

NO. 45162-0-II

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

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

Appellants,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Individuals who reside in adult family homes are often totally dependent upon the facility and the staff that work there. The extreme vulnerability of adult family home residents has led to the development of requirements that are designed to protect and promote the physical, mental, and emotional well-being of residents. Nancy Meyer, an adult family home provider, and her caregivers, Tim Meyer and Kerri Brooks (“Appellants”), were cited by the Department of Social and Health Services (“the Department”) for multiple violations of these adult family home licensing requirements. In addition, findings of neglect and/or abuse were made against each of them individually.

Appellants appeal the Department’s 111-page Review Decision and Final Order (“Review Decision and Final Order”) dated March 30, 2012, which found that the Appellants had become aware of inappropriate, non-consensual sexual contact between an adult family home resident and Mr. and Ms. Meyer’s developmentally disabled-adult son, but had failed to report that sexual abuse to the Department or to the proper legal authorities. The Review Decision and Final Order also found that Appellants had failed to take any steps to protect the other residents in the adult family home from the risk of sexual abuse, and that they attempted to enroll the resident into a therapy program for inappropriate “sexual

behaviors,” even though there is some question as to the identity of the aggressor.

The Appellants claim the Department’s revocation of the adult family home license and the findings of neglect and/or abuse should be overturned because there are procedural deficiencies in the Review Decision and Final Order, and the Department’s actions are arbitrary and capricious. Because the Review Decision and Final Order is supported by substantial evidence, takes into consideration the facts and circumstances, and does not contain erroneous interpretations or applications of the law, it should be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES

1. Have Appellants correctly assigned error to findings of fact?
2. Did the Review Judge properly amend the findings of fact and conclusions of law in the Review Decision and Final Order?
3. Is the Review Decision and Final Order supported by substantial evidence?
4. Is the Review Decision and Final Order arbitrary and capricious?
5. Are Appellants entitled to attorney’s fees and costs on review?

III. COUNTERSTATEMENT OF THE FACTS

Since 2005, Nancy Meyer was licensed to operate an adult family home, Pathfinder House (Pathfinder). Administrative Record (AR) at 62, Finding of Fact (FF) 2-3; 8 Verbatim Report of Proceedings (RP) at 13

1. 4. Prior to operating Pathfinder, Nancy worked in a community protection program that provided residential supervision and care for sexual offenders. AR at 62, FF 1; 7 RP at 187 ll. 19-25, 188 ll. 1-4. Ms. Meyer's husband, Tim Meyer, and Nancy's friend, Kerri Brooks, also worked as caregivers at Pathfinder. AR at 62-63, FF 3; 6 RP at 91 ll. 9-12; 9 RP at 147 ll. 6-17.

In 2009, Ms. Meyer was providing care and services to five developmentally disabled adults in her adult family home: Tyler, Brian, Mike, Troy and Larry.¹ AR at 63, FF 3; 1 RP at 36 ll. 10-23; 3 RP at 190 l. 6. The adult family home residents at Pathfinder qualified for services through Medicaid. 3 RP at 124 ll. 19-25, 125 ll. 1-16. Ms. Meyer was also receiving payment from Medicaid to provide care and services for her adult, disabled son, Tommy,² who is diagnosed with Down Syndrome. AR at 62-63, FF 3; 6 RP at 109 ll. 1-10; 9 RP at 187 ll. 3-13. Tommy resided in the upstairs residential portion of Pathfinder with Ms. Meyer, Mr. Meyer, and Ms. Brooks, while the adult family home residents lived downstairs. AR at 62-63, FF 3; 1 RP at 52 ll. 4-11.

¹ In order to protect the identity of the vulnerable adults involved in this case, their first names were used throughout the hearing, and in the exhibits, and will be used in this brief.

² Tommy is referred to as "Household Member", "HM1", or "HM", throughout the exhibits.

A. Tyler's Medical Appointments Regarding Sexual Behaviors

Between February 23, 2009 and February 27, 2009, Ms. Meyer went out of state on vacation leaving Mr. Meyer and Ms. Brooks in charge of Pathfinder. AR at 63, FF 4; 5 RP at 160 ll. 8-19. After returning from vacation, Ms. Meyer contacted Sunrise Community Mental Health Services and scheduled an appointment for Tyler. AR at 64, FF 9, AR at 557, 687; 2 RP at 108 ll. 3-19; 9 RP at 168 ll. 7-11; 169 ll. 14-17. On March 27, 2009, Ms. Brooks took Tyler to the scheduled appointment and attended an hour long assessment session with Tyler and a mental health clinician, Heather Silva. AR at 65, FF 11, AR at 689-702; 5 RP at 194 ll. 2-24; 2 RP at 113 ll. 7-25, 114 ll. 1-15. Ms. Brooks reported to Ms. Silva that Tyler “manipulated another person into sexual unsavory things—he is humping him and we don’t feel comfortable with others being alone with Tyler.” AR at 65, FF 11, AR at 691; 2 RP at 115 ll. 1-10. Ms. Brooks further reported Tyler “takes advantage of other people less able.” AR at 692. At the conclusion of the assessment on March 27, 2009, Ms. Silva’s recommendations included therapy, medication modification, and further psychiatric evaluations for Tyler’s “sexually inappropriate behavior”. AR at 65, FF 12; AR at 702.

Tyler was scheduled for another appointment on April 14, 2009. AR at 65, FF 13; AR at 703; 2 RP at 112 ll. 11-12. Ms. Meyer attended

this next appointment, and remained in the room with Tyler and Devora Bills, his mental health case manager and counselor. AR at 65, FF 13; AR at 525; 2 RP at 112 ll. 10-12, 117 ll. 4-21. At the end of the session, Ms. Meyer reported to Ms. Bills that Tyler's behavior had improved since Ms. Meyer had told him he may have to move out of the adult family home. AR at 525. Ms. Meyer further disclosed to Ms. Bills that Tyler had inappropriately touched members of the household and he was no longer allowed to be alone with Tommy. AR at 66, FF 13; AR at 525; 2 RP at 118 ll. 1-9, 120 ll. 18-20. Ms. Meyer said that Tyler was "dry humping" Tommy.³ AR at 65, FF 13; 2 RP at 126 ll. 15-25, 127 ll. 1-5. Ms. Meyer also told Ms. Bills that Tyler preys on persons who are more vulnerable than him, but he has not "done it with the guys who are bigger and more functioning". AR at 66, FF 13; AR at 525; 2 RP at 121 ll. 10-15. Ms. Meyer also reported that there had been a similar incident between Tyler and a former resident of the adult family home, and she had not reported either incident to the Department. AR at 65-66, FF 13; AR at 712; 2 RP at 118 ll. 3-4, 120 ll. 6-12.

After the disclosures by Ms. Meyer, Ms. Bills was concerned about the other residents in Pathfinder. 2 RP at 121 ll. 16-18. Ms. Bills had a

³ Ms. Bills testified at hearing that Ms. Meyer used the term "dry humping" and it means "one person thrusting upon another person with clothes on". 2 RP at 151 ll. 12-24.

conversation with Ms. Meyer about reporting and protecting the vulnerable adults in her home and reporting the incident of sexual abuse to the Department. AR at 66, FF 13; AR at 710, 712; 2 RP at 118 ll. 3-4. Despite being told to do so by Ms. Bills, Ms. Meyer did not report the incident to the Department at that time. AR at 710.

That same day, Ms. Bills scheduled a psychosexual evaluation for Tyler and, as a mandatory reporter, called the Department and reported the allegations of sexual abuse. AR at 66-67, FF 14; AR at 525, 564, 704, 712; 2 RP at 123 ll. 4-25, 124 l. 25, 172 ll. 6-15. Ms. Bills documented in a critical incident report what she learned from Ms. Meyer including, “Tyler had been caught dry humping [Tommy] who has Down Syndrome whom is reported to be at the cognitive age of 8”, that Tyler was also touching Tommy through his pants in the groin area, and that a similar incident took place with another roommate who no longer lives at Pathfinder. AR at 530.

B. Tyler’s Eviction For Sexual Behavior

After meeting with Ms. Meyer and Tyler, Ms. Bills also contacted Tyler’s case manager, Wesley Fullerton. AR at 566-67; 2 RP at 123 l. 7. Mr. Fullerton called Ms. Bills back that same day, and reported that Ms. Meyer had also called him to report that Tyler needed to move out of the adult family home and there had been an incident where Tyler had

“humped” Tommy.⁴ AR at 67-68, FF 15, 17; AR at 525; 3 RP at 140 ll. 11-25, 141 ll. 1-25. Based on what he knew, Mr. Fullerton made a report to the Department as a mandatory reporter. AR at 68, FF 18; 1 RP at 82 ll. 14-21; 3 RP at 125 ll. 15-18, 145 ll. 1-22.

