricious for the Department to uphold a finding of child neglect based on a new and restrictive interpretation of its child neglect regulations that ignores the requirements of the governing child neglect statute?
6. Is Appellant Melinda Marcum entitled to attorneys’ fees and costs on appeal in this matter pursuant to RAP 18.1 and Washington’s Equal Access to Justice Act, RCW 4.84.340-360?

D. STATEMENT OF THE CASE

1. Melinda Marcum and Prime Time Childcare

Appellant Melinda Marcum has approximately 20 of years experience in providing child care services. AR¹ at 47, 170. Ms. Marcum operated Prime Time Childcare LLC in Tacoma, Washington (“Prime Time”) and the Department of Early Learning had authorized her to care for up to 17 children. AR at 141.

It is undisputed that, during the time that she operated Prime Time, Ms. Marcum had in place and utilized numerous protocols and procedures to ensure the safety and security of the children in her care, including “buddy systems” and “head counts.” AR at 10. Parents of children who were enrolled in Ms. Marcum’s facility testified to the excellent care and nurturing their children received from her, and the record shows that Ms. Marcum is “a pleasant person who enjoys working very much with young children.” AR at 10.

2. The DSHS Finding of Neglect

On the morning of December 10, 2008, Ms. Marcum was the only person working at her facility. AR at 10. As a result, when she needed to

¹ Citations in this brief are to the agency’s certified administrative record (AR) and the transcript of proceedings (TP) for In Re Melinda Marcum, DSHS BOA Docket No. 03-2009-L-1906; to the clerk’s papers in Superior Court designated for transmittal to the Court of Appeals (CP); and to the Rule Making File for WAC Chapter 388-15-009 (RMF).

drive to a nearby Headstart program to pick up two additional children, she took the other children along with her in her vehicle. AR at 11. Somehow, without Ms. Marcum's knowledge, it appears that she left one child behind at the childcare center for approximately 10 minutes. AR at 12-13.

Three weeks later, on December 31, 2008, the DSHS Division of Licensed Resources/Child Protective Services ("CPS") notified Ms. Marcum that it had determined she neglected a child in her child care facility. AR at 76. This determination was based on an allegation that Ms. Marcum left a child in her facility unattended while she briefly drove to pick up two additional children at a nearby HeadStart program. AR at 10-13. Ms. Marcum requested administrative review of the DSHS neglect finding. On February 17, 2009, CPS upheld its finding. AR at 14. Ms. Marcum then appealed this finding as described more fully below.

3. The Proceedings Below

On March 17, 2009, Ms. Marcum requested administrative hearings on DSHS' finding of child neglect and on the DEL revocation of her license.² AR at 69, 140. A two-day administrative hearing was held before the Office of Administrative Hearings ("OAH") on July 13, and 14,

² The DSHS finding of neglect was a basis for the DEL license revocation and for her disqualification as a childcare worker. AR at 52, 125-137.

2009. AR at 46. The DSHS and DEL appeals were consolidated for the hearing. AR at 63. On September 4, 2009, the ALJ presiding over that hearing issued an initial order, upholding the DSHS finding of neglect and the DEL license revocation. AR at 52, 54.

Ms. Marcum requested administrative review from DSHS and DEL. AR at 1. Her petition for review of the DSHS child neglect order was filed with the DSHS Board of Appeals (“BOA”). AR at 25-42. On February 3, 2010, BOA issued a Review Decision and Final Order affirming the ALJ’s initial order. AR at 1, 17. In this Final Order, the BOA adopted the ALJ’s findings of fact nearly verbatim. AR at 10-15. The BOA Review Judge explicitly declined to determine whether Ms. Marcum’s actions amounted to “a **serious disregard** of consequences of such magnitude as to constitute **a clear and present danger**” to this child: “...the proper factual and legal analysis is whether the Appellant’s actions failed to provide [the child] with adequate supervision necessary for [the child’s] health, welfare, and safety; *it is not whether the Appellant’s actions created a clear and present danger to [the child].*” (Emphasis added). AR at 16. Similarly, a DEL Review Judge issued an order upholding the ALJ’s Initial Order with regard to the DEL issues.

