

NO. 45748-2

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

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DAN ALBERTSON, as Limited Guardian ad Litem for AIDEN  
RICHARD BARNUM, an incapacitated minor,

Appellant,

v.

STATE OF WASHINGTON acting through its DEPARTMENT OF  
SOCIAL AND HEALTH SERVICES,

Respondent.

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**BRIEF OF RESPONDENT/CROSS APPELLANT**

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## I. INTRODUCTION

Plaintiff (Aiden Barnum, by and through his Guardian Ad Litem, Dan Albertson, hereinafter “Plaintiff” or “Aiden”) argues that the jury’s verdict should be reversed because the jury should not have been instructed on the issue of superseding cause and the jury’s finding of negligence was inconsistent with its finding of no proximate cause. In both arguments, Plaintiff speculates about what the jury found and why they found it and bases his arguments on several erroneous or unfounded assumptions:

1. The Department had the authority to remove Plaintiff from his parents’ care without a court order (erroneous matter of law);

2. It was undisputed at trial that Plaintiff’s broken arm, the injury that was the basis for the CPS investigation, was intentionally, as opposed to accidentally, inflicted by Plaintiff’s father (disputed);

3. The jury decided causation based on the existence of a superseding cause, as opposed to the absence of proof of proximate cause (speculative);

4. The jury found that the Department’s negligence resulted in a harmful placement of the Plaintiff – allowing him to stay with his parents (completely unfounded).

By erroneously assuming that Plaintiff's first injury was intentionally inflicted by his father, Plaintiff claims that his second injury was foreseeable as a matter of law and therefore it was error to instruct the jury on the issue of superseding cause. This ignores the record. At trial, this issue was highly disputed. (See e.g. Dr. Duralde's conclusion that the first injury was accidental. CP at 2486, 2482-83). The jury also heard testimony that the Attorney General's Office would not have initiated a dependency proceeding, which would have prevented Plaintiff's removal from his parents by court order. Because the evidence was disputed on both of these independent, intervening causes it was proper to let the jury determine the facts.

Plaintiff's irreconcilable verdict argument is also based on unfounded assumptions. Most troubling is the Plaintiff's repeated assertion that the jury actually found that the Department's negligence ". . . caused Aiden to be 'harmfully' placed back in his parents' home." There is no basis in the record to support the claim that the jury ever made such a finding. Compare Jury Instruction No. 10<sup>1</sup> (negligence had to result in a harmful placement), CP at 3969 with the jury's finding of no proximate cause. CP at 3990. The jury found that the Department's negligence was not a proximate cause of Plaintiff's injury. This must indicate that the jury

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<sup>1</sup> Jury instructions are attached as Appendix (App.) 1-7.

concluded Defendant's negligence did **not** result in a harmful placement of Plaintiff. CP at 3969, 3990. On the real issue of causation regarding Plaintiff's placement, Plaintiff offered no evidence to establish that the Department could or would have obtained a court order authorizing the Department to remove Plaintiff from his parents – the only lawful means by which it could have done so. *See* Chapter 13.34 RCW. The absence of such evidence eliminated liability under a theory of negligent investigation.

Neither of Plaintiff's alleged errors were preserved below and therefore are not properly before this Court on appeal. Plaintiff never objected to the superseding cause instruction based upon the foreseeability argument he now asserts to this Court. Moreover, because Plaintiff did not propose a special verdict form that would have clarified whether the jury even reached the issue of superseding cause or simply decided the case on the absence of cause in fact, Plaintiff's argument that the jury's verdict was based upon a finding of superseding cause is pure speculation. Similarly, Plaintiff never raised his inconsistent verdict argument below. He did not object to the verdict form given by the court, or propose a special verdict form requiring the jury to explain why it found negligence but no proximate cause. For these reasons, this Court need not address either of these alleged errors. CR 49(b) and 51(f).

The Department respectfully requests this Court affirm the jury's verdict and address the arguments raised in its cross-appeal in order to clarify the proper scope of the Department's liability in future cases.

## **II. RESTATEMENT OF THE ISSUES ON APPEAL**

1. Whether the trial court properly allowed the jury to determine the issue of superseding cause when the evidence at trial established a material question of fact as to whether Plaintiff's injury was accidental or intentional, and thus any subsequent injury to Plaintiff was not foreseeable as a matter of law?

2. Whether Plaintiff failed to preserve the trial court's alleged error in giving the superseding cause instruction (Jury Instruction No. 16) when his objection based on the *Rollins* decision did not put the trial court on notice of why the instruction was allegedly erroneous and is not raised on appeal, and when Plaintiff's argument that his subsequent injury was foreseeable was never raised at trial?

3. Whether a jury's verdict is inconsistent when the evidence presented at trial supported a finding that the negligent acts alleged by Plaintiff did not cause his injury?

4. Whether Plaintiff preserved his argument that the jury's verdict was inconsistent when he did not object to the Court's general verdict form, did not raise the alleged inconsistency prior to the discharge

of the jury under CR 49(b), and did not propose a special verdict form that would have indicated whether the jury even considered superseding cause or simply rendered its verdict based on an absence of proximate cause?

5. Whether Assistant Attorney General (AAG) Bailey's testimony that she would not have initiated a dependency proceeding to remove Plaintiff from his parents' care was properly admitted because it was not opinion testimony on the ultimate issue of whether the Department was negligent and was relevant to the jury's determination of causation?

6. Whether Plaintiff failed to preserve his argument that Assistant Attorney General Bailey's testimony was an improper legal opinion when Plaintiff failed to object to the testimony at trial on that basis?

7. Whether the trial court properly excluded counselor Kelley West's opinions concerning Plaintiff's father when the opinions were both improper lay and expert witness testimony, and when Plaintiff was not prejudiced by the exclusion because the jury nonetheless heard this evidence during the testimony of Dr. Carole Jenny?

### **III. ASSIGNMENTS OF ERROR ON CROSS-APPEAL**

1. The trial court erred in allowing Plaintiff to argue to the jury that the duty under RCW 26.44.050 includes a duty to implement voluntary conditions and services (Issue Nos. 1 and 2).

2. The trial court erred in giving Jury Instruction No. 10 defining negligent investigation and failing to give the Department's proposed Jury Instructions 20 and 37. (Issue Nos. 2 and 3).

3. The trial court erred in refusing to grant the Department's CR 50 motion dismissing Plaintiff's case for lack of evidence of establishing proximate cause (Issue Nos. 3, 4, and 5).

### **IV. STATEMENT OF ISSUES ON CROSS-APPEAL**

1. Whether the trial court erred in determining that the scope of the duty owed by the Department to Plaintiff to conduct a reasonable investigation of a referral of child abuse under RCW 26.44.050 included a duty to implement voluntary conditions or services?

2. Whether the trial court erred in giving its Jury Instruction No. 10 because that instruction did not instruct the jury as to each of the elements necessary to find liability for the negligent investigation of a referral of child abuse under RCW 26.44.050?

3. Whether the trial court erred in denying the Department's CR 50 motion dismissing Plaintiff's case for lack of evidence establishing

proximate cause when Plaintiff presented no evidence at trial establishing the factual showing upon which a judge could have declared him dependent, thus allowing the Department to remove him from his parents' care?

4. Whether the trial court erred in denying the Department's CR 50 motion dismissing Plaintiff's case for lack of evidence establishing proximate cause when he did not prove his father would have voluntarily separated from him?

5. Whether the trial court erred in denying the Department's CR 50 motion dismissing Plaintiff's case for injury resulting from the Department's alleged failure to implement voluntary conditions and services when he did not prove this alleged failure was the proximate cause of his injuries?

## **V. RESTATEMENT OF THE CASE**

### **A. Plaintiff's Birth And Caregivers**

Plaintiff was born to 18-year old Sarah Tate and 17-year old Jacob Mejia on November 6, 2008. The two had been together for over a year at the time of his birth. RP at 977. Plaintiff's mother moved in with his father and his father's family, parents Kimberly and Bernard and sister Ashley, sometime before his birth. RP at 975.

Plaintiff's mother was his primary caregiver. RP at 975. Plaintiff's father was still attending high school and both paternal grandparents worked during the day. RP at 975. His parents had no income and were dependent on his paternal grandparents for support. RP at 975. Neither had a driver's license. RP at 975.

Plaintiff was born with no notable health conditions and was considered to be a normal, healthy infant. Plaintiff's parents took Plaintiff to his newborn pediatrician appointments on November 10 and 17, 2008, where he continued to present as a healthy infant. RP at 544-46.

**B. Plaintiff Is Seen At Harrison Hospital For A Limp Left Arm**

Twelve days after his birth, Plaintiff was brought by his parents and paternal grandmother to Harrison Medical Center with a limp left arm. RP at 382, 386, 388, 426. X-rays revealed a spiral fracture to the mid-shaft of Plaintiff's left humerus. RP at 393. Plaintiff's parents and paternal grandmother expressed confusion over the cause of the injury, first indicating it may have happened while Plaintiff was passed around at a wedding several days earlier. RP at 386, 410. Plaintiff's mother subsequently suggested the injury happened when his father swaddled him after she noticed his arm was limp when un-swaddling him hours later. RP at 434. The treating emergency room physician concluded Plaintiff's injury was suspicious for nonaccidental trauma and instructed hospital

social worker Nicole Miller to report the injury to the Kitsap County Sheriff's Office and the Department. RP at 398, 411. The referral was made to the Department at approximately 6:25 p.m. that evening. RP at 361-62. A 72-hour law enforcement hold was placed on Plaintiff by the Kitsap County Sheriff's Office at approximately 6:30 p.m. that evening. RP at 343. Plaintiff was subsequently transferred to Mary Bridge Children's Hospital for further treatment and evaluation. RP at 411-12.

**C. The Department's Investigation**

The following morning, Department social worker Heather Lofgren received the referral and immediately began her investigation. RP at 951. She first reviewed the intake report generated from the information provided by Ms. Miller, including the emergency room physician's concerns that Plaintiff's injury appeared inconsistent with the explanation provided by his parents and was suspicious for nonaccidental trauma. RP at 955; Ex. at 40.

Ms. Lofgren then reviewed Department records for prior referrals concerning Plaintiff's parents and paternal grandmother and found none. RP at 954-55. She ran a background check through the National Crime Information Center on Plaintiff's father, mother and paternal grandmother. No prior arrest or conviction history was returned. RP at 969-70.

Ms. Lofgren called the Kitsap County Sheriff's Office to determine who had been assigned to investigate the law enforcement referral. RP at 963. She also requested an initial face-to-face consultation with Plaintiff and his parents at Mary Bridge Children's Hospital, which was conducted by Pierce County-based Department social worker Billie Reed-Lyyski. RP at 960.

Ms. Lofgren then called Harrison Medical Center in an attempt to speak with social worker Nicole Miller. Instead she reached a nurse familiar with the family from Plaintiff's birth there. RP at 957-58. The nurse relayed that Plaintiff's mother denied any adverse mental health history at the time of Plaintiff's birth and was seeing a family counselor because of her parents' divorce. RP at 958. The nurse also observed that Plaintiff's parents seemed like normal, functioning adults. RP at 958.

Ms. Lofgren also called the high school attended by Plaintiff's father and formerly attended by his mother. RP at 971-72. The school reported Plaintiff's father was a good, well-respected student who was not a troublemaker and did not get into fights or hang out with a bad crowd. RP at 972. The school likewise had no concerns about Plaintiff's mother. RP at 972.

Ms. Lofgren additionally called Mary Bridge Children's Hospital and spoke with Plaintiff's attending nurse. RP at 959. The nurse reported

Plaintiff's grandparents and parents were in the room and his parents had slept next to Plaintiff all night. RP at 959. Hospital night staff observed Plaintiff's parents demonstrating concern for him and asking appropriate questions. RP at 959.

Ms. Lofgren additionally spoke with Mary Bridge Children's Hospital social worker Mareesha Backman. RP at 961. Ms. Backman also reported Plaintiff's parents to be concerned and appropriate. RP at 961.

**D. The Department Consults With Child Abuse Medical Expert Dr. Yolanda Duralde**

Because of the seriousness of Plaintiff's injury and the inconsistent explanation of its occurrence, Ms. Lofgren determined a medical evaluation of Plaintiff was necessary to assess whether his injury was consistent with abuse. RP at 963-65. She contacted Dr. Yolanda Duralde, Medical Director of the Child Abuse Intervention Department at Mary Bridge Children's Hospital for the consultation.<sup>2</sup> RP at 963-64; CP at 2404, 2467-68. Dr. Duralde has been the Medical Director of the Child Abuse Intervention Department for approximately 20 years. CP at 2404. She has testified in court in over 100 child abuse cases. CP at 2468-69. Dr. Duralde is regarded as having more depth and breadth of knowledge in

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<sup>2</sup> Dr. Duralde is part of the state-wide Medical Consultation Network of child abuse medical experts the Department is required to utilize for such consults. RP at 965-67; CP at 2473-74.

the area of child maltreatment than other physicians at Mary Bridge, and she is deferred to as an expert by those physicians. RP at 34, 36-37.

Dr. Duralde met with Plaintiff and his parents at the hospital on November 19, 2008. CP at 2404, 2471-72. Prior to meeting with the family, she reviewed available medical records for Plaintiff, including those received from Harrison Medical Center. CP at 2423-24, 2439-40, 2480-82. She then performed a physical examination of Plaintiff and interviewed his parents about the mechanism of his injury. CP at 2405-06, 2411, 2478-83. Dr. Duralde also asked Plaintiff's father to demonstrate using a doll how he swaddled Plaintiff. CP at 2412, 2475. He indicated on the doll pinning Plaintiff's left arm behind his back and pulling it forward again in a twisting motion to get it back to the side after he had wrapped Plaintiff in the blanket. CP at 2475-2477. He did this because he thought babies were supposed to be swaddled with their arms down at their sides. RP at CP 2422-23. Plaintiff's father believed his actions were consistent with how a hospital nurse had taught him to swaddle at the time of Plaintiff's birth. CP at 2422-23. His actions demonstrated a twisting motion to Plaintiff's arm, which Dr. Duralde believed explained a consistent mechanism for Plaintiff's injury. CP at 2431, 2468, 2477-78.

Dr. Duralde observed Plaintiff's parents to be young and inexperienced, but engaged in what was going on. Ex. 17. Plaintiff's

father was remorseful and tearful at times during the consultation. Ex 17. Dr. Duralde believed he was telling the truth about how he had swaddled Plaintiff, in part because she did not believe he was sophisticated enough to come up with a plausible explanation of the twisting motion he used in swaddling Plaintiff as the mechanism for Plaintiff's injury, which Dr. Duralde determined could have caused the particular type of fracture to Plaintiff's arm. CP at 2420, 2436-37. Dr. Duralde consequently concluded Plaintiff's injury by his father was a "probable accidental injury to a newborn." CP at 2486. She was the only physician to attempt to determine the mechanism of Plaintiff's injury. CP at 2482-83.

**E. The Department's Determination To Return Plaintiff To His Parents' Care**

After receiving the results of Dr. Duralde's consult, Ms. Lofgren discussed the results of her investigation with her supervisor, Jonathan Lawson. RP at 974. Neither could conclude Plaintiff's father had intentionally harmed him, and thus determined there was no basis to seek Plaintiff's separation from his parents upon discharge from the hospital. RP at 973-74. This was based on Dr. Duralde's conclusion that Plaintiff's injury was more likely than not accidental, the lack of concerning information reported by collateral contacts, the lack of arrest or conviction history of Plaintiff's caregivers, and the fact that Plaintiff was returning

home not only to the care of his parents, but also his paternal grandparents. RP at 970-71, 973-74, 1397-98. Plaintiff returned home from the hospital to the care of his parents and paternal grandparents on November 19, 2008.

**F. The Department Conducts A Home Visit And Drafts A Safety Plan**

On the day of Plaintiff's release, Ms. Lofgren called Plaintiff's father to schedule a home visit for the following day. RP at 972. During the call, Plaintiff's father stated he was scared and upset for what had happened. RP at 972.

On November 20, 2008, Ms. Lofgren and co-worker Danielle Terry visited the Mejia home. RP at 974. The purpose of the visit was to observe Plaintiff's family home environment for any safety hazards, obtain additional information regarding any criminal or mental health history, and to meet with Plaintiff's parents face-to-face to assess whether they appeared appropriate. RP at 974-75. The Mejia home was a one-level single family home with three bedrooms. RP at 981. There were no noticeable health or safety hazards and it appeared to be a normal, safe home for a child. RP at 981-82.

At the home, Ms. Lofgren spoke with both of Plaintiff's parents and paternal grandfather. RP at 975. Plaintiff's parents indicated having a

good relationship with their respective families and receiving lots of help with Plaintiff. RP at 976. They were also participating in the Washington Department of Health's Nutritional Program for Women, Infants and Children (WIC). RP at 976, 1094-95. Plaintiff's parents denied any mental health issues and reported they do not "fight" just "argue sometimes." RP at 977. Plaintiff's mother indicated she had been seeing family counselor Kelley West prior to Plaintiff's birth for her parents' divorce. RP at 977, 1074-75. Plaintiff's paternal grandfather reported no concerns with Plaintiff's parents' parenting skills and said the family is supportive of them. RP at 977.

During the visit, Plaintiff's parents indicated they were receptive to receiving additional supportive services to better their parenting skills. RP at 976-77. They stated a hospital staff member was already referring them to a public health nurse. RP at 976. Ms. Lofgren agreed to follow up to make sure the referral had been made, and if not, agreed to make another one. RP at 978. Ms. Lofgren also shared information about parenting classes in the Bremerton area. RP at 976. Plaintiff's parents were interested in parenting classes but wanted to find classes to attend closer to their home in Kingston. RP at 976-77. Plaintiff's parents indicated they could find these classes on their own. RP at 977, 982.

During the home visit Ms. Lofgren completed a safety plan. RP at 977-79; Ex. 18. The plan was signed by Plaintiff's parents and paternal grandfather and had four main provisions: (1) Ms. Lofgren would refer Plaintiff's parents to parenting classes and they agreed to attend; (2) Plaintiff's parents would follow up and access the public health nurse; (3) Plaintiff's parents agreed to schedule and attend all of Plaintiff's doctor's appointments; and (4) Plaintiff's grandfather agreed to monitor the compliance of Plaintiff's parents with the safety plan, and all parties agreed to contact the Department with any concerns they had about Plaintiff's care. RP at 977-78, 980-81, Ex. 18.

Between November 20 and December 22, 2008, the Department had no contact with Plaintiff's family and received no referrals or other communication regarding his care or condition. RP at 981. There was no evidence presented at trial that Plaintiff's parents arranged for visits from a public health nurse or attend parenting classes during this time. RP at 1080.

After November 20, 2008, Plaintiff's case remained open for completion of final paperwork. RP at 1381-82. It was still open at the time of Plaintiff's December 22, 2008, injury. RP at 1423.

**G. Claim, Defense And Verdict Of No Proximate Cause**

At trial, Plaintiff claimed the Department was liable because it failed to conduct a non-negligent investigation after Plaintiff was taken to the hospital at 12-days old with a spiral fracture to his upper left arm and returned Plaintiff to the care of his parents the following day, allowing Plaintiff to be significantly injured one month later. The Department established at trial that any injury to Plaintiff after he was returned to his parents' care was not caused by the Department because it conducted a thorough investigation and consulted with a child abuse medical expert who determined the injury to Plaintiff was accidental. The Department argued Plaintiff's injuries were caused by his father, and not by the actions of the Department.

Plaintiff argued the Department failed to obtain the records of his mother's family counselor, Kelley West, and was unaware of Ms. West's conclusions that his father—whom she had never met—had the propensity to harm an unborn child. Had the Department obtained these records, Plaintiff argued, it would not have returned Plaintiff to his parents' care. In response, the Department established through rebuttal witness Assistant Attorney General (AAG) Barbara Bailey that even considering Ms. West's opinions, there were insufficient facts to prove Plaintiff was in imminent risk of serious harm, the legal standard necessary to seek a court order

removing Plaintiff from his parents' care. The trial court's evidentiary rulings regarding the testimony of AAG Bailey and Ms. West are discussed in further detail in the arguments below.