The following day, April 15, 2009, Ms. Meyer issued a thirty day notice of eviction to Tyler, stating “we have found that [Tyler] is unable to control his impulses, and has acting out issues with other clients in a manner that affects the safety and health of individuals within our home.” AR at 67, FF 15; AR at 526, 565. Ms. Meyer contacted Mr. Fullerton to let him know she was issuing the discharge letter, and informed him there had been an incident of “dry humping” between Tyler and Tommy. AR at 65, FF 17; AR at 712; 3 RP at 145 ll. 15-22, 149 ll. 2-15. Mr. Fullerton spoke to Mr. Meyer on April 15, and Mr. Meyer also told him that Tyler was “dry humping” Tommy. AR at 68, FF 18; 3 RP at 142 ll. 7-11, 168 ll. 20-23. Ms. Meyer and Mr. Meyer both described the incident to Mr. Fullerton as sexual contact and confirmed that it was nonconsensual. 3 RP at 147 ll. 7-25, 148 ll. 1-17. Mr. Meyer and Ms. Meyer also told Mr. Fullerton that they were protecting Tommy by not leaving him alone with Tyler. AR at 68, FF 18; 3 RP at 152 ll. 2-14. Mr. Fullerton told Ms. Meyer that what she described was a

⁴ He further testified at hearing that Nancy used the word “humped” to describe to him what had occurred. AR at 68, FF 17; 3 RP at 141 ll. 18-21.

reportable incident and she needed to call the Department's complaint intake number and make a report. AR at 712; 3 RP at 151 ll. 9-25. No report to the Department was made by Ms. Meyer at that time.

C. Law Enforcement Investigation Of Sexual Assault

On April 16, 2009, law enforcement received a referral regarding Tyler's behavior toward Tommy. AR at 68-69, FF 19; AR at 563; 3 RP at 40 ll. 2-10. The allegations included Tyler touching the genital area of Tommy and attempting some form of mock intercourse. AR at 563. Detective Ben Hagglund and Detective Meyer⁵ of the Skagit County Sherriff's office went to Pathfinder to investigate. AR at 69, FF 19; AR at 564. Detective Hagglund summarized the complaint to Ms. Meyer upon arrival and stated in his report that Ms. Meyer "seemed familiar with the details". AR at 564; 3 RP at 43 ll. 7-13.

Detective Hagglund explained to Ms. Meyer that he was investigating a report that Tyler sexually assaulted Tommy. AR at 69, FF 19; 3 RP at 43 ll. 12-17. Ms. Meyer explained to Detective Hagglund that she had been out of state between February 23 and February 27 when the incident occurred. AR at 564. Ms. Meyer then reported to Detective Hagglund that when she returned, she learned that Brian stated he had observed Tyler "humping" Tommy. *Id.* Ms. Meyer told Detective

⁵ Detective Meyer is not related to Tim and Nancy Meyer. AR at 69, FF 19.

Hagglund that Mr. Meyer and Ms. Brooks talked to Tyler right away and he “owned up to it”. AR at 564; 3 RP at 117 ll. 6-22. Ms. Meyer said Tyler also revealed to her what had happened and she made arrangements for him to go to therapy. AR at 564. Ms. Meyer told Detective Hagglund that Tommy was no longer allowed to go downstairs when Tyler was at home “because of this case” and that Tyler had been given a letter to remove him from the home. AR at 564; 3 RP at 42 ll. 21-22, 43 ll. 5-25.

Detective Hagglund left three blank statement forms asking Ms. Meyer, Mr. Meyer, and Ms. Brooks to provide statements and return those to him; they did not do so. 3 RP at 48 ll. 22-25, 49 ll. 1-4.

D. Adult Family Home Licensing Investigation

On April 23, 2009, the Department’s adult family home licensing complaint investigator, Robbie Hochreiter, conducted interviews at Pathfinder. AR at 71, FF 23; AR at 539-45; 1 RP at 32 ll. 11-21; 3 RP at 15 l. 19. During her attempts to conduct interviews, Mr. Meyer kept interrupting her and would not leave her alone with the residents. 4 RP at 38 ll. 10-12. Ms. Hochreiter’s manager, Roberta Crawford, later returned to Pathfinder with her to conduct additional interviews and review resident records. AR at 71, FF 23; AR at 539-45; 3 RP at 25 ll. 2-17; 4 RP at 38 ll. 5-20.

1. The Licensing Investigation Interviews Of Ms. Meyer, Mr. Meyer And Ms. Brooks

Over the course of the Department's licensing investigation, Ms. Meyer, Mr. Meyer, and Ms. Brooks reported that, on February 23, 2009, Tyler and Tommy were alone downstairs at Pathfinder. Ms. Brooks brought Brian home from a doctor appointment and, when she went to make lunch, Brian went downstairs. Shortly thereafter, Brian came back upstairs and reported "something inappropriate" was occurring between Tyler and Tommy. AR at 63, FF 5-6; AR at 541; 1 RP at 39 ll. 18-25; 3 RP at 25 ll. 24-25, 26 ll. 1-15; 5 RP at 160 ll. 23-25, 161 ll. 1-14. When Tommy came upstairs, Ms. Brooks sent him to talk to Mr. Meyer, and she went downstairs to talk to Tyler. AR at 63, FF 6; AR at 541; 1 RP at 39 ll. 24-25; 3 RP at 26 ll. 1-15.

Ms. Brooks reported she spoke to both Tyler and Tommy on February 23, and Tyler admitted to her that he rubbed his genitals on Tommy in a "humping", or mock intercourse, manner. AR at 71-72, FF 25; AR at 541; 1 RP at 45 ll. 1-6; 3 RP at 26 ll. 1-15. Ms. Brooks used the words "humping" and "dry humping" to describe the incident to the Department licensing investigators. 1 RP at 45 ll. 7-9, 14-17; 4 RP at 25 ll. 14-21. Ms. Brooks said she did not report the incident to the Department's complaint hotline because she did not feel this was sexual

abuse because both of the residents had their clothes on.⁶ AR at 79, FF 25; AR at 541; 3 RP at 26 ll. 12-14.

Mr. Meyer reported to the licensing investigators that he also spoke to Tommy and Tyler on February 23, and Tyler admitted he “got impulses” he could not control and that he was “dry humping” Tommy. AR at 73, FF 27; AR at 541; 1 RP at 46 ll. 14-21, 47 ll. 9-13, 22-25, 48 ll. 1-3, 18-25, 49 ll. 1-9. Mr. Meyer used the term “dry humping” when speaking with the Department investigator to describe what had occurred between Tyler and Tommy. He also demonstrated the behavior to the Department investigator by “thrusting” and “gyrating his pelvis” in a “sexual way”. AR at 73, FF 26; 1 RP at 114 ll. 9-25, 115 ll. 1-25, 116 ll. 1-25. Mr. Meyer reported that he was “pissed” when he learned what happened and he told Tyler “the impulses are over-this is complete Bull S[***].” AR at 72, FF 26; AR at 544; 1 RP at 70 ll. 4-10; 4 RP at 23 ll. 12-19.

Mr. Meyer told the licensing investigator that he didn’t allow Tommy to go downstairs after this incident and that he “had a talk with the

⁶ Providers and caregivers are required to prevent abuse, neglect, and exploitation, are required to protect against future abuse, neglect, and exploitation, and are required to report to the Department’s Hotline/Complaint Resolution Unit anytime they suspect abuse, neglect, or exploitation. WAC 388-76-10670-73. Sexual abuse means “any form of nonconsensual sexual contact, including but not limited to unwanted or inappropriate touching, rape, sodomy, sexual coercion, sexually explicit photographing, and sexual harassment...” WAC 388-76-10000(2)(a).

guys about inappropriate touching”. AR at 72, FF 26; 1 RP at 51 ll. 2-10. Tim said he did not report the incident to the Department because no one got hurt. AR at 541; 1 RP at 77 ll. 2-9. Mr. Meyer was adamant when he spoke to the Department licensing investigators that Tommy could not consent to sexual activity, and that he has the mental capacity of a child. 3 RP at 32 ll. 5-8; 4 RP at 23 ll. 12-19.