Ms. Marcum filed a Petition for Judicial Review in the DSHS matter on March 4, 2010 in Thurston County Superior Court cause number

10-2-00477-4. Ms. Marcum filed a Petition for Judicial Review in the DEL matter on June 4, 2010 in Thurston County Superior Court cause number 10-2-01252-1. Because both the DSHS and DEL matters shared the same factual record, the two cases were consolidated for hearing. The Superior Court heard oral argument on both petitions on February 18, 2011, and issued an Order on May 23, 2011, upholding both the DSHS and DEL agency decisions. CP at 72.

Ms. Marcum did not appeal the DEL decision revoking her license to this court, but now seeks judicial review of the DSHS child neglect finding.

E. ARGUMENT

1. Standard of Review

Under the Administrative Procedure Act, RCW 34.05 *et seq.*, an individual who is substantially prejudiced by a state agency adjudicative order may seek judicial review of both the individual order in her case, and the state agency regulations on which the order was based. RCW 34.05.570(3); *see also* RCW 34.05.570(1)(d); RCW 34.05.530; RCW 34.05.570(2)(a). The reviewing court may set aside the agency's final adjudicative order based on a determination that the order (or the statute or rule on which the order is based) is outside the statutory authority of the agency; is arbitrary or capricious; or is not supported by substantial

evidence; or the agency has erroneously interpreted or applied the law.
RCW 34.05.570(3).

The court may also declare the agency regulations on which the offending order was based invalid on their face or as applied on a showing that: the rules at issue are outside the statutory authority of the agency; the agency has erroneously interpreted or applied the law; or the rules are arbitrary and capricious. RCW 34.05.570(2)(c).

An appellate court applies the standards in RCW 34.05.570 “directly to the record before the agency, sitting in the same position as the superior court.” *Utter v. State, Dep’t of Soc. and Health Servs.*, 140 Wn. App. 293, 299, 165 P.3d 399 (2007) (quoting *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998)).

In the present case, as discussed in detail below, the Department’s order upholding the finding of child neglect should be set aside by the Court, pursuant to RCW 34.05.570(3), because the Department’s finding of neglect without making a determination on whether there was a “serious disregard of consequences of such magnitude as to constitute a clear and present danger” is outside the Department’s statutory authority, is arbitrary and capricious, is not supported by substantial evidence, and is based on an erroneous interpretation and application of the law.

The Court should also issue a declaratory judgment pursuant to RCW 34.05.570(2) invalidating WAC 388-15-009(5) as interpreted and applied in Ms. Marcum's case, because the Department's interpretation is outside the statutory authority of the agency, and erroneously fails to follow the statute governing child abuse and neglect.

2. Melinda Marcum is substantially prejudiced by the Department's finding that she committed child abuse or neglect.

A finding of child neglect can have serious consequences for the individual against whom the finding is made, such as being disqualified as a childcare worker or having a "negative action" on a DSHS background check (as both were the case with Ms. Marcum).³ The Department of Early Learning ("DEL") is the state agency primarily responsible for, among other things, "coordinat[ing] and consolidat[ing] state activities relating to child care." RCW 43.215.005(b)(4). DEL is authorized to conduct background checks:

When authorizing individuals who will or may have unsupervised access to children who are in child day care,

³ AR at 128. Ms. Marcum was a child care provider for many years. AR at 47, 170. Her child care license was suspended and subsequently revoked by the Department of Early Learning ("DEL") based in part on the DSHS finding of child neglect at issue in this case. Ms. Marcum appealed the DEL action and her appeal was consolidated for hearing before an Administrative Law Judge ("ALJ") and for judicial review in superior court. Ms. Marcum did not prevail in her DEL appeal on judicial review, and though she disputes the revocation of her childcare license and her disqualification as a child care worker, she is not appealing the DEL action in this case.

in early learning programs, or receiving early childhood learning education services in licensed or certified agencies, including but not limited to licensees, agency staff, interns, volunteers, contracted providers, and persons living on the premises who are sixteen years of age or older....

RCW 43.43.832(6)(b).

Under DEL's regulations, an applicant shall be disqualified from child care if his or her background contains, among other things, a finding of child neglect. WAC 170-06-0070(3).

DSHS has a similar mandate when it comes to conducting background checks. RCW 43.43.832(4). The Department's regulations require a background check on "...individuals who may have unsupervised access to children or to individuals with a developmental disability in department licensed or contracted homes, or facilities which provide care." WAC 388-06-0110(3). The following people must undergo background checks with the Department:

- (a) A volunteer or intern with regular or unsupervised access to children;
- (b) Any person who regularly has unsupervised access to a child or an individual with a developmental disability;
- (c) A relative other than a parent who may be caring for a child;
- (d) A person who is at least sixteen years old, is residing in a foster home, relatives home, or child care home and is

not a foster child.