The legal issues for the jury were whether the Department negligently investigated the referral of a report of possible abuse to Plaintiff by his father, and if so, whether that negligence proximately caused Plaintiff's injury. The trial court's rulings on jury instructions relating to causation and negligent investigation are discussed in further detail in the respective arguments below. After hearing 18 days of testimony and argument, returned a unanimous verdict finding the Department was not the cause of Plaintiff's injury. RP at 2088-2102; CP at 3990-91.

**H. This Court Should Be Wary Of Plaintiff's Repeated Mischaracterization That The "Jury Found" The Department Caused Plaintiff's Harmful Placement**

As a preliminary matter, the record must be clarified as to the erroneous mischaracterization of the jury's special verdict findings made repeatedly by Plaintiff on appeal. In his brief, Plaintiff repeatedly asserts "the jury found" and "concluded" that the Department's negligence "resulted in a harmful placement decision." Brief of Appellants (Br. of Appellants) at 2, 13, 22, 33.

For example, on p. 22 of Appellant’s Brief, Plaintiff makes the statement: “By finding CPS negligent, the jury found that *CPS made a harmful placement decision, and returned Aiden to the same harmful situation where he then was abused again.* CP at 3969, 3990.” (Emphasis original.) Plaintiff’s citation to the record consists of Jury Instruction No. 10 (CP at 3969; App. at 1-7) and the jury’s completed verdict form (CP at 3990-91). Neither support Plaintiff’s assertion.

Jury Instruction No. 10 instructed the jury that:

The State of Washington through its divisions of departments, must conduct a reasonable investigation of a report of potential child abuse. A claim against Defendant DSHS for negligent investigation is available when DSHS conducts a negligent investigation that results in a harmful placement decision.

CP at 3969; App. at 1-7. The trial court’s instruction to the jury was thus bifurcated into two components—whether DSHS conducted a negligent investigation (the breach of a standard of care element), and whether that negligence resulted in a harmful placement (the causation element). Accordingly, the trial court’s verdict form addressed—and the jury expressly answered—each of these inquiries:

**QUESTION 1: Was the defendant negligent?**

**ANSWER:** Yes (Write “yes” or “no”)

*(DIRECTION: If you answered “no” to question 1, sign this verdict form. If you answered “yes” to Question 1, answer Question 2.)*

**QUESTION 2: Was the defendant’s negligence a proximate cause of injury or damage to the plaintiff?**

**ANSWER:** *No* (Write “yes” or “no”)

*(DIRECTION: If you answered “no” to Question 2, sign this verdict form. If you answered “yes” to Question 2, answer Question 3.)*

The jury expressly and unanimously came to the opposite conclusion represented by Plaintiff on appeal—that the Department’s negligence *was not* the proximate cause of Plaintiff’s injury, meaning that it *did not find* the Department caused Plaintiff’s harmful placement. CP at 3990-91. Plaintiff’s repeated contention to the contrary is a misrepresentation of the trial court’s Jury Instruction No. 10 (App. at 1-7) and the jury’s verdict (App. at 1-10). This Court should disregard each of Plaintiff’s arguments premised upon this misrepresentation of the jury’s finding of no causation.

**I. Washington’s Dependency Statutes Significantly Limit The Department’s Ability To Remove A Child From His Or Her Parents’ Care**

An additional preliminary matter concerns the lens through which this Court must evaluate the issues raised on appeal by both parties, which

requires a general understanding of the exclusive statutory structure in our state that allows the Department to remove a child from his or her parents' care, even on a very temporary basis. Many of Plaintiff's arguments are premised on the incorrect assertion that the Department's adherence to this statutory structure is merely optional and that removal of a child from his parents care can nonetheless be mandated outside of this framework. *See* RP at 252 (“[W]e may hear that the CPS investigator didn't think there was reason to file a dependency petition. A dependency petition is a petition to remove the child from the home. That has nothing to do with the responsibility of CPS to separate the father from the baby. This can be done without a dependency petition.”).

In Washington, the only way the Department can remove a child from his or her parents' care is by obtaining a court order. Through an Assistant Attorney General, the Department initiates this process by filing a dependency petition with the court prior to an initial first shelter care hearing, which must be held within 72-hours of a child being taken into protective custody. RCW 13.34.065(1)(a)(2008).<sup>3</sup> This means that the longest period of time a child can be removed from his or her parents' care

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<sup>3</sup> While law enforcement may take a child into protective custody without a court order pursuant to RCW 26.44.050, there is no statute granting the Department such authority.

*without* the Department obtaining a court order to continue separation is 72 hours.

“The primary purpose of the shelter care hearing is to determine whether the child can be immediately and safely returned home while the adjudication of the dependency is pending.” RCW 13.34.065(1)(a), (4)(b) (2008). Parents separated from their children have significant due process rights at a shelter care hearing. This includes not only the right to have a hearing in front of the court, but the right to be informed of the nature of the hearing, of their rights, and of the proceedings that will occur; the right to be represented by counsel and to have counsel appointed to represent them if indigent; and the right to present testimony to the court regarding the need or lack of need for shelter care. RCW 13.34.065(2)-(3) (2008).

At the shelter care hearing, the court is required to *return* the child to the care of his or her parent unless the court finds reasonable cause to believe that (a) reasonable efforts have been made to prevent or eliminate the need for removal of the child and to make it possible for the child to return home, and (b) the child has no parent or guardian to care for them, the release of the child would “present a *serious threat of substantial harm* to such child,” or the parent or guardian to whom the child could be released has been charged with the crime of custodial interference. RCW 13.34.065(5) (2008) (emphasis added). “Uncertainty by a parent,

guardian, legal custodian, relative, or other suitable person that the alleged abuser has in fact abused the child shall not, alone, be the basis upon which a child is removed from the care of a parent[.]” RCW 13.34.065(5)(f) (2008). If a court order is obtained placing a child into shelter care, the court must continue to review a child’s status in shelter care every 30 days to determine that the child’s separation from his or her parent continues to meet these statutory requirements. RCW 13.34.065(7)(a) (2008). Here there was just over a month between the time Plaintiff returned home from the hospital and the time he was significantly injured by his father, meaning that a court order would have been required for Plaintiff’s continuous separation from his father for the duration of this time.

This is the *only* statutory structure in Washington allowing the Department to remove a child from his or her parents’ care and custody for any period of time. Plaintiff’s erroneous contention that the Department can ignore these statutory requirements is not supported by any legal authority and each of Plaintiff’s arguments premised on this faulty assertion should be disregarded by this Court.

## **VI. ARGUMENT IN SUPPORT OF RESPONSE TO APPEAL**

**A. The Jury Was Properly Allowed To Decide The Issue of Superseding Cause Because Plaintiff's Injury Was Not Foreseeable As A Matter Of Law**

A defendant's negligence is the cause of the plaintiff's injury only if such negligence, unbroken by any new independent cause, produces the injury complained of. Where an intervening act does break the chain of causation, it is referred to as a superseding cause. *Rikstad v. Holmberg*, 76 Wn.2d 265, 268, 456 P.2d 355 (1969). "Whether an act may be considered a superseding cause sufficient to relieve a defendant of liability depends on whether the intervening act can reasonably be foreseen by the defendant; only intervening acts which are not reasonably foreseeable are deemed superseding causes." *Cramer v. Dep't of Highways*, 73 Wn. App. 516, 520, 870 P.2d 999 (1994).

At trial, the Department argued Plaintiff's father was the cause of his injury on December 22, 2008. RP at 2057. The court instructed the jury on the issue of superseding cause using Washington Pattern Instruction (WPI) 15.05. CP at 3975. Plaintiff argues that no jury instruction should have been given on the issue of superseding cause because Plaintiff's injury was foreseeable as a matter of law. Br. of Appellants at 19. The problem with Plaintiff's argument is that it assumes the trial court could have concluded as matter of law that the spiral fracture to Plaintiff's arm was intentional, when in fact the issue of

whether this injury was intentional or accidental was in significant dispute and the evidence presented regarding the injury created a question of fact for the jury. In particular, Dr. Duralde—the only child abuse medical expert to try and determine the mechanism of Plaintiff’s injury by interviewing Plaintiff’s father and receiving a demonstration of how the particular injury occurred—concluded on a more probable than not medical basis that the injury was accidental and did not believe that under the circumstances such a plausible, sophisticated medical explanation could have been provided by Plaintiff’s 17 year-old father. CP at 2420, 2436-37.

Applying *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 733 P.2d 969 (1987), as Plaintiff suggests, this Court would have to determine that it was error for the trial court not to conclude as a matter of law that what was indicated to be an accidental injury to Plaintiff caused by his 17 year-old father’s inexperience in swaddling him is the *same harm* as the intentional criminal assault that occurred a month later. Again, this argument fails because it is premised on the assumption that the spiral fracture to Plaintiff’s arm was unequivocally *intentional*, thus a subsequent intentional injury to Plaintiff was foreseeable—an argument easily made in hindsight but not supported as a matter of law by the record.

At trial the jury heard evidence of a number of factors it could consider in determining whether it was foreseeable that Plaintiff's father would subsequently severely injure him. These included Plaintiff's father's lack of any prior criminal history or reported violence; the fact that he was attending school and residing with his parents and sister in a safe, stable and supportive home environment; his sincere demonstration of swaddling to Dr. Duralde as well as the fact he was crying and contrite about doing so incorrectly and injuring Plaintiff; his observed appropriate care and concern for Plaintiff after his injury; his indicated desire and willingness to improve his parenting skills by taking classes; and the overall continued health and well-being of Plaintiff observed by his physicians during prior and subsequent doctor's appointments. *See supra* pp. 9-16.

When the facts are disputed “[f]oreseeability is normally an issue for the trier of fact and will be decided as a matter of law only where reasonable minds cannot differ.” *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 477, 951 P.2d 749 (1998). In *Crowe v. Gaston*, 134 Wn.2d 509, 517, 951 P.2d 1118 (1998), our Supreme Court provided an example of the type of fact-specific questions that must be resolved by a jury in determining whether a resultant act was foreseeable:

Whether or not it was foreseeable that the minor purchaser would share the alcohol with others is a question of fact for the jury. . . The trier of fact may consider the amount and character of the alcohol purchased, the time of day, the presence of other minors on the premises or in a vehicle, and statements made by the purchaser to determine whether it was foreseeable the alcohol would be shared with others.

Because the facts presented at trial strongly suggested Plaintiff's initial injury was accidental, the question of whether a future criminal assault by Plaintiff's father was foreseeable was for the jury to decide.

A separate factual question on superseding cause was also raised as to whether there were sufficient facts to both initiate a dependency proceeding and obtain a court order authorizing Plaintiff's removal from his parents' care. This was true where AAG Bailey testified the facts were insufficient and where Plaintiff offered no testimony at trial proving a judge would have found Plaintiff dependent. RP at 1657, 1668, 1678. *See* discussion, *infra*, pp. 42-44. Given these facts, the issue of superseding cause was properly submitted to the jury.<sup>4</sup>

**B. Plaintiff Failed To Preserve Any Alleged Error In The Trial Court Allowing The Jury To Determine Superseding Cause**

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<sup>4</sup> *See* Comment to WPI 15.05, citing *Gausvik v. Abbey*, 126 Wn. App. 868, 107 P.3d 98 (2005) (decision by a prosecutor can be a superseding cause); *Bishop v. Miche*, 137 Wn.2d 518, 973 P.2d 465 (1999) (court's decision not to issue an order revoking probation was a superseding cause).

Nonetheless, this Court need not consider the merits of Plaintiff's assignments of error to the trial court's superseding cause instruction because he failed to preserve these alleged errors at trial.

**1. Plaintiff's Objection To Jury Instruction No. 16 Based On The *Rollins* Decision Did Not Put The Court On Notice Of An Error Because *Rollins* Did Not Address A Causation Instruction**

CR 51(f) requires clarity and specificity when making objections to an instruction for the record: "The objector shall state distinctly the matter to which he objects, and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection was made." *Moore v. Mayfair Tavern, Inc.*, 75 Wn.2d 401, 406-07, 451 P.2d 669 (1969). Vague or general objections are not sufficient. *Burlingham-Meeker Co. v. Thomas*, 58 Wn.2d 79, 81-82, 360 P.2d 1033 (1961); *Bitzan v. Parisi*, 88 Wn.2d 116, 125, 558 P.2d 775 (1977).

Additionally, the objection must apprise the trial court of the precise points of law involved and the reason why giving the instruction would be error. *Klise v. City of Seattle*, 52 Wn.2d 412, 413, 325 P.2d 888 (1958); *Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 427, 40 P.3d 1206 (2002). The purpose of the rule is to allow errors to be corrected at the trial court level whenever possible,

eliminating the need for an appeal and retrial. *Van Hout v. Celotex Corp.*, 121 Wn. 2d 697, 702-03, 853 P.2d 908 (1993) (manufacturer's theory argued before Court of Appeals was never presented to trial court and therefore could not be basis for reversal).

At trial, Plaintiff took exception to the trial court giving a jury instruction on superseding cause solely on the basis that “in *Rollins* there was no such instruction regarding superseding cause.”<sup>5</sup> RP at 1846-47, 1873, 1924. The problem with Plaintiff’s *Rollins* objection at trial is that *Rollins* dealt only with a damages instruction. *Rollins*, 148 Wn. App. at 375 (“Metro’s appeal raises issues relating to segregation and allocation of damages.”). There is no discussion, holding, or point of law in *Rollins* relating to superseding cause, or even causation in general. Here, although the trial court was familiar with *Rollins* after the parties’ discussion of a segregation of damages jury instruction, Plaintiff’s reliance on *Rollins* as the basis for why a *superseding cause* jury instruction should not be given was inadequate to put the trial court on notice of why the instruction was erroneous. See *Cowan v. Chicago, M., St. P. & P. R. R.*, 55 Wn.2d 615, 620-21, 349 P.2d 218 (1960) (where the assignment of error indicated that plaintiff wanted one instruction and the exception indicated that he regarded principle of law stated in another instruction as applicable to case

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<sup>5</sup> *Rollins v. King County Metro Transit*, 148 Wn. App. 370, 199 P.3d 499, review denied, 166 Wn.2d 1025 (2009).

and desired such instruction, the exception did not adequately apprise the trial court of the principle of law which plaintiff regarded as applicable to case). Simply stating that a superseding cause instruction should not be given in the present case because it was not given by another court in another case—as Plaintiff did here—when there is no indication one was even *proposed* by either party in that case, was wholly insufficient to put the trial court on notice of the legal basis for the objection. RP at 1846-47, 1873, 1924.

**2. Plaintiff Abandons His *Rollins* Argument And Instead Raises A New Argument For The First Time On Appeal**

This Court should also refuse to consider Plaintiff’s assignment of error for a second, independent reason—Plaintiff offers a new basis for his objection to Jury Instruction No. 16 that was not offered at trial.<sup>6</sup> In doing so, Plaintiff abandons his *Rollins* argument in favor of a new and unrelated “foreseeability” argument not raised below. In fact, no citation or mention of the *Rollins* case can be found in the Brief of Appellants.

Washington courts refuse to consider an argument that an instruction was improper even though an appellant objected to the instruction at trial, where the basis for the objection at trial differs from the

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<sup>6</sup> The same is true for Plaintiff’s assignment of error to Jury Instruction Nos. 3 (claims instruction) (App. 1-6) and 14 (proximate cause instruction) (App. 1-8), which Plaintiff lumps into a general reference to “the trial court’s instructions on superseding causation.” Br. of Appellants at 28. Plaintiff did not raise any superseding cause-related objection to these instructions.

argument on appeal. *Sulkosky v. Brisebois*, 49 Wn. App. 273, 275-76, 742 P.2d 193 (1987) (unsuccessful personal injury plaintiff, who failed at trial to object to jury instruction on pedestrian duty of care as inapplicable to location of accident could not raise issue for first time on appeal); *Riblet v. Ideal Cement Co.*, 57 Wn.2d 619, 623-24, 358 P.2d 975 (1961) (additional reasons advanced on appeal as to why appellants believed instruction was incorrect could not be considered where they were not within scope of exceptions taken in trial court); *Micro Enhancement Int'l, Inc.*, 110 Wn. App. at 427 (“We look at the objection and its context when passing on whether an objection is sufficient. And we do not consider statements made in a motion for new trial, on reconsideration, or on appeal.”) (citing *Trueax v. Ernst Home Ctr., Inc.*, 124 Wn.2d 334, 340, 878 P.2d 1208 (1994)). This Court should likewise refuse to consider Plaintiff’s new foreseeability argument here.

**3. Plaintiff Failed To Preserve Any Error Regarding The Superseding Cause Instruction By Failing To Propose A Special Verdict Form Allowing The Jury To Determine Whether It Based Its Finding Of No Causation On A Superseding Cause Or Simply Concluded That The Plaintiff Failed To Prove The Existence Of Proximate Cause**

Plaintiff’s assertion that the jury reached its verdict because it found his father’s actions were a superseding cause is purely speculative. Even assuming the plaintiff is correct, which he is not, that Jury

Instruction No. 16 (App. at 1-9) was in error, there is no way to determine whether the jury's verdict of no proximate cause was based on a superseding cause finding because that is not delineated in the general verdict form. Where a verdict is rendered in a multi-theory case and one of the theories is later invalidated, remand is only permitted where a party proposed a clarifying special verdict form. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 539-40, 70 P.3d 126 (2003). *Infra*, pp. 37-38.

In addition to not objecting to the superseding cause instruction based upon the argument that he now raises on appeal, Plaintiff also failed to preserve his alleged error by not proposing a special verdict form that would have demonstrated the jury actually made a finding of superseding cause. Therefore, this error is waived and need not be addressed by this Court on appeal. *Id.*

**C. The Jury's Answers On The Special Verdict Form Did Not Result In An Inconsistent Or Irreconcilable Verdict**

Plaintiff alleges the jury's finding that the Department was negligent was irreconcilable with its finding that the Department's actions were not the proximate cause of his injury. CP at 3990; Br. of Appellant at 30. But this argument is based on his erroneous assertion that the "jury found that CPS negligently investigated the November 18, 2008, child abuse referral, resulting in the harmful placement of Aiden back with

Mejia.” Br. of Appellants at 32. As explained *supra* pp. 18-20, the jury’s finding of no proximate causation means it found the Department’s negligence did *not* result in a harmful placement.<sup>7</sup> Accordingly, there is nothing inconsistent in the jury’s verdict. Plaintiff simply failed to prove that however the Department was negligent, that negligence did not cause Plaintiff’s injury.

**1. The Jury’s Affirmative Response To The Negligence Interrogatory Does Not Imply Anything With Regard To Its Finding That Plaintiff Did Not Prove Causation**

As erroneously suggested by Plaintiff, the fact that the jury answered “yes” to the verdict interrogatory regarding the Department’s negligence is not dispositive of Plaintiff’s entire negligent investigation claim when it was followed by a proximate cause interrogatory:

The context makes clear that the trial court intended the jury to understand the question to refer only to this more limited definition of negligence, corresponding to the duty and breach elements of a negligence claim; otherwise the court would not need to include an interrogatory on proximate cause. As such, the answer to the interrogatory does not resolve any particular claim; instead, it merely establishes two elements of a claim.

*Mears v. Bethel Sch. Dist. No. 403*, \_\_\_ Wn. App. \_\_\_, 332 P.3d 1077, 1084 (2014); *See also Micro Enhancement*, 110 Wn. App. at 430.