Ms. Meyer was interviewed alone in her office on the first day of the investigation and reported Tyler began having sexually inappropriate behaviors, “since two weeks after he moved in”. AR at 566; 1 RP at 78 ll. 16-18. At that point, Tyler had lived in the house for one year. AR at 75, FF 34. When Ms. Meyer returned home from vacation on February 27, she learned about the incident of “humping” between Tommy and Tyler that occurred on the 23rd, but felt Mr. Meyer took care of it, and she would get Tyler into counseling. AR at 71, FF 23; AR at 541; 1 RP at 39 ll. 18-25, 40 ll. 1-4, 17-25, 51 ll. 11-19; 4 RP at 21 ll. 14-25, 22 ll. 1-24. Ms. Meyer used the word “humping” to describe the incident. 4 RP at 21 ll. 21-25, 22 l. 1. Ms. Meyer and Mr. Meyer both reported they were protecting Tommy by keeping him upstairs when Tyler was home, but they were doing nothing to protect the other residents because they “weren’t [Tyler’s] type” as they are older and “wouldn’t put up with that”. AR at 541; 1 RP at 51 ll. 2-19. Ms. Meyer admitted that when she took

Tyler to his counseling session on April 14, the counselor “lit into” her telling her that she should have done something sooner about it. AR at 714.

During the investigation on April 29, 2009, Ms. Crawford told Ms. Meyer and Mr. Meyer that, for at least 45 days after becoming aware, they failed to meet their mandatory reporting requirements and that any time they had a suspicion of abuse they were required to report it. For example, Ms. Meyer should have reported the incident as soon as she learned about it the day she returned from vacation. 3 RP at 31 ll. 19-25; 4 RP at 68 ll. 3-25, 69 ll. 1-18.

Finally, on April 30, 2009, Ms. Meyer made her mandatory report to the Complaint Resolution Unit stating, “I want to report an allegation of non-consensual touching between a resident and another resident”. AR at 713.

2. Interviews Of Residents Regarding The Sexual Incident

When interviewed during the adult family home licensing investigation, the residents of the adult family home indicated that Tommy may have been the instigator of the sexual contact. Tyler reported that Tommy was the instigator, that Tommy started it by sitting on his lap, and that Tommy was the one that did “lap dances” on him. AR at 73-74, FF 29; AR at 568; 1 RP at 52 ll. 12-24. Tyler said he tried to explain

Tommy's sexual behavior to Mr. Meyer and Ms. Meyer and he would complain about it, but they did not believe him. AR at 568; 1 RP at 52 ll. 23-25, 53 ll. 1-3. Mr. Meyer told Tyler what happened was "criminal" and Tyler felt like Mr. Meyer and Ms. Meyer were blaming him for everything that had happened. AR at 568; 1 RP at 66 ll. 24-25, 67 ll. 1-7. Tyler reported that after this incident, Tommy was still allowed to come downstairs. AR at 541. Tyler said that when he and Ms. Meyer went to counseling, Ms. Meyer talked to Devora Bills about the incident. 1 RP at 76 ll. 1-4. Tyler's father reported Tyler also complained to him that Tommy initiated sexual contact and that Mr. Meyer and Ms. Meyer wouldn't believe him. AR at 75, FF 33; 1 RP at 56 ll. 11-13.

Brian reported that Tommy would expose his genitals to him and he didn't want to see that because it bothered him. AR at 74-75, FF 31-32. Brian said Tommy would come downstairs wearing only boxer shorts that were "too revealing", would "gape" open causing Brian to see things he "didn't want to see", and that Tommy was always adjusting himself. AR at 541; 1 RP at 53 ll. 21-25, 54 l. 1, 156 ll. 2-7. Brian reported to the Department licensing investigators that Tommy is "sexually inappropriate". AR at 74-75, FF 31; 1 RP at 54 ll. 2-5. Brian's mother testified that Brian would be able to identify "inappropriate touching" and report something of an "inappropriate sexual nature" because he had made

a similar report of being victimized while at Boy Scouts in the past. 5 RP at 78 ll. 2-25. Brian did tell his mother about Tommy “touching himself”, “touching his privates” and that “Tommy would sometimes grab himself”. 5 RP at 53 l. 1, 54 ll. 1-20. Brian’s mother said that Brian was an accurate reporter and “Brian will tell the truth”. 5 RP at 87 l. 13.

A third resident of the adult family home, Mike, also reported that Tommy would come down and do “lap dances” on the residents, act inappropriately, and would wear revealing boxer short that would “show open”. AR at 75, FF 31; AR at 568; 1 RP at 58 ll. 6-13.

3. Resident Interviews Regarding Mental Abuse

During the investigation regarding the allegations of sexual abuse, the residents also reported being upset about how they were treated in the adult family home and made allegations of mental abuse and other issues in Pathfinder, including resident rights violations.⁷⁷ AR at 76-77, FF 35-36. Tyler reported that after the February 23 incident, Ms. Brooks blamed him for everything and would yell at him. AR at 78, FF 37; AR at 542, 544. Tyler’s family reported that after the February 23

⁷⁷ Mental abuse “means any willful action or inaction of mental or verbal abuse. Mental abuse includes, but is not limited to, coercion, harassment, inappropriate isolating of a vulnerable adult from family, friends, or regular activity, and verbal assault that includes ridiculing, intimidating, yelling, or swearing.” WAC 388-76-10000(2)(c). Resident Rights listed in WAC 388-76-10620 include: “(2) Within reasonable home rules designated to protect the rights and quality of life of residents, the home must ensure the resident’s right to: (a) Choose activities, schedules, and health care consistent with his or her interests, assessments, and negotiated care plans, ... (c) make choices about aspects of his or her life in the home that are significant to the resident....”

incident, Mr. Meyer handed Tyler the phone book and told him to find a new place to live. AR at 544; 1 RP at 57 ll. 1-14. Tyler said Mr. Meyer told him he had found a new home for him in another town that was full of criminals and that Tyler belonged on the street where he can find out how bad life can be. AR at 542, 544; 1 RP at 57 ll. 11-14.

Brian reported both Ms. Brooks and Mr. Meyer would yell at him and would yell at the other residents. AR at 77-78, FF 36-37; AR at 542, 544; 1 RP at 73 ll. 13-20. Brian said that Mr. Meyer yelled at Mike for “pooping on his bed” and called him a baby telling him that if he was going to act like a baby, they were going to treat him like a baby. AR at 78, FF 37; AR at 542; 1 RP at 57 ll. 20-23. While crying, Brian also gave other examples of yelling in the adult family home and he stated that the yelling makes him feel bad much of the time and he is afraid to tell the caregivers anything because they will get mad at him. AR at 77, FF 36; AR at 542-44; 1 RP at 57 ll. 24-25, 58 ll. 1-3, 73 ll. 13-20.

Mike confirmed Mr. Meyer and Ms. Brooks yelled at him about “poop on the bed” when he had been incontinent of stool recently and that Ms. Brooks would call him a baby, which upset him. AR at 77, FF 36; AR at 542, 544; 1 RP at 58 ll. 20-23. Mike said he would get into “scuffles” with Mr. Meyer and Ms. Brooks and that, when he first moved in, he was afraid of Mr. Meyer because he had “fits” and didn’t seem to

know how to calm down. AR at 542, 544; 1 RP at 69 ll. 13-25. Mike said that Mr. Meyer was always right, and there would be no discussion allowed. AR at 544; 1 RP at 69 ll. 19-23. Mike reported Ms. Brooks “gets in my face about my room” and “she yells at me about my room”. AR at 542; 1 RP at 69 ll. 13-25.

4. Observations And Resident Interviews About Other Licensing Violations

Based on observation and the statements of the residents of the adult family home, the licensing investigators also became concerned regarding impermissible food restrictions in the home. During one of the onsite complaint investigations in April 2009, the Department investigators observed Ms. Brooks making lunch for the residents. AR at 542. She made peanut butter and mayonnaise sandwiches and left them on the counter with single serving potato chip bags. AR at 542. The residents were not offered choices of food or beverage. AR at 542. The residents drank water with their lunch. AR at 542. The residents were not allowed to go into the refrigerator or pantry to get food. 1 RP at 178 ll. 9-14.