WAC 388-06-0110(3).

The DSHS finding of neglect obviously impairs Ms. Marcum's ability to return to work as a child care provider, even as an employee in another licensed facility. Under the DSHS background requirements, she will also be prohibited from caring for a vulnerable adult relative under contract with the Department.

The consequences of a founded finding of child neglect can be long and far reaching, as discussed above. It is therefore critical that the elements of the neglect statute be strictly met before the Department makes a determination on whether someone has committed child abuse or neglect. In Ms. Marcum's case, however, the Department has adopted an interpretation of "negligent treatment or maltreatment" to uphold a finding of child neglect that fails to strictly apply the statutory criteria. Ms. Marcum is substantially prejudiced by the Department's action.

3. **The statutory definition of "negligent treatment or maltreatment" requires the Department to consider whether there was a "serious disregard of consequences of such magnitude as to constitute a clear and present danger."**

Washington's statutory scheme regarding child abuse and neglect unambiguously requires a determination as to whether alleged conduct

rises to the level of a serious disregard of consequences of such magnitude constituting a clear and present danger.

RCW 26.44.020(1) defines “Abuse or neglect” as follows:

[S]exual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child's health, welfare, or safety, excluding conduct permitted under RCW 9A.16.100; or the **negligent treatment or maltreatment** of a child by a person responsible for or providing care to the child. An abused child is a child who has been subjected to child abuse or neglect as defined in this section. (Emphasis added).

RCW 26.44.020(14) further defines “negligent treatment or maltreatment” as:

[A]n act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a **serious disregard** of consequences of such magnitude as to constitute **a clear and present danger** to a child's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100. When considering whether a clear and present danger exists, evidence of a parent's substance abuse as a contributing factor to negligent treatment or maltreatment shall be given great weight. The fact that siblings share a bedroom is not, in and of itself, negligent treatment or maltreatment. Poverty, homelessness, or exposure to domestic violence as defined in RCW 26.50.010 that is perpetrated against someone other than the child does not constitute negligent treatment or maltreatment in and of itself. (Emphasis added).

No language in the child abuse and neglect statute directs or authorizes DSHS, either explicitly or implicitly, to promulgate rules regarding or expanding the statutory definitions of either “abuse or neglect,” or “negligent treatment or maltreatment.”

DSHS's abuse of children regulations at WAC 388-15-009(5) first faithfully recite the above statutory definition of "negligent treatment or maltreatment" but go on to add language not found in the statute. This added language expands the statutory definition of the term to also include "failure to provide adequate food, shelter, clothing, supervision, or health care necessary for a child's health, welfare, or safety..."

In this case, the Review Judge found that Ms. Marcum failed to provide "supervision" as set out in the WAC definition, but did not make any determination that Ms. Marcum's action or inaction "evidences a serious disregard of the consequences to the child of such magnitude that it creates a clear and present danger to the child's health, welfare, or safety" as required by both the statute and the WAC. AR at 16-17.

Instead, the Department erroneously interpreted and applied WAC 388-15-009(5) to utilize a negligence per se determination.⁴ After finding that Ms. Marcum negligently "failed to provide adequate supervision," AR at 15, the BOA Review Judge concluded *ipso facto* that she also committed child abuse or neglect.

⁴ The Review Judge apparently applied a form of strict liability, or tort law analysis, to this case, concluding that Ms. Marcum engaged in an act that is "per se" negligent treatment or maltreatment of a child. However, negligence under tort law is not the same as child neglect as defined by RCW 26.44. There is no Washington jurisprudence which conflates these two fundamentally different terms or which would otherwise support the Review Judge's analysis.

The BOA Review Judge noted that WAC 388-15-009(5) creates the requirement that for a child's caregiver's act to be negligent treatment or maltreatment, that act must "[show] a serious disregard of the consequences to the child of such magnitude that it creates a clear and present danger to the child's health, welfare, and safety." However, the Review Judge then interpreted and applied subsection (a) of the WAC to be a list of acts by a caregiver that are "per se" serious enough to meet the above quoted requirement. AR at 16. In having done so, the Review Judge found that as a matter of law, the regulation permits the failure to supervise without more to constitute child neglect regardless of whether there is any evidence that the failure demonstrated a "serious disregard of such magnitude" that it creates a "clear and present danger" as a result.

