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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BY DM BY RONALD R. SANDERSON
DEPUTY

CLERK

PATHFINDER HOUSE, NANCY MEYER,
TIM MEYER AND KERRI BROOKS,

Appellants,

and

STATE OF WASHINGTON,

Respondent.

BRIEF OF APPELLANTS

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A. ASSIGNMENTS OF ERROR and ISSUES

Assignments of Error

1. That Nancy “ran” a home housing “several” residents with sexual deviancy problems.” FF1
2. That Brian told Kerri something inappropriate occurred “between” Tyler and Tommy. FF6
3. That Kerri went downstairs and “sent Tommy upstairs.” FF6
4. That Kerri and Tim were told by Brian, Tyler, “and/or” Tommy about any sexual activity that had occurred. FF 7
5. That Kerri and Tim were told about that Tyler had rubbed his private parts against Tommy while . . . dancing or under other circumstances. FF 7
6. That Kerri and Tim were told about anything that could be described as “dry humping” or mock intercourse. FF 7
7. That any sexual contact occurred between Tyler and Tommy. FF 7
8. That Tim told Ms. Hochreiter that Tommy said he did not like Tyler rubbing himself on him. FF 7
9. That “the” or “this” sexual “incident” or “contact”, as stated in FF 7, and also in other places as “it”, “this act”, etc., occurred. FF 5, 7, 8, 9, 10, 11, 13, 14, 17, 18, 19, 21, 23, 25, 26, 27, 30, 34, 37, 44, 45, 47, 49, 50, 52, 54, 55, 56, 61.
10. That Nancy scheduled appointment for Tyler as a result of learning of “the incident”. FF 9
11. That Kerri told Heather Silva the following words as a single statement: “Tyler manipulated another person into sexual unsavory things - he is ‘humping’ him. We don’t feel comfortable with other [or others] being alone with Tyler.” FF 11
12. That it is more likely than not that Kerri made the above statement, even though Kerri denied making it. FF 11
13. That Kerri used the word “humping” with anybody. FF 11, 25
14. That Kerri used the words “sexual unsavory” with Silva. FF 11
15. That the handwritten note on Ex 20 was made by Silva “during” the part of the interview dealing with possible criminal conduct. FF 11

16. That Kerri told Silva Tyler was “humping” another person. FF 11
17. That Exhibit 20 says they didn’t feel comfortable with “other” being alone with Tyler. FF 11
18. In omitting from her finding that Heather Silva recommended that Tyler’s behavior be monitored to see if assessment for sexually inappropriate behavior would be appropriate. FF 12
19. That Devora Bills spoke with Nancy “before or after” her April 14, 2009 session with Tyler. FF 13
20. That Bills testified Nancy told her “they” had caught Tyler. FF 13
21. That anyone “caught” Tyler and Tommy doing anything inappropriate. FF 13
22. That Tommy engaged in any sexual conduct FF 13
23. That Tommy engaged in any inappropriate conduct FF 13
24. That Tyler and Tommy were engaging in any sexual conduct. FF 13
25. That Devora Bills accurately recalled that Mrs. Meyer had used the term “dry humping” to describe the conduct. FF 13
26. That Nancy Meyer used the term “dry humping”. FF 13, 19
27. That Nancy mentioned an incident between Tyler and another female resident. FF 13
28. That when Brian came upstairs he told Kerri of any interaction between anybody.
29. That the only thing Devora Bills misunderstood from Nancy was that it was Nancy who had “walked in on Tommy and Tyler while the contact was taking place.” FF 13
30. That anyone walked on Tommy and Tyler while “the contact” was taking place. FF 13
31. That the remainder of Bills’ testimony was consistent with what appellants told the Department witnesses. FF 13
32. That any risk from Tyler mentioned by appellants was sexual. FF 13
33. That any information from Nancy required a report to APS. FF 14, 19
34. That Bills made her APS report 43 minutes after she spoke with Nancy. FF 14

35. That the critical incident report Ms. Bills filed was based on what Nancy had told her. FF15
36. That Nancy told Devora Bills Tyler had raped Tommy. FF 15, R529
37. That Nancy told Devora Bills Tyler had been caught “dry humping” Tommy. FF 15, R530
38. That Nancy told Devora Bills Tyler had touched Tommy’s groin area through his pants. FF 15
39. That Nancy told Devora Bills Tyler had done similar sexual things to another resident. FF 15
40. That Nancy told anyone that Tyler had groped Tommy through his clothing. FF 17
41. That Nancy told anyone that Tyler had rubbed his genitals against Tommy. FF 17
42. That Fullerton heard the word “humped” from Nancy. FF 17
43. That Tim ever used the term “dry humping”. FF 17, 18
44. That Fullerton learned from Nancy or Tim that Tyler was a perpetrator. FF 17
45. That Fullerton learned from Nancy or Tim that Tyler touched the genital area of Tommy in a way that could be described as “mock intercourse”. FF 17
46. That Fullerton learned from Nancy or Tim that Tommy was a victim. FF 17
47. That Fullerton learned from Nancy or Tim that Tommy said Tyler had touched his genital area (in any manner). FF 17
48. That Fullerton’s incident report (insofar as it was a mandatory report) was based on what Nancy or Tim had told him. FF 18
49. That Det. Hagglund ever told Nancy what had specifically been reported. FF 19
50. That Det. Hagglund ever told Tim what had specifically been reported. FF 19
51. That Det. Meyer interviewed or even spoke to Nancy. FF 19
52. That Det. Meyer ever told Tim what had specifically been reported. FF 19

53. That Nancy confirmed Tyler had been caught humping Tommy. FF 19
54. That Nancy confirmed Tyler owned up to humping Tommy when confronted. FF 19
55. That Nancy told Hagglund that Brian said he saw Tyler humping Tommy. FF 19
56. That Brian was aware of an incident between Tyler and Tommy. FF 19
57. That Devora Bills had obtained reportable information from Nancy Meyer. FF 19
58. That Hagglund did not interview any resident. FF 19
59. That the reason given by Det. Hagglund for ending the law enforcement investigation was absence of “clear evidence”. FF 19
60. That the complaint from Tyler’s father was the second complaint. FF 21
61. That Nancy testified at 8:20–21 she could not recall whether Hochreiter asked her questions [on April 23]. FF 23
62. That there is any implication or inference that Nancy testified dishonestly as to having been interviewed by Hochreiter. FF 23
63. That Kerri said to Ms. Crawford that “Tyler admitted to her that he rubbed his genitals against Tommy in mock intercourse.” FF 25
64. That Kerri told Ms. Crawford that Brian said “an incident was occurring downstairs”. FF 25
65. That after Brian came upstairs Kerri “called Tommy up from downstairs”. FF 25
66. That after Brian came upstairs Kerri “asked Tommy what had occurred.” FF 25
67. That Ms. Brooks was told: “Tyler’s humping Tommy.” FF 25
68. That Kerri said to Ms. Crawford: “Tyler’s humping Tommy.” FF 25
69. That Kerri called Tyler upstairs. FF 25
70. That Tyler asked Kerri, “Did Tommy rat me out?” FF 25
71. That Kerri told Tyler that something was inappropriate. FF 25
72. That Kerri told Tim that anything sexual had occurred. FF 25
73. That Kerri had any basis after talking with Tommy, Tyler and Tim on

February 24, 2009 to believe anything sexual had occurred between Tyler and Tommy. FF 25

74. That Kerri stated on her own and not in answer to Ms. Crawford's question as to why she did not feel whatever Brian had deemed inappropriate had been a sexual assault. FF 25
75. That Kerri used the term "dry humping". FF 25
76. That Kerri told Ms. Crawford about any sexual abuse. FF 25
77. That Tim found out about any sexual activity between Tyler and Tommy. FF 26
78. That when Tim got "pissed" it was about sexual activity. FF 26
79. That Tim thought or said to Ms. Hochreiter that Tyler had done anything sexual to Tommy. FF 26
80. That Tim thought Tyler had done anything reportable. FF 26
81. That the behavior by Tyler that Tim told him he would not tolerate in the home and that was "complete bullshit" was sexual misconduct rather than mockery of Tommy. FF 26
82. That Tim used the term "dry humping" with Ms. Hochreiter. FF 26
83. That Tyler disclosed any sexual incident. FF 26
84. That protective actions taken by Tim and Nancy had anything to do with sexual misconduct. FF 26
85. That Tyler's impulsive actions that Tim told him had to stop were sexual in nature. FF 26
86. That any talk Tim had with "the guys" about inappropriate touching was in response to any incident of sexual touching between residents and/or Tommy. FF 26
87. That any sexual touching occurred between residents and/or Tommy. FF 26
88. That Tim ever discussed with or showed Ms. Hochreiter the concept of "dry humping". FF 26
89. That Tim demonstrated "dry humping" rather than the dance called "the hump". FF 26
90. That Tim told Hochreiter that Tyler had "dry humped" Tommy. FF 26