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<sup>7</sup> As the prevailing party, the evidence and all reasonable inferences supporting the jury’s verdict must be viewed in the light most favorable to the Department. *Gorman v. Pierce County*, 176 Wn. App. 63, 87, 307 P.3d 795 (2013).

Nor does the jury's negligence finding indicate that it found *all* or any particular one of Plaintiff's negligence theories substantiated. A plaintiff who prevails on a negligence claim in an auto accident case, for example, after presenting evidence that a defendant both drove at excessive speed and failed to take a driver's education course in high school, has not established the jury found that the defendant's lack of training proximately caused the accident. *Mears*, P.3d at 1083.

**2. The Jury's General Verdict Gives No Guidance As To Which Of Plaintiff's Many Theories Of Negligence The Jury Found Or How That Finding Relates To The Issue Of Proximate Cause**

Plaintiff argued multiple theories of negligence at trial. For example, during opening remarks alone he outlined four separate theories of negligence:

Why are we suing Child Protective Services? There are four reasons. The first reason is that they chose not to do a complete and thorough investigation as required. The second reason is because they chose not to follow the required policies and procedures. The third reason is they chose not to call child protection teams as required by a Governor's mandate which was an executive order of Governor Lowry in 1995. And the final reason is they chose not to follow up or provide services or monitoring that were promised and needed.

RP at 233-234; CP at 4044. In his closing argument, Plaintiff modified these theories, providing the jury with additional reasons why they might find the Department negligent. RP at 1941-42. Specifically,

Plaintiff used a slide projected in front of the jury suggesting 16 different ways in which the Department “failed to perform a reasonable investigation.” CP at 4216-18. These ranged from not interviewing Plaintiff’s parents and grandparents separately, to not following up with Plaintiff’s parents regarding parenting classes. However, there is nothing in the record to support any conclusion as to which of these 16 separate theories the jury based its finding of negligence.

The general rule in Washington is that a jury verdict finding a defendant negligent but that the negligence is not the proximate cause of plaintiff’s injuries is not inconsistent if there is evidence in the record to support a finding of negligence but also evidence to support a finding that the resulting injury would have occurred regardless of the defendant’s actions. *Estate of Stalkup v. Vancouver Clinic, Inc.*, 145 Wn. App. 572, 586, 187 P.3d 291 (2008) (citing *Brashear v. Puget Sound Power & Light Co.*, 100 Wn.2d 204, 209, 667 P.2d 78 (1983) (jury could find that physician was negligent in failing to investigate coronary artery disease adequately or in failing to refer patient to a specialist, but that physician’s negligence did not cause patient’s death); *Mears*, P.3d at 1084 (“[A]s long as the Mears alleged that each defendant committed some act or omission that the jury could properly have found to be negligent, but not a

proximate cause of Mercedes's death, no inconsistency would lie in the verdict[.]”).

For example here, the jury could have determined in response to the first verdict interrogatory that the Department was negligent in failing to interview Plaintiff’s parents separately from his grandparents, but—in response to the second verdict interrogatory—that the Department’s failure to do so was not the proximate cause of Plaintiff’s injury. Because Plaintiff presented many differing theories of negligence at trial, as a natural consequence the jury could have found any one of Plaintiff’s theories of negligence substantiated but *not* the proximate cause of his injury. *See Estate of Stalkup*, 145 Wn. App. at 591 (there was more than one scenario under which the jury's findings of negligence but lack of proximate cause can be reconciled—failure to conduct blood tests, failure to diagnose or treat coronary artery disease, or both—but because the jury's answers could be reconciled, the trial court erred when it granted a new trial based on the alleged inconsistency of the jury verdict).

Finally, Plaintiff’s reliance on *Alvarez*, Br. of Appellants at 31-32, is inapposite. *Alvarez* dealt with a conflict in the jury’s special verdict responses that concerned allocation of fault, not causation. *Alvarez v. Keys*, 76 Wn. App. 741, 743, 887 P.2d 496 (1995) (In a two-car accident, “[i]t is illogical that Keyes could be 55 percent negligent for her own

damage to her car, but not negligent at all for the accident, where her duty of care is identical in both cases.”).

**D. Plaintiff Failed To Preserve The Error He Alleges In The Jury’s Verdict**

This Court need not reach the merits of Plaintiff’s inconsistent verdict argument, however, because he did not raise or preserve the issue at trial. Plaintiff neglected to take appropriate exception to the general verdict form that was used, or propose a special verdict form that would have explained what the jury found to be the negligent conduct of the Department and how the same related to its finding of an absence of proximate cause. Plaintiff did not bring the issue to the trial court’s attention after the jury reached its verdict, but before it was discharged. Nor was the alleged error raised in a post-trial motion to the trial court.

**1. Plaintiff Did Not Object To The Allegedly Inconsistent Interrogatories In The Verdict Form**

At trial, the only exception taken to the special verdict form by Plaintiff was to the language in the *third* interrogatory regarding segregation of damages that the jury did not reach and to which Plaintiff has not assigned error. RP at 1881-87. On appeal, Plaintiff now argues that the *first* and *second* interrogatories regarding negligence and proximate cause—both of which were adopted verbatim from Plaintiff’s First Supplemental Proposed Special Verdict Form—led to an erroneous

verdict when coupled with the trial court's superseding cause instruction. CP at 3429-31; Br. of Appellants at 33. At trial Plaintiff proposed no special verdict form containing an interrogatory expressly relating to superseding or intervening cause.

The rule for properly objecting to verdict forms is by analogy governed by CR 51(f), which also governs jury instructions. *Raum v. City of Bellevue*, 171 Wn. App. 124, 144-45, 286 P.3d 695 (2012), review denied, *City of Bellevue v. Raum*, 176 Wn.2d 1024, 301 P.3d 1047 (2013). The requirement that an attorney must state distinctly the matter to which he objects and the ground of his objection when objecting to the giving of any instruction includes any special verdict forms. *Micro Enhancement*, 110 Wn. App. at 427 (citing *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 63, 882 P.2d 703 (1994); *Conrad ex rel. Conrad v. Alderwood Manor*, 119 Wn. App. 275, 78 P.3d 177 (2003)). A party is not permitted to wait and speculate on chances for a verdict and then raise objections that should have been raised during trial. *Micro Enhancement*, 110 Wn. App. at 429 (citing *Agranoff v. Morton*, 54 Wn.2d 341, 346, 340 P.2d 811 (1959)).

**2. Plaintiff Waived Any Challenge To The Special Verdict Form By Failing To Suggest A Legally Sufficient Alternative**

Likewise, “[i]f a party is dissatisfied with a verdict form, then that party has a duty to propose an appropriate alternative[.]” *Raum*, 171 Wn. App. at 145. Plaintiff waived any challenge to the general verdict form by failing to provide a legally sufficient alternative. *Davis v. Microsoft*, 149 Wn.2d 521, 539-40, 70 P.3d 126 (2003) (where general verdict is rendered in a multi-theory case and one of the theories is later invalidated, remand is only permitted where party proposed a clarifying special verdict form).

Without knowing what the jury found to be the basis for the Department’s negligence and how that related to its finding of no proximate cause, it is purely speculative to assert that the jury’s verdict is inconsistent. Had Plaintiff made the appropriate objection and proposed a special verdict form that delineated the basis for the jury’s negligence finding allowing the jury to explain why it was not a proximate cause of Plaintiff’s injury, then the reasoning behind the jury’s verdict would be known and could be analyzed to see if it was inconsistent. Without that information, Plaintiff is simply guessing as to the basis for the jury’s negligence finding cause. This Court should refuse to consider such speculation.

**3. Plaintiff Waived His Challenge To The Allegedly Inconsistent Verdict By Failing To Bring It To The Court’s Attention Prior To The Discharge Of The Jury**

This Court should also decline to consider Plaintiff's irreconcilable verdict argument for a third, independent reason—Plaintiff never raised it at trial, either prior to the discharge of the jury, or in a motion for new trial. Washington courts decline to consider challenges based on allegedly inconsistent answers to jury interrogatories where the appealing party did not raise the alleged inconsistencies prior to the discharge of the jury. *Gjerde v. Fritzsche*, 55 Wn. App. 387, 393, 777 P.2d 1072 (1989), *review denied*, 113 Wn.2d 1038 (1990); *Minger v. Reinhard Distrib. Co., Inc.*, 87 Wn. App. 941, 946, 943 P.2d 400 (1997); *State v. Barnes*, 85 Wn. App. 638, 668, 932 P.2d 669 (1997).

Those rulings come from CR 49(b), which provides that when special verdict answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall return the jury for further consideration of its answers and verdict or shall order a new trial. The purpose of CR 49(b) is to allow the trial court to correct the error and prevent an appeal or new trial:

[T]here is wisdom in the general rule that parties must raise a point of error at the time the error occurs, so that the trial court has opportunity to correct the error. The purpose of the rule is that such correction will prevent the necessity of an appeal or a new trial. Here, if we assume the trial court would have recognized the verdict as legally erroneous, an objection would have allowed the court to so advise the jury and to send the jury back for further deliberations.

*Malarkey Asphalt Co. v. Wyborney*, 62 Wn. App. 495, 510, 814 P.2d 1219 (1991) (internal citations omitted).

For each of these independent reasons, Plaintiff has failed to preserve any alleged error in the jury's verdict and this Court should decline review.

**E. The Testimony Of Assistant Attorney General Bailey Was Properly Admitted**

On appeal, Plaintiff argues that because AAG Bailey's testimony included her legal opinion as to the sufficiency of evidence to support a dependency proceeding, her testimony was improper. Br. of Appellants at 41. But AAG Bailey's testimony was proper for two reasons—it was not legal opinion testimony on the issue of whether the Department was negligent, and was relevant to aid the jury in determining causation.

**1. AAG Bailey's Testimony Was Not A Legal Opinion On An Ultimate Legal Issue Before The Jury And Plaintiff's Position To The Contrary Is Inconsistent**

At trial, the ultimate factual issue for the jury to decide was whether the Department conducted a negligent investigation that led to a harmful placement decision. AAG Bailey did not testify as to her opinion—legal or otherwise—on this issue. Her testimony was limited to aiding the trier of fact in understanding the chain of events necessary to give the Department the authority to remove Plaintiff from his parents'

care, and did not include any endorsement or opinion on the Department's investigative conduct or actions in implementing a safety plan.

Plaintiff's arguments on AAG Bailey's testimony should also be rejected by this Court as inconsistent. *Almquist v. Finley School Dist.*, No. 53, 114 Wn. App. 395, 403, 57 P.3d 1191 (2002) (the appellate court need not entertain new arguments that are patently inconsistent with the positions advanced at trial). Plaintiff argues the Department was not required to engage in the juvenile court's dependency process in order to remove him from his parents' care, but could simply rely on its own policies to do so. Br. of Appellants at 8, 9, 12 (n.8), 22, 25, 45-46. If this contention were accurate, the ability to obtain an order of dependency would be wholly irrelevant to Plaintiff's ability to prove his claim.<sup>8</sup> Yet Plaintiff also asserts that whether there was sufficient evidence for the Attorney General's Office to initiate a dependency was an ultimate legal issue reserved only for the trial court. Br. of Appellants at 43-45. These positions are legally inconsistent. If obtaining a dependency order was not necessary to prevent the harm that occurred to Plaintiff—as he argues—the factual sufficiency of the evidence available to do so was not an “ultimate issue” in his case.

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<sup>8</sup> As previously pointed out, Plaintiff claims the Department can remove a child from his parents without a court order is contrary to law. *See supra* pp. 20-23.

**2. Bailey’s Testimony As An Independent Decision-Maker Created A Question Of Fact As To Whether The Department Would Have Sought Plaintiff’s Separation From His Father Prior To The Date Of Injury**

Negligent child abuse investigation cases are analogous with negligent parole supervision cases because both require proof that a judicial officer would have taken a specific action—removed a child from a harmful situation or incarcerated a probationer on the date of harm—in order to establish causation. *See Tyner v. Dep’t of Social & Health Servs.*, 141 Wn.2d 68, 84-85, 1 P.3d 1148 (2000); *Petcu v. State*, 121 Wn. App. 36, 57-58, 86 P.3d 1234 (2004); *Estate of Bordon v. Dep’t of Corr.*, 122 Wn. App. 227, 242, 95 P.3d 764 (2004). In negligent parole supervision cases, courts also require evidence from independent decision-makers charged with determining whether to pursue judicial action that leads to an offender being in custody as of a certain date—such as a prosecutor who would have pursued a probation violation in court. *See Bordon*, 122 Wn. App. at 247 [n.38] (“[T]he prosecutor’s office [] makes an independent decision about whether to pursue the violation with the court. Bordon presented no evidence establishing that the prosecutor’s office would have pursued the violation in this case.”); *Gausvik v. Abbey*, 126 Wn. App. 868, 886, 107 P.3d 98 (2005) (decision to prosecute a parent was a superseding intervening cause breaking the causal connection to a negligent CPS

investigation); *Stoot v. City of Everett*, 582 F.3d 910, 926 (9th Cir. 2009) (“liability may not attach if an intervening decision of an informed, neutral decision-maker breaks the chain of causation”) (internal quotations omitted)).

As the independent decision-maker who would have determined whether to pursue a dependency on Plaintiff’s behalf after his November 18, 2008 injury, AAG Bailey’s testimony was essential to Plaintiff’s ability to establish causation. *See Miller v. Gammie*, 335 F.3d 889, 898 (9th Cir. 2003) (“It would appear that the critical decision to institute proceedings to make a child a ward of the state is functionally similar to the prosecutorial institution of criminal proceedings.”)

AAG Bailey testified that even after reviewing counselor Kelley West’s records, there were insufficient facts to pursue a dependency proceeding, and she would not have initiated a dependency proceeding. RP at 1649, 1678. Plaintiff was permitted to rebut this assertion through the testimony of former AAG Catherine Cruikshank who testified there *were* facts sufficient to seek dependency on Plaintiff’s behalf. RP at 1723-24. Thus AAG Bailey’s testimony, especially when combined with former AAG Cruikshank’s rebuttal testimony, at a minimum, created a

question of fact for the jury as to whether the Department could have separated Plaintiff from his father on December 22, 2008.<sup>9</sup>

**F. Plaintiff Failed To Preserve Any Alleged Error In AAG Bailey’s Testimony Because He Never Objected On The Basis It Was An Improper Legal Opinion At Trial**

Nonetheless, this Court need not reach the merits of Plaintiff’s alleged impermissible legal opinion error because he never raised this argument at trial. There Plaintiff’s substantive objections to AAG Bailey’s testimony were limited to a single argument: that she was precluded from testifying because she was an employee of the Attorney General’s Office—the agency representing the Department at trial—and therefore had a conflict of interest under RPC 3.7’s “Lawyer As Witness” rule. CP at 1291-314; RP at 149-56.

On appeal, Plaintiff does not renew his RPC 3.7 argument, instead asserting for the first time that AAG Bailey’s testimony was improper legal opinion. Br. of Appellants at 44. Because this argument was never raised at the trial court level, it should not be considered for the first time by this Court. *See State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) (“A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. Since the

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<sup>9</sup> Since AAG Bailey would have been the person who actually made the decision on whether or not to initiate a dependency proceeding, and she testified she would not have done so, her independent decision broke the causal chain and negated causation as a matter of law. *See infra* pp. 67-70.

specific objection made at trial is not the basis the defendants are arguing before this court, they have lost their opportunity for review.”) (internal citations omitted); *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 206-07, 31 P.3d 1 (2001) (appellate court would not consider employee’s disparate treatment theory presented on appeal, where employee argued only a reasonable accommodation theory and never mentioned disparate treatment throughout proceedings below).

**G. The Trial Court Properly Excluded Counselor Kelley West's Lay Opinions Regarding Plaintiff's Father**

In its First Amended Motion in Limine No. 25, the Department set forth a number of evidentiary bases upon which the opinion testimony of fact witness counselor Kelley West should be excluded.<sup>10</sup> These included ER 701, 702, 703, 705, 803, 404(b), 801(c) and 803(a)(4). CP at 1172-76, 1212-30, 1803-06. At trial, the court reserved its ruling on the Department's motion, but cautioned Plaintiff "I am unlikely, let me just tell you, to allow a counselor, depending on her qualifications, to testify as to the propensity for abuse of somebody that she's never met." CP at 1855-58; RP at 209.

Prior to Ms. West's testimony, the trial court revisited the reserved ruling, entertaining further argument of counsel, and concluded as follows:

I'm going to allow her to testify now. I am not going to allow her to testify as to any opinions regarding propensity for violent behavior. And without sufficient foundation, I am not going to allow her to give an opinion about domestic violence and how it might—his behavior and his tussling or psychological abuse might have translated into abuse of a child.

RP at 1007. Plaintiff then tried to admit Ms. West's notes from her counseling sessions with Plaintiff's mother that included her opinions about Plaintiff's father, despite the fact that Ms. West had never met him.

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<sup>10</sup> There were two separate motions in limine by the Department concerning the testimony of Kelley West, both erroneously numbered 25. CP at 1172-76.

The Department objected. RP at 1017. The trial court sustained the objection on the basis of ER 403 and 404(b), but allowed Ms. West to testify to facts that were relayed to her by Plaintiff's mother during her counseling sessions. Ms. West was not permitted to testify regarding her opinions of Plaintiff's father. RP 1023-1024. RAP 2.5 allows this Court to affirm the trial court's decision on any ground supported by the record. *See* Tegland, 2A Washington Practice: Rules Practice, RAP 2.5 (6th ed.) (the rule is an illustration of a more general rule, that an appellate court may affirm on any basis apparent from the record, even if that basis was not argued at the trial court level); *Laue v. Estate of Elder*, 106 Wn. App. 699, 710, 25 P.3d 1032 (2001) (regardless of whether trial court was correct in excluding letter from attorney as hearsay, trial court would be affirmed because letter constituted a settlement offer and was inadmissible under Rule 408); *State v. Jones*, 71 Wn. App. 798, 824, 863 P.2d 85 (1993) (appellate court justified exclusion of evidence on basis of Rule 403, even though trial court had not mentioned the rule). In addition to ER 403 and 404, Ms. West's testimony was also inadmissible under ER 701 and 702.

**1. The Trial Court Correctly Found That Ms. West's Opinion Was Not Admissible As The Opinion Of A Lay Or Expert Witness**

Plaintiff's mother never corroborated the information in Ms. West's counseling notes by testifying at trial. Instead, Plaintiff offered Ms. West's opinion alone to prove that his mother was a victim of domestic violence, and that Plaintiff's father was the perpetrator of that abuse and thus would also be abusive toward Plaintiff once born. RP at 1961 ("You heard the testimony of Ms. West. She has a very soft voice, but her testimony was chilling, of escalating domestic violence during Sarah's pregnancy."). This was not admissible opinion testimony from a lay or expert witness.

ER 701 ("Opinion Testimony By Lay Witnesses") provides:

If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony, or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

ER 701. "Limitation (a) is the familiar requirement of first-hand knowledge or observation." *State v. Carlson*, 80 Wn. App. 116, 124, 906 P.2d 999 (1995). Ms. West never met Plaintiff's father. RP at 1030. Ms. West's gratuitous opinions were formed based solely on the

statements of Plaintiff's mother. Yet Plaintiff's mother never told Ms. West Plaintiff's father had physically assaulted her—only that he had once accidentally tripped or shoved her during an incident at Wal-Mart where the two were “goofing off.” RP at 1041-42. Nor did Ms. West ever observe any injury or signs of physical abuse during her sessions with Plaintiff's mother. RP at 1064. Consequently, Ms. West lacked any personal knowledge of whether Plaintiff's father had physically abused his mother. Plaintiff did not offer any evidence from his mother—let alone any evidence that she was afraid of Plaintiff's father or feared he would harm her or Plaintiff in the future. Accordingly, the lay opinions sought to be offered through the testimony of Ms. West were unfounded and were correctly excluded by the trial court under ER 701.