Tyler reported to the investigators that he would prefer to have milk with his lunch and dinner but was only allowed one glass of milk per day at breakfast and had to drink water the rest of the day. AR at 542-43;

1 RP at 62 ll. 3-9, 63 ll. 3-4, 20-22. Tyler also reported that he would like to have sugar with his unsweetened cereal but they were not allowed to have sugar, it was hidden from them. AR at 543; 1 RP at 62 ll. 5-7, 63 ll. 4-7, 22-23. Tyler said that the residents have to eat whatever Mr. Meyer cooks and are not allowed to ask for something different stating Mr. Meyer “chewed” him out for trying to have a bowl of cereal instead of what he was serving. AR at 543; 1 RP at 66 ll. 5-7. Tyler’s family confirmed that Tyler would have to wait until the following morning to eat if he didn’t eat what they served for dinner and that the home would not allow him to have sugar for his cereal. AR at 543; 1 RP at 63 ll. 5-11.

Brian reported to the investigators that he also does not get enough to eat. AR at 543. He said the previous night Mr. Meyer served hamburgers that were still “raw”. AR at 543; 1 RP at 63 ll. 23-25. When Brian asked Mr. Meyer about it, Mr. Meyer “nuked” the hamburger in the microwave until it was “dry and awful”. AR at 543; 1 RP at 63 ll. 23-25, 64 ll. 1-2. Brian said that the residents are not allowed to have milk for lunch or dinner unless they bought it themselves and they are not allowed to have sugar for their cereal. AR at 543; 1 RP at 62 ll. 3-15. Brian’s mother confirmed that Brian complained about not being allowed to have second helpings at meals and that Ms. Meyer told her that they limited the

residents' access to sugar because it wasn't good for them. 5 RP at 61 ll. 1-7, 64 ll. 4-23.

Mike reported that Mr. Meyer would not allow them to have sugar because it was "bad" for them. AR at 543; 1 RP at 60 ll. 7-10. Mike also reported that they are served "raw" hamburgers for dinner and that they are not allowed to have seconds because there is not enough food. AR at 543; 1 RP at 62. Mike said that when Mr. Meyer cooks breakfast on Sunday mornings, the residents are not allowed to have anything else and that if Mr. Meyer is the only staff on duty at lunch time, he will not make lunch or allow the residents to make lunch, and they just have to wait until Ms. Meyer or Ms. Brooks return. AR at 543. Mike's father testified at hearing that Mike did complain about not "getting the milk he wanted" while he was a resident at Pathfinder. 4 RP at 158 ll. 3-15.

Former resident Tom Mcveigh testified that when he lived at Pathfinder he could take things out of the refrigerator "as long as it was [his]". AR at 77, FF 35; 4 RP at 122 ll. 18-24. He also confirmed that the pantry at Pathfinder was "off limits" and that "you needed permission from the administrator or his wife" before you could go in there. 4 RP at 123 ll. 18-23.

Ms. Meyer was asked about the issues with restricting access to food and sugar during the investigation and she confirmed that they serve

unsweetened cereal and do not make sugar available because the residents will “consume the whole container at once” and that she believed sugar causes diabetes. AR at 543; 1 RP at 64 ll. 15-20. Mr. Meyer also confirmed the residents are limited to one glass of milk per day because their consumption of milk was “out of control,” but that the residents could have milk if they buy it themselves. AR at 76, FF 35; AR at 543; 1 RP at 65 ll. 3-16. Ms. Meyer said the residents drink water for lunch and dinner because she also does not offer soda. AR at 543; 1 RP at 65 ll. 10-14.

On May 7, 2009, at the conclusion of the licensing investigation, the Department summarily suspended operations at Pathfinder and revoked the adult family home license. AR at 80, FF 42; AR at 550.

E. Statements During The Informal Dispute Resolution Process

Ms. Meyer participated in an informal dispute resolution process with the Department in an attempt to address the adult family home licensing action. AR at 81-82, FF 44-47; AR at 539, 574. During the informal dispute resolution process, Ms. Meyer provided a written explanation, dated May 12, 2009, that described when she became aware Tyler “most likely rubbed himself, including his private parts, on our son Tommy” and that after learning that they “took vigorous steps to separate Tommy and Tyler until Tyler moved out”. AR at 557-58. Ms. Meyer

stated that it was her son that was the victim, and that she disagreed with “Tyler’s allegations that Tommy was the instigator of abuse or inappropriate behavior”. AR at 558-59. Ms. Meyer further claimed in this letter that, at no time, did anyone tell her she needed to report the sexual abuse to the Department. AR at 557-59.

On June 2, 2009, Ms. Meyer provided a second statement for the purpose of informal dispute resolution. This time, Ms. Meyer altered her assertions to include that Tyler and Tommy were “just goofing around and dancing”. AR at 570. Ms. Meyer explained that Tommy was just “imitating Elvis or John Travolta” and that Tommy’s lap dances are “simply his Elvis impersonation”. AR at 570. Ms. Meyer also changed her prior statement to say that she was already planning to take Tyler to therapy before this incident “for other behavioral issues” and that it was Ms. Bills who said Tyler had to move out causing her to believe “something other than the incident had come to light”. AR at 570. She also changed her statements about milk and sugar saying that both were available to the residents whenever they wanted. AR at 571.

F. Resident Client Protection Program Investigations

The Resident and Client Protection Program within the Department investigates allegations that adult family home residents have been abused, neglected, or financially exploited by individuals working in an adult

family home. WAC 388-76-11000.⁸ Gloria Morrison is the Resident and Client Protection Program Investigator who was assigned to investigate allegations of neglect and abuse against Ms. Meyer, Mr. Meyer and Ms. Brooks. AR at 709, 721, 731.

Ms. Morrison interviewed Tyler on July 9, 2009. Tyler told her that, on the date of the incident, Tommy snuck up behind him, grabbed him, pulled him down and “started humping” him. AR at 711; 2 RP at 18 ll. 19-25, 19 ll. 18-20. Tyler said this happened on more than one occasion and he told Ms. Morrison that he had reported this to Mr. Meyer and Ms. Meyer. 2 RP at 19 ll. 23-25. Tyler reported that Ms. Meyer said her son never does that. AR at 711. Tyler said he felt Ms. Meyer was more concerned for Tommy, than she was for him. AR at 711. Tyler said he told Mr. Meyer and Ms. Meyer that it was Tommy that was doing the humping, but he did not tell Ms. Brooks because “she thinks I lie”. AR at 711; 2 RP at 19 ll. 23-25, 20 ll. 1-2. Tyler told Ms. Morrison that Ms. Brooks was “really nasty to everyone”, that she was mean to him, she would yell at him, she would call him a liar, she would tease Mike for

⁸ If the allegations against an individual are substantiated, the Department makes a preliminary finding of abuse, neglect, or exploitation. *See* WAC 388-76-11005. Any individual with access to a long-term care facility is eligible for a finding of abuse, neglect, exploitation, or financial exploitation, regardless of whether the individual is a licensed provider. WAC 388-76-11000. Specifically, providers, employees of the adult family home, entity representatives, anyone affiliated with a provider, and caregivers, are all subject to such findings. *Id.*

wearing a diaper, and that he was happy he was no longer living at Pathfinder. AR at 734. Tyler reported to Ms. Morrison that the residents “never got seconds” 2 RP at 61 ll. 7-12.

Ms. Morrison interviewed Brian on July 8, 2009. Brian did not recall an incident of sexual contact between Tyler and Tommy at that time, but he reported that Tommy was supposed to stay upstairs, but he would come downstairs anyway. AR at 712; 2 RP at 21 ll. 16-23.

Brian also discussed various instances where Ms. Brooks yelled at him or called him a baby. For example, Brian reported that Ms. Brooks scared him and he relayed an incident where, when a water bottle got broken, Ms. Brooks would not give him a chance to explain, told him to go to his room, followed him downstairs, sat in his chair yelling at him, and called him a baby when he began to cry. AR at 734; 2 RP at 41 ll. 1-25, 42 ll. 1-22.

Ms. Morrison also interviewed Mr. Meyer, Ms. Meyer, and Ms. Brooks, together with their attorney present by speaker phone, on July 9, 2009. AR at 713; 2 RP at 22 ll. 21-25, 23 ll. 1-10. In contrast to what they had disclosed to prior investigators and during the informal dispute resolution process, they indicated that they were unaware there had been any sexualized event at the adult family home, and, after Brian reported something inappropriate was going on downstairs, they

investigated and determined that nothing had happened. AR at 713-14, 724, 736; 2 RP at 23 ll. 11-25, 24 ll. 1-15, 25 ll. 19-21, 26 ll. 21-25, 27 ll. 1-4, 8-13, 28 ll. 24-25, 29 ll. 1-4. They denied that Tommy or Tyler reported any touching that day, they denied being aware of any allegations of sexualized behavior between Tommy and Tyler, and denied receiving any reports of sexualized behavior regarding any resident or any household member. *Id.* Ms. Meyer told Ms. Morrison that she issued Tyler an eviction notice because Ms. Bills told her to do so, and that Ms. Bills would not tell her the reason it had to be done. Ms. Meyer further claimed that, even up to the day Ms. Morrison interviewed her, she still did not know why it was necessary to discharge Tyler. AR at 714; 2 RP at 213 ll. 4-10.