91. That Tim's demonstration of the dance "the hump" included any contact with another person. FF 26
92. That Ms. Hochreiter never heard anyone mention Elvis in her investigation of Pathfinder House. FF 26
93. That Tim said or implied Tyler's impulses were sexual. FF 27
94. That either Tim or Kerri told Ms. Hochreiter there was physical contact between Tyler and Tommy. FF 27
95. That Tim's demonstration of an erection with his finger and saying Tommy had never had an erection was proof that Tim was talking about a sexual incident between Tyler and Tommy when Tim was responding to and refuting Ms. Hochreiter's claim that something sexual had occurred. FF 27
96. That Kerri was present when Tim demonstrated an erection with his finger or when he demonstrated the dance "the hump" and that thus she knew there was sexual contact between Tyler and Tommy. FF 27
97. That Nancy learned from Tim and Kerri something sexual had occurred between Tyler and Tommy when she was in California. FF 27
98. That any earlier statements of Nancy conflicted with her testimony that nothing sexual had happened between Tyler and Tommy. FF 27
99. That Tyler's statements to Ms. Hochreiter were reliable when he was known to be a liar and had a motive to defend himself from Ms. Bills' accusation that he had raped Tommy. FF 29
100. That, if any thing called "lap dances" occurred, Nancy, Tim or Kerry had ever been told about them. FF 29
101. That the term "lap dance" meant the same thing to Tyler as it did to Ms. Hochreiter. FF 29
102. That Tyler meant the term "lap dance" to be sexual behavior. FF 29
103. That there was unwanted sexually inappropriate behavior in the home. FF 29
104. That an obligation to report suspected abuse arose when Brian came upstairs and said there was something going on in the basement. FF 30
105. That Nancy said Tyler "preys on vulnerable people out in the community." FF 30
106. That Tommy wearing boxer shorts, constantly adjusting himself,

touching himself and his shorts describes sexual behavior. FF 31

107. That Tommy exposed his genitals to Brian due to the way he wore his boxer/basketball shorts. FF 30
108. That if Tommy exposed his genitals due to the way he wore his boxer/basketball shorts, it was not sexual nor intentional. FF 30
109. That if Tommy exposed his genitals by the way he wore his shorts was communicated to Nancy, Tim or Kerry.
110. That if Tommy was incapable of consenting to any sexual contact, FF 7, he was not capable of sexual behavior. FF 31
111. That Brian or Mike described to Ms. Hochreiter what a lap dance was so that she knew what they meant. FF 31
112. That Brian's thinking Tommy's touching himself was inappropriate meant Tommy's actions were sexual. FF 32
113. That Nancy and/or Tim believed Tyler had initiated any sexual action toward Tommy. FF 33
114. That Nancy told Hochreiter different things on different days. FF 34
115. That Nancy told Ms. Hochreiter that Tyler had been behaving in sexually inappropriate ways since two weeks after he came to the facility. FF 34
116. That Tim and Kerri told Hochreiter different things on different days. FF 34
117. That Nancy and Tim told Ms. Hochreiter they did not keep sugar on the table. FF 35
118. That Nancy and Tim told Ms. Hochreiter they only allowed one glass of milk at breakfast. FF 35
119. That there is ample evidence in the record that food was unreasonably restricted by the appellants. FF 35
120. That raising the voice is yelling. FF 36
121. That Kerri told Brian he was living in Mr. and Mrs. Meyer's house. FF 36
122. That the developmentally disabled adults were reliable reporters or witnesses. FF 36, 37
123. That developmentally disabled adults were more reliable reporters than

Nancy, Tim and Kerri, as well as professional Jeannie Tull. FF 37

124. That Tim “got in scuffles” with Mike and “does not know how to calm himself.” FF 37
125. That Ms Hochreiter wrote the SOD on April 30, 2009. FF 38
126. In insinuating that Nancy was not directed by Ms. Crawford to call the Department hotline and the CRU, as well as to relieve Tim and Kerri of all duties in the AFH. FF39
127. That Nancy did not testify at the hearing that she was aware of allegations involving sex when Ms. Crawford advised her to call the CRU. FF 40
128. That Nancy admitted in Ex 12 that Tyler rubbed his private parts on her son Tommy. FF 44
129. That “this issue” R557 was sexual abuse rather than impulsive behavior. FF 44
130. That the meeting with the mental health therapist was not planned or “in the process” before Nancy went to California. FF 44
131. That Nancy’s statement about future reporting was based on anything other than the SOD, Ex 7, 8. FF 44
132. That Nancy and Tim did not take steps after February 24, 2009 to keep Tommy upstairs and not allow Tommy to be alone with Tyler. FF 44
133. That what Nancy wrote in Ex 12 was directly contradicted by the testimony of Tim and Nancy. FF 44
134. That Nancy did not testify as to which incident she discussed with Devora Bills. FF 45
135. That Tim yelled at Mike when Mike had soiled his bed. FF 46
136. That emphatic, animated, loud speaking is yelling. FF 46
137. That Tyler told Ms. Morrison the truth about him and Tommy and that Tommy did anything to Tyler. FF 50
138. That Ms. Morrison’s leading questions and demonstration did not give Tyler ideas of what to say to her. FF 50
139. That there is basis in the record that Tyler said Tommy snuck up behind him and grabbed him on any other occasion than in response to Ms. Morrison’s leading questions and demonstration. FF 50

140. That Ms. Morrison's reports or the RCPP panel findings were accurate as to the appellants. FF 51
141. That it is more likely than not that she made the statements attributed to her by Ms. Morrison. FF 52
142. That Nancy kept Tyler and Tommy apart because she believed sexual contact had occurred between Tyler and Tommy on February 24, 2009. FF 52
143. That Nancy was not aware before Tyler left the home of Tyler mocking Tommy by "helping" him dance. FF 52
144. That Nancy learned of any sexualized or reportable behavior between Tyler and Tommy. FF 54
145. That Nancy did not make an effort to assure that all of the clients in her home were safe from any kind of sexual predatory behavior. FF 54
146. That Nancy demonstrated a pattern of neglect to five vulnerable adults who were residents at the home. FF 54
147. That Nancy knew of sexual abuse and did not appropriately report it. FF 54
148. That hearing an investigator's allegations is necessarily grounds to have a reportable obligation. FF 54
149. That Nancy had any need of putting protections in place concerning unwanted sexual contact or to ask for help from department staff so as to not neglect the vulnerable adults' health, wellbeing and safety. FF 54
150. That Tim neglected vulnerable adults. FF 55
151. That Tim learned that there had been a sexualized or reportable event in his home on February 23, 2009. FF 55
152. That Tim needed to implement interventions to protect the residents from potential sexual behavior. FF 55
153. That Tim demonstrated a pattern of neglect to five vulnerable adults who were residents at the home. FF 55
154. That Tim knew of sexual abuse and did not appropriately report it. FF 55
155. That any inaction by Tim left the vulnerable adults at potential risk of abuse. FF 55

156. That Kerri neglected and abused vulnerable adults. FF 56
157. That Kerri learned that there had been a sexualized or reportable event in his home on February 23, 2009. FF 56
158. That Kerri was really nasty to everyone. FF 56
159. That Kerri chastised Michael about his laundry, and expressed anger at Tyler when he tried to help Michael with his laundry. FF 56
160. That Kerri called Tyler a liar. FF 56
161. That when Brian dropped something and it broke, Kerri became very angry at him and told him to go downstairs and followed him downstairs and continued to criticize him. FF 56
162. That Kerri called Brian a baby when he cried. FF 56
163. That Kerri yelled at Brian and scares the wits out of him. FF 56
164. That Brian's statements to Ms. Morrison about Kerri were spontaneous and not the result of leading questions or mistaken assumptions by Ms. Morrison. FF 56
165. That Kerri demonstrated a serious disregard the health, well-being and safety of five vulnerable adults who lived at the adult family home. FF 56
166. That Kerri ever became aware of inappropriate sexual conduct in the home. FF 56
167. That any inaction by Kerri left the vulnerable adults at potential risk of abuse. FF 56
168. That sometime between July 1, 2008 and April 30, 2009, Kerri verbally and mentally abused three vulnerable adults by ridiculing them and yelling at them.
169. That Tyler had no motive to lie in light of his lying when he is accused of something and when he had been falsely accused of rape by his own therapist. FF 58
170. That Tommy had been or had told anybody that he had been touched sexually inappropriately. FF 58
171. That Tommy had touched Tyler sexually without consent. FF 58
172. That there was any humping, lap dances, or rubbing of one's genitals on another by anyone toward any resident of Pathfinder AFH. FF 58