Though the statutory definition of "negligent treatment or maltreatment" has been amended over the years, the Courts have consistently focused on the statutory elements regarding a "serious disregard" of consequences constituting a "clear and present danger" to a child's health, welfare and safety. See *Morgan v. Dep't of Soc. and Health Servs.*, 99 Wn. App. 148, 153-154, 992 P.2d 1023, 1026 (2000); *In Re Welfare of Fredericksen*, 25 Wn. App. 726, 733, 610 P.2d 371, 375 (1979); *In the Matter of the Dependency of M.S.D.*, 144 Wn. App. 468, 182 P.3d 978 (2008).

In *Morgan*, this Court reviewed the DSHS revocation of a foster care provider's license. The agency revocation was largely based on three allegations: (1) leaving a 14-year-old developmentally delayed child at a skating rink without adult supervision; (2) using profanity with the children in her care; and (3) slapping one of those children." *Morgan* at 151-52, 1025-26. During the period of time that the 14-year-old child, and several other children for whom the foster care provider was responsible, were left unsupervised, the 14-year-old had a seizure and lost consciousness. The foster care provider had knowingly left several children in her care unsupervised. *Id.* At issue was whether the appellant's actions rose to the level of child neglect. *Id.* at 153, 1026. Based on an earlier version of the language in RCW 26.44.020, this Court defined "negligent treatment or maltreatment" as "the **serious disregard** of consequences constituting a **clear and present danger** to the child's health, welfare and safety." *Id.* at 154, 1026. (Emphasis added). This Court determined that there was substantial evidence on the record to conclude that the appellant in that case had left a 14-year-old developmentally disabled child at a skating rink without adult supervision, had used cruel and unusual discipline, corporal punishment and profanity to address the children in her care. *Id.* at 155, 1027. The Court upheld the revocation of her foster care license. *Id.* at 156, 1027.

The “serious disregard/clear and present danger” analysis has also been applied in the dependency context. In *M.S.D.*, DSHS petitioned to establish a dependency of a seven year old child. DSHS alleged that the child’s mother had committed child neglect by failing to protect the child from the risk posed by the mother’s boyfriend. The State’s petition alleged that the child had watched pornography with the mother’s boyfriend, possible sexual abuse of the child by the boyfriend, and the boyfriend’s conviction for assault of a child in the second degree from approximately ten years earlier. *Id.* at 472-73, 979-80. The Court reversed the finding of dependency, determining that the finding of neglect was not supported by substantial evidence because the State failed to show that the boyfriend’s assault conviction constituted a clear and present danger to the child’s health, welfare, or safety. *Id.* at 470, 978.

In the present case, Ms. Marcum’s alleged acts fall far below the clear and present danger that the Court found existed in *Morgan* and even well below the potential danger posed in *M.S.D.* Unlike the foster care provider in *Morgan*, there was no evidence that Ms. Marcum intentionally left a child behind, or that she would ever intentionally harm a child.

Here, however, the Department’s Review Judge explicitly declined to undertake any analysis as to whether there in fact was a “clear and present danger” in Ms. Marcum’s case, relying on the language of the

WAC without regard to the language of the statute: “[t]he proper factual and legal analysis is whether the Appellant’s actions failed to provide [the child] with adequate supervision necessary to [his] health, welfare, and safety; **it is not whether the Appellant’s actions created a clear and present danger** to [the child].” (Emphasis added). AR at 16.

This interpretation and application of the regulation circumvents the required statutory analysis of whether there was a “serious disregard of the consequences to the child of such magnitude as to constitute a clear and present danger...” This interpretation and application of the regulation is inconsistent with both the WAC itself and RCW 26.44.020 and therefore exceeds the authority granted to the agency. Absent a finding that Ms. Marcum’s actions were in “serious disregard of consequences of such magnitude as to constitute a clear and present danger,” this Court should conclude that the BOA committed error of law when it upheld the Department’s finding of child neglect. This Court should reverse the BOA Review Decision and Final Order.