Based on her investigation, as well as a review of the Department's licensing investigation, Ms. Morrison concluded that neglect and abuse did occur at Pathfinder. 2 RP at 29 ll. 8-25, 30 ll 1-8, 21-25, 31 ll. 1-3, 32 ll. 19-25, 33 ll. 1-24, 36 ll. 4-18. Findings of neglect were made against Ms. Meyer, Mr. Meyer and Ms. Brooks. AR at 705-06, 717-18, 727-28. A separate finding of mental abuse was also made against Ms. Brooks. AR at 727-28.

G. Conflicting Statements During Testimony At Hearing

The initial appeal of the adult family home licensing action was filed with the Office of Administrative Hearings on May 14, 2009. AR at 555. The licensing appeal was eventually consolidated with the three appeals by Ms. Meyer, Mr. Meyer and Ms. Brooks of the findings of neglect and abuse that had been made against them individually. AR at 1-2, FF 1-3. A nine day hearing was held before an Administrative Law Judge (ALJ) in bifurcated proceedings with three days of hearing in February 2010, four days of hearing in April 2010, and two days of hearing in June 2010. AR at 327-48. Testimony was taken from 14 witnesses and over 50 exhibits were offered.⁹ AR at 328.

At the hearing in April 2010, Ms. Brooks denied learning anything about sexual touching on February 23, 2009. She testified that after Brian reported something inappropriate was going on, she went downstairs and asked Tyler about it, but that he said nothing to her other than to ask, “who ratted me out?”. 5 RP at 162 ll. 23-25, 163 ll. 1-10, 168 ll. 24-25, 169 ll. 1-22. She also testified that she talked to Mr. Meyer, and that Tommy reported to him that he and Tyler were just “goofing around”. 5 RP at 180 ll. 21-25, 182 ll. 9-25. Ms. Brooks also testified that she and Mr. Meyer concluded “nothing had happened” and she denied “ever

⁹ Appellant’s Exhibits at AR at 476-508; Department’s Exhibits at AR at 509-830.

[being] aware of sexual activity between Tommy and residents”. 5 RP at 183 ll. 7-21. Ms. Brooks further denied each and every statement attributed to her regarding her knowledge of any reports of sexual touching whatsoever. *See generally*, 5 RP at 90-222; 6 RP at 1-146. Ms. Brooks did agree that she is a mandatory reporter, and that both Tommy and Tyler are vulnerable adults. 6 RP at 89 ll. 4-22.

Similarly, Mr. Meyer testified that on February 23, 2009, Brian came up and said “something inappropriate is going on downstairs” and that Ms. Brooks said he better go talk to Tommy. 6 RP at 111 ll. 12-19. He testified that he learned Tommy and Tyler were downstairs “dancing”. 6 RP at 112 ll. 7-13. Mr. Meyer further testified that he spoke with Tyler and also learned that “nothing” was going on, but Mr. Meyer did agree that he told Tyler “this stuff’s gonna stop”, “if it is an impulse thing, it’s not gonna happen. It’s gonna stop”. 6 RP at 114 ll. 18-25, 117 ll. 3-19. During the hearing, Mr. Meyer denied ever being aware of “any inappropriate sexual activity” occurring in the house. 6 RP at 123 ll. 16-24. Mr. Meyer denied having any knowledge as to why Tyler had to move out, testifying that, without any explanation, Devora Bills told them they had to evict Tyler.¹⁰ 6 RP at 128 ll. 2-25, 129 ll. 1-3. Mr. Meyer

¹⁰ However, a week later when Mr. Meyer took the stand again, he testified that Devora Bills told Ms. Meyer that she was referring Tyler for sexual deviancy and that “on the basis of what she said” they gave Tyler the eviction notice. 8 RP at 143 ll. 18-24.

testified that, prior to law enforcement arriving at his home, there had been no discussions between Ms. Brooks, Mr. Meyer and Ms. Meyer regarding any sexual issues. 6 RP at 129 ll. 4-10. Mr. Meyer said the first he knew of “any kind of sexual activity” was when the deputies came out to investigate “a possible sexual assault”. 6 RP at 129 ll. 11-15. At the hearing, Mr. Meyer did admit that he had told the investigators he was concerned about “ruining Tyler’s life,” and stating that “once that kind of thing gets into your file, it stays there”. 7 RP at 32 ll. 13-16. Mr. Meyer testified that this is what happened to Tommy in junior high, when a teacher reported he was inappropriately touching himself. 7 RP at 32 ll. 13-25, 33 ll. 1-9.

Over a month later, the hearing reconvened and Ms. Meyer testified. 8 RP at 1-2. Consistent with the testimony of Mr. Meyer and Ms. Brooks, Ms. Meyer said that when she returned from vacation she was told that Brian reported something inappropriate was going on downstairs and that they investigated, determining that nothing happened between Tyler and Tommy. 8 RP at 51 ll. 7-18. Ms. Meyer testified that she took Tyler to his meeting with Devora Bills and was told Ms. Bills was referring Tyler to sexual offender treatment, which she knew about from her previous experience working in the community protection program

with offenders.¹¹ 8 RP at 70 ll. 1-8; 9 RP at 156 ll. 16-24. Ms. Meyer testified she asked why, but was told it was confidential. 8 RP at 70 ll. 1-8. Ms. Meyer said she was “dumbfounded” and did not know the reason why they had to give Tyler an eviction notice. 8 RP at 70 ll. 10-17. Ms. Meyer further testified that the first time she knew what was going on was after law enforcement arrived and told her they were investigating a sexual assault in her home that involved Tyler, Tommy, and Brian. 8 RP at 102 ll. 1-10, 105 ll. 22-24, 106 ll. 23-25, 110 ll. 4-22. Ms. Meyer then testified that when the Department licensing investigators came after law enforcement left, she did not know why the Department was there or what they were investigating, and she did not have any idea that it had anything to do with allegations of sexual touching. 9 RP at 21 ll. 5-25, 22 ll. 1-21, 45 ll. 24-25, 46 ll. 1-14, 68 ll. 19-25, 69 l. 1. Ms. Meyer testified that there was never a sexual connotation to the February 23, 2009, incident until the State got involved and started using sexualized words. 9 RP at 109 l. 25, 110 ll. 1-7.

¹¹ Three weeks later, when Ms. Meyer testified again, she said she had not learned that Tyler was referred to sexual offender treatment until *after* he had left her home on May 1, 2009. 9 RP at 140 ll. 21-25, 141 l. 1. When cross examined and asked, “Isn’t it true that Devora Bills told you [that Tyler would be referred to sexual offender treatment] on April 14th?” she answered “I don’t recall.” Then she was asked, “Isn’t it true that Devora Bills also told you she was referring Tyler to a psychosexual therapist?” and she answered, “I don’t even know what that is.” 9 RP at 156 ll. 21-25, 157 ll. 1-7.

At the end of Ms. Meyer's testimony, she said that even after speaking with the police, reading the police reports, speaking with the complaint investigators, speaking to the Resident and Client Protection Program investigator, speaking to Devora Bills, learning Tyler was referred to sexual offender treatment, and knowing everything else that she learned during multiple investigations, she still had no reason to suspect nonconsensual sexual touching may have occurred and she believed she had no reason to call in a report as a mandatory reporter. 9 RP at 175 ll. 4-25, 176 ll. 10-13, 177 ll. 18-21.

H. Credibility Findings And Procedural History

Despite discounting the Appellants' testimony, and finding the Department's witnesses credible, the ALJ reversed the revocation of Ms. Meyer's adult family home license, and overturned the findings of neglect and/or abuse against Appellants. AR at 327-46. The Department timely appealed the ALJ's Initial Decision to the Board of Appeals. AR at 287.