173. That any sexually inappropriate acts occurred on February 23, 2009. FF 59
174. That hearsay by Ms. Silva who did not testify can be the a for any finding in the hearing. FF 59
175. That appellants made statements to Heather Silva, Devora Bills, Robbie Hochreiter, Roberta Crawford, and Skagit County Detective Ben Hagglund that they were aware of any sexually inappropriate conduct in the AFH. FF 59
176. That appellants' stories ever changed. FF 59
177. That Heather Silva, Devora Bills, Robbie Hochreiter, and Roberta Crawford accurately heard and interpreted what the appellants said to them. FF 59
178. That Tommy doing a dance called "the hump" and doing Elvis impersonations was a new topic after the investigations began. FF 59
179. That the appellants did not realize the need to explain their use of the term "the hump" of Tommy's Elvis impersonations due to the gross distortions and misunderstandings of the investigators. FF 59
180. That the totality of the evidence supports a finding that the statements attributed to the Appellants by Department witnesses were made and were accurately documented. FF 60
181. That the Review Judge made an independent review of the evidence. FF 60
182. That earlier misunderstood or misquoted statements are more reliable than later statements made when all the facts had been revealed to the Appellants. FF 61
183. That there was an instance of sexual contact between Tommy and Tyler on February 23, 2009, or that Mr. Meyer and Ms. Brooks learned of it that day. FF 61
184. That Mrs. Meyer scheduled a counseling appointment for Tyler in response to an incident of inappropriate sexual conduct. FF 61
185. That Tim made all three responses listed in FF 26. FF 61
186. That Kerri told Heather Silva of any incident of inappropriate sexual conduct in the AFH. FF 61
187. That the Appellants had determined on a course of denying that any

incident of inappropriate sexual conduct occurred. FF 61

188. That appellants had to deny statements they made to others verbally and in writing. FF 61
189. That appellants intentionally testified falsely or incorrectly. FF 61
190. That the appellants' initial statements were at odds with their later statements. FF 61

Issues Pertaining to Assignments of Error

1. Whether the Review Judge was blinded by bias or denial and therefore unable to recognize the true facts of the case?
2. Whether there is substantial evidence in the record to support the Review Officer's decision?
3. Whether the Review Officer used the wrong standard of substantial evidence in her review rather than de novo review?
4. Whether the appellants are entitled to attorneys fees as prevailing party?
- 5.

B. STATEMENT OF THE CASE

In March 2008, Tyler came to live at Pathfinder House. Nancy Meyer was the provider, and her husband, Tim, and their employee Keri Brooks, were additional care givers. When he first came to Pathfinder House, some of the negative behaviors that he exhibited were instigating things with the other developmentally disabled residents. 8:21. In addition to instigating things, Tyler also had impulse control issues, such that he wouldn't consider the consequences before acting on his impulses. 8:23. The staff at Pathfinder House spent a lot of time talking with Tyler, and talking about his behaviors and what expectations there were for an adult. 8:21. As a result, Tyler showed significant progress, and his mother was very pleased with that progress. 8:22–23. Tyler's impulse control continued to be a problem, though it usually did not involve his interactions with other people. Examples of his impulse control would be to throw his video game controller, perhaps breaking it, or breaking a CD if it wasn't playing correctly. He did not, however, damage other people's belongings. 8:23–24. Tyler also exhibited other behavioral problems in interacting with the other residents such as wanting to be the center of attention and mocking or making fun of others. 8:24.

Also living at Pathfinder House was the Meyer's 26-year-old Downs Syndrome son, Tommy. Tommy's bedroom was on the third floor with his

parents while the adult family home residents lived in the daylight basement. Tommy, who is very social, would often go down to the residents' living area to listen to music and interact with the residents. Tommy's uncle was an Elvis impersonator, and as a result, Tommy did Elvis impersonations himself. In fact, Tommy had a band and performed on a regular basis, complete with an Elvis suit. Around the house, Tommy enjoyed music and dancing, though at times the other residents considered him a nuisance.

Tim did not like the way Tommy dances, imitating Elvis, and Tim would say that Tommy's "dancing the hump" or "doing the hump". 6:131. The hump was a dance Tim was familiar with from the 1960s. 8:42. Though Tim didn't like the style of dancing, he didn't want to stop Tommy from doing it as it was very important to him. Tim would rather he had another hobby. 6:132. Tim didn't usually use the term around Tommy, but only around Nancy, 6:132, and Keri, 5:186–187; 5:192.

One of the problems of mockery that developed was that Tyler would mock Tommy when he danced, though Tommy was oblivious to the mockery due to his developmental disability. Tyler's mockery of Tommy bothered Nancy, Tommy's mother, however, and it really bothered Tim, Tommy's father. But good-natured Tommy always considered Tyler his friend. 8:28. The other developmentally disabled adults did not complain about Tyler, though the one non-disabled resident (who was there to recover from a

stroke) had complained about Tyler, 8:28, because he was aware that Tyler was actually mocking whereas the other residents would not be aware. 8:29–30. If Tommy or the others were dancing, Tyler might “kind of dance along with them, but not really with them. More like making fun of them.” 8:25. The dancing that Tommy and the others did in the residents’ living area as individual dancing rather than dancing with each other. 8:26. Tyler mocked some of the residents as well, but they generally got along with him. 8:27.

Another behavioral issue regarding Tyler was that he exaggerated most things, 8:34, and told stories that couldn’t have been true, like bungy jumping off Deception Pass bridge. 8:34. There had never been issues of inappropriate sexual behavior on the part of any of the residents or Tommy.

In order to assist Tyler, Nancy enrolled him in a social skills class at Compass Mental Health, R557. In addition, behavioral consultant Jeannine Tull came to Pathfinder House to work with Tyler and Tommy. 5:93. Her work with Tommy concerned boundary issues as a result of his being very social, interrupting in conversations he wasn’t invited to be involved in. 5:96. Ms. Tull also worked with Tyler regarding boundary issues. 5:26. Ms. Tull’s expertise also included dealing with issues of sexuality with developmentally disabled adults. 5:107 & 113. Ms. Tull was never aware of any sexual issues with either Tommy or Tyler or the other residents.

5:112. And in her expert opinion, Tommy is not capable of any type of sexual assault. 5:114–115; R502–03. Ms. Tull last worked with Tyler in early 2009. 5:112. Ms. Tull testified that Tyler at times was definitely not truthful. Having been in the home, Ms. Tull also had very positive things to say about the Meyers, Keri, and Pathfinder House. R502–03; 5:120–21.

As a result of Tyler’s behavioral issues, Tyler was prescribed psychotropic medications, though he was dissatisfied with the medication because it made him feel like a zombie. 8:57. Tyler’s medications were prescribed by his medical doctor. 8:56. Tyler also talked to his medical doctor about doing things, but not knowing why he did them. After Ms. Tull was no longer working with Tyler, Tyler’s doctor said he needed to see a psychiatrist in order to change his medications. 8:57. Nancy set an appointment with his medical doctor regarding new medications. 8:56–57. In order to change medications, Tyler’s doctor felt he should see a psychiatrist, and Nancy learned that Tyler would have to be seen by a mental health therapist to get a referral to a psychiatrist. 8:57.

After learning of the need for a therapist, but before setting an appointment with the therapist, Nancy took a trip to Disney Land. 8:57. Besides changing his medication, Nancy was expecting the therapist to address Tyler’s impulse control and his behaviors in destroying his own property. 8:58–59. Tyler was referred to therapist Devora Bills at Sunrise

Services by Tyler's case manager, Wesley Fulerton. 8:57–58.