Additionally, Ms. West was disclosed as a fact witness only. CP at 41-60. But even if she had been properly disclosed as an expert witness, Washington courts do not recognize the ability of a doctor or other expert to diagnose abuse based only on the statements of an alleged victim. This is because in such instances, the expert's opinion is based solely on his or her determination of the victim's veracity. *Carlson*, 80 Wn. App. at 125-27 (“Dr. Feldman's physical findings were inconclusive, and Washington law has never recognized the ability of a doctor or other expert to diagnose sexual abuse based only on the statements of an alleged victim.”); *State v.*

*Alexander*, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992) (counselor's testimony that alleged victim's description of abuse was "very clear" and that it remained consistent throughout their counseling sessions exceeded scope of evidence permitted under the "fact of the complaint doctrine" by impermissibly bolstering victim's credibility).

Despite the trial court's restrictions on Ms. West's testimony, she nonetheless testified to the following: she felt Plaintiff's mother was "in enough danger that she needed intervention" from a "battered women's shelter" to which Ms. West made some calls, but Plaintiff's mother did not follow up (RP at 1044); Ms. West called Child Protective Services prior to Plaintiff's birth to give them a "heads up about the potential for damage to both Sarah and the fetus" (RP at 1064-65); Ms. West contemplated a "family intervention," prior to Plaintiff's birth, the purpose of which was to bring family members together "to help Sarah develop a safety plan in case the potential for violence became too much for her to handle" (RP at 1066).

Because it was improper for Ms. West to give an expert opinion that Plaintiff's mother was a victim of domestic violence, it would further stretch the bounds of reason, as Plaintiff suggests, to have allowed her to opine as a lay witness on whether *Plaintiff's father* had a future propensity to commit violent acts toward an unborn child. Thus ER 701 and 702

provide additional grounds supporting the exclusion of Ms. West's opinion testimony.

**2. Plaintiff Was Permitted To Cross-Examine AAG Bailey Using The Information In Ms. West's Treatment Notes**

Plaintiff argues the trial court prohibited the "effective cross-examination of Bailey with the West records." Br. of Appellants at 41. Specifically, Plaintiff asserts West's treatment notes were admissible as rebuttal or impeachment testimony because the Department "opened the door" when AAG Bailey testified there was nothing in West's records indicating a risk of imminent harm—the standard to seek a dependency. Br. of Appellants at 39-40. Without citing any specifics, Plaintiff argues this testimony contradicted the evidence in Ms. West's records.

As a preliminary matter, Plaintiff *did* cross-examine AAG Bailey regarding her opinion on the legal sufficiency to seek a dependency despite the information contained in Ms. West's treatment notes:

Q: All right. And the fact that Sarah Tate had told Ms. West that Jacob hates kids, that they are annoying to him, he doesn't like to touch them, that Sarah finds Jacob uncaring, controlling, verbally aggressive, jealous and angry and that she had been pushed down while pregnant doesn't cut—didn't —was of no significance to you in determining whether or not there is legal sufficiency?

A: Well, again it goes to corroboration. It's still Kelley West saying that this is what Sarah Tate told her. It doesn't verify the validity of any of those things other than it was—that those were things she allegedly said to Ms. West.

RP at 1678. Plaintiff did not ask any additional questions on cross regarding the events documented in Ms. West's counseling notes, despite Ms. West having already testified to each of those events. RP at 1041-42, 1062-64.

More importantly however, there were no facts in Ms. West's treatment notes—only her conclusory opinions, which are not evidence—indicating a risk of imminent harm to the then unborn Plaintiff. CP at 518-31. Nor does Plaintiff offer any specifics as to what evidence he refers. Assuming, for example, the “Wal-Mart incident”—the only arguably physical incident between Plaintiff's mother and father—is the basis of Plaintiff's contention, Ms. West's notes regarding the same establish neither the harm requirement, nor the imminency requirement. Ms. West documented the incident in a June 16, 2008, progress note some five months before Plaintiff's birth. During the incident, Plaintiff's mother and father were reportedly “goofing off” in a Wal-Mart and Plaintiff's father tripped or shoved his mother to the ground. RP at 1062-64. Plaintiff's mother indicated to Ms. West that the incident was an accident, that she was not injured, and that she did not indicate seeking medical treatment as a result. RP at 1062-64. Nonetheless, the jury was fully informed of this incident because Ms. West was permitted to testify

about it on both direct and cross-examination, and AAG Bailey was cross-examined about it. *See pp. 49, supra.* RP at 1041-42, 1062-64, 1678. Plaintiff fails to identify how he was not permitted to cross-examine AAG Bailey with any admissible evidence.

**H. Plaintiff Was Not Prejudiced By The Exclusion Of Ms. West's Opinions Regarding Plaintiff's Father Because The Jury Nonetheless Heard This Evidence During The Testimony Of Dr. Carole Jenny**

At trial, Plaintiff offered the testimony of expert witness Dr. Carole Jenny, a physician board certified in general pediatrics and child abuse pediatrics—a sub-specialty involving the care of children in cases of suspected child abuse and neglect. RP at 565. Dr. Jenny testified she reviewed Ms. West's counseling notes and relied on them in forming her opinions. RP at 601. Washington allows admission of expert opinion based on data interpreted by another when certain requirements of ER 703 are met. *State v. Nation*, 110 Wn. App. 651, 662, 41 P.3d 1204 (2002).<sup>11</sup>

At trial, Dr. Jenny summarized Ms. West's notes for the jury as follows:

A: She [West] noted that the father of the child...was at least on one occasion physically assaulting the mother, assaultive or violent with the mother, that the mother was afraid of him, that he was psychologically abusing the mother and quite extensively...that kind of behavior is very

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<sup>11</sup> The same was not true for Kelley West, who was not offered as an expert witness. *Nation*, 110 Wn. App. at 662 (if requirements of ER 703 are not met, ER 703 may not be used as a mechanism for admitting otherwise inadmissible evidence as an explanation of an expert's opinion).

highly correlated with the high risk in domestic violence family [*sic*][.]

\* \* \*

Q: Based on your review of the records of Kelly West, did you form an opinion as to whether or not there was evidence of domestic violence within those records?

A: There was clearly one episode of, when the mother was pregnant, of father of the child pushing her down. You know, tussling with her and pushing her down[.]

RP at 601-03. Dr. Jenny also testified—based on Ms. West’s counseling notes—as to Plaintiff’s father’s propensity for future violence:

A: The [West] records were quite compelling and quite concerning and just fit so much the prototype of a dangerous, violent situation that, you know, has the capacity to explode.

Q: Was there any indication in Ms. West’s records that she had a concern?

A: I think she called the hotline and they didn’t take a report.

\* \* \*

Q: In this particular setting, Dr. Jenny, based on everything you reviewed, what was the safety threat to Aiden as of November 20, 2008?

A: ...[L]eaving him [Plaintiff] in a vulnerable situation with a potentially violent person puts him at great risk for future injury.

Q: Who was the safety threat?

A: The father.

RP at 603-04, 619-20.

Error cannot be assigned to the exclusion of evidence that was in fact admitted through other witnesses.<sup>12</sup> The jury effectively heard the opinions contained in Ms. West's notes through the testimony of Dr. Jenny, who assumed in forming her opinions the veracity of not only Ms. West's opinions, but Plaintiff's mother's statements to Ms. West. In light of Dr. Jenny's expert testimony, Plaintiff cannot establish that an error in the trial court's refusal to admit Ms. West's lay opinion testimony materially affected the jury's verdict. *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986).

## **VII. ARGUMENT IN SUPPORT OF CROSS-APPEAL**

On cross-appeal, the Department seeks to have this Court clarify the scope of its duty under the implied cause of action for negligent investigation based upon RCW 26.44.050. In order to provide guidance to the trial court in the event of a remand, but more importantly to provide clarity on the law to the courts in future cases, the Department respectfully requests review on these issues.

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<sup>12</sup> *Latham v. Hennessey*, 13 Wn. App. 518, 526, 535 P.2d 838, 843 (1975) *aff'd*, 87 Wn. 2d 550, 554 P.2d 1057 (1976) ("In any event, similar testimony was already before the court through witnesses who were not barred by the deadman's statute and therefore the 'impression testimony' offered by appellant is cumulative at best and, as such, any error in its exclusion may be deemed harmless.").

**A. Standard Of Review**

This Court's standard of review for each of the issues raised by the Department on cross-appeal is de novo. This Court reviews judgment as a matter of law decisions de novo, engaging in the same inquiry as the trial court, and may affirm on any ground supported by the record. *Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000); *Davis*, 149 Wn.2d at 530-31. Similarly, in the negligence context, whether a circumscribed duty exists is a question of law that is reviewed de novo. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999); *Sheikh*, 156 Wn.2d at 448. Jury instructions, including a trial court's omission of a proposed statement of the governing law, are likewise reviewed de novo for errors of law. *Joyce v. Dep't of Corr.*, 155 Wn.2d 306, 323, 119 P.3d 825 (2005); *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 266-67, 96 P.3d 386 (2004).

**B. The Trial Court Erred In Determining That The Department's Duty To Conduct A Reasonable Investigation Includes A Duty To Implement Voluntary Conditions Or Services**

At trial, Plaintiff sought damages based in part on the alleged negligence of the Department in failing to provide and implement an adequate safety plan upon returning him to the care of his parents on November 19, 2008. RP at 233-34, 1943-44. A safety plan is a post-

investigative plan offered upon placement that seeks caregiver compliance with conditions and services on a voluntary participation basis only. RP at 983-84. Because it is an aspirational tool designed to strengthen the parent-child bond and ameliorate conditions that may result in *future* abuse or neglect referrals—and not part of the investigative process that results in placement decisions—“negligent implementation” of a safety plan does not fall within the narrow cause of action implied by RCW 26.44.050. The trial court erred in allowing Plaintiff to argue this as an actionable theory of liability at trial.

**1. Pressuring Parents To Voluntarily Relinquish Care Of Their Child Without Instituting A Dependency Action Circumvents State Law As Well As The Substantive And Procedural Due Process Rights Of Parents And Children**

Many of Plaintiff’s arguments revolve around the erroneous assertion that the Department could have mandated the removal or separation of Plaintiff from his parents without judicial intervention. Br. of Appellants at 8, 9, 12 (n.8), 22, 25, 45-46.

As discussed *supra*, pp. 20-23, this is not the law in Washington:

Under RCW 13.34.060, an initial shelter care hearing must occur within 72 hours after a child's removal from the parents' custody. RCW 13.34.060(1). The initial 72-hour hearing is followed by a second shelter care hearing, set 30 days after the initial hearing. A factfinding hearing (the final hearing on dependency) is set at the second shelter care hearing, and must occur within 75 days of the initial

hearing. RCW 13.34.060(1); 13.34.070(1). In addition to these hearings, additional hearings can be set at any time by any party. RCW 13.34.060(10).

*In re Dependency of H.*, 71 Wn. App. 524, 528, 859 P.2d 1258 (1993). Consequently, Plaintiff's suggestion that separation can occur for longer than a 72-hour period outside of this statutory scheme is not only incorrect, but would violate constitutional procedural and substantive due process protections afforded to parents and children. *See Wallis v. Spencer*, 202 F.3d 1126, 1136-37 (9th Cir. 1999) ("Parents and children have a well-elaborated constitutional right to live together without governmental interference. That right is an essential liberty interest protected by the Fourteenth Amendment's guarantee that parents and children will not be separated by the state without due process of law except in an emergency.") (internal citations omitted).

Plaintiff argued at trial—and does so again on appeal—that the Department may ignore this statutory scheme in reliance on internal policies allowing social workers to “mandate” separation or removal of a child from his or her parents’ care by simply writing it in a safety plan. Br. of Appellants at 8, 45-46. However, a state agency cannot grant itself the power to take children away from their parents without a court order, and can only promulgate internal policy directives to implement pre-existing statutory authority. Internal policies and directives do not create

substantive law. *Joyce*, 155 Wn.2d at 323 (citing *Melville v. State*, 115 Wn.2d 34, 793 P.2d 952 (1990)) (“Unlike administrative rules and other formally promulgated agency regulations, internal policies and directives generally do not create law.”).

In making this argument, Plaintiff proposes an expansion of the negligent investigation cause of action that should be rejected on public policy grounds. His suggestion that the Department should face liability in cases where a child abuse medical expert has determined an injury to be accidental and the Department fails to nonetheless pressure a parent into voluntarily relinquishing care of that child ignores the statutory framework in place to prevent Department social workers from separating families absent the required showing that a child is in imminent risk of harm. Effectively, Plaintiff’s scenario would create *de facto* dependencies absent a hearing and representation by counsel—the due process requirements created by the legislature as a prerequisite to disturbing the fundamental parent-child relationship. By suggesting that the Department may be negligent for failing to include voluntary separation or supervision provisions in a safety plan, Plaintiff proposes this Court adopt a cause of action for “negligent failure to circumvent a parent’s due process rights.” This Court should decline to do so. *Roberson v. Perez*, 156 Wn. 2d 33, 46-47, 123 P.3d 844 (2005) (holding that a parent's voluntarily sending a

child away based on fear of investigation is not a placement decision: “Our interpretation of the statute in *M.W.* unequivocally requires that the negligent investigation to be actionable must lead to a ‘harmful placement decision.’”).

**2. RCW 26.44.050 Allows A Claim For Negligent Investigation Only When The Department Conducts A Biased Or Incomplete Investigation That Leads To A Harmful Placement Decision**

“[O]ur Supreme Court has rejected the proposition that an actionable breach of duty occurs every time the state conducts an investigation that falls below a reasonable standard of care by, for example, failing to follow proper investigative procedures.” *Petcu*, 121 Wn. App. at 59 (citing *M.W. v. Dep’t of Soc. & Health Servs.*, 149 Wn.2d 589, 601–02, 70 P.3d 954 (2003)). *See also Roberson*, 156 Wn.2d at 45, (citing *M.W.*, 149 Wn.2d at 595) (rejecting argument that negligent investigation cause of action encompassed all physical or emotional injuries suffered by the child as a result of a negligent investigation). Instead, the only cause of action available for the negligence of Department social workers is when, during a child abuse or neglect investigation conducted pursuant to RCW 26.44.050, “[the Department] [] gather[s] incomplete or biased information that results in a harmful placement decision such as removing a child from a non-abusive home,

placing a child in an abusive home or letting a child remain in an abusive home.” *Tyner*, 141 Wn.2d at 77-82. *See also M.W.*, 149 Wn.2d at 602 (holding that an inappropriate physical exam of a young child is not the kind of harm contemplated by the statute because it did not result in a harmful placement decision). Because RCW 26.44.050 does not contemplate harms that do not have the necessary causal nexus to a harmful placement decision, the trial court erred when it allowed Plaintiff to argue that liability could be based on acts or omissions that do not result in a harmful placement decision.

The Department offers voluntary service plans and protective guidelines to parents—such as those included in Plaintiff’s safety plan—consistent with Chapter 26.44 RCW’s dual goals of parent-child reunification and mitigation of conditions that may result in future abuse or neglect referrals. *See M.W.*, 149 Wn.2d at 597 (“As we have held when previously analyzing this statute [RCW 26.44.050], this statement of purpose encompasses two concerns: the integrity of the family and the safety of the children.”); *see also* RCW 26.44.020(3); 195(1); 030(8) (2008).

Our State Supreme Court has already considered—and rejected—the suggestion that RCW 26.44.010’s statement of intent referencing “protective services” that “shall be made available in an effort to prevent

further abuses, and to safeguard the general welfare of such children” supports a more expansive duty of care to protect children from all types of harm by Department investigators. *M.W.*, 149 Wn.2d at 598-99. The Department’s duty is limited to conducting a non-negligent investigation and providing accurate information to a court in a dependency proceeding. It does not encompass the implementation of a voluntary safety plan to deter all future potential for parental abuse.

**3. Protective Services Offered In Plaintiff’s Safety Plan Were Not Part Of The Department’s Investigation Or Placement Determination**

Plaintiff asserted at trial that because the Department’s investigation remained open for completion of final paperwork for over a month after the placement decision was made, any action or inaction by the Department during that time falls within the scope of a negligent investigation cause of action. CP at 3414, 3420.

But under Plaintiff’s rationale the Department’s tort liability would be premised not on investigative acts that lead to harmful placement, but on the timeline associated with the Department’s processing of any administrative paperwork necessary to “close” an investigation of child abuse. In this scenario, all acts of general negligence occurring during an “open” Department investigation—even those that do not inform the Department’s placement determination—may result in liability for

negligent investigation. This is wholly inconsistent with our State Supreme Court’s refusal to extend tort liability to “all physical or emotional injuries suffered by the child as a result of a negligent investigation” when the actions causing these harms are not causally connected to a placement determination. *M.W.*, 149 Wn.2d at 601-602 (Court of Appeals erred “in finding a general duty to investigate reasonably implicit in the statutory duty to investigate” because “the statute from which the tort of negligent investigation is implied does not contemplate other types of harm”—those that do not occur as a result of an “erroneous placement decision that removed the child from the home based on a biased or incomplete investigation.”).

**4. The Department’s Failure To Force Plaintiff’s Parents To Comply With A Voluntary Safety Plan Does Not Constitute A Violation Of The Duty To Reasonably Investigate A Referral Of Child Abuse Under RCW 26.44.050 And Therefore Is Not A Valid Theory Of Tort Liability**

The trial court erred when it allowed Plaintiff to argue to the jury that the Department should be held liable in tort because the safety plan did not include language separating him from his father and the Department did not contact his parents between November 20 and December 22, 2008, to ensure they were attending parenting classes and

receiving public health nurse services. RP at 1956-57. Both would have required voluntary participation by Plaintiff's parents.

Plaintiff should have been precluded from arguing either of these alleged failures as separate bases for negligence at trial because there is no negligence cause of action based on the voluntary actions of a child's parents during a child abuse investigation. This is wholly beyond the scope of the implied statutory cause of action for negligent investigation. *See Roberson*, 156 Wn.2d 33 at 47 (denying a request to enlarge the scope negligent investigation cause of action under RCW 26.44.050 to include the speculative harms resulting from constructive placement determinations that occur through a parent's voluntary acts). This is because it is the child's caregiver—not the Department—who can ultimately determine through their own voluntary actions whether the "harmful placement" required by *M.W.* occurs. *See Melville*, 115 Wn.2d at 40 ("We do note that even if we assume, arguendo, that a duty [to provide mental health treatment to a prison inmate] might arise from these policy directives, plaintiff fails to overcome the threshold problem that the mental health treatment he contends should have been given was to be provided on a voluntary participation basis only.").

RCW 26.44.050 does not create an actionable tort duty requiring enforcement of a voluntary directive because the very nature of the

compliance being voluntary ensures that the caregiver—not the Department—is the only one who can choose to follow the directive. In the instant case, Plaintiff’s parents had the power to determine whether he would have had contact with his father or to participate in services that may mitigate or prevent future injury. *See Roberson*, 156 Wn.2d at 46-47, identifying three reasons why:

Extending the cause of action for negligent investigation to include so-called “constructive placement” decisions would be problematic and is beyond the statute [RCW 26.44.050]. First, any “harm” resulting from the investigation would be purely speculative in nature. . . . Second, claimants asserting “constructive placement” could largely control the extent of their damages. . . Finally, extending the cause of action for negligent investigation to include constructive placement decisions could encourage individuals to frustrate investigations.

(Citation added.) As in *Roberson*, parents often seek to undermine Department investigations. Imposing such a duty on the Department would be problematic at best. Consistent with controlling precedent, this Court should refuse to do so here.