- 4. The Department’s determination that Ms. Marcum committed child neglect, under its interpretation and application of WAC 388-15-009(5), violates the clear intent and plain meaning of the governing child abuse and neglect statute in RCW 26.44.**

As discussed above, the relevant portion of the Washington Administrative Code defines “negligent treatment or maltreatment” as “an

act or a failure to act on the part of a child's parent, legal custodian, guardian, or caregiver that shows a **serious disregard** of the consequences to the child of such magnitude that it creates a **clear and present danger** to the child's health, welfare, and safety." WAC 388-15-009 (Emphasis added).

In the present case, neither the WAC nor the statute under which it was created defines the terms "serious" or "disregard." However, under well-settled principles of statutory construction, words in a statute are given their ordinary meaning. *Garrison v. Washington State Nursing Bd.*, 87 Wn.2d 195, 196, 550 P.2d 7 (1976). This principle applies with equal force to the interpretation of administrative regulations. *Tesoro Refining and Mkt. Co. v. State Dep't of Revenue*, 164 Wn.2d 310, 322, 190 P.3d 28 (2008). Because the terms "serious" and "disregard" are not defined by the statute, it is appropriate to look to a dictionary or case law to ascertain their ordinary meaning. *State v. Pacheco*, 125 Wn.2d 150, 154, 882 P.2d 183, 185 (1994). Merriam-Webster Online Dictionary's definition of "disregard" is "to pay no attention to" or "treat as unworthy of regard or notice." *Merriam-Webster Online Dictionary*, <http://www.merriam-webster.com/dictionary/disregard> (last visited Oct. 3, 2011). Similarly, "serious" is defined, among other irrelevant applications, as "excessive or impressive in quality, quantity, extent, or degree." *Id.* at

<http://www.merriam-webster.com/dictionary/serious> (last visited Oct. 3, 2011). Applying these definitions to the regulation at hand, it is clear that in order to have negligently treated or maltreated a child, an individual must have ignored, to an excessive or impressive degree, the consequences of his or her actions to that child.⁵

This interpretation of WAC 388-15-009(5) is also in accord with the legislative intent of RCW 26.44.010 *et seq.* See *Burlington Northern, Inc. v. Johnston*, 89 Wn.2d 321, 326, 572 P.2d 1085 (1977) (holding that “[i]n interpreting a statute, it is the duty of the court to ascertain and give effect to the intent and purpose of the legislature, as expressed in the act”). Specifically, RCW 26.44.010 declares that government intervention is warranted in instances of “nonaccidental injury, neglect...” In this way, the legislature has limited state intervention in families to cases that involve an element of purposeful or intentional harm.

Harmonizing the Legislature’s declaration of purpose with the phrase “serious disregard,” as defined by its plain meaning, yields a clear statutory intention that a person commits negligent treatment or

⁵ Notably, although in a different context, the Washington State Supreme Court has defined “disregard” as “an aggravated kind of negligence or carelessness, falling short of recklessness but constituting a more serious dereliction than hundreds of minor oversights and inadvertences encompassed within the term ‘negligence.’” *State v. Eike*, 72 Wn.2d 760, 765-66, 435 P.2d 680 (1967).

maltreatment only if the person purposefully dismisses, to an excessive degree, the risk of harm to a child by the person's act or omission.

The Court should also apply the plain meaning of "clear and present danger." Neither the statute nor the Department regulations define the term "clear and present danger," or the terms "clear" and "present." There is also no reported Washington State case law that defines these terms in the context of child neglect. Therefore, it is also appropriate to look to a dictionary to ascertain their ordinary meaning. The same dictionary cited above defines "clear," among other applications, as "free from obscurity or ambiguity; easily understood; unmistakable." *Merriam-Webster Online Dictionary*, <http://www.merriam-webster.com/dictionary/clear> (last visited Oct. 3, 2011). "Present" is defined as "now existing or in progress." *Id.* at <http://www.merriam-webster.com/dictionary/present>. Under the plain meaning, of the phrase "clear and present danger," a person commits negligent treatment or maltreatment of a child only if the harm to which the child is exposed is unmistakable and free from ambiguity.

Here, there is no evidence that Ms. Marcum purposefully dismissed, to an excessive degree, the risk of harm to the child in this case. There is no evidence that she knowingly or intentionally left a child behind. In fact, she had protocols and procedures in place to keep track of

the children in her care. The Review Judge even found that Ms. Marcum would never intentionally harm a child. There was also no evidence of an unmistakable danger to the child.