Two days after Nancy left for Disney Land, an incident occurred at Pathfinder House which became the focal point of this case. With Nancy gone, Tim and Keri were the caregivers at the adult family home. Keri had returned from a doctor's appointment with Brian, a new resident who had only been at the home for a few days. 5:161. While Keri began fixing lunch for the residents in the kitchen, Brian went downstairs to put his backpack away. 5:162. About a minute later, the time it would have taken to put his backpack away, Brian came back upstairs and said, "something inappropriate's going on". He made no further comment and went sit as his place for lunch. 5:163. At the point in time, Tim was in the living room watching television. 5:164. When Keri went over to the stairs, she saw Tommy coming up the stairs. 5:165–166. When he reached the top, Keri asked him what he was up to and told him to go talk to his father to find out what he had been up to, and he did so, thinking that Tyler and Tommy had been up to some "tomfoolery", such as having a pillow fight. 5:166; 5:176. Keri also called to Tim to tell him what Brian had said. 5:175. Keri had no idea what Brian meant when he used the word "inappropriate", but the idea of sexual behavior did not come to her mind. 5:177. Rather, some of the inappropriate things that went on in the basement among the residents and Tommy were "loud belching, farting, noises with their mouths...potty

humor.” Or other inappropriate things such as pillow fights, tug of war with a blanket, throwing cards into a bucket. 5:177. Tommy’s demeanor as he came up the stairs was nothing out of the ordinary. *Id.* The only other person in the home that day was Tyler, who was downstairs. After sending to his father, Keri went downstairs, standing at the bottom of the stairs, which was about 15 feet from where Tyler was sitting on the couch. 5:167–168. Keri asked Tyler, “What are you guys up to?” Tyler’s defensive response was, “Who ratted me out?” Tyler often used that expression regardless of whether he had done something wrong. 5:170–171. Keri then said, “Well, what did you do?”, to which Tyler replied, “Nothing.” She then asked him again and he again, “Nothing”. 5:169. Though Keri had seen Tyler responding in a guilty manner on other occasions, there was nothing unusual in his demeanor as he answered her nor did he appear guilty. *Id.* Keri then told him she was fixing lunch and to come upstairs, which after washing his hands he did. *Id.* Brian, Tommy and Tyler all ate lunch in the kitchen, each sitting at his own place, but nothing further was mentioned regarding anything “inappropriate” nor was there conversation or interactions anything out of the ordinary. 5:173–174.

After lunch, Keri spoke with Tim to find out what Tommy had told him and to tell Tim what Tyler had told her. 5:182. Keri recalled Tim saying that Tommy just said he had been goofing around. 5:182. It was “pretty

obvious” to Keri that nothing had happened in the basement that wasn’t normal behavior. Keri had never been aware of any sexual activity downstairs between the residents or Tommy. 5:183.

Tim said that when Keri sent Tommy in to speak with him he was actually in the office off the living room. 7:111. And when Tommy go to him, he asked Tommy, “What’s going on?”, to which Tommy replied, “Nothing.” Tim then said, “Well, something. What were you doing?” Tommy said that he was “dancing” and that “Tyler was helping me”. Tim then sent Tommy back into the kitchen for lunch. 7:112. Tommy appeared as he normally was and nothing appeared to be bothering him at the point Tim spoke to him. *Id.* When he and Keri talked after lunch about what Tyler had said, she relayed Tyler’s comment about being ratted out and that he had said, “Nothing”, which Tim testified was Tyler’s typical answer. 7:113. After lunch, Tim talked to Tyler and asked him what was going on, and Tyler told Tim, “Nothing”. 7:114. Tim then said, “Are you sure, Tyler?” and Tyler again said, “Nothing”. *Id.* Then Tim asked, “Well, what was the thing with the dancing?” Tim testified that up to that point he hadn’t given it much thought, but realized that if Tyler was helping Tommy dance, Tommy thought Tyler was his friend, but Tyler didn’t really act like Tommy’s friend. He realized that if Tyler was helping Tommy dance, knowing Tyler, Tyler was probably mocking Tommy. 7:114–115. Tim said the more he thought

about the situation that Tyler was probably mocking Tommy or goofing around, he said something like, “Is this another impulse thing” or something similar. When Tyler said, “No”, Tim said, “Well, if it is, this stuff’s gonna stop. You know, if it’s an impulse thing it’s not gonna happen. It’s gonna stop.” 7:117. Investigator Robert Hochreiter testified relating what Tim told her about his conversation with Tyler, that Tim said that he got “pissed”. 1:70. Tim told Tyler, “These impulses are over. This is complete bullshit.” 1:70.

As far as Tim and Keri were concerned, the matter had been resolved. Tim indicated that nothing about his or Keri’s conversations with Tommy and Tyler suggested that anything sexual had occurred in the basement, 6:138, and he further said:

If I had thought it was anything sexual from Tyler towards my son, if there was anything assaultive, it would have been 30-minute notice. He’d have been sitting at the deputy’s. He’d have been down at the sheriff’s department. Because that would—it wouldn’t be 30-day notice...I wouldn’t leave somebody at the house like that. We’re there to protect our kids and our people.

At that point in his testimony, Tim became emotional. And he again said, “How could you leave somebody in your house that you think is molesting your son?” 6:138.

When Nancy came back from California, Tim and Keri spoke with Nancy about things that had happened while she was away, including Brian’s

comment that “something inappropriate was going on”. 5:185. During that conversation, Tim told Nancy about Tommy dancing the hump. 5:186. Keri also told Nancy about her conversation with Tyler. 5:187.

After Nancy returned, they arranged for Tyler’s appointment with Devora Bills as they had planned before Nancy left on her trip. 8:158–159. Keri took Tyler to the intake at Sunrise Services because Nancy was unavailable. 8:159; Ex. 20, R687–702. The intake was done by Heather Silva, whom the state did not call to testify in the hearing. Keri was present with Tyler during the intake, and she added additional comments. During the intake assessment, Heather Silva hand wrote the on page four the following questions in criminal history:

Keri: Tyler manipulated another person into sexual unsavory things – “humping” him – we don’t feel comfortable w/ others being alone w/ Tyler.

R691. Keri said that she never said that statement, but she did talk about Tyler’s manipulation. 5:202. Keri said that Tyler takes advantage of people and gave as an example of how he talked the other residents into giving him their candy bars or ice cream when they were at a camp ground, rather than paying for those items himself. Keri also said she told Ms. Silva of an impulsive comment he had made to Keri’s daughter when he met her saying to her daughter, “Nice boobs” and that he had been staring at her chest when

he made the comment. 5:209–210. Keri prompted Tyler to tell Ms. Silva that when he was 18 or 19 he present when his 9-year-old female cousin disrobed in his presence and that the girl’s father had gotten mad at Tyler. 5:211. Keri said that the only thing she could think of regarding the word “humping” was regarding the way Tommy danced and that it was brought up in the intake. 5:212. Keri also told Ms. Silva that they don’t feel comfortable leaving Tyler alone with others because of an incident when Tyler had been holding the money for other residents and bought things for himself but did not share the money equally. 5:212–213. Keri gave another example of why they didn’t feel comfortable with others being around Tyler regarding a time when Tyler and two other residents had taken the bus to Bellingham and Tyler walked home, leaving the other two at the bus stop. 5:195, 5:216. Keri said she also told Ms. Silva about other incidents of when they had to keep their eye on Tyler. 5:216.

The mental health clinical assessment by Heather Silva, R687-88, said that the reason Tyler was referred to Sunrise Services by Pathfinder House was “because of his mood swings and disruptive behavior”, noting that during the interview itself he had “poor impulse control”. The issue of sex was not mentioned at all in Ms. Silva’s mental health clinical assessment. On the final page, of the assessment, R702, Ms. Silva wrote:

Possibly will need assessment for sexually inappropriate

behavior. Monitor behavior to see if assessment is appropriate. Talk to Nancy Meyers[sic] (owner of Pathfinders House) to see if behavior necessitates call to APS and report if needed.

Ms. Silva is a mandated reporter and she made no report to the CRU or law enforcement as required by WAC 388-76-10673 and RCW 74.34.035(2).

The appellants did not receive a copy of the intake assessment until discovery was provided in this case.

Tyler's appointment with Devora Bills did not take place until April 14, 2009 at 2:00 p.m. Nancy sat in on the appointment, after which at 2:50 p.m., Ms. Bills spoke with Nancy. Ms. Bills testified that she had read the intake assessment several times, including the day prior to her appointment with Tyler. Ms. Bills testified that she could not remember what Nancy had said during their post-appointment discussion, but that she would have to rely upon her notes set forth in R525. Specifically, she wrote:

Nancy also disclosed that Tyler has inappropriately touched members of the household and that he is not currently allowed to be alone with a member of the household due to this. Nancy reports that APS is not involved. Nancy reports that Tyler preys on persons that are more vulnerable than him. He 'hasn't done it with the guys that are bigger or more functioning than him.'