**C. The Trial Court Erred In Not Using The Department’s Proposed Instructions And Instead Improperly Instructed The Jury On The Elements Required To Find Liability For A Negligent Investigation Under RCW 26.44.050 (Jury Instruction No. 10)**

At trial, the court gave the jury the following instruction regarding the implied cause of action for negligent investigation:

The State of Washington through its divisions or departments, must conduct a reasonable investigation of a report of potential child abuse. A claim against Defendant DSHS for negligent investigation is available when DSHS conducts a negligent investigation that results in a harmful placement decision.

CP at 3969; App. at 1-7 (Jury Instruction No. 10). The court’s instruction erroneously instructed the jury that a negligent investigation is any unreasonable investigation, and thus the Department was liable for any unreasonable investigation that results in a harmful placement decision. The Department took exception to the court’s instruction and the failure to give the correlating instructions it proposed. RP at 1899-1911, 1929.

This is a misstatement of the law. As discussed in pp. 60-62 *supra*, an implied cause of action for negligent investigation is

available only to children, parents, and guardians of children who are harmed because DSHS has gathered incomplete or biased information that results in a harmful placement decision, such as removed a child from a nonabusive home, placing a child in an abusive home, or letting a child remain in an abusive home.<sup>13</sup>

Liability does not—as the trial court’s instruction suggests—extend to all cases in which the Department conducts an investigation that falls below a “reasonable” standard of care. *Petcu*, 121 Wn. App. at 59 (citing *M.W.*, 149 Wn.2d at 601-02) (“[O]ur Supreme Court has rejected the proposition that an actionable breach of duty occurs every time the state conducts an

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<sup>13</sup> *M.W.*, 149 Wn.2d at 602.

investigation that falls below a reasonable standard of care by, for example, failing to follow proper investigative procedures.”). Yet, this is precisely one of the theories of negligence the Plaintiff based liability on in his opening statement—that he was suing the Department because it “chose not to follow required CPS policies and procedures.” CP at 4044. The trial court committed error in giving Jury Instruction No. 10.

The trial court also erred in not giving the Department’s Proposed Instruction Nos. 20 or 37, both of which accurately informed the jury of each of the necessary elements required to prove a claim of negligent investigation. CP at 2376, 3897. Specifically, both instructions clarified that liability for a negligent investigation is limited to an investigation in which the Department (1) gathered incomplete information during its investigation, *or* (2) gathered biased information during its investigation, and that also resulted in a harmful placement decision. By not giving either of these instructions, the jury was allowed to base the Department’s liability on an inaccurate and overly broad theory of negligence.

**D. The Trial Court Erred In Not Granting The Department’s CR 50 Motion And Dismissing Plaintiff’s Claims For Lack Of Evidence Establishing Causation**

At trial, the Department moved for CR 50 judgment as a matter of law at both the close of Plaintiff’s case in chief, and prior to submission of the case to the jury on the basis that Plaintiff failed to establish legal and

factual causation. RP at 1509-23, 1767-72; CP at 3385-408, 3859-66.

The trial court denied both of these motions in error. CP at 3426-27.

**1. Plaintiff Did Not Prove The Department Had The Authority To Remove Him From His Parents' Care**

Plaintiff argued to the jury at trial that his injuries would not have occurred if the Department had not negligently failed to remove him from his father's care on December 22, 2008. RP at 1960. Yet absent from Plaintiff's case in chief was evidence establishing a legal or factual basis that would have given the Department the authority to do so. *See Joyce*, 155 Wn.2d at 320 [n.3] ("when the *authority* to do an act does not exist, the *duty* to do the act also does not exist") (emphasis original). As discussed at length in pp. 20-23, *supra*, outside of the statutory structure of RCW Chapter 13.34, the Department does not have the legal authority to remove a child from his or her parents' care.

In the similar context of negligent parole supervision cases, Washington courts have routinely found that granting a defendant's motion as a matter of law is proper when there is no evidence that the perpetrator of the harm would have been incarcerated on the date the harm occurred. This outcome turns on decisions made by independent decision-makers, such as prosecutors. *Bordon*, 122 Wn. App. at 247 [n.38] ("[T]he prosecutor's office [] makes an independent decision about whether to

pursue the violation with the court. Bordon presented no evidence establishing that the prosecutor's office would have pursued the violation in this case.”). Causation in such cases is also determined by the actions of a judicial officer. *Bordon*, 122 Wn. App. at 240-41 (trial court erred in denying defendant’s CR 50 motion when plaintiff presented no evidence suggesting court would have sentenced offender to additional jail time or that jail time would have encompassed date of injury); *Hungerford v. State*, 135 Wn. App. 240, 253, 139 P.3d 1131 (2006) (unsupported assertion that a court would have revoked probation had it known of the probation violations is not sufficient to defeat summary judgment).

At trial, the jury heard testimony from AAG Bailey that after reviewing the Department’s case file *and* counselor Kelley West’s treatment notes of Plaintiff’s mother, there would have been insufficient evidence to pursue a dependency proceeding to separate Plaintiff from his father’s care. RP at 1657, 1668, 1678. AAG Bailey’s determination that she would not have pursued a dependency proceeding, at a minimum, created a question of fact on the issue of causation. *See supra* pp. 42-44. However, because AAG Bailey would have been the person who actually made that decision if the Department had inquired about seeking a removal order, her decision not to do so would have broken the causal chain. *Id.*

Significantly, at trial Plaintiff informed the court and the Department that he did not intend to offer testimony, expert or otherwise, as to whether a judge would have granted an order for dependency, or whether that order would have allowed the Department to separate Plaintiff from his father as of December 22, 2008. RP at 169 (“So in our case in chief we do not expect to say whether a judge would rule [at a dependency proceeding]. We do not expect to ask our witnesses how a judge would rule.”)

Judicial intervention may be a superseding cause. *Bishop v. Miche*, 137 Wn.2d 518, 531-32, 973 P.2d 465 (1999) (a court’s refusal to revoke a DUI petitioner two days before he drove and killed plaintiff decedent was a superseding intervening cause to the county’s negligent probation supervision preceding the court hearing); *Tyner*, 141 Wn.2d at 82; *Petcu v. State*, 121 Wn. App. 36, 56, 86 P.3d 1234 (2004) (a court order prohibiting a father’s contact with his child may be an intervening cause breaking the chain from a negligent CPS investigation only if all material information was presented to the court that issued the order).

Because the AAG responsible for determining whether to file a dependency action testified no action would have been initiated and Plaintiff presented no evidence establishing that a court would have removed Plaintiff from his parents if such a proceeding had been brought,

the Department's motions for judgment as a matter of law should have been granted.<sup>14</sup>

**2. Plaintiff Did Not Prove His Father Would Have Voluntarily Separated From Him**

In an effort to get around the limitations imposed by the statutory requirements cited by the Department as well as the lack of any evidence on the only proper, actionable tort theory available (negligent investigation), Plaintiff argued at trial that because his caregivers had been “cooperative” during the Department's investigation, the court and the jury should infer that had the Department requested the voluntary separation of Plaintiff and his father, Plaintiff's father would have complied and the two would have been separated on December 22, 2008. RP at 1519-20, 1949.

Again, even if negligent failure to voluntarily separate a parent from a child was a cognizable theory of tort liability, Plaintiff presented no evidence showing such a separation would have occurred. He did not call his father, mother, sister or paternal grandparents—anyone from his caregiver household—who could have testified that voluntary separation would have occurred under the circumstances. Presumably, the testimony of these witnesses would have been unfavorable. *See Lynott v. Nat'l*

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<sup>14</sup> If this Court agrees that the Department's duty to conduct a reasonable investigation does not encompass trying to voluntarily separate a child from his parents or voluntarily rehabilitate a parent, it need not address the next two arguments.

*Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 689, 871 P.2d 146 (1994). Further, evidence at trial showed that Plaintiff's mother and Plaintiff's father, who was 17 years old at the time, had no driver's license, lived at home and was still attending school, were fully dependent on Plaintiff's father's parents for support. RP at 975. Plaintiff's suggestion that a request for voluntary separation would have prevented his injury is nothing more than rank speculation. A plaintiff alleging negligence does not demonstrate cause-in-fact when relying on conjecture and speculation to do so. *See Hungerford*, 135 Wn. App. at 254.

**3. Plaintiff Did Not Prove The Department's Alleged Failure To Implement Voluntary Conditions Or Services Proximately Caused His Injury**

Assuming the Department had a duty to implement voluntary conditions or services while Plaintiff was lawfully in his parents' care, in order to prove negligence, Plaintiff was required to prove that his parents would have voluntarily taken advantage of the services in the safety plan and the provision of these services would have prevented his injury. *See Moore v. Hagge*, 158 Wn. App. 137, 150-51, 241 P.3d 787 (2010) ("the plaintiff must establish more than that the government's breach of duty *might* have caused the injury") (emphasis original); *see also Miller v. Likins*, 109 Wn. App. 140, 145-46, 34 P.3d 835 (2001) (in order to hold a governmental body liable for an accident based upon its failure to provide

a safe roadway, the plaintiff must establish more than that the government's breach of duty *might* have caused the injury) (emphasis original).

To do so, Plaintiff had to present evidence at trial demonstrating that had the Department caused his parents to attend the recommended parenting classes and receive visits from the public health nurse between November 20 and December 22, 2008, these actions would have had a rehabilitative effect on Plaintiff's father, preventing him from harming Plaintiff on December 22, 2008. Plaintiff attempted to elicit this evidence from his expert, Dr. Carole Jenny.

At trial, Dr. Jenny vaguely referenced a study by "a man who is now in Colorado named David Olds" indicating that the rate of "child maltreatment" decreased in "high risk moms" who received home visits from trained nurses. RP at 615-16. This was not sufficient to establish causation. This Court has rejected similar testimony in the past when it suggests only a correlation—not a causal relationship—and when the witness fails to include any source material supporting it. *See Hungerford*, 135 Wn. App. at 255 (Rejecting plaintiff's contention that had DOC properly supervised offender during his probation, offender would have been rehabilitated, when plaintiff's expert made vague references to studies suggesting correlation between supervision and recidivism but did

not include reference any source material to support it—as a matter of law, DOC’s alleged failure to closely supervise offender and rehabilitate him was not the legal cause of decedent’s death). Both are true of Dr. Jenny’s statistical study testimony.

Dr. Jenny also acknowledged that “whether a public health nurse could have prevented or taught the parents anything that might have prevented” Plaintiff’s December 22, 2008, injury would be “speculative” on her part. RP at 5-6<sup>15</sup>. Similarly, when asked what information she had to suggest that the parenting classes—taught outside the home—would have prevented Plaintiff’s injury, Dr. Jenny indicated that it would “just depend on the nature of the parenting classes.” RP at 7-8. This inconclusive evidence was insufficient to establish that the Department’s failure to follow up on services recommended in the safety plan was the cause of Plaintiff’s injury. *See Melville*, 115 Wn.2d at 40¶¶ (expert opinion that voluntary participation in a treatment program would have prevented future assault on a child was speculative).

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<sup>15</sup> The Report of Proceedings is sequentially numbered with the exception of Volume 4b, which was transcribed by a different court reporter. The citations to the record contained in this paragraph of the brief are to Volume 4b.

### VIII. CONCLUSION

For the foregoing reasons, the Department respectfully requests that this Court affirm the trial court's judgment on the jury's unanimous October 28, 2013, verdict finding the Department was not the proximate cause of Plaintiff's injury. The Department also requests that this Court address the issues raised in its cross-appeal to clarify the law and prevent similar error in the future.

RESPECTFULLY SUBMITTED this 6th day of October, 2014.

ROBERT W. FERGUSON  
Attorney General of Washington

*s/Heather L. Welch*

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HEATHER L. WELCH  
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Assistant Attorney General  
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7141 Cleanwater Lane SW  
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**CERTIFICATE OF SERVICE**

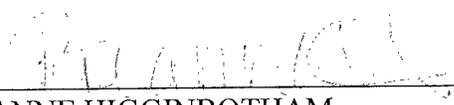
I certify that on the 6th day of October 2014, I caused a true and correct copy of this statement of arrangements to be served on the following in the manner indicated below:

Philip Albert Talmadge  
Sidney Charlotte Tribe  
Talmadge/Fitzpatrick  
2775 Harbor Avenue SW  
Suite C 3<sup>rd</sup> Floor  
Seattle, WA 98126

(x) US Mail

Jeffrey Johnson  
Dennis Woods  
Scheer & Zehnder  
701 Pike Street, Suite 2200  
Seattle, WA 98101

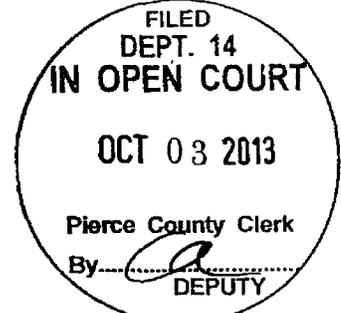
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BREANNE HIGGINBOTHAM  
Legal Assistant

# Appendix 1



12-2-05377-0 41463879 DFPIN 10-29-13



Honorable Susan K. Serko

STATE OF WASHINGTON  
PIERCE COUNTY SUPERIOR COURT

DAN ALBERTSON, as Limited  
Guardian ad Litem for AIDEN  
RICHARD BARNUM, an  
incapacitated minor,

Plaintiff,

v.

STATE OF WASHINGTON acting  
through its DEPARTMENT OF  
SOCIAL AND HEALTH SERVICES,

Defendant.

NO. 12-2-05377-0

STATE OF WASHINGTON'S  
PROPOSED JURY  
INSTRUCTIONS

Defendant, State of Washington, Department of Social and  
Health Services submit these proposed jury instructions for  
presentation to the jury.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of September, 2013.

ROBERT W. FERGUSON  
Attorney General

JOSEPH M. DIAZ, WSBA No. 16170  
HEATHER L. WELCH, WSBA No. 37229  
Assistant Attorneys General  
Attorneys for Defendant State

**DEFENDANT'S PROPOSED INSTRUCTION NO. 20**

The Department of Social and Health Services may only be liable for a negligent investigation if:

- (1) DSHS received a report of child abuse and neglect,
- (2) DSHS gathered incomplete or biased information investigating the report, and
- (3) The investigation resulted in a harmful placement decision.

A harmful placement decision must be either:

- (1) Removal of a child from a non-abusive parent, guardian, or legal custodian,
- (2) Placement of a child in an abusive home, or
- (3) Allowing a child to remain in an abusive home.

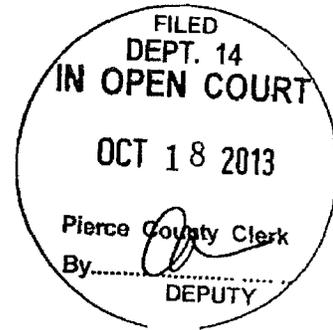
The Department of Social and Health Services does not have a duty to protect children from all forms of abuse and neglect.

RCW 26.44.050

*Tyner v. DSHS*, 141 Wn.2d 68, 81, 1; P.3d 1148 (2000);  
*M.W. v. DSHS*, 149 Wn.2d 589, 599-602, 70 P.3d 954 (2003);  
*Braam v. State*, 150 Wn.2d 689, 711-12, 81 P.3d 851 (2003);  
*Aba Sheikh v. Choe*, 156 Wn.2d 441, 457-58, 128 P.3d 574 (2006);  
*DeWater v. State*, 130 Wn.2d 128, 139-40, 921 P.2d 1059 (1996);  
*Beltran v. DSHS*, 98 Wn. App. 245, 255, 989 P.2d 604 (1999);  
*Terrell C. v. State*, 120 Wn. App 20, 28, 84 P.3d 899 (2004).



12-2-05377-0 41463962 DFPIN 10-29-13



Honorable Susan K. Serko

STATE OF WASHINGTON  
PIERCE COUNTY SUPERIOR COURT

DAN ALBERTSON, as Limited  
Guardian ad Litem for AIDEN  
RICHARD BARNUM, an  
incapacitated minor,

Plaintiff,

v.

STATE OF WASHINGTON acting  
through its DEPARTMENT OF  
SOCIAL AND HEALTH SERVICES,

Defendant.

NO. 12-2-05377-0

STATE OF WASHINGTON'S  
THIRD SUPPLEMENTAL  
PROPOSED JURY  
INSTRUCTIONS (CITED)

Defendant, State of Washington, Department of Social and Health Services submits its third proposed supplemental jury instructions.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of October, 2013.

ROBERT W. FERGUSON  
Attorney General

Joseph M. Diaz  
JOSEPH M. DIAZ, WSBA No. 16170  
HEATHER L. WELCH, WSBA No. 37229  
Assistant Attorneys General  
Attorneys for Defendant State

**DEFENDANT'S PROPOSED INSTRUCTION NO. 37**

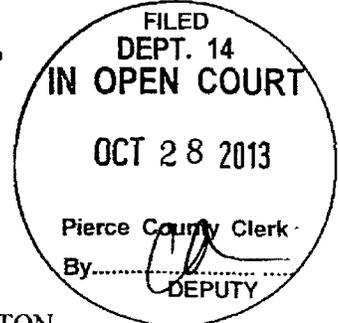
A State statute provides that upon receipt of a report concerning the possible occurrence of abuse or neglect of a child the Defendant DSHS must investigate. A claim against the Defendant DSHS for negligent investigation is only available when DSHS conducts a biased or incomplete investigation that results in a harmful placement decision.

RCW 26.44.050  
*M.W. v. DSHS*, 149 Wn.2d 589, 599-602, 70 P.3d (2003)

THE HONORABLE SUSAN K. SERKO



**ORIGINAL**



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR PIERCE COUNTY

DAN ALBERTSON, as Limited Guardian ad Litem for AIDEN RICHARD BARNUM, an incapacitated minor,

NO. 12-2-05377-0

Plaintiffs,

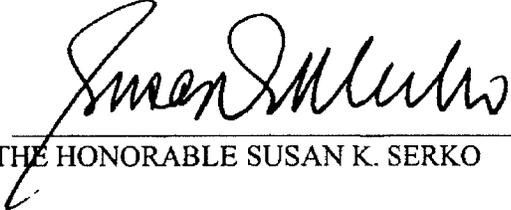
v.

STATE OF WASHINGTON acting through its DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Defendant.

COURT'S INSTRUCTIONS TO THE JURY

DATED this 21 day of October, 2013.

  
\_\_\_\_\_  
THE HONORABLE SUSAN K. SERKO

INSTRUCTION NO. 3

The Plaintiff claims that the State of Washington, through its departments and divisions, negligently investigated the November 18, 2008 child abuse referral regarding Aiden Barnum and as a result Aiden Barnum was injured.

Plaintiff claims that Defendant's conduct was a proximate cause of Aiden Barnum's injuries and damages which occurred after November 18, 2008.

Defendant denies Plaintiff's claims and further denies the nature and extent of Plaintiff's claimed injuries and damages.

Defendant claims as a defense that if there are injuries as claimed, only Jacob Mejia caused injury to Plaintiff.

INSTRUCTION NO. 10

The State of Washington through its divisions or departments, must conduct a reasonable investigation of a report of potential child abuse. A claim against Defendant DSHS for negligent investigation is available when DSHS conducts a negligent investigation that results in a harmful placement decision.

INSTRUCTION NO. 14

The term "proximate cause" means a cause which in a direct sequence unbroken by any superseding cause produces the injury complained of and without which such injury would not have occurred.

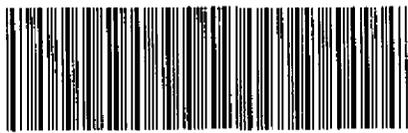
There may be more than one proximate cause of an injury.

INSTRUCTION NO. 116

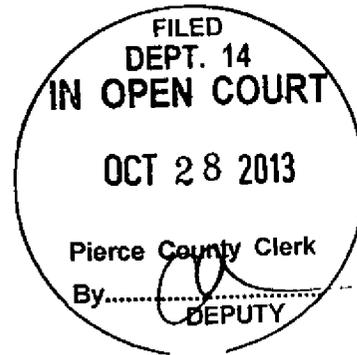
A superseding cause is a new independent cause that breaks the chain of proximate causation between a defendant's negligence and an injury.