However, the BOA Review Judge explicitly declined to even make a determination on whether Ms. Marcum's alleged acts evidenced a serious disregard of the consequences to the child that rose to the level of a clear and present danger to that child. The Review Judge also explicitly declined to apply the plain meaning of the statute at issue in Ms. Marcum's case. AR at 16-17. This Court should conclude that the BOA's decision upholding the finding of child neglect violates the clear intent and plain meaning of the governing child abuse and neglect statute in RCW 26.44, and that the BOA committed an error of law when it deliberately failed to apply the plain language of the statute at issue in Ms. Marcum's case. The Court should reverse the BOA Review Decision and Final Order.

5. **WAC 388-15-009(5) should be invalidated as outside the statutory authority of DSHS, to the extent it allows the Department to circumvent the requirements of the abuse and neglect statute in RCW 26.44.**

An agency may not change or amend enactments of legislature.

Kitsap-Mason Dairymen's Ass'n v. Washington State Tax Comm'n, 77

Wn.2d 812, 815, 467 P.2d 312 (1970). As interpreted and applied in Ms.

Marcum's case, WAC 388-15-009(5) amends RCW 26.44.020(14) because it extends the statute's reach. Rules that have the effect of extending the statute are an invalid exercise of power. *State v. Miles*, 5 Wn.2d 322, 326, 105 P.2d 51 (1940). As interpreted and applied here, WAC 388-15-009(5) extends the statute to include certain conduct as "negligent treatment" which the statute alone does not include. Thus, because the regulation adds to the statute, it has the effect of extending the statute, and the regulation is therefore invalid.

Although agencies may adopt rules to fill in gaps, that authority exists only if those rules are necessary for effectuation of a general statutory scheme. *State ex rel. Evergreen Freedom Foundation v. Washington Educ. Ass'n*, 140 Wn.2d 615, 634, 999 P.2d 602 (2000). In this case, the addition of examples is not just a gap-filler because the examples were not required for the effectuation of a general statutory scheme. The language of the statute itself is enough to effectuate the statutory scheme because it provides the standard: behavior that evidences a "serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare, or safety." RCW 26.44.020(14). In other words, enforcement of RCW 26.44.020(14) does not require that the agency promulgate rules with examples of negligent treatment.

In *Littleton v. Whatcom County*, 121 Wn. App. 108, 86 P.3d 1253 (2004), a farmer filed a declaratory judgment action against Whatcom County to determine whether he was required to obtain a solid waste handling permit to operate a worm farm. Chicken manure is used in worm farms in one phase of their operations. Because the trial court determined that chicken manure is a solid waste, Littleton was required to obtain a solid waste handling permit. However, Division I reversed, holding that, because the legislature removed the word “manure” from its definition of “solid waste,” chicken manure as used on a worm farm could not be solid waste and the Department of Ecology regulation to the contrary was invalid. There, the regulations defined “solid waste” to include agricultural manures, and while the relevant statute authorized the Department of Ecology to adopt rules in the area of solid waste handling standards, the statute nowhere permitted the agency to amend or alter the statutory definitions of applicable terms by adding “manure” to the defined term when the legislature had removed it.

In the present case, the abuse of children statute does not authorize DSHS to amend or alter the statutory definition of “negligent treatment or maltreatment” in WAC 388-15-009(5), nor does it authorize the agency to amend or alter any other definitions in RCW 26.44.020. The only explicit relevant authorization granted anywhere in the statute is in RCW

26.44.125—“Alleged Perpetrators, Right to Review and Amendment of Finding—Hearing,” in subsection (6): “The department may adopt rules to implement this section.” This provision is intended to authorize DSHS to promulgate a process by which perpetrators may challenge and seek review of a Department finding, not to alter the substance of the statute.

This Court should conclude that WAC 388-15-009(5), as interpreted and applied to Ms. Marcum is outside the statutory authority and jurisdiction of the agency because it extended the legislative enactment by adding examples of negligent treatment in Part (a) which, as applied in Ms. Marcum’s case, excused the agency from examining whether her actions reflected serious disregard or constituted a clear and present danger to the child allegedly left without supervision for some period of time. This Court should further conclude that WAC 388-15-009 (5) is invalid as interpreted and applied in Ms. Marcum’s case.

6. It is arbitrary and capricious for the Department to uphold a finding of child neglect based on a new and restrictive interpretation of its child neglect regulations that ignores the requirements of the governing child neglect statute.