Nancy testified that she did not mention sexual touching to Devora Bills, only inappropriate touching. Ms. Bills told Nancy that Tyler could no longer live in the adult family home, because he was not safe to be around the others

in the home, but she gave Nancy no further information. Nancy assumed this professional knew what she was talking about and therefore called Wesley Fulerton, Tyler's case manager, and told him that she had to give Tyler 30-days notices, but that she did not understand specifically why. Ms. Bills called Wesley Fulerton and said that Tyler was "dry humping" another member of the household. No one previously had used the term "dry humping". Two days later, on April 16, 2009, Ms. Bills filled out and submitted a critical incident report to the Northsound Mental Health Administration, Ex. 6 R529-31, in which she checked the box "allegation of rape (perpetrator)". She also wrote:

Care giver reported that Tyler had been caught 'dry humping' her son who has Downs Syndrome, who is reported to be at a cognitive age of 8. Tyler was also reported to touch through his pants in the groin area. Care giver then reported that a similar incident took place with a roommate who no longer lives at the resident.

R530. Tyler did not use the word "hump" during his 50-minute appointment with Ms. Bills, 8:116, nor did Nancy during her 10-minute discussion with Ms. Bills. Ms. Bills could not recall during testimony if the words "dry humping" were hers or Nancy's words. 2:126-127. Unbeknownst to Pathfinder House and the appellants, Ms. Bills' initial "dry humping" set in motion an investigation that led to the summary suspension of their adult family home. Though all the investigators had the term "dry humping" in

their minds, the appellants never used that term, though they did speak about Tommy dancing the hump.

C. SUMMARY OF ARGUMENT

This case presents two divergent pictures. They both can't be right. If the state and the reviewing officer are correct, the appellants are liars. If the appellants are correct, a great injustice has been done; and there must be an explanation for how the state and the reviewing officer could maintain their divergent position.

The answer lies in a critical review of the record, particularly the willingness of the state's witnesses to make incorrect presumptions and allow the presumptions to affect their words and actions. Specifically, the state's witnesses created an entire construct of sexual behavior based upon misuse of the word "hump". The state's primary witnesses were Roberta Hochreiter and Devora Bills. The appellants believe the cross-examinations of these two witnesses are most instructive to show the presumptuous and misguided nature of their testimony. *See*, Vol 1:88–190, 206–291 (Hochreiter) and Vol. 2:130–168, 172–176 (Bills).

Unfortunately, once the word "the hump" was uttered in the hearing of the department witnesses, or communicated among one another, they could think of nothing but finding sexual activity in the Pathfinder Adult Family Home. See Attachment A re Sexual Words.

This is what the case is all about, and understanding it will require that the source of sexual words be traced from one person to the

next—something the reviewing officer appears to have refused to do.

D. ARGUMENT

I. STANDARD OF REVIEW

In reviewing administrative action, the appellate court sits in the same position as the superior court and applies the standards of the WAPA directly to the record before the agency. *Tapper v. State Employment Security Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). We review conclusions of law de novo under an error of law standard. *Williams-Batchelder v. Quasim*, 103 Wn.App. 8, 13, 19 P.3d 421 (2000). Factual determinations are sufficient only if supported by evidence that is substantial when viewed in light of the whole record before the court. *Martini v. Employment Security Dep't*, 98 Wn.App. 791, 795, 990 P.2d 981 (2000). The WAPA also allows a reviewing court to reverse an administrative decision when the decision is arbitrary or capricious. RCW 34.05.570(3)(i).

Bond v. Dep't of Soc. & Health Servs., 111 Wn. App. 566, 571-72, 45 P.3d 1087 (2002). The decision in cas case is arbitrary and capricious

A. Errors of the Review Judge

1. **The reviewing officer was arbitrary and capricious**

The reviewing officer was arbitrary and capricious in failing to follow proper review standards, relying in critical places—if not entirely—on the substantial evidence rule rather than de novo review. In so doing she disregarded virtually the entire response of appellants. CL 2, 000090. It is thus necessary for the court to consider the appellants' response to the reviewing officer, including the Appendix (time line), Attachment A (Objections to Findings and Conclusions in Final Order) and particularly Attachment B (origin of sexual words used by state witnesses).

It is important to read the cross-examination of the state's witness, particularly Hochreiter, Bills and Fullerton.

2. Devora Bills lied

The grossest error of the Review Judge is found in Finding of Fact 13. There the judge turns a blind eye to the fact that Devora Bills, the prime mover in this case, virtually lied by stating that Nancy told her Nancy had "caught" or "walked in on" Tyler sexually assaulting Tommy. Unfortunately for Ms. Bills, everyone else, including the State's investigators, knew Nancy was in California when Bills said she walked in on Tyler sexually abusing Tommy.

On the other hand, the Review Judge holds everything against the appellants.

3. Failure to Consider the Implications of the Intake Assessment

- a. Why didn't Heather Silva report abuse?
- b. Why didn't she ask Kerri what she meant when Silva wrote down "he is humping him"?
- c. Why didn't Tyler get upset if in fact Kerri said in his presence that he had been humping or having mock intercourse with Tommy?
- d. Why didn't Devora Bills write "dry humping" in her notes, Ex 3, on the day she spoke with Nancy Meyer?

- e. Why would Bills leave out the words “dry humping” in her notes of her conversation with Nancy written within a half hour of the conversation yet use the words in her Critical Incident Report 42 hours later?
- f. Why would Bills check the box for “rape” in the Critical Incident Report, Ex 6, when she could have checked the box for “sexual assault”?
- g. Why did Jeanine Tull equate “inappropriately touched” with “sexually touched”?
- h. Why did Hochreiter derive sexual meaning from Tim, Nancy and Kerri’s words when she admitted none of them used the word “sexual” [or “sexually”]?
- i. Why would Tim and Nancy Meyer, whose witnesses testified were caring people and excellent caregivers, put up with someone sexually using their own special needs son?
- j. Why would there be such a variety of sexual words, virtually none of which were ultimately attributed to the appellants?
- k. Why didn’t Bills report abuse when read the Intake, Ex 20, prior to the day she met with Tyler, when she testified that after reading the Intake she “had reason to suspect that there were sexually inappropriate conduct that had occurred.” 2:134

l. Why did Bills get a pass from the ALJ, who—when it became known she had committed the gross misdemeanor crime of not reporting sexual abuse to law enforcement—stated, “[S]he’s explained that she made a mistake. And people make mistakes.”? 2:161; 3:119;RCW 74.34.035(2), 74.34.053(1).

m. Why did Bills get a pass from the reviewing officer when Bills emphatically claimed Nancy had “caught” and had “walked in on” Tyler having sexual contact with her own son—when everyone else knew that Nancy was in Disneyland— stating, “Ms. Bills misunderstood at least some of what Mrs. Meyer told her”. FF 13; 2:118, 119

B. The reviewing officer confuses the standard under which the initial order is to be reviewed.

On March 3, 2011, the authority of the review judge, as explicitly stated in WAC 388-02-0600, was significantly changed when WSR 11-04-074, which had been promulgated two months earlier by the Department, became effective. Eight days later on March 11, 2011, the state filed its petition for review—apparently unaware of the change in the WAC—citing to the former WAC 388-02-0600. *See* BR 289-90, 4.¹ The appellants pointed out the change to the reviewing officer, BR 111, and although the reviewing officer

¹ BR refers to the Board of Appeals record, and leading zeroes are omitted herein from the page references.

recognized there had been a change in the WAC, BR 91 (n. 211), the reviewing officer does not acknowledge either the Department's error or the appellants' correction. The fundamental change in the WAC was that the reviewing officer's review was to be *de novo* rather than the substantial evidence standard. BR 111, 289-90.

More importantly—perhaps because the amendment to the WAC was recent and unfamiliar—the reviewing officer relied upon the standards of the former WAC in making her determination. Though the reviewing officer appears to give credence to the proper standard, BR 90, in what appears to be primarily boiler plate, BR 90-92, she nevertheless relied on the substantial evidence test of the former WAC. BR 62 (“the undersigned left unchanged those findings of fact supported by substantial evidence based on the entire record”). *See also* BR 98, indicating that additional findings are “proven by substantial evidence in the hearing record”. The authority of the review judge, stated in the current WAC 388-02-060(1), states in relevant part:

The review judge has the same decision-making authority as the ALJ. The review judge considers the entire record and decides the case *de novo* (anew).