If you find that the defendant was negligent, but that the sole proximate cause of the injury was a later independent intervening act of a person not a party to this action that the defendant, in the exercise of ordinary care, could not reasonably have anticipated, then any negligence of the defendant is superseded and such negligence was not a proximate cause of the injury. If, however, you find that the defendant was negligent and that in the exercise of ordinary care, the defendant should reasonably have anticipated the later independent intervening act, then that act does not supersede defendant's original negligence and you may find that the defendant's negligence was a proximate cause of the injury.

It is not necessary that the sequence of events or the particular resultant injury be foreseeable. It is only necessary that the resultant injury fall within the general field of danger which the defendant should reasonably have anticipated.



12-2-05377-0 41464015 VRD 10-29-13



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR PIERCE COUNTY

DAN ALBERTSON, as Limited Guardian ad Litem for AIDEN RICHARD BARNUM, an incapacitated minor,

Plaintiff,

vs.

STATE OF WASHINGTON acting through its DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Defendant.

NO. 12-2-05377-0

**SPECIAL VERDICT FORM**

We, the jury, answer the questions submitted by the court as follows:

**QUESTION 1: Was the defendant negligent?**

ANSWER: YES (Write "yes" or "no")

*(DIRECTION: If you answered "no" to Question 1, sign this verdict form. If you answered "yes" to Question 1, answer Question 2.)*

**QUESTION 2: Was the defendant's negligence a proximate cause of injury or damage to the plaintiff?**

ANSWER: NO (Write "yes" or "no")

*(DIRECTION. If you answered "no" to Question 2, sign this verdict form. If you answered "yes" to Question 2, answer Question 3.)*

**QUESTION 3:**

**What do you find to be the plaintiff's amount of damages proximately caused by negligence of defendant State of Washington?**

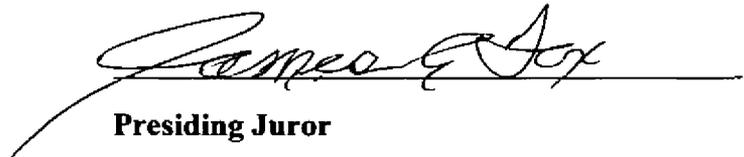
**1) future wage loss:**                    **ANSWER: \$** \_\_\_\_\_

**2) future economic damages other than wage loss:**                    **ANSWER: \$** \_\_\_\_\_

**3) past and future non-economic damages**                    **ANSWER: \$** \_\_\_\_\_

*(DIRECTION: Sign this verdict form and notify the Judicial Assistant.)*

**DATE:** 10-28-13

  
**Presiding Juror**

# Appendix 2

**13.32A.200 Hearings under chapter—Time or place—Public excluded.** (1) All hearings pursuant to this chapter may be conducted at any time or place within the county of the residence of the parent and such cases shall be heard in conjunction with the business of any other division of the superior court, except as provided in subsections (2) and (3) of this section.

(2) The public shall be excluded from a child in need of services hearing if the judicial officer finds that it is in the best interest of the child.

(3) The public shall be excluded from an at-risk youth hearing if:

(a) The judicial officer finds that it is in the best interest of the child; or

(b) Either parent requests that the public be excluded from the hearing.

(4) At the beginning of the at-risk youth hearing, the judicial officer shall notify the parents that either parent has the right to request that the public be excluded from the at-risk youth hearing.

(5) If the public is excluded from hearings under subsection (2) or (3) of this section, only such persons who are found by the court to have a direct interest in the case or the work of the court shall be admitted to the proceedings. [2007 c 213 § 1; 2000 c 123 § 25; 1979 c 155 § 34.]

**Effective date—Severability—1979 c 155:** See notes following RCW 13.04.011.

**13.32A.205 Acceptance of petitions by court—Damages.** No superior court may refuse to accept for filing a properly completed and presented child in need of services petition or an at-risk youth petition. To be properly presented, the petitioner shall verify that the family assessment required under RCW 13.32A.150 has been completed. In the event of an improper refusal that is appealed and reversed, the petitioner shall be awarded actual damages, costs, and attorneys' fees. [1995 c 312 § 32.]

**Short title—1995 c 312:** See note following RCW 13.32A.010.

**13.32A.210 Foster home placement—Parental preferences.** In an attempt to minimize the inherent intrusion in the lives of families involved in the foster care system and to maintain parental authority where appropriate, the department, absent good cause, shall follow the wishes of the natural parent regarding the placement of the child. Preferences such as family constellation, ethnicity, and religion shall be given consideration when matching children to foster homes. Parental authority is appropriate in areas that are not connected with the abuse or neglect that resulted in the dependency and should be integrated through the foster care team. [1990 c 284 § 24.]

**Finding—Effective date—1990 c 284:** See notes following RCW 74.13.250.

**13.32A.250 Failure to comply with order as civil contempt—Motion—Penalties.** (1) In all child in need of services proceedings and at-risk youth proceedings, the court shall verbally notify the parents and the child of the possibility of a finding of contempt for failure to comply with the terms of a court order entered pursuant to this chapter. Except as otherwise provided in this section, the court shall treat the

parents and the child equally for the purposes of applying contempt of court processes and penalties under this section.

(2) Failure by a party to comply with an order entered under this chapter is a civil contempt of court as provided in RCW 7.21.030(2)(e), subject to the limitations of subsection (3) of this section.

(3) The court may impose remedial sanctions including a fine of up to one hundred dollars and confinement for up to seven days, or both for contempt of court under this section.

(4) A child placed in confinement for contempt under this section shall be placed in confinement only in a secure juvenile detention facility operated by or pursuant to a contract with a county.

(5) A motion for contempt may be made by a parent, a child, juvenile court personnel, or by any public agency, organization, or person having custody of the child under a court order adopted pursuant to this chapter.

(6) Whenever the court finds probable cause to believe, based upon consideration of a motion for contempt and the information set forth in a supporting declaration, that a child has violated a placement order entered under this chapter, the court may issue an order directing law enforcement to pick up and take the child to detention. The order may be entered ex parte without prior notice to the child or other parties. Following the child's admission to detention, a detention review hearing must be held in accordance with RCW 13.32A.065. [2000 c 162 § 14; 2000 c 162 § 4; 1998 c 296 § 37; 1996 c 133 § 28; 1995 c 312 § 29; 1990 c 276 § 16. Prior: 1989 c 373 § 16; 1989 c 269 § 4; 1981 c 298 § 14.]

**Effective date—2000 c 162 §§ 11-17:** See note following RCW 13.32A.060.

**Findings—Intent—1998 c 296 §§ 36-39:** See note following RCW 7.21.030.

**Findings—Intent—Part headings not law—Short title—1998 c 296:** See notes following RCW 74.13.025.

**Findings—Short title—Intent—Construction—1996 c 133:** See notes following RCW 13.32A.197.

**Short title—1995 c 312:** See note following RCW 13.32A.010.

**Intent—1990 c 276:** See RCW 13.32A.015.

**Conflict with federal requirements—Severability—1990 c 276:** See notes following RCW 13.32A.020.

**Severability—1989 c 373:** See RCW 7.21.900.

**Severability—1981 c 298:** See note following RCW 13.32A.040.

**13.32A.300 No entitlement to services created by chapter.** Nothing in this chapter shall be construed to create an entitlement to services nor to create judicial authority to order the provision at public expense of services to any person or family where the department has determined that such services are unavailable or unsuitable or that the child or family are not eligible for such services. [1995 c 312 § 43.]

**Short title—1995 c 312:** See note following RCW 13.32A.010.

## Chapter 13.34 RCW

### JUVENILE COURT ACT—DEPENDENCY AND TERMINATION OF PARENT-CHILD RELATIONSHIP

#### Sections

13.34.010

Short title.

13.34.020

Legislative declaration of family unit as resource to be nurtured—Rights of child.

ilies caused by complying with these federal requirements." [1983 c 311 § 1.]

**Severability—1982 c 129:** See note following RCW 9A.04.080.

**Effective date—Severability—1979 c 155:** See notes following RCW 13.04.011.

**Effective dates—Severability—1977 ex.s. c 291:** See notes following RCW 13.04.005.

**13.34.040 Petition to court to deal with dependent child—Application of Indian child welfare act.** (1) Any person may file with the clerk of the superior court a petition showing that there is within the county, or residing within the county, a dependent child and requesting that the superior court deal with such child as provided in this chapter. There shall be no fee for filing such petitions.

(2) In counties having paid probation officers, these officers shall, to the extent possible, first determine if a petition is reasonably justifiable. Each petition shall be verified and contain a statement of facts constituting a dependency, and the names and residence, if known to the petitioner, of the parents, guardian, or custodian of the alleged dependent child.

(3) Every petition filed in proceedings under this chapter shall contain a statement alleging whether the child is or may be an Indian child as defined in 25 U.S.C. Sec. 1903. If the child is an Indian child as defined under the Indian child welfare act, the provisions of the act shall apply.

(4) Every order or decree entered under this chapter shall contain a finding that the Indian child welfare act does or does not apply. Where there is a finding that the Indian child welfare act does apply, the decree or order must also contain a finding that all notice requirements and evidentiary requirements under the Indian child welfare act have been satisfied. [2004 c 64 § 3; 2000 c 122 § 2; 1977 ex.s. c 291 § 32; 1913 c 160 § 5; RRS § 1987-5. Formerly RCW 13.04.060.]

**Effective dates—Severability—1977 ex.s. c 291:** See notes following RCW 13.04.005.

**13.34.050 Court order to take child into custody, when—Hearing.** (1) The court may enter an order directing a law enforcement officer, probation counselor, or child protective services official to take a child into custody if: (a) A petition is filed with the juvenile court alleging that the child is dependent and that the child's health, safety, and welfare will be seriously endangered if not taken into custody; (b) an affidavit or declaration is filed by the department in support of the petition setting forth specific factual information evidencing reasonable grounds that the child's health, safety, and welfare will be seriously endangered if not taken into custody and at least one of the grounds set forth demonstrates a risk of imminent harm to the child. "Imminent harm" for purposes of this section shall include, but not be limited to, circumstances of sexual abuse, sexual exploitation as defined in RCW 26.44.020, and a parent's failure to perform basic parental functions, obligations, and duties as the result of substance abuse; and (c) the court finds reasonable grounds to believe the child is dependent and that the child's health, safety, and welfare will be seriously endangered if not taken into custody.

(2) Any petition that does not have the necessary affidavit or declaration demonstrating a risk of imminent harm

requires that the parents are provided notice and an opportunity to be heard before the order may be entered.

(3) The petition and supporting documentation must be served on the parent, and if the child is in custody at the time the child is removed, on the entity with custody other than the parent. Failure to effect service does not invalidate the petition if service was attempted and the parent could not be found. [2005 c 512 § 9; 2000 c 122 § 3; 1998 c 328 § 1; 1979 c 155 § 38; 1977 ex.s. c 291 § 33.]

**Finding—Intent—Effective date—Short title—2005 c 512:** See notes following RCW 26.44.100.

**Effective date—Severability—1979 c 155:** See notes following RCW 13.04.011.

**Effective dates—Severability—1977 ex.s. c 291:** See notes following RCW 13.04.005.

**13.34.055 Custody by law enforcement officer—Release from liability.** (1) A law enforcement officer shall take into custody a child taken in violation of RCW 9A.40.060 or 9A.40.070. The law enforcement officer shall make every reasonable effort to avoid placing additional trauma on the child by obtaining such custody at times and in a manner least disruptive to the child. The law enforcement officer shall return the child to the person or agency having the right to physical custody unless the officer has reasonable grounds to believe the child should be taken into custody under RCW 13.34.050 or 26.44.050. If there is no person or agency having the right to physical custody available to take custody of the child, the officer may place the child in shelter care as provided in RCW 13.34.060.

(2) A law enforcement officer or public employee acting reasonably and in good faith shall not be held liable in any civil action for returning the child to a person having the apparent right to physical custody. [1984 c 95 § 4.]

**Severability—1984 c 95:** See note following RCW 9A.40.060.

**13.34.060 Shelter care—Placement—Custody—Duties of parties.** (1) A child taken into custody pursuant to RCW 13.34.050 or 26.44.050 shall be immediately placed in shelter care. A child taken by a relative of the child in violation of RCW 9A.40.060 or 9A.40.070 shall be placed in shelter care only when permitted under RCW 13.34.055. No child may be held longer than seventy-two hours, excluding Saturdays, Sundays, and holidays, after such child is taken into custody unless a court order has been entered for continued shelter care. In no case may a child who is taken into custody pursuant to RCW 13.34.055, 13.34.050, or 26.44.050 be detained in a secure detention facility.

(2) Unless there is reasonable cause to believe that the health, safety, or welfare of the child would be jeopardized or that the efforts to reunite the parent and child will be hindered, priority placement for a child in shelter care, pending a court hearing, shall be with any person described in RCW 74.15.020(2)(a) or 13.34.130(1)(b). The person must be willing and available to care for the child and be able to meet any special needs of the child and the court must find that such placement is in the best interests of the child. The person must be willing to facilitate the child's visitation with siblings, if such visitation is part of the supervising agency's plan or is ordered by the court. If a child is not initially placed with a relative or other suitable person requested by

the parent pursuant to this section, the supervising agency shall make an effort within available resources to place the child with a relative or other suitable person requested by the parent on the next business day after the child is taken into custody. The supervising agency shall document its effort to place the child with a relative or other suitable person requested by the parent pursuant to this section. Nothing within this subsection (2) establishes an entitlement to services or a right to a particular placement.

(3) Whenever a child is taken into custody pursuant to this section, the supervising agency may authorize evaluations of the child's physical or emotional condition, routine medical and dental examination and care, and all necessary emergency care. [2007 c 413 § 3; 2002 c 52 § 4; 2000 c 122 § 4; 1999 c 17 § 2; 1998 c 328 § 2; 1990 c 246 § 1; 1987 c 524 § 4. Prior: 1984 c 188 § 3; 1984 c 95 § 5; 1983 c 246 § 1; 1982 c 129 § 5; 1979 c 155 § 39; 1977 ex.s. c 291 § 34.]

**Severability—2007 c 413:** See note following RCW 13.34.215.

**Intent—2002 c 52:** See note following RCW 13.34.025.

**Finding—1999 c 17:** "The legislature has found that any intervention into the life of a child is also an intervention in the life of the parent, guardian, or legal custodian, and that the bond between child and parent is a critical element of child development. The legislature now also finds that children who cannot be with their parents, guardians, or legal custodians are best cared for, whenever possible and appropriate by family members with whom they have a relationship. This is particularly important when a child cannot be in the care of a parent, guardian, or legal custodian as a result of a court intervention." [1999 c 17 § 1.]

**Severability—1990 c 246:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1990 c 246 § 11.]

**Severability—1984 c 95:** See note following RCW 9A.40.060.

**Severability—1982 c 129:** See note following RCW 9A.04.080.

**Effective date—Severability—1979 c 155:** See notes following RCW 13.04.011.

**Effective dates—Severability—1977 ex.s. c 291:** See notes following RCW 13.04.005.

**13.34.062 Shelter care—Notice of custody and rights.**

(1)(a) Whenever a child is taken into custody by child protective services pursuant to a court order issued under RCW 13.34.050 or when child protective services is notified that a child has been taken into custody pursuant to RCW 26.44.050 or 26.44.056, child protective services shall make reasonable efforts to inform the parent, guardian, or legal custodian of the fact that the child has been taken into custody, the reasons why the child was taken into custody, and their legal rights under this title, including the right to a shelter care hearing, as soon as possible. Notice must be provided in an understandable manner and take into consideration the parent's, guardian's, or legal custodian's primary language, level of education, and cultural issues.

(b) In no event shall the notice required by this section be provided to the parent, guardian, or legal custodian more than twenty-four hours after the child has been taken into custody or twenty-four hours after child protective services has been notified that the child has been taken into custody.

(2)(a) The notice of custody and rights may be given by any means reasonably certain of notifying the parents including, but not limited to, written, telephone, or in person oral notification. If the initial notification is provided by a means

other than writing, child protective services shall make reasonable efforts to also provide written notification.

(b) The written notice of custody and rights required by this section shall be in substantially the following form:

"NOTICE

Your child has been placed in temporary custody under the supervision of Child Protective Services (or other person or agency). You have important legal rights and you must take steps to protect your interests.

1. A court hearing will be held before a judge within 72 hours of the time your child is taken into custody excluding Saturdays, Sundays, and holidays. You should call the court at (insert appropriate phone number here) for specific information about the date, time, and location of the court hearing.

2. You have the right to have a lawyer represent you at the hearing. Your right to representation continues after the shelter care hearing. You have the right to records the department intends to rely upon. A lawyer can look at the files in your case, talk to child protective services and other agencies, tell you about the law, help you understand your rights, and help you at hearings. If you cannot afford a lawyer, the court will appoint one to represent you. To get a court-appointed lawyer you must contact: (explain local procedure).

3. At the hearing, you have the right to speak on your own behalf, to introduce evidence, to examine witnesses, and to receive a decision based solely on the evidence presented to the judge.

4. If your hearing occurs before a court commissioner, you have the right to have the decision of the court commissioner reviewed by a superior court judge. To obtain that review, you must, within ten days after the entry of the decision of the court commissioner, file with the court a motion for revision of the decision, as provided in RCW 2.24.050.

You should be present at any shelter care hearing. If you do not come, the judge will not hear what you have to say.

You may call the Child Protective Services' caseworker for more information about your child. The caseworker's name and telephone number are: (insert name and telephone number).

5. You have a right to a case conference to develop a written service agreement following the shelter care hearing. The service agreement may not conflict with the court's order of shelter care. You may request that a multidisciplinary team, family group conference, or prognostic staffing be convened for your child's case. You may participate in these processes with your counsel present.

6. If your child is placed in the custody of the department of social and health services or other supervising agency, immediately following the shelter care hearing, the court will enter an order granting the department or other supervising agency the right to inspect and copy all health, medical, mental health, and education records of the child, directing health care providers to release such information without your further consent, and granting the department or supervising agency or its designee the authority and responsibility, where applicable, to:

- (1) Notify the child's school that the child is in out-of-home placement;
- (2) Enroll the child in school;

- (3) Request the school transfer records;
- (4) Request and authorize evaluation of special needs;
- (5) Attend parent or teacher conferences;
- (6) Excuse absences;
- (7) Grant permission for extracurricular activities;
- (8) Authorize medications which need to be administered during school hours and sign for medical needs that arise during school hours; and
- (9) Complete or update school emergency records."

Upon receipt of the written notice, the parent, guardian, or legal custodian shall acknowledge such notice by signing a receipt prepared by child protective services. If the parent, guardian, or legal custodian does not sign the receipt, the reason for lack of a signature shall be written on the receipt. The receipt shall be made a part of the court's file in the dependency action.

If after making reasonable efforts to provide notification, child protective services is unable to determine the whereabouts of the parents, guardian, or legal custodian, the notice shall be delivered or sent to the last known address of the parent, guardian, or legal custodian.

(3) If child protective services is not required to give notice under this section, the juvenile court counselor assigned to the matter shall make all reasonable efforts to advise the parents, guardian, or legal custodian of the time and place of any shelter care hearing, request that they be present, and inform them of their basic rights as provided in RCW 13.34.090.

(4) Reasonable efforts to advise and to give notice, as required in this section, shall include, at a minimum, investigation of the whereabouts of the parent, guardian, or legal custodian. If such reasonable efforts are not successful, or the parent, guardian, or legal custodian does not appear at the shelter care hearing, the petitioner shall testify at the hearing or state in a declaration:

(a) The efforts made to investigate the whereabouts of, and to advise, the parent, guardian, or legal custodian; and

(b) Whether actual advice of rights was made, to whom it was made, and how it was made, including the substance of any oral communication or copies of written materials used. [2007 c 413 § 4; 2007 c 409 § 5; 2004 c 147 § 2; 2001 c 332 § 2; 2000 c 122 § 5.]