The Board of Appeals' Review Judge (Review Judge) reversed the Initial Decision of the ALJ, upheld the revocation of the adult family home license, and affirmed the findings of abuse and/or neglect against the Appellants in a detailed Review Decision and Final Order with 61 findings of fact. AR at 1-111. The Review Judge, after conducting a "meticulous"

de novo review of the entire record, including the 830-page Certified Appeal Board Record and an additional nine volumes of written transcripts containing 1,745 pages of testimony from all witnesses, upheld each of the Department's enforcement actions and each of the findings against the Appellants. AR at 61-62; 90-91; *See*, AR at 91 n.212.

The Appellants next sought judicial review of the Review Decision and Final Order.

On June 8, 2013, the Honorable Christine Schaller of Thurston County Superior Court issued an Order on Judicial Review affirming the Department's Review Decision and Final Order, upholding the stop placement, summary suspension, and revocation of the adult family home license, and upholding the findings of neglect and/or abuse against the Appellants. The Appellants now present the Review Decision and Final Order for further review to this Court.

IV. ARGUMENT

A. **The Court's Review Is Limited To The Board Of Appeal's Review Decision And Final Order**

Under the Administrative Procedures Act, an aggrieved party may seek appellate review of an administrative order. *Tapper v. Employ't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993); *Chancellor v. Dep't of Ret. Syst.*, 103 Wn. App. 336, 341, 12 P.3d 164 (2000). This Court's

review is limited to a review of the agency's Review Decision and Final Order, not the ALJ's Initial Order. *Tapper*, 122 Wn.2d at 403-04 (commissioner's decision, not the ALJ's, is reviewed); *Nw. Steelhead & Salmon Council of Trout Unlimited v. Dep't of Fisheries*, 78 Wn. App. 778, 785-786, 896 P.2d 1292 (1995) (agency head's findings, not the ALJ's, are reviewed). The court also does not review or consider the superior court's judicial review order, and gives no deference to its rulings. *Verizon Nw, Inc. v. Employ't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 225 (2008); *Markam Grp., Inc. v. Employ't Sec. Dep't.*, 148 Wn. App. 555, 560-61, 200 P.3d 748 (2009); *Chancellor*, 103 Wn. App. at 341. Thus, this Court's review is limited to the March 30, 2012, Review Decision and Final Order. AR at 1-111.

B. Standard Of Review

In reviewing administrative action, the appellate court sits in the same position as the superior court, reviews the record before the administrative agency, and applies Administrative Procedures Act standards of review. *Tapper*, 122 Wn.2d at 402; *Hong v. Dep't of Soc. & Health Servs.*, 146 Wn. App. 698, 712, 192 P.3d 21 (2008). Issues not raised in the administrative forum cannot be considered by the reviewing court. RCW 34.05.554; *US West Commc's, Inc. v. WA Util. Transp. Comm'n*, 134 Wn.2d 48, 72, 949 P.2d 1321 (1997).

When reviewing a question of law, the court reviews the agency’s legal conclusions *de novo*. *Franklin Cnty. Sheriff’s Office v. Sellers*, 97 Wn.2d 317, 325, 646 P.2d 113 (1982), *cert. denied*, 459 U.S. 1106 (1983). The court independently determines the applicable law and its meaning, and applies that law to the facts found by the agency. *Id.*; *Potter v. Dep’t of Ret. Sys.*, 100 Wn. App. 898, 903, 999 P.2d 1280 (2000). Notwithstanding the *de novo* standard of review, the court will give substantial weight to an agency’s interpretation of its own rules. *Tapper*, 122 Wn.2d at 403.

The burden of proof on review rests with the Appellants. RCW 34.05.570(1)(a). To satisfy their burden, the Appellants must show that the final administrative order is invalid on one of the grounds listed in RCW 34.05.570(3) as applied to the administrative action at the time it was taken.¹² RCW 34.05.570(1)(b). In addition, the reviewing court “shall grant relief only if it determines that a person seeking judicial review has

¹² The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that: (a) The order, or rule on which the order is based, is unconstitutional; (b) The order is outside the statutory authority or jurisdiction of the agency; (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure; (d) The agency has erroneously interpreted or applied the law; (e) The order is not supported by substantial evidence when viewed in light of the whole record before the court; (f) The agency has not decided all issues requiring resolution; (g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party; (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency; or (i) The order is arbitrary or capricious. RCW 34.05.570(3).

been substantially prejudiced by the action complained of.” RCW 34.05.570(1)(d). Here, the Appellants have not satisfied their burden.

C. The Court Should Disregard Appellants’ Assignments Of Error Because Findings Of Fact Have Been Challenged For The First Time On Review, Error Assignments Are Not Supported By Argument, And Appellants’ Brief Did Not Comply With RAP 10.3 And 10.4

Appeals pursuant to the Administrative Procedures Act must set forth assignments of error as required by RAP 10.3(a)(3) and (g) and include “a separate concise statement of each error which a party contends was made by the agency issuing the order, together with the issues pertaining to each assignment of error.” RAP 10.3(h). Absent assignments of error, findings are considered verities on appeal. *Hilltop Terrace Homeowners Ass’n v. Island Cnty.*, 126 Wn.2d 22, 30, 891 P.2d 29 (1995). This Court should not consider Appellants’ assignments of error 1-190, and findings of fact 1-61 should be considered verities on appeal, for three reasons.

First, Appellants’ assignments of error 1-179 should be disregarded because Appellants are challenging those findings of fact for the first time on appeal. Appellate courts do not consider error assignments based on arguments not raised in trial court. RAP 2.5(a); *Gooldy v. Golden Grain Trucking Co.*, 69 Wn.2d 610, 613, 419 P.2d 582

(1966). RAP 2.5(a) encourages efficient use of judicial resources and avoidance of unnecessary appeals by providing trial courts the opportunity to correct errors. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). In this case, the trial court was not given the opportunity to review the issues raised in assignments of error 1-179 because Appellants did not challenge any of the findings of fact in their Petitioners' Trial Brief submitted to the trial court for judicial review. While the trial court found that findings of fact 60 and 61 were implicitly challenged by Petitioners, it explicitly determined that findings of fact 1-59 were not. Clerks Papers (CP) at 180-82, Order on Judicial Review, June 28, 2013. Therefore, challenges to findings of fact 1-59 are raised for the first time on appeal and assignments of error 1-179 should not be considered.

Second, assignments of error 1-190 should not be considered because, although Appellants assign error to every finding of fact in the Review Decision and Final Order, they do not provide argument as to why the findings were in error. Assignments of error to findings of fact are abandoned if the appellant does not present any argument or authority as to why the finding was erroneous. *State v. Motherwell*, 114 Wn.2d 353, 358, 788 P.2d 1066 (1990); *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 630, 733 P.2d 182 (1987).

In *Matter of Estate of Lint*, the court disregarded assignments of error not argued in the appellant's brief because it is incumbent on the appellant to present argument as to why specific findings are not supported by evidence and cite to the record in support of that argument. *Matter of Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998). "If we were to ignore the rule requiring counsel to direct argument to specific findings of fact which are assailed and to cite to relevant parts of the record as support for that argument, we would be assuming an obligation to comb the record with a view toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings." *Id.*

Appellants' assignments of error have been abandoned because Appellants have not presented any argument or authority as to why the vast majority of the challenged findings of fact are erroneous. The only exception is that the Appellants do argue that finding of fact 13 is erroneous because the Review Judge turned a blind eye to the fact that a witness "virtually lied," however, the Appellants do not cite to the record to provide support for this argument. Brief of Appellants at 27. Argument is not presented for any other assignment of error. Therefore, all assignments have been abandoned and should not be considered.

Finally, Appellants' assignments of error should be disregarded because Appellants failed to comply with the requirements of RAP 10.4(c). The purpose of RAP 10.4(c) is "to add order to and expedite appellate procedure by eliminating the laborious task of searching through the record for such matters as findings claimed to have been made in error." *In re Marriage of Stern*, 57 Wn. App. 707, 710, 789 P.2d 807 (1990). RAP 10.4(c) requires verbatim reproduction of challenged findings of fact in briefs. The court has held that noncompliance with RAP 10.4(c) can result in nonconsideration of the claimed error. *Thomas v. French*, 99 Wn.2d 95, 101, 659 P.2d 1097 (1983); *Oblizalo v. Oblizalo*, 54 Wn. App. 800, 802-03, 776 P.2d 166 (1989) (declining to address findings and conclusions challenged in assignments of error because the material portions are not set forth verbatim). The court can consider a brief despite noncompliance with the Rules of Appellate Procedure regarding presenting specific assignments of error, but should only do so if the nature of the appeal is clear, the relevant issues are argued in the brief, and citations are supplied so that the court isn't inconvenienced and the respondent prejudiced. *Wright v. Colville Tribal Enter. Corp.*, 127 Wn. App. 644, 648-49, 111 P.3d 1244 (2005) *rev'd*, 159 Wn.2d 108, 147 P.3d 1275 (2006). Here, Appellants violated RAP 10.4(c) by not reproducing verbatim the text of the challenged findings of fact.