The WAC was amended to comport with the requirements of RCW 34.05.464 which states that the reviewing officer :

- (4) 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. [and]
- (5) shall personally consider the whole record or such portions of

it as may be cited by parties.

The reviewing officer further confused her legal authority by appearing to claim that the *de novo* requirement applied to issues. BR 92: “Because the ALJ is directed to decide the issues *de novo*, the undersigned has also decided the issues *de novo*.” The footnotes, omitted from the preceding quote, cite WAC 388-02-0215(1), RCW 34.05.464(4), and WAC 388-02-0600(1). The reviewing officer is mistaken in several regards. First, she misquotes the requirement by claiming that the *de novo* requirement applies to “issues”. This is in keeping with her error noted above regarding reviewing findings on the substantial evidence standard. Second, the reviewing officer misunderstands the WAC by referring to the authority of the ALJ as the basis for *her* authority to decide issues *de novo*. It is true that WAC 388-02-0600(1) states that the review judge has the same decision-making authority as the ALJ. However, the reviewing officer is mistaken that the requirement of *de novo* review is derived from the ALJ’s authority. The reviewing officer’s authority is not derived. Rather it is explicitly granted: “The review judge considers the entire record and decides the case *de novo*.” *Id.*² The law requires the reviewing officer to decide the “case”

² It is true that in the same passage, the reviewing officer acknowledges her obligation to consider the whole record, stating: “Consequently, the undersigned has considered the adequacy, appropriateness, and legal correctness of all Initial Findings of Facts, Conclusions of Law, admitted evidence, any previous proceedings and orders, regardless of whether any

anew, not just the “issues”.

C. The reviewing officer improperly limited the scope of her review.

Notwithstanding the statutory requirement that the reviewing officer “shall exercise” all decision-making authority she would have had if she had presided over the hearing, RCW 34.05.464(4)—which requirement is reflected in WAC 38-02-0600(1) that she is to decide “the case *de novo* (anew)” —the reviewing officer explicitly refused to consider issues raised by the appellants. At BR 90, referring to WAC 388-02-0570, the reviewing officer misstates the law. The reason for misstating the law is either because she misconstrues the WAC relied upon or that WAC is outside the statutory authority. Specifically, the reviewing officer stated:

The Department is correct that the Appellants cannot appeal any additional findings of fact and conclusions of law in the Initial Order, and may only respond to those challenged by the Department. The portion of the Appellants’ response that responds to the Department’s challenges to the Initial Findings of Fact is accepted and has been considered. To the extent that the Appellants seek to appeal any aspect of the Initial Order, that appeal needed to be filed in compliance with the timeliness in WAC 388-02-0570.

Implicit in the foregoing quotation is that the reviewing officer did not in fact

party has asked that they be reviewed.” BR 92. Note that, the reviewing officer states that the obligation to decide *de novo* applies to issues, and has only “considered” the ALJ’s Findings of Fact. This distortion of the statutory requirements is in keeping with the reviewing officer’s having reviewed/considered the ALJ findings under the substantial evidence test, as noted above.

consider the entire record, and only a portion of the Appellants' response. However, the amendment to WAC 388-02-0600 effective eight days before the Department's Petition for Review was filed, said that the review judge "decides the case *de novo* (anew)", in keeping with the requirement of RCW 34.05.464(4) that the reviewing officer "shall exercise" its decision-making power. As stated by the reviewing officer at BR 91, note 213, case law acknowledges that the final decision-making authority rests with the agency head and general legal principles regarding appeals do not apply to administrative review of administrative determinations.

The reviewing officer relied on WAC 388-02-0570 that "if more than one party requests request, each request must meet the [filing] deadlines". Thus, according to the reviewing officer, appellants could not challenge any findings or conclusions of the ALJ if they had not already appealed them within the deadline. This, however, is in conflict with RCW 34.050.464(4) ("all the decision-making power") and WAC 388-02-0600(1) ("decides the case *de novo*"). If the case must be decided *de novo* by the reviewing officer, then no facts or issues can be excluded. Thus, the reviewing officer's purported limiting of the facts and issues to be decided on review was in violation of the statute and rule above. WAC 388-02-0570(2) is therefore in violation of the Administrative Procedure Act.

Actually, it could be held that WAC 388-02-0570(2) is not invalid but

only misconstrued by the reviewing officer. Specifically, nothing in that WAC suggests that the responding party to a petition for review can not address the case *de novo* (anew). Alternatively, as appellants argued in their response to Department's Petition for Review, BR 145–146, responding to the Department's Petition for Review required responding to the ALJ's finding on credibility.

Finally, in this particular case, the appellants, though not pleased with the findings of the ALJ, nevertheless were successful on the ultimate questions before the ALJ. It thus would have made little sense to have appealed the Initial Order, only costing more time and expense and inability to pursue their vocation as an adult family home. To demand the appellants appeal unfavorable portions of a ruling in order to retain their successful outcome because the state could possibly appeal is contrary to due process and equal protection. Such a circumstance would require every successful litigant before the OAH to go to the probably unnecessary expense and effort to file a petition for review at the last moment in the expectation that the Department might be doing the same.

D. Sexual words created by the state. - Other witnesses

Because the reviewing officer disregarded major points made by the appellants, the reviewing officer gave no consideration to Attachment A to appellants' response, BR 196–203. There can be seen from the record

(references to Attachments C–G to appellants’ response) of who used what terms. The eight-page chart serves as proof that the sexual abuse, acts, or whatever were more likely the creation of state workers and others predisposed to the existence of abuse in appellants’ adult family home. The chart speaks for itself; however, some examples are that Ms. Hochreiter used the term “rubbed his genitals against [Tommy] in mock intercourse,” as a nicer way to say “dry humping”. Ms. Hochreiter, however, did not ask anyone what “dry humping” meant. Vol. 1, pp. 151–152. She did not ask Kerri Brooks what she meant because Ms. Hochreiter had a “pretty good idea” what dry humping was. Vol. 1, p. 45. When she asked Tim Meyer what he meant by dry humping, she said that he demonstrated it to her by sitting in a chair with no one else around but herself and moving his pelvis back and forth. Vol. 1, pp. 115–120. Though she made no entry in her interview notes regarding this demonstration. Vol. 1, p. 35. She concluded, however, that dry humping was what she thought it to be, which was Tyler rubbing his genitals against Tommy in mock intercourse. On one occasion she said Tim Meyer used the word “dry humped”. Vol. 1, p. 117. But later she said he did not use the term “dry humped” just the term “humped”, Vol. 1, pp. 134, 136, testifying that the word “dry” does not show up in her interview notes of Mr. Meyer.

Regarding the term “lap dance”, Ms. Hochreiter testified that she did not

know what Tyler meant when he used the term, Vol. 1, p. 98; that Tyler did not describe a lap dance to her, Vol. 1, p. 96; that she did not ask Tyler what he meant by the term, Vol. 1, p. 99; and that she did not ask Tyler to demonstrate a lap dance. *Id.* The same failure to inquire occurred regarding Michael’s use of the term “lap dance”. Vol. 1, pp. 101, 103. Moreover, Ms. Hochreiter failed to inquire whether the Meyers or Ms. Brooks were told about “lap dances” by Tyler or Michael (no one else having used the term with her). Vol. 1, p. 103.

As to the word “inappropriate”, Ms. Hochreiter testified that she did not ask Tyler, Michael or Brian what they understood the term to mean. Vol. 1, pp. 106–107. And though her SOD, Exhibit 7, p. 6, uses only the term “impulses” regarding Tim Meyer’s comments about Tyler, Ms. Hochreiter testified they were “sexual impulses”. Vol. 1, p. 136. She did acknowledge that her interview notes of Mr. Meyer do not include the word “sexual”. *Id.*

In addition, Ms. Hochreiter testified that neither Mr. or Mrs. Meyer or Kerri Brooks used the term “sexual” in describing what had occurred downstairs that Brian had termed inappropriate. Vol. 1, pp. 148–149.