**Reviser's note:** This section was amended by 2007 c 409 § 5 and by 2007 c 413 § 4, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

**Severability—2007 c 413:** See note following RCW 13.34.215.

**Effective date—2007 c 409:** See note following RCW 13.34.096.

**Effective date—2004 c 147:** See note following RCW 13.34.067.

**13.34.065 Shelter care—Hearing—Recommendation as to further need—Release.** (1)(a) When a child is taken into custody, the court shall hold a shelter care hearing within seventy-two hours, excluding Saturdays, Sundays, and holidays. The primary purpose of the shelter care hearing is to determine whether the child can be immediately and safely returned home while the adjudication of the dependency is pending.

(b) Any parent, guardian, or legal custodian who for good cause is unable to attend the shelter care hearing may

request that a subsequent shelter care hearing be scheduled. The request shall be made to the clerk of the court where the petition is filed prior to the initial shelter care hearing. Upon the request of the parent, the court shall schedule the hearing within seventy-two hours of the request, excluding Saturdays, Sundays, and holidays. The clerk shall notify all other parties of the hearing by any reasonable means.

(2)(a) The department of social and health services shall submit a recommendation to the court as to the further need for shelter care in all cases in which it is the petitioner. In all other cases, the recommendation shall be submitted by the juvenile court probation counselor.

(b) All parties have the right to present testimony to the court regarding the need or lack of need for shelter care.

(c) Hearsay evidence before the court regarding the need or lack of need for shelter care must be supported by sworn testimony, affidavit, or declaration of the person offering such evidence.

(3)(a) At the commencement of the hearing, the court shall notify the parent, guardian, or custodian of the following:

(i) The parent, guardian, or custodian has the right to a shelter care hearing;

(ii) The nature of the shelter care hearing, the rights of the parents, and the proceedings that will follow; and

(iii) If the parent, guardian, or custodian is not represented by counsel, the right to be represented. If the parent, guardian, or custodian is indigent, the court shall appoint counsel as provided in RCW 13.34.090; and

(b) If a parent, guardian, or legal custodian desires to waive the shelter care hearing, the court shall determine, on the record and with the parties present, whether such waiver is knowing and voluntary. A parent may not waive his or her right to the shelter care hearing unless he or she appears in court and the court determines that the waiver is knowing and voluntary. Regardless of whether the court accepts the parental waiver of the shelter care hearing, the court must provide notice to the parents of their rights required under (a) of this subsection and make the finding required under subsection (4) of this section.

(4) At the shelter care hearing the court shall examine the need for shelter care and inquire into the status of the case. The paramount consideration for the court shall be the health, welfare, and safety of the child. At a minimum, the court shall inquire into the following:

(a) Whether the notice required under RCW 13.34.062 was given to all known parents, guardians, or legal custodians of the child. The court shall make an express finding as to whether the notice required under RCW 13.34.062 was given to the parent, guardian, or legal custodian. If actual notice was not given to the parent, guardian, or legal custodian and the whereabouts of such person is known or can be ascertained, the court shall order the supervising agency or the department of social and health services to make reasonable efforts to advise the parent, guardian, or legal custodian of the status of the case, including the date and time of any subsequent hearings, and their rights under RCW 13.34.090;

(b) Whether the child can be safely returned home while the adjudication of the dependency is pending;

(c) What efforts have been made to place the child with a relative;

(d) What services were provided to the family to prevent or eliminate the need for removal of the child from the child's home;

(e) Is the placement proposed by the agency the least disruptive and most family-like setting that meets the needs of the child;

(f) Whether it is in the best interest of the child to remain enrolled in the school, developmental program, or child care the child was in prior to placement and what efforts have been made to maintain the child in the school, program, or child care if it would be in the best interest of the child to remain in the same school, program, or child care;

(g) Appointment of a guardian ad litem or attorney;

(h) Whether the child is or may be an Indian child as defined in 25 U.S.C. Sec. 1903, whether the provisions of the Indian child welfare act apply, and whether there is compliance with the Indian child welfare act, including notice to the child's tribe;

(i) Whether, as provided in RCW 26.44.063, restraining orders, or orders expelling an allegedly abusive household member from the home of a nonabusive parent, guardian, or legal custodian, will allow the child to safely remain in the home;

(j) Whether any orders for examinations, evaluations, or immediate services are needed. The court may not order a parent to undergo examinations, evaluation, or services at the shelter care hearing unless the parent agrees to the examination, evaluation, or service;

(k) The terms and conditions for parental, sibling, and family visitation.

(5)(a) The court shall release a child alleged to be dependent to the care, custody, and control of the child's parent, guardian, or legal custodian unless the court finds there is reasonable cause to believe that:

(i) After consideration of the specific services that have been provided, reasonable efforts have been made to prevent or eliminate the need for removal of the child from the child's home and to make it possible for the child to return home; and

(ii)(A) The child has no parent, guardian, or legal custodian to provide supervision and care for such child; or

(B) The release of such child would present a serious threat of substantial harm to such child, notwithstanding an order entered pursuant to RCW 26.44.063; or

(C) The parent, guardian, or custodian to whom the child could be released has been charged with violating RCW 9A.40.060 or 9A.40.070.

(b) If the court does not release the child to his or her parent, guardian, or legal custodian, the court shall order placement with a relative, unless there is reasonable cause to believe the health, safety, or welfare of the child would be jeopardized or that the efforts to reunite the parent and child will be hindered. The relative must be willing and available to:

(i) Care for the child and be able to meet any special needs of the child;

(ii) Facilitate the child's visitation with siblings, if such visitation is part of the supervising agency's plan or is ordered by the court; and

(iii) Cooperate with the department in providing necessary background checks and home studies.

(c) If the child was not initially placed with a relative, and the court does not release the child to his or her parent, guardian, or legal custodian, the supervising agency shall make reasonable efforts to locate a relative pursuant to RCW 13.34.060(1).

(d) If a relative is not available, the court shall order continued shelter care or order placement with another suitable person, and the court shall set forth its reasons for the order. If the court orders placement of the child with a person not related to the child and not licensed to provide foster care, the placement is subject to all terms and conditions of this section that apply to relative placements.

(e) Any placement with a relative, or other person approved by the court pursuant to this section, shall be contingent upon cooperation with the agency case plan and compliance with court orders related to the care and supervision of the child including, but not limited to, court orders regarding parent-child contacts, sibling contacts, and any other conditions imposed by the court. Noncompliance with the case plan or court order is grounds for removal of the child from the home of the relative or other person, subject to review by the court.

(f) Uncertainty by a parent, guardian, legal custodian, relative, or other suitable person that the alleged abuser has in fact abused the child shall not, alone, be the basis upon which a child is removed from the care of a parent, guardian, or legal custodian under (a) of this subsection, nor shall it be a basis, alone, to preclude placement with a relative under (b) of this subsection or with another suitable person under (d) of this subsection.

(6)(a) A shelter care order issued pursuant to this section shall include the requirement for a case conference as provided in RCW 13.34.067. However, if the parent is not present at the shelter care hearing, or does not agree to the case conference, the court shall not include the requirement for the case conference in the shelter care order.

(b) If the court orders a case conference, the shelter care order shall include notice to all parties and establish the date, time, and location of the case conference which shall be no later than thirty days before the fact-finding hearing.

(c) The court may order another conference, case staffing, or hearing as an alternative to the case conference required under RCW 13.34.067 so long as the conference, case staffing, or hearing ordered by the court meets all requirements under RCW 13.34.067, including the requirement of a written agreement specifying the services to be provided to the parent.

(7)(a) A shelter care order issued pursuant to this section may be amended at any time with notice and hearing thereon. The shelter care decision of placement shall be modified only upon a showing of change in circumstances. No child may be placed in shelter care for longer than thirty days without an order, signed by the judge, authorizing continued shelter care.

(b)(i) An order releasing the child on any conditions specified in this section may at any time be amended, with notice and hearing thereon, so as to return the child to shelter care for failure of the parties to conform to the conditions originally imposed.

(ii) The court shall consider whether nonconformance with any conditions resulted from circumstances beyond the control of the parent, guardian, or legal custodian and give

weight to that fact before ordering return of the child to shelter care.

(8)(a) If a child is returned home from shelter care a second time in the case, or if the supervisor of the caseworker deems it necessary, the multidisciplinary team may be reconvened.

(b) If a child is returned home from shelter care a second time in the case a law enforcement officer must be present and file a report to the department. [2008 c 267 § 2; 2007 c 413 § 5; 2001 c 332 § 3; 2000 c 122 § 7.]

**Severability—2007 c 413:** See note following RCW 13.34.215.

**13.34.067 Shelter care—Case conference—Service agreement.** (1) Following shelter care and no later than thirty days prior to fact-finding, the department shall convene a case conference as required in the shelter care order to develop and specify in a written service agreement the expectations of both the department and the parent regarding voluntary services for the parent.

The case conference shall include the parent, counsel for the parent, caseworker, counsel for the state, guardian ad litem, counsel for the child, and any other person agreed upon by the parties. Once the shelter care order is entered, the department is not required to provide additional notice of the case conference to any participants in the case conference.

The written service agreement expectations must correlate with the court's findings at the shelter care hearing. The written service agreement must set forth specific services to be provided to the parent.

The case conference agreement must be agreed to and signed by the parties. The court shall not consider the content of the discussions at the case conference at the time of the fact-finding hearing for the purposes of establishing that the child is a dependent child, and the court shall not consider any documents or written materials presented at the case conference but not incorporated into the case conference agreement, unless the documents or written materials were prepared for purposes other than or as a result of the case conference and are otherwise admissible under the rules of evidence.

(2) At any other stage in a dependency proceeding, the department, upon the parent's request, shall convene a case conference. [2004 c 147 § 1; 2001 c 332 § 1.]

**Effective date—2004 c 147:** "This act takes effect July 1, 2004." [2004 c 147 § 5.]

**13.34.069 Shelter care—Order and authorization of health care and education records.** If a child is placed in the custody of the department of social and health services or other supervising agency, immediately following the shelter care hearing, an order and authorization regarding health care and education records for the child shall be entered. The order shall:

(1) Provide the department or other supervising agency with the right to inspect and copy all health, medical, mental health, and education records of the child;

(2) Authorize and direct any agency, hospital, doctor, nurse, dentist, orthodontist, or other health care provider, therapist, drug or alcohol treatment provider, psychologist, psychiatrist, or mental health clinic, or health or medical records custodian or document management company, or

school or school organization to permit the department or other supervising agency to inspect and to obtain copies of any records relating to the child involved in the case, without the further consent of the parent or guardian of the child; and

(3) Grant the department or other supervising agency or its designee the authority and responsibility, where applicable, to:

(a) Notify the child's school that the child is in out-of-home placement;

(b) Enroll the child in school;

(c) Request the school transfer records;

(d) Request and authorize evaluation of special needs;

(e) Attend parent or teacher conferences;

(f) Excuse absences;

(g) Grant permission for extracurricular activities;

(h) Authorize medications which need to be administered during school hours and sign for medical needs that arise during school hours; and

(i) Complete or update school emergency records.

Access to records under this section is subject to the child's consent where required by other state and federal laws. [2007 c 409 § 2.]

**Effective date—2007 c 409:** See note following RCW 13.34.096.

**13.34.070 Summons when petition filed—Service procedure—Hearing, when—Contempt upon failure to appear—Required notice regarding Indian children.** (1) Upon the filing of the petition, the clerk of the court shall issue a summons, one directed to the child, if the child is twelve or more years of age, and another to the parents, guardian, or custodian, and such other persons as appear to the court to be proper or necessary parties to the proceedings, requiring them to appear personally before the court at the time fixed to hear the petition. If the child is developmentally disabled and not living at home, the notice shall be given to the child's custodian as well as to the child's parent. The developmentally disabled child shall not be required to appear unless requested by the court. When the custodian is summoned, the parent or guardian or both shall also be served with a summons. The fact-finding hearing on the petition shall be held no later than seventy-five days after the filing of the petition, unless exceptional reasons for a continuance are found. The party requesting the continuance shall have the burden of proving by a preponderance of the evidence that exceptional circumstances exist. To ensure that the hearing on the petition occurs within the seventy-five day time limit, the court shall schedule and hear the matter on an expedited basis.

(2) A copy of the petition shall be attached to each summons.

(3) The summons shall advise the parties of the right to counsel. The summons shall also inform the child's parent, guardian, or legal custodian of his or her right to appointed counsel, if indigent, and of the procedure to use to secure appointed counsel.

(4) The summons shall advise the parents that they may be held responsible for the support of the child if the child is placed in out-of-home care.

(5) The judge may endorse upon the summons an order directing any parent, guardian, or custodian having the custody or control of the child to bring the child to the hearing.

(6) If it appears from affidavit or sworn statement presented to the judge that there is probable cause for the issuance of a warrant of arrest or that the child needs to be taken into custody pursuant to RCW 13.34.050, the judge may endorse upon the summons an order that an officer serving the summons shall at once take the child into custody and take him or her to the place of shelter designated by the court.

(7) If the person summoned as provided in this section is subject to an order of the court pursuant to subsection (5) or (6) of this section, and if the person fails to abide by the order, he or she may be proceeded against as for contempt of court. The order endorsed upon the summons shall conspicuously display the following legend:

NOTICE:  
 VIOLATION OF THIS ORDER  
 IS SUBJECT TO PROCEEDING  
 FOR CONTEMPT OF COURT  
 PURSUANT TO RCW 13.34.070.

(8) If a party to be served with a summons can be found within the state, the summons shall be served upon the party personally as soon as possible following the filing of the petition, but in no case later than fifteen court days before the fact-finding hearing, or such time as set by the court. If the party is within the state and cannot be personally served, but the party's address is known or can with reasonable diligence be ascertained, the summons may be served upon the party by mailing a copy by certified mail as soon as possible following the filing of the petition, but in no case later than fifteen court days before the hearing, or such time as set by the court. If a party other than the child is without the state but can be found or the address is known, or can with reasonable diligence be ascertained, service of the summons may be made either by delivering a copy to the party personally or by mailing a copy thereof to the party by certified mail at least ten court days before the fact-finding hearing, or such time as set by the court.

(9) Service of summons may be made under the direction of the court by any person eighteen years of age or older who is not a party to the proceedings or by any law enforcement officer, probation counselor, or department employee.

(10)(a) Whenever the court or the petitioning party in a proceeding under this chapter knows or has reason to know that an Indian child is involved, the petitioning party shall promptly provide notice to the child's parent or Indian custodian and to the agent designated by the child's Indian tribe to receive such notices. Notice shall be by certified mail with return receipt requested. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, notice shall be given to the secretary of the interior in the manner described in 25 C.F.R. 23.11. If the child may be a member of more than one tribe, the petitioning party shall send notice to all tribes the petitioner has reason to know may be affiliated with the child.

(b) The notice shall: (i) Contain a statement notifying the parent or custodian and the tribe of the pending proceeding; and (ii) notify the tribe of the tribe's right to intervene and/or request that the case be transferred to tribal court. [2004 c 64 § 4; 2000 c 122 § 8; 1993 c 358 § 1; 1990 c 246 §

2; 1988 c 194 § 2; 1983 c 311 § 3; 1983 c 3 § 16; 1979 c 155 § 40; 1977 ex.s. c 291 § 35; 1913 c 160 § 6; RRS § 1987-6. Formerly RCW 13.04.070.]

**Severability—1990 c 246:** See note following RCW 13.34.060.

**Legislative finding—1983 c 311:** See note following RCW 13.34.030.

**Effective date—Severability—1979 c 155:** See notes following RCW 13.04.011.

**Effective dates—Severability—1977 ex.s. c 291:** See notes following RCW 13.04.005.

**13.34.080 Summons when petition filed—Publication of notice.** (1) The court shall direct the clerk to publish notice in a legal newspaper printed in the county, qualified to publish summons, once a week for three consecutive weeks, with the first publication of the notice to be at least twenty-five days prior to the date fixed for the hearing when it appears by the petition or verified statement that:

(a)(i) The parent or guardian is a nonresident of this state; or

(ii) The name or place of residence or whereabouts of the parent or guardian is unknown; and

(b) After due diligence, the person attempting service of the summons or notice provided for in RCW 13.34.070 has been unable to make service, and a copy of the notice has been deposited in the post office, postage prepaid, directed to such person at his or her last known place of residence. If the parent, guardian, or legal custodian is believed to be a resident of another state or a county other than the county in which the petition has been filed, notice also shall be published in the county in which the parent, guardian, or legal custodian is believed to reside.

(2) Publication may proceed simultaneously with efforts to provide service in person or by mail, when the court determines there is reason to believe that service in person or by mail will not be successful. Notice shall be directed to the parent, parents, or other person claiming the right to the custody of the child, if their names are known. If their names are unknown, the phrase "To whom it may concern" shall be used, apply to, and be binding upon, those persons whose names are unknown. The name of the court, the name of the child (or children if of one family), the date of the filing of the petition, the date of hearing, and the object of the proceeding in general terms shall be set forth. There shall be filed with the clerk an affidavit showing due publication of the notice. The cost of publication shall be paid by the county at a rate not greater than the rate paid for other legal notices. The publication of notice shall be deemed equivalent to personal service upon all persons, known or unknown, who have been designated as provided in this section. [2000 c 122 § 9; 1990 c 246 § 3; 1988 c 201 § 1; 1979 c 155 § 41; 1977 ex.s. c 291 § 36; 1961 c 302 § 4; 1913 c 160 § 7; RRS § 1987-7. Formerly RCW 13.04.080.]

**Severability—1990 c 246:** See note following RCW 13.34.060.

**Effective date—Severability—1979 c 155:** See notes following RCW 13.04.011.

**Effective dates—Severability—1977 ex.s. c 291:** See notes following RCW 13.04.005.

**13.34.090 Rights under chapter proceedings.** (1) Any party has a right to be represented by an attorney in all proceedings under this chapter, to introduce evidence, to be

# Appendix 3

ment to custody becomes effective under the order. [1982 c 35 § 195; 1979 c 141 § 35; 1955 c 272 § 6.]

**Intent—Severability—Effective dates—Application—1982 c 35:** See notes following RCW 43.07.160.

**26.40.070 Petition by parent for rescission, change in co-custodians, determination of parental responsibility.** The parents or parent upon whose petition an order for the commitment of a child to custody has been issued may, before such commitment becomes effective, petition the court for a rescission of the order or for a change in the co-custodians other than the state, or to determine that they are unable to continue parental responsibilities for the child, and the court shall proceed on such petition as on the original petition. [1955 c 272 § 7.]

**26.40.080 Health and welfare of committed child—State and co-custodian responsibilities.** It shall be the responsibility of the state and the appropriate departments and agencies thereof to discover methods and procedures by which the mental and/or physical health of the child in custody may be improved and, with the consent of the co-custodians, to apply those methods and procedures. The co-custodians other than the state shall have no financial responsibility for the child committed to their co-custody except as they may in written agreement with the state accept such responsibility. At any time after the commitment of such child they may inquire into his well-being, and the state and any of its agencies may do nothing with respect to the child that would in any way affect his mental or physical health without the consent of the co-custodians. The legal status of the child may not be changed without the consent of the co-custodians. If it appears to the state as co-custodian of a child that the health and/or welfare of such child is impaired or jeopardized by the failure of the co-custodians other than the state to consent to the application of certain methods and procedures with respect to such child, the state through its proper department or agency may petition the court for an order to proceed with such methods and procedures. Upon the filing of such petition a hearing shall be held in open court, and if the court finds that such petition should be granted it shall issue the order. [1955 c 272 § 8.]