Requiring the court and opposing counsel to locate the support for sixty findings of fact within such a voluminous record is a considerable hardship. For the foregoing reasons, this Court should disregard all assignments of error.

D. Appellants Have Failed To Meet Their Burden Of Proof On Review Because They Have Not Shown That The Review Decision And Final Order Is Invalid Under RCW 34.05.570(3)

The Appellants do not contest that the conduct alleged in the Review Decision and Final Order justifies the Department's action in this case. Instead after disregarding Appellants' assignments of error, only three issues remain in Appellants' brief. Appellants contend that (1) the agency has erroneously interpreted or applied the law when the Review Judge applied the wrong standard on review, that (2) the Review Decision and Final Order is not supported by substantial evidence in the record, and that (3) the Review Decision and Final Order is arbitrary or capricious. Appellants have not satisfied their burden of proof on these three arguments and, therefore, have not demonstrated that the final administrative order is invalid.

1. The Review Judge Interpreted And Applied The Correct Standard on Review

Appellants allege that the Review Judge used the wrong standard on review. Brief of Appellants at 29-32. The basis for this contention is that an outdated version of the Department's hearing rule regarding the

authority of review judges was erroneously cited in the March 11, 2011, Petition for Review to the Board of Appeals. Brief of Appellants at 29. This error is immaterial to this case because, regardless of what was cited in the briefs of the parties, the correct standard of review was used by the Review Judge in the Review Decision and Final Order.

Before March 3, 2011, former WAC 388-02-0600 (2008) gave a Review Judge the same decision making authority as an ALJ when reviewing enforcement actions taken against adult family home licenses (with deference to an ALJ's opportunity to observe witnesses), but restricted a Review Judge's authority to change ALJs' findings of abuse, neglect, or exploitation of vulnerable adults in Resident and Client Protection Program cases.¹³ The revised WAC, applies the *de novo* review standard to both licensing matters and Resident and Client

¹³ Former WAC 388-02-0600 (2008), prior to the amendments effective March 3, 2011, stated in relevant part: (1) Review judges review initial orders and enter final orders. Review judges may return cases to OAH for further action. (2) The review judge has the same decision-making authority as the ALJ when reviewing initial orders in the following cases, but must consider the ALJ's opportunity to observe the witnesses: (a) Licensing, certification and related civil fines; [...] (3) In all other cases, the review judge may only change the initial order if: (a) There are irregularities, including misconduct of a party or misconduct of the ALJ or abuse of discretion by the ALJ, that affected the fairness of the hearing; (b) The findings of fact are not supported by substantial evidence based on the entire record; (c) The decision includes errors of law; (d) The decision needs to be clarified before the parties can implement it; or (e) Findings of fact must be added because the ALJ failed to make an essential factual finding. The additional findings must be supported by substantial evidence in view of the entire record and must be consistent with the ALJ's findings that are supported by substantial evidence based on the entire record. *Id.*

Protection Program matters. Effective March 3, 2011, WAC 388-02-0600

states, in relevant part:

(1) Review judges review initial orders and enter final orders. 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). In reviewing findings of fact, the review judge must give due regard to the ALJ's opportunity to observe witnesses.

Despite the incorrect citation in the Department's brief to the standard on review, the Review Judge applied the correct review standard in her decision. AR at 90-92. In the Review Decision and Final Order, the Review Judge extensively cited to the correct standard and provided analysis of the newly revised WAC 388-02-0600, supported by her observations of this Court's opinions in *Kabbae v. Dep't of Soc. & Health Servs.*, 144 Wn. App 432, 446 (2008). AR at 90-93. The Review Judge states in part:

In an adjudicative proceeding regarding adult family home licensing or resident and client protection program cases the undersigned has the same authority as the ALJ to enter Findings of Fact, Conclusions of Law, and Orders; The Washington Administrative Procedure Act also states that the undersigned Review Judge has the same decision-making authority when deciding and entering the Final Order as the ALJ had while presiding over the hearing and deciding and entering the Initial Order ...; RCW 34.05.464(4) grants the undersigned Review Judge the same decision-making authority as the ALJ and in the same manner as if the undersigned had presided over the hearing.

AR at 90-91.

The Review Judge complied with the newly adopted standard and did so under a full and complete understanding of the history and the basis of that authority.

Furthermore, Appellants' argument that the Review Decision and Final Order is invalidated by an erroneously applied review standard fails because Appellants do not show how they were prejudiced by the alleged error. Error without prejudice is not grounds for reversal. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). Error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the case. *Id.* Appellants do not state how any alleged error affected the findings, conclusions, or the outcome of the case and do not point to any prejudice.

If the old standard of review had been applied, the Review Judge would have had a much narrower scope of review and would have been less able to amend the original findings of the ALJ (the same findings and conclusions that were in favor of the Appellants). Thus, in theory, the old review standard actually favored Appellants' posture on review, and disfavored the Department. The Review Judge applied the correct standard on review, but even if she had not, any error would have been harmless to Appellants and detrimental to the Department.

Appellants also argue that the Review Judge improperly relied on WAC 388-02-0570 to limit review. Brief of Appellants at 33. As such, the Appellants contend that the Review Judge failed to appropriately consider assignments of error and related issues raised by the Appellants for the first time in their untimely response to the Department's timely petition for review, and improperly limited their arguments to addressing the findings and issues raised by the Department. *Id.* These arguments are without merit. Regardless of the Review Judge's determination that Appellants were precluded from assigning errors to findings of fact not raised by the Department, she nevertheless made it very clear in her Review Decision and Final Order that she considered each of the ALJ's findings of fact, each of the conclusions of law, and any and all of the possible related issues in her *de novo* review of the record. The Review Judge states:

Review Judges must personally consider the whole record or such portions of it as may be cited by the parties. 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 party has asked that they be reviewed. Because the ALJ is directed to decide the issues *de novo*, the undersigned has also decided the issues *de novo*.

AR at 92.

Because the review judge did not erroneously interpret or apply the law, there has been no prejudice to Appellants.

2. The Review Decision And Final Order Is Supported By Substantial Evidence In The Record

It is Appellants' burden on appeal to demonstrate that the findings of fact are unsupported by substantial evidence in the record. *Donahue v. Cent. WA Univ.*, 140 Wn. App. 17, 23, 163 P.3d 801 (2007) (findings are upheld if supported by substantial evidence). Evidence is substantial if it is sufficient to persuade a fair-minded person of the truth of the matter. *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995). If enough evidence supports the finding, it does not matter that there are conflicting facts in the record or other interpretations of the facts. *Dep't of Rev. v. Sec. Pacific Bank*, 109 Wn. App. 795, 803, 38 P.3d 354 (2002). The court determines only if the evidence most favorable to the prevailing party reasonably supports the challenged finding. *Id.*; *Sherrel v. Selfors*, 73 Wn. App. 596, 600-01, 871 P.2d 168, *review denied*, 125 Wn.2d 1002 (1994). Therefore, if there is substantial evidence to uphold the revocation of the adult family home license and the findings of neglect and abuse against the Appellants, the Department's actions should be upheld. Here, there is a robust administrative record that supports the Review Decision and Final Order.

The administrative hearing record in this case is unnecessarily complicated, in large part, because Appellants continued to change their story of what happened at Pathfinder throughout the hearing process. During the licensing investigation, the informal dispute resolution process, the Resident and Client Protection Program investigation, and the hearing process, their stories evolved and flatly contradicted earlier statements, and even one another. The variation in the testimony was acknowledged by the ALJ when he made a credibility determination that supported the Department's witnesses because, with ample opportunity to hear the testimony of the witnesses presented by both sides, he determined that the evidence supported a finding that the statements attributed to the Appellants by Department witnesses were made and accurately documented. AR at 331-32, FF 7. The Review Judge agreed with this credibility determination. AR at 89, FF 60-61.