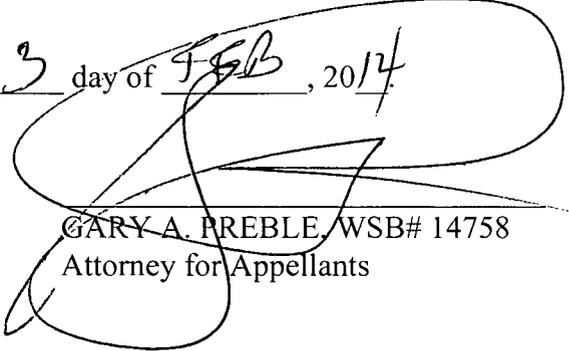
II. APPELLANT IS ENTITLED TO ATTORNEYS FEES ON APPEAL.

Appellants are entitled to attorneys fees as prevailing party under the EAJA, RCW 4.84.350, Judicial review of agency action — Award of fees and expenses.

E. CONCLUSION

Based on the foregoing, the Appellants request the court to reverse the trial court the BOA and the credibility determination of the ALJ and grant Appellants attorneys fees.

Respectfully submitted this 3 day of FEB, 2014



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APPENDIX A

**ORIGIN OF SEXUAL WORDS USED
According to State's Witnesses .**

No.	Sexual Term	Witness	Testimony	Location	Source of Term	Appellant stated?
1.	Humping	None	Hearsay only (Silva did not testify) Devora Bills said Silva told her she quoted Kerri Brooks. But she later said she did not recall the exact words Silva said to her when she asked her about her handwritten notation.	Ex. 20, p. 4 [BR 690] 2p134-138	[Silva or Brooks]	KB?
		Devora Bills	Regarding her notes in Ex 3, Devora Bills said, GP: And you don't recall the exact words she (Nancy) spoke to you, correct? DB: I can only vouch for what is in my notes. GP: And you have one thing in quotes, one statement in quotes of her, "He hasn't done it with the guys who are bigger or more functioning than him," correct? DB: Yes GP: And the quotes mean that that was Nancy's direct statement, correct? DB: Yes GP: But you can not be sure of the remainder of the language in there isn't that correct? DB: That is correct.	2p141		[No]
	Humping	Devora Bills	GP: Did she tell you that that was humping or did she use the words sexually inappropriate or do you recall what she said? DB: I, I can honestly say that cannot recall that conversation. It was almost a year ago.	2p145		[No]
	Humping	Det. Hagglund	Nancy told him Brian said he observed Tyler "humping" on Thomas, assumed Nancy meant "general sex-related" when she used term. He acknowledged the term can mean a variety of things but he did not ask her what she meant. "The incident had been defined in my mind by [APS Davis and RCS Fullerton] reports previously."	Ex 13, page 5 [BR 564] 3p81 3p100-101	Brian [per Nancy Meyer]	Yes?

No.	Sexual Term	Witness	Testimony	Location	Source of Term	Appellant stated?
	Hump	Roberta Hochreiter	GP: Who used the word hump with you first? RH: Without looking at my notes I don't know if I could say that accurately, I'm not sure.	1p133		
	Humped	Roberta Hochreiter	GP: And did you notice in your interview with Tim did he use the word "dry humping"? RH: I don't know if he used the word "dry", but he used the word he definitely used the word "humping". GP: Would you like to review your notes on that? RH: Sure. Okay tell me the question again. GP: Did he use the word "dry humping"? RH: He used the word "humped". GP: Not "dry humped"? RH: No.	1p133-135		Tim
	Hump	Roberta Hochreiter	GP: And you didn't notice it going through - RH: I wasn't looking for that I was looking for the word "hump".	1p135		
2.	Dry Humping	Devora Bills	Referring to Ex 6, p.2 that Nancy said Tyler had been caught dry humping, when asked if "dry humping" in quotes were Nancy's words, said, "I can't recall at this time. . . . I believe that is what she told me but unfortunately I did not document that in my other notes, um, and so that . . ."	2p126-127	Can't recall	
		Det. Hagglund	"Did Devora Bills use the word 'dry humping'. Yes"	3p80	Devora Bills	No
		Wesley Fullerton	"It's included in my records in reference to my conversation with [Devora Bills]."	3p168-169	Devora Bills	No
		Wesley Fullerton	"[Devora Bills] used those words. She was also providing information to me that she learned from the provider. She did not directly witness the incident; she was telling me what she was told."	3p169	Devora Bills	No
		Wesley Fullerton	"When people use that term it's meant to refer to a particular kind of act—mock sex ... with clothes on."	3p170		

No.	Sexual Term	Witness	Testimony	Location	Source of Term	Appellant stated?
		Roberta Hochreiter	Testified that Devora Bills had used the word 'dry humping' and that Tim had not.	1p133	Devora Bills	No
		Roberta Hochreiter	Later reverts and says Tim used term "dry humping" RH: He told me that it was reported to him that Tyler did something to Tommy GP: So, um, and what is it exactly that was reported to him that Tyler did to Tommy? RH: Tyler dry humped Tommy. GP: But you just told me that the word dry humped does not show up in your interview with Tim, correct? RH: I didn't write the word dry in front of humping, no.	1p138		Yes?
3.	Thrusting	Devora Bills	When asked what was in her mind when she read the word "humping", she testified: "I would assume one thrusting upon another person—so, thrusting."	2p135	Devora Bills	No
		Devora Bills	When asked whether by 'thrusting' and 'humping' she was thinking of bodily contact, she answered "Yes."	2p135		
		Gloria Morrison	Regarding use of word "thrusting" in parentheses in her notes regarding her conversation with Laura as to what Tyler had told Laura: "Um, let's see, I told Laura about one time Tommy was bugging me. I told her one time about what Tommy was doing"; and in parentheses I said 'the thrusting'. Those are my parentheses, my conclusion, my assumption."	2p64-65	Gloria Morrison	No
4.	Grope	Wesley Fullerton	"when that word was first uttered to me I know specifically ... by the mental health therapist."	3p141	Devora Bills	No
5.	Genital contact	Roberta Hochreiter	Testified that Devora Bills used the words "genital contact".	1p133	Devora Bills	No
6.	Rubbed his genitals	Wesley Fullerton	When asked on direct if Nancy used the term "rubbed his genitals", he read through his notes and said, "The first .. the language where that appears, I can only quote as hearing that language from Devora Bills at that time."	3p145	Devora Bills	No

No.	Sexual Term	Witness	Testimony	Location	Source of Term	Appellant stated?
		Roberta Hochreiter	Wrote that Kerri Brooks said Tyler said he had "rubbed his genitals against [Tommy] in mock intercourse". When challenged to locate the term "rubbed his genitals" in her notes of the interview with Ms. Brooks, Hochreiter admitted that was her term. "That's the term we used in the Statement of Deficiencies to avoid saying the words 'dry humping'".	Ex 7, page 3 [BR 534] 1p151-152	Roberta Hochreiter	No
7.	Repeatedly rubbed his genitals	Roberta Hochreiter	Said Ms. Brooks and/or Mr. Meyer "concluded [Tyler] had repeatedly rubbed his genitals against [Tommy's] leg in a sexual manner imitating intercourse."	Ex 7, page 7 [BR 538] 1p44-45	Roberta Hochreiter	
8.	Touching of private areas	Wesley Fullerton	"I can only quote as hearing that language from Devora Bills"	3p145	Devora Bills	No
9.	Touched through pants	Wesley Fullerton	He used term but could not directly attribute to anyone.	3p174	Wesley Fullerton	No
10.	Felt private part through pants	Det. Hagglund	Tyler had felt Tommy's private part through his pants	Ex 13, page 5 [BR 564] 3p62	[Devora Bills] (anon) to APS Larry Craig	No
11.	Touched the genital area.	Wesley Fullerton (Ex 37)	When asked about Ex. 37, p. 1 and whether the words "allegedly touched the genital area" were from Nancy Meyer, stated, "That is not a quotation of her."	3p178		No
		Wesley Fullerton	"Again, this incident report represents my summary of what took place based on the information I received from Nancy and from Devora Bills. It's not intended to quote anyone."	3p178-179	[Wesley Fullerton or Devora Bills]	[No]
		Det Hagglund	Tyler allegedly touched the genital area of victim Tommy	Ex 13, p. 4 [BR 563] 3p64	RCS (Wesley Fullerton)	
12.	Hands on Tommy's genitals	Wesley Fullerton	When questioned on cross about the meaning of the term "no hands involved" in his notes, Fullerton said, "... they had told me that ... Tyler did not use his hands on Tommy's genitals."	3p171	Fullerton	??