An agency action is arbitrary and capricious if it is made in disregard of the facts and circumstances. *Seymour v. Washington State Dep’t of Health, Dental Quality Assur. Comm’n*, 152 Wn. App. 156, 172, 216 P.3d 1039 (2009). In the present case, the BOA Review Decision and

Final Order was explicitly made without an analysis as to whether there was a “serious disregard” of the circumstances that created a “clear and present” danger (as required by RCW 26.44) that constituted neglect. The Court should conclude that the BOA Review Decision and Final Order is arbitrary and capricious.

7. Appellant Melinda Marcum is entitled to attorneys’ fees and costs on appeal in this matter pursuant to RAP 18.1 and Washington’s Equal Access to Justice Act, RCW 4.84.340-360.

Attorneys’ fees are available to the prevailing party where authorized by “contract, statute, or a recognized ground in equity.”

Cosmopolitan Eng’g Group, Inc. v. Ondeo Degremont, Inc., 159 Wn.2d 292, 296-297, 149 P.3d 666 (2006). In the present case, Ms. Marcum is entitled to recover her attorney fees under Washington’s Equal Access to Justice Act (“EAJA”), RCW 4.84.340-360, which provides in pertinent part:

Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys’ fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

RCW 4.84.350(1).

Here, Ms. Marcum is a “qualified party,”⁶ and will have prevailed if the Court reverses the Department’s action affirming the founded finding of child neglect.

Upon establishing that Ms. Marcum is a “qualified prevailing party,” the Department can avoid an attorneys’ fees award only by convincing the Court that its action affirming the founded finding of child neglect, made without a determination as to whether there was a “serious disregard” or “clear and present danger,” was “substantially justified.” *See Language Connection, LLC v. Employment Sec. Dep’t*, 149 Wn. App. 575, 586, 205 P.3d 924 (2009). To meet this burden, the Department would have to demonstrate that its action “had a reasonable basis in law and fact.” *Id.*

It is clear, however, that the Department cannot meet its burden. The Department cannot do so when it ignored its statutory requirements and explicitly refused to determine whether Ms. Marcum’s alleged actions rose to the level of “a serious disregard of consequences of such magnitude as to constitute a clear and present danger.”

⁶ A “qualified party” for purposes of an EAJA award is defined as “an individual whose net worth did not exceed one million dollars at the time the initial petition for judicial review was filed...” RCW 4.84.340(5). Ms. Marcum’s affidavit of financial need confirming her financial eligibility for an EAJA award will be separately filed and served no later than 10 days prior to oral argument in this matter as required by RAP 18.1(c).

All of the requirements in the EAJA for authorizing an award of reasonable attorneys' fees to Ms. Marcum are met in this case. The Court should authorize an award of fees and costs, including reasonable attorneys' fees pursuant to RAP 18.1 and RCW 4.84.350.

F. CONCLUSION

The Court should conclude that the Department's interpretation and application of WAC 388-15-009(5), the regulation defining "negligent treatment or maltreatment," is invalid insofar as it circumvents the requirements of RCW 26.44 and exceeds the statutory authority granted to the agency. The Court should also conclude that the meaning of the statutory definition of "negligent treatment or maltreatment" in RCW 26.44.020(14) is unambiguous and plain on its face, and therefore apply the plain language meaning of "serious disregard" and "clear and present" to the facts of this case.

The Court should set aside the DSHS Board of Appeals Review Decision and Final Order issued in Ms. Marcum's case, and set aside the agency action finding her to have committed child neglect. The Court should also invalidate WAC 388-15-009(5) as interpreted and applied in her case. Finally, the Court should authorize an award of reasonable attorneys' fees and costs to Ms. Marcum.

RESPECTFULLY SUBMITTED this 6th day of October, 2011.

NORTHWEST JUSTICE PROJECT

A handwritten signature in cursive script, reading "Alberto Casas", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that today, the 6th day of October, 2011, a true and accurate copy of the foregoing **Opening Brief of Appellant** in the above-entitled matter was delivered to the attorney for Respondent in this matter; Lucretia Fishburn Greer, Assistant Attorney General, Attorney for the State of Washington Department of Social and Health Services, at 1250 Pacific Ave Ste 105, PO Box 2317, Tacoma, WA 98401-2317.

DATED this 6th day of October, 2011.



ALBERTO CASAS, WSBA #39122

Attorneys for Appellant

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