Based on this determination, the findings of fact support that: In the original adult family home complaint investigation, Ms. Meyer, Mr. Meyer, and Ms. Brooks admitted that they knew there was inappropriate, non-consensual sexual contact between an adult family home resident and Ms. Meyer and Mr. Meyer's developmentally disabled adult son. Once they knew about the sexual abuse, they failed to report it to the Department and to the proper legal authorities, and did not take any

steps to protect the other residents in the home from the risk of sexual abuse. Furthermore, they attempted to enroll the resident they believed was the perpetrator of the sexual abuse into a therapy program for inappropriate “sexual behaviors,” even though there is some question as to who was actually the aggressor of the sexual abuse.

Ms. Meyer, Mr. Meyer and Ms. Brooks interacted with several professionals prior to the licensing complaint investigation, including a police officer, mental health therapists, and a Department case worker. During their interactions with these professionals, Appellants’ stories stayed fairly consistent: there was inappropriate, non-consensual sexual contact between Tommy and Tyler, they had not reported this sexual contact to the proper authorities, they did not protect the other residents in the adult family home, and they sought mental health counseling for the resident, but not for their son. Once the adult family home license was revoked, Appellants’ stories started to drastically change. Suddenly, they had no idea why others thought there was any sexual abuse in the adult family home. They each testified at the hearing that they had no idea of the underlying allegations that prompted the Department investigations, or that the police investigation involved sexual abuse.

This evolving story is implausible and was not believed by the ALJ or the Review Judge. The ALJ’s original credibility determination

supports the Department's witnesses and the information that Ms. Meyer, Mr. Meyer and Ms. Brooks admitted during the course of the adult family home licensing investigation amply supports the Department's positions in this case. On review, the Review Judge made an independent assessment of the credibility findings and concurred with the ALJ. AR at 89. The Review Judge determined that the Appellants' original statements, made in the initial stages of the investigation and to other professionals even before the Department investigation were credible, versus the denials Appellants made *after* the Department took action against them. AR at 89-90. The Review Judge described in detail why her independent review of the credibility of Appellants resulted in her concurrence with the ALJ:

Some [of the statements made by Ms. Meyer, Mr. Meyer, and Ms. Brooks] were made closer in time to the incident, some were made during the time period when the Department alleges the Appellants (now the Petitioners) should have reported contact between Tommy and Tyler, and these statements were more credible than their later, conflicting, testimony. As told by the Appellants at the outset of the investigation, there was an instance of sexual contact between Tommy and Tyler on February 23, 2009. Mr. Meyer and Ms. Brooks learned of it that day. They told Mrs. Meyer of the incident when she returned from a trip on February 27, 2009. In response to the incident, Mrs. Meyer scheduled a counseling appointment for Tyler, and Mr. Meyer made the three responses outlined in Finding of Fact 26. [Footnote omitted]. Ms. Brooks told Heather Silva of the incident on March 27, 2009. By the time of the Resident and Client Protection Program

investigations in July, the Appellants had determined on a course of denying that the incident occurred. This meant that they had to deny the follow up precautions they made. This meant that they had to deny statements they made to others verbally and in writing. At hearing, this meant that they “forgot” a number of conversations; even while “remembering” contemporaneous conversations. Their initial statements, both verbal and written are more credible than their later denials.

AR at 89-90.

As the voluminous record in this case demonstrates, substantial evidence supports the Review Decision and Final Order.

3. The Review Decision And Final Order Is Not Arbitrary And Capricious

Appellants argue that the Review Judge acted arbitrarily and capriciously when she affirmed the Department’s revocation of Ms. Meyer’s adult family home license and the findings of neglect or verbal abuse against the Appellants. Under RCW 34.05.570(3)(i), an order by an administrative agency is “arbitrary and capricious” when it is willful and unreasoning without consideration for, or in disregard of, the facts. *Pierce Cnty. Sheriff v. Civil Serv. Comm’n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). Agency action is not arbitrary and capricious if taken honestly and upon due consideration of the facts, even if a reviewing court may have reached a different conclusion. *Trucano v. Dept. of Labor and Industries*, 36 Wn. App. 758, 762, 677 P.2d 770 (1984); *Heinmiller*, 127 Wn.2d at 609. The test for arbitrary and capricious action is a narrow one,

and the party asserting it “. . . must carry a heavy burden.” *Pierce Cnty. Sheriff*, 98 Wn.2d at 695.

Appellants fail to demonstrate that the Review Judge acted arbitrarily and capriciously in issuing the Review Decision and Final Order that affirmed the Department’s decisions. The lengthy Review Decision and Final Order, which sets forth the final agency position in great detail, demonstrates that the agency action was taken with due consideration of the facts and circumstances. To formulate her findings of fact, the Review Judge considered the testimony, exhibits, hearing recordings and records, party briefing, and Initial Order and supported each finding of fact with evidence. AR at 61-89. The Review Judge’s conclusions of law were supported by the findings of fact that were derived from the evidence. AR at 106. Therefore, agency action was not arbitrary and capricious because it was exercised upon due consideration of all the facts in the case.

E. The Department Is Not Required To Pay Fees And Costs To Appellants Because Appellants Did Not Prevail On Their Petition For Judicial Review And Agency Action Was Substantially Justified

Appellants argue that they are statutorily entitled to attorney fees and costs under the Washington Equal Access to Justice Act (EAJA). In judicial review proceedings under the Administrative Procedures Act, an

award of attorney's fees and costs is allowed under the EAJA when a qualified party prevails in a judicial review of an agency action, unless the agency action was substantially justified or other circumstances would make an award unjust. RCW 4.84.350(1)(a). The EAJA, like any statute awarding attorney's fees against the state, should be strictly construed since it constitutes a waiver of sovereign immunity and runs counter to the American rule barring an award of attorney's fees without specific authority. *Rettkowski v. Dep't of Ecology*, 76 Wn. App. 384, 389, 885 P.2d 852 (1994), *aff. in part, rev. on other grounds in part*, 128 Wn.2d 508, 910 P.2d 462 (1996).

In this case, Appellants were not entitled to an award of fees and costs by the superior court because they did not prevail on their petition for judicial review. A party "prevails" if he or she obtains "relief on a significant issue that achieves some benefit" that the party sought in the judicial review proceeding. RCW 4.84.350(1). Appellants have not obtained relief on any significant issue raised in their petition and, thus, are not entitled to fees and costs under the EAJA.

Even if Appellants' are found to have preserved their request for attorney's fees on appeal and prevail in this Court, attorneys' fees should not be awarded because the agency action was substantially justified. Agency action is substantially justified when the State's position has a

reasonable basis in law and fact; in other words, action is justified to a degree that would satisfy a reasonable person. *H&H P'Ship v. State*, 115 Wn. App. 164, 62 P.3d 510 (2003), citing *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988); *Constr. Indus. Training Council v. WA State Apprenticeship & Training. Council of Dep't of Labor & Indus.*, 96 Wn. App. 59, 68, 977 P.2d 655 (1999).

The Washington legislature has determined that vulnerable adults may be in particular need of protection from abuse, neglect, abandonment, or exploitation. *Kraft v. Dep't of Social and Health Services*, 145 Wn. App. 708, 717 (2008). The Legislature has also mandated that the health, safety, and well-being of vulnerable adults must be the paramount concern in determining whether to issue an adult family home license to an applicant, whether to suspend or revoke a license, or whether to take other licensing actions. RCW 70.128.005. In taking action against Ms. Meyer's license and making findings of abuse and/or neglect against Ms. Meyer, Mr. Meyer, and Ms. Brooks, the Department's actions were not only substantially justified by facts and law, they were mandated under the law.

V. CONCLUSION

The Department's actions are supported by the evidence, consistent with the statutes and governing regulations, and were not

arbitrary and capricious. For these reasons, the Court should uphold the Department's revocation of Ms. Meyer's adult family home license, and the findings of neglect and/or abuse against Ms. Meyer, Mr. Meyer, and Ms. Brooks.

The Review Decision and Final Order should be affirmed.

RESPECTFULLY SUBMITTED this 4th day of April, 2014.

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CERTIFICATE OF SERVICE

Christine Howell, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. On April 4th, 2014, I served a true and correct copy of this **BRIEF OF RESPONDENT** and this **CERTIFICATE OF SERVICE** on the following parties to this action, as indicated below:

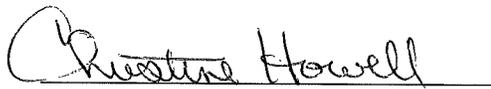
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- By Federal Express
- By Hand Delivery by: _____

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

DATED this 4th day of April 2014, at Tumwater, Washington.


CHRISTINE HOWELL
Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

April 04, 2014 - 2:50 PM

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