No.	Sexual Term	Witness	Testimony	Location	Source of Term	Appellant stated?
13.	Hands on Tommy's pants	Wesley Fullerton	When asked whether they used the word "genitals", he then stated, "They used the word 'pants'; and he acknowledged the word 'pants' was also not in his notes.	3p173		
		Wesley Fullerton	He admitted that he was required to make service episode records	3p172		
		Wesley Fullerton	He admitted even though the conversation was an important one, he made no service episode record of it.	3p172		
14.	Genitals	Wesley Fullerton	He admitted the word "genitals" was not in his notes of the conversation, stating that he didn't write down every word and that just because he didn't write it down doesn't mean they didn't say it.	3p173		??
		Roberta Hochreiter	Tim Meyer did not use the word genitals with her.	1p121		No
15.	Groin area	Det. Hagglund	Devora Bills told Det. Hagglund that Nancy said Tyler touched Tommy in the "groin area".	Ex 13, p. 8 [BR 567] 3p80-81	Devora Bills	No
16.	Sexual	Wesley Fullerton	"I'm using those words."	3p154	Wesley Fullerton	No
		Roberta Hochreiter	"[Nancy, Tim & Kerri] did not use the word 'sexual'."	1p148-149	[Roberta Hochreiter]	No
		Gloria Morrison	Regarding that Tyler had told Laura ___ about his experience with Tommy: "I think I assumed that there was some sexual thing about it."	2p64	Gloria Morrison	No
17.	Sexual contact	Det. Hagglund	Tim didn't tell Det. Hagglund sexual contact occurred	3p86		No
18.	Inappropriate sexual contact	Wesley Fullerton	"I can only quote as hearing that language from Devora Bills"	3p145	Devora Bills	No
19.	Inappropriately touched	Devora Bills	Asked regarding the words "inappropriately touched" in Exhibit 3: "Yes, I did testify that those were not [Nancy's] words."	2p145	Devora Bills	No

No.	Sexual Term	Witness	Testimony	Location	Source of Term	Appellant stated?
20.	Sexually inappropriate	Devora Bills	"So earlier today when I said 'sexually inappropriate'—yes, that was my own wording . . ."	2p146	Devora Bills	No
21.	Preys on vulnerable people out in the community	Roberta Hochreiter	Admits in testimony that this was taken from Devora Bills word for word.	1p210-211	Devora Bills	No
22.	Mock Intercourse	Wesley Fullerton	"Mock intercourse' are my words."	3p147	Wesley Fullerton	No
		Det. Hagglund	Tyler attempted some form of mock intercourse.	Ex 13, page 4 [BR 563] 3p64-65	RCS (Wesley Fullerton)	
		Roberta Hochreiter	"That's the term we wrote in the statement of deficiencies to avoid saying the word 'dry humping'."	1p152	Roberta Hochreiter [Roberta Crawford]	[No]
		Roberta Hochreiter	When asked if Nancy, Tim or Kerri had used the term "mock intercourse", she said, "No."	1p151-152		No
23.	Mock sex with clothes on	Wesley Fullerton	The meaning of "mock intercourse".	3p170-171	Wesley Fullerton	No
24.	Intercourse	Roberta Hochreiter	When asked if Nancy, Tim or Kerri had used the term "intercourse", she said, "No."	1p151-152	Roberta Hochreiter [Roberta Crawford]	No
		Roberta Hochreiter	Said Ms. Brooks and/or Mr. Meyer "concluded [Tyler] had repeatedly rubbed his genitals against [Tommy's] leg in a sexual manner imitating intercourse."—admitted she used these terms in her report "because it described what 'dry humping' was."	Ex 7, page 7 [BR 538] 1p151-152	Roberta Hochreiter [Roberta Crawford]	No
25.	Sexual impulses	Roberta Hochreiter	When Tim had told her Tyler "was impulsive and gets verbally abusive", she testified that Tyler gets "[s]exual impulses that he has to act on."	1p136	Roberta Hochreiter	
26.	Sexualized impulses	Gloria Morrison	"[Tim] did not mention any 'sexualized impulses' to me."	2p206		No

No.	Sexual Term	Witness	Testimony	Location	Source of Term	Appellant stated?
27.	Sexualized behavior	Gloria Morrison	She used the words in her questions and people responded.	2p78-79 2p188-189 2p193, 2p206 Ex 29, page 4 [BR 724]	Gloria Morrison	No
		Gloria Morrison	When she asked Ms. Brooks if she was aware of any "sexualized behavior", Ms. Brooks said no. Morrison felt that Ms. Brooks had not been made aware of any sexualized behavior in the home.	2p188-189	Gloria Morrison	No
		Gloria Morrison	Mr. Meyer was unaware of sexualized behavior between Tyler and Tommy "and had received no reports of sexualized behavior."	2p205	Gloria Morrison	No
28.	Unwanted sexual behaviors	Roberta Hochreiter	Caregiver not protect residents from unwanted sexual behaviors	Ex 7, page 3 [BR 534]	Roberta Hochreiter	
29.	Sexual abuse	Det. Hagglund	"Nancy also stated that Tyler revealed what occurred to her" does not - you can not say that she said that Tyler revealed her that sexual abuse occurred	Ex 13, page 5 [BR 564] 3p99-100		No
		Gloria Morrison	"I have people who say that there was sexual assault in the home or sexual abuse."	2p23	Gloria Morrison	No
30.	Sexual assault	Roberta Hochreiter	Testified that she could not say yes or no whether a sexual assault occurred	1p94-95		[No]
		Gloria Morrison	"I have people who say that there was sexual assault in the home or sexual abuse." She admitted she did not know if sexual assault had occurred.	2p23		No
		Devora Bills	When asked regarding the words "he is humping him" in Ex 20, p. 4 if she had reason to suspect sexual assault had occurred, she answered, "I don't want to use the word 'assault'; so no."	2p134		
		Devora Bills	After reading assessment of Tyler, Ex 20, which included "he is 'humping' him", she did not have reason to believe sexual assault had occurred.	2p137		

No.	Sexual Term	Witness	Testimony	Location	Source of Term	Appellant stated?
31.	Rape	Devora Bills	Regarding the word "rape" in Exhibit 6, page 1: "That was the box that my supervisor suggested I check . . ."	2p155-156	Devora Bills	No
32.	Lap dance	Roberta Hochreiter	Mike said that Tommy did a lap dance to Tyler. Hochreiter testified Tyler and Michael used the term with her but she asked neither what they thought a "lap dance" was. Did not ask them if they had told Mr. or Mrs. Meyer or Ms. Brooks about "lap dances".	Ex 7, page 3 [BR 534] 1p96-101	Mike (resident)	No
		Gloria Morrison	Brian was the source of the term, and he said, "They thought he was lap dancing, but he was like Elvis." Morrison did not ask Brian what he thought "lap dancing" was	2p177-178	Brian (resident)	No
33.	Not prolonged	Wesley Fullerton	He used testimony but could not directly attribute to anyone.	3p167	Wesley Fullerton	No
34.	Rubbed on back	Wesley Fullerton	He used testimony but could not directly attribute to anyone.	3p167	Wesley Fullerton	No
35.	Helping him	Wesley Fullerton	He used testimony but could not directly attribute to anyone.	3p167	Wesley Fullerton	No
36.	No hands involved	Wesley Fullerton	He used testimony but could not directly attribute to anyone.	3p171	Wesley Fullerton	No
37.	Rubbed with hips	Wesley Fullerton	He used testimony but could not directly attribute to anyone.	3p180	Wesley Fullerton	No
38.	No bodily penetration	Wesley Fullerton	He used testimony but could not directly attribute to anyone.	3p147	Wesley Fullerton	No
39.	From behind	Wesley Fullerton	He used testimony but could not directly attribute to anyone.	3p176	Wesley Fullerton	No

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

In re:

NO. 45162-0-II

PATHFINDER HOUSE, et al,

DECLARATION OF SERVICE

Appellants,

v.

WASHINGTON STATE DEPARTMENT
OF SOCIAL AND HEALTH SERVICES,

Respondent.

I certify that on February 3, 2014, I caused to be delivered to the following, by email (*see below*) a copy of the Brief of Appellants':

Angela Coats McCarthy, AAG
Joanna Giles, AAG
Office of the Attorney General
PO Box 40124
Olympia WA 98504-0124

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

DATED this 3rd day of February, 2014, at Olympia, Washington.



TRISH EVANS, Paralegal