**26.40.090 Petition by co-custodians for rescission of commitment—Hearing.** When the co-custodians of any child committed to custody under provisions of this chapter agree that such child is no longer in need of custody they may petition the court for a rescission of the commitment to custody. Upon the filing of such petition a hearing shall be held in open court and if the court finds that such petition should be granted it shall rescind the order of commitment to custody. [1955 c 272 § 9.]

**26.40.100 Chapter does not affect commitments under other laws.** Nothing in this chapter shall be construed as affecting the authority of the courts to make commitments as otherwise provided by law. [1955 c 272 § 10.]

**26.40.110 Lease of buses to transport children with disabilities.** See RCW 28A.160.040 through 28A.160.060.

[Title 26 RCW—page 132]

## Chapter 26.44 RCW

### ABUSE OF CHILDREN

(Formerly: Abuse of children and adult dependent persons)

#### Sections

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- 26.44.015 Limitations of chapter.
- 26.44.020 Definitions.
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- 26.44.031 Unfounded referrals—Report retention.
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- 26.44.115 Child taken into custody under court order—Information to parents.
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- 26.44.170 Alleged child abuse or neglect—Use of alcohol or controlled substances as contributing factor—Evaluation.
- 26.44.180 Investigation of child sexual abuse—Protocols—Documentation of agencies' roles.
- 26.44.185 Investigation of child sexual abuse—Revision and expansion of protocols—Child fatality, child physical abuse, and criminal child neglect cases.
- 26.44.190 Investigation of child abuse or neglect—Participation by law enforcement officer.
- 26.44.195 Negligent treatment or maltreatment—Offer of services—Evidence of substance abuse—In-home services—Initiation of dependency proceedings.
- 26.44.200 Methamphetamine manufacture—Presence of child.
- 26.44.210 Alleged child abuse or neglect at state school for the deaf—Investigation by department—Investigation report.
- 26.44.220 Abuse of adolescents—Staff training curriculum.
- 26.44.230 Abuse of adolescents—Reviews and reports.
- 26.44.240 Out-of-home care—Emergency placement—Criminal history record check.
- 26.44.900 Severability—1975 1st ex.s. c 217.

*Child abuse, investigation: RCW 74.13.031.*

*Child abuse and neglect training for participants in early childhood education programs: RCW 43.63A.066.*

*Council for children and families: Chapter 43.121 RCW.*

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*Day care—Information to parents and providers:* RCW 74.15.200.

*Domestic violence prevention:* Chapter 26.50 RCW.

*Missing children clearinghouse and hot line:* Chapter 13.60 RCW.

*Persons over sixty, abuse:* Chapter 74.34 RCW.

*Primary prevention program for child abuse and neglect:* RCW 28A.300.160.

*Record checks:* RCW 43.43.830 through 43.43.840 and 43.20A.710.

*School districts to develop policies and participate in programs:* RCW 28A.230.080.

*Shaken baby syndrome:* RCW 43.121.140.

*Witness of offense against child, duty:* RCW 9.69.100.

**26.44.010 Declaration of purpose.** The Washington state legislature finds and declares: The bond between a child and his or her parent, custodian, or guardian is of paramount importance, and any intervention into the life of a child is also an intervention into the life of the parent, custodian, or guardian; however, instances of nonaccidental injury, neglect, death, sexual abuse and cruelty to children by their parents, custodians or guardians have occurred, and in the instance where a child is deprived of his or her right to conditions of minimal nurture, health, and safety, the state is justified in emergency intervention based upon verified information; and therefore the Washington state legislature hereby provides for the reporting of such cases to the appropriate public authorities. It is the intent of the legislature that, as a result of such reports, protective services shall be made available in an effort to prevent further abuses, and to safeguard the general welfare of such children: PROVIDED, That such reports shall be maintained and disseminated with strictest regard for the privacy of the subjects of such reports and so as to safeguard against arbitrary, malicious or erroneous information or actions: PROVIDED FURTHER, That this chapter shall not be construed to authorize interference with child-raising practices, including reasonable parental discipline, which are not proved to be injurious to the child's health, welfare and safety. [1999 c 176 § 27; 1987 c 206 § 1; 1984 c 97 § 1; 1977 ex.s. c 80 § 24; 1975 1st ex.s. c 217 § 1; 1969 ex.s. c 35 § 1; 1965 c 13 § 1.]

**Findings—Purpose—Severability—Conflict with federal requirements—1999 c 176:** See notes following RCW 74.34.005.

**Severability—1984 c 97:** See RCW 74.34.900.

**Purpose—Intent—Severability—1977 ex.s. c 80:** See notes following RCW 4.16.190.

**26.44.015 Limitations of chapter.** (1) This chapter shall not be construed to authorize interference with child-raising practices, including reasonable parental discipline, which are not injurious to the child's health, welfare, or safety.

(2) Nothing in this chapter may be used to prohibit the reasonable use of corporal punishment as a means of discipline.

(3) No parent or guardian may be deemed abusive or neglectful solely by reason of the parent's or child's blindness, deafness, developmental disability, or other handicap. [2005 c 512 § 4; 1999 c 176 § 28; 1997 c 386 § 23; 1993 c 412 § 11.]

**Finding—Intent—Effective date—Short title—2005 c 512:** See notes following RCW 26.44.100.

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**Findings—Purpose—Severability—Conflict with federal requirements—1999 c 176:** See notes following RCW 74.34.005.

**Application—Effective date—1997 c 386:** See notes following RCW 13.50.010.

**26.44.020 Definitions.** (*Effective until October 1, 2008.*) The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Court" means the superior court of the state of Washington, juvenile department.

(2) "Law enforcement agency" means the police department, the prosecuting attorney, the state patrol, the director of public safety, or the office of the sheriff.

(3) "Practitioner of the healing arts" or "practitioner" means a person licensed by this state to practice podiatric medicine and surgery, optometry, chiropractic, nursing, dentistry, osteopathic medicine and surgery, or medicine and surgery or to provide other health services. The term "practitioner" includes a duly accredited Christian Science practitioner: PROVIDED, HOWEVER, That a person who is being furnished Christian Science treatment by a duly accredited Christian Science practitioner will not be considered, for that reason alone, a neglected person for the purposes of this chapter.

(4) "Institution" means a private or public hospital or any other facility providing medical diagnosis, treatment or care.

(5) "Department" means the state department of social and health services.

(6) "Child" or "children" means any person under the age of eighteen years of age.

(7) "Professional school personnel" include, but are not limited to, teachers, counselors, administrators, child care facility personnel, and school nurses.

(8) "Social service counselor" means anyone engaged in a professional capacity during the regular course of employment in encouraging or promoting the health, welfare, support or education of children, or providing social services to adults or families, including mental health, drug and alcohol treatment, and domestic violence programs, whether in an individual capacity, or as an employee or agent of any public or private organization or institution.

(9) "Psychologist" means any person licensed to practice psychology under chapter 18.83 RCW, whether acting in an individual capacity or as an employee or agent of any public or private organization or institution.

(10) "Pharmacist" means any registered pharmacist under chapter 18.64 RCW, whether acting in an individual capacity or as an employee or agent of any public or private organization or institution.

(11) "Clergy" means any regularly licensed or ordained minister, priest, or rabbi of any church or religious denomination, whether acting in an individual capacity or as an employee or agent of any public or private organization or institution.

(12) "Abuse or neglect" means sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child's health, welfare, or safety, excluding conduct permitted under RCW 9A.16.100; or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child. An abused

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child is a child who has been subjected to child abuse or neglect as defined in this section.

(13) "Child protective services section" means the child protective services section of the department.

(14) "Sexual exploitation" includes: (a) Allowing, permitting, or encouraging a child to engage in prostitution by any person; or (b) allowing, permitting, encouraging, or engaging in the obscene or pornographic photographing, filming, or depicting of a child by any person.

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

(16) "Child protective services" means those services provided by the department designed to protect children from child abuse and neglect and safeguard such children from future abuse and neglect, and conduct investigations of child abuse and neglect reports. Investigations may be conducted regardless of the location of the alleged abuse or neglect. Child protective services includes referral to services to ameliorate conditions that endanger the welfare of children, the coordination of necessary programs and services relevant to the prevention, intervention, and treatment of child abuse and neglect, and services to children to ensure that each child has a permanent home. In determining whether protective services should be provided, the department shall not decline to provide such services solely because of the child's unwillingness or developmental inability to describe the nature and severity of the abuse or neglect.

(17) "Malice" or "maliciously" means an evil intent, wish, or design to vex, annoy, or injure another person. Such malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.

(18) "Sexually aggressive youth" means a child who is defined in RCW 74.13.075(1)(b) as being a sexually aggressive youth.

(19) "Unfounded" means available information indicates that, more likely than not, child abuse or neglect did not occur. No unfounded allegation of child abuse or neglect may be disclosed to a child-placing agency, private adoption agency, or any other provider licensed under chapter 74.15 RCW. [2006 c 339 § 108; 2005 c 512 § 5; 2000 c 162 § 19; 1999 c 176 § 29; 1998 c 314 § 7. Prior: 1997 c 386 § 45; 1997 c 386 § 24; 1997 c 282 § 4; 1997 c 132 § 2; 1996 c 178 § 10; prior: 1993 c 412 § 12; 1993 c 402 § 1; 1988 c 142 § 1; prior: 1987 c 524 § 9; 1987 c 206 § 2; 1984 c 97 § 2; 1982 c 129 § 6; 1981 c 164 § 1; 1977 ex.s. c 80 § 25; 1975 1st ex.s. c 217 § 2; 1969 ex.s. c 35 § 2; 1965 c 13 § 2.]

**Effective date—2006 c 339 § 108:** "Section 108 of this act takes effect January 1, 2007." [2006 c 339 § 404.]

**Intent—Part headings not law—2006 c 339:** See notes following RCW 70.96A.325.

**Finding—Intent—Effective date—Short title—2005 c 512:** See notes following RCW 26.44.100.

**Findings—Purpose—Severability—Conflict with federal requirements—1999 c 176:** See notes following RCW 74.34.005.

**Application—Effective date—1997 c 386:** See notes following RCW 13.50.010.

**Findings—1997 c 132:** "The legislature finds that housing is frequently influenced by the economic situation faced by the family. This may include siblings sharing a bedroom. The legislature also finds that the family living situation due to economic circumstances in and of itself is not sufficient to justify a finding of child abuse, negligent treatment, or maltreatment." [1997 c 132 § 1.]

**Effective date—1996 c 178:** See note following RCW 18.35.110.

**Severability—1984 c 97:** See RCW 74.34.900.

**Severability—1982 c 129:** See note following RCW 9A.04.080.

**Purpose—Intent—Severability—1977 ex.s. c 80:** See notes following RCW 4.16.190.

#### **26.44.020 Definitions. (Effective October 1, 2008.)**

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

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

(2) "Child" or "children" means any person under the age of eighteen years of age.

(3) "Child protective services" means those services provided by the department designed to protect children from child abuse and neglect and safeguard such children from future abuse and neglect, and conduct investigations of child abuse and neglect reports. Investigations may be conducted regardless of the location of the alleged abuse or neglect. Child protective services includes referral to services to ameliorate conditions that endanger the welfare of children, the coordination of necessary programs and services relevant to the prevention, intervention, and treatment of child abuse and neglect, and services to children to ensure that each child has a permanent home. In determining whether protective services should be provided, the department shall not decline to provide such services solely because of the child's unwillingness or developmental inability to describe the nature and severity of the abuse or neglect.

(4) "Child protective services section" means the child protective services section of the department.

(5) "Clergy" means any regularly licensed or ordained minister, priest, or rabbi of any church or religious denomination, whether acting in an individual capacity or as an employee or agent of any public or private organization or institution.

(6) "Court" means the superior court of the state of Washington, juvenile department.

(7) "Department" means the state department of social and health services.

(8) "Founded" means the determination following an investigation by the department that, based on available information, it is more likely than not that child abuse or neglect did occur.

(9) "Inconclusive" means the determination following an investigation by the department, prior to October 1, 2008, that based on available information a decision cannot be made that more likely than not, child abuse or neglect did or did not occur.

(10) "Institution" means a private or public hospital or any other facility providing medical diagnosis, treatment, or care.

(11) "Law enforcement agency" means the police department, the prosecuting attorney, the state patrol, the director of public safety, or the office of the sheriff.

(12) "Malice" or "maliciously" means an intent, wish, or design to intimidate, annoy, or injure another person. Such malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.

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

(14) "Pharmacist" means any registered pharmacist under chapter 18.64 RCW, whether acting in an individual capacity or as an employee or agent of any public or private organization or institution.

(15) "Practitioner of the healing arts" or "practitioner" means a person licensed by this state to practice podiatric medicine and surgery, optometry, chiropractic, nursing, dentistry, osteopathic medicine and surgery, or medicine and surgery or to provide other health services. The term "practitioner" includes a duly accredited Christian Science practitioner: PROVIDED, HOWEVER, That a person who is being furnished Christian Science treatment by a duly accredited Christian Science practitioner will not be considered, for that reason alone, a neglected person for the purposes of this chapter.

(16) "Professional school personnel" include, but are not limited to, teachers, counselors, administrators, child care facility personnel, and school nurses.

(17) "Psychologist" means any person licensed to practice psychology under chapter 18.83 RCW, whether acting in an individual capacity or as an employee or agent of any public or private organization or institution.

(18) "Screened-out report" means a report of alleged child abuse or neglect that the department has determined

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does not rise to the level of a credible report of abuse or neglect and is not referred for investigation.

(19) "Sexual exploitation" includes: (a) Allowing, permitting, or encouraging a child to engage in prostitution by any person; or (b) allowing, permitting, encouraging, or engaging in the obscene or pornographic photographing, filming, or depicting of a child by any person.

(20) "Sexually aggressive youth" means a child who is defined in RCW 74.13.075(1)(b) as being a sexually aggressive youth.

(21) "Social service counselor" means anyone engaged in a professional capacity during the regular course of employment in encouraging or promoting the health, welfare, support or education of children, or providing social services to adults or families, including mental health, drug and alcohol treatment, and domestic violence programs, whether in an individual capacity, or as an employee or agent of any public or private organization or institution.

(22) "Unfounded" means the determination following an investigation by the department that available information indicates that, more likely than not, child abuse or neglect did not occur, or that there is insufficient evidence for the department to determine whether the alleged child abuse did or did not occur. [2007 c 220 § 1; 2006 c 339 § 108; (2006 c 339 § 107 expired January 1, 2007); 2005 c 512 § 5; 2000 c 162 § 19; 1999 c 176 § 29; 1998 c 314 § 7. Prior: 1997 c 386 § 45; 1997 c 386 § 24; 1997 c 282 § 4; 1997 c 132 § 2; 1996 c 178 § 10; prior: 1993 c 412 § 12; 1993 c 402 § 1; 1988 c 142 § 1; prior: 1987 c 524 § 9; 1987 c 206 § 2; 1984 c 97 § 2; 1982 c 129 § 6; 1981 c 164 § 1; 1977 ex.s. c 80 § 25; 1975 1st ex.s. c 217 § 2; 1969 ex.s. c 35 § 2; 1965 c 13 § 2.]

**Effective date—2007 c 220 §§ 1-3:** "Sections 1 through 3 of this act take effect October 1, 2008." [2007 c 220 § 10.]

**Implementation—2007 c 220 §§ 1-3:** "The secretary of the department of social and health services may take the necessary steps to ensure that sections 1 through 3 of this act are implemented on their effective date." [2007 c 220 § 11.]

**Effective date—2006 c 339 § 108:** "Section 108 of this act takes effect January 1, 2007." [2006 c 339 § 404.]

**Expiration date—2006 c 339 § 107:** "Section 107 of this act expires January 1, 2007." [2006 c 339 § 403.]

**Intent—Part headings not law—2006 c 339:** See notes following RCW 70.96A.325.

**Finding—Intent—Effective date—Short title—2005 c 512:** See notes following RCW 26.44.100.

**Findings—Purpose—Severability—Conflict with federal requirements—1999 c 176:** See notes following RCW 74.34.005.

**Application—Effective date—1997 c 386:** See notes following RCW 13.50.010.

**Findings—1997 c 132:** "The legislature finds that housing is frequently influenced by the economic situation faced by the family. This may include siblings sharing a bedroom. The legislature also finds that the family living situation due to economic circumstances in and of itself is not sufficient to justify a finding of child abuse, negligent treatment, or maltreatment." [1997 c 132 § 1.]

**Effective date—1996 c 178:** See note following RCW 18.35.110.

**Severability—1984 c 97:** See RCW 74.34.900.

**Severability—1982 c 129:** See note following RCW 9A.04.080.

**Purpose—Intent—Severability—1977 ex.s. c 80:** See notes following RCW 4.16.190.

**26.44.030 Reports—Duty and authority to make—Duty of receiving agency—Duty to notify—Case planning**

[Title 26 RCW—page 135]

**and consultation—Penalty for unauthorized exchange of information—Filing dependency petitions—Interviews of children—Records—Risk assessment process.** (*Effective until October 1, 2008.*) (1)(a) When any practitioner, county coroner or medical examiner, law enforcement officer, professional school personnel, registered or licensed nurse, social service counselor, psychologist, pharmacist, employee of the department of early learning, licensed or certified child care providers or their employees, employee of the department, juvenile probation officer, placement and liaison specialist, responsible living skills program staff, HOPE center staff, or state family and children's ombudsman or any volunteer in the ombudsman's office has reasonable cause to believe that a child has suffered abuse or neglect, he or she shall report such incident, or cause a report to be made, to the proper law enforcement agency or to the department as provided in RCW 26.44.040.

(b) When any person, in his or her official supervisory capacity with a nonprofit or for-profit organization, has reasonable cause to believe that a child has suffered abuse or neglect caused by a person over whom he or she regularly exercises supervisory authority, he or she shall report such incident, or cause a report to be made, to the proper law enforcement agency, provided that the person alleged to have caused the abuse or neglect is employed by, contracted by, or volunteers with the organization and coaches, trains, educates, or counsels a child or children or regularly has unsupervised access to a child or children as part of the employment, contract, or voluntary service. No one shall be required to report under this section when he or she obtains the information solely as a result of a privileged communication as provided in RCW 5.60.060.

Nothing in this subsection (1)(b) shall limit a person's duty to report under (a) of this subsection.

For the purposes of this subsection, the following definitions apply:

(i) "Official supervisory capacity" means a position, status, or role created, recognized, or designated by any nonprofit or for-profit organization, either for financial gain or without financial gain, whose scope includes, but is not limited to, overseeing, directing, or managing another person who is employed by, contracted by, or volunteers with the nonprofit or for-profit organization.

(ii) "Regularly exercises supervisory authority" means to act in his or her official supervisory capacity on an ongoing or continuing basis with regards to a particular person.

(c) The reporting requirement also applies to department of corrections personnel who, in the course of their employment, observe offenders or the children with whom the offenders are in contact. If, as a result of observations or information received in the course of his or her employment, any department of corrections personnel has reasonable cause to believe that a child has suffered abuse or neglect, he or she shall report the incident, or cause a report to be made, to the proper law enforcement agency or to the department as provided in RCW 26.44.040.

(d) The reporting requirement shall also apply to any adult who has reasonable cause to believe that a child who resides with them, has suffered severe abuse, and is able or capable of making a report. For the purposes of this subsection, "severe abuse" means any of the following: Any single

act of abuse that causes physical trauma of sufficient severity that, if left untreated, could cause death; any single act of sexual abuse that causes significant bleeding, deep bruising, or significant external or internal swelling; or more than one act of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, or unconsciousness.

(e) The report must be made at the first opportunity, but in no case longer than forty-eight hours after there is reasonable cause to believe that the child has suffered abuse or neglect. The report must include the identity of the accused if known.

(2) The reporting requirement of subsection (1) of this section does not apply to the discovery of abuse or neglect that occurred during childhood if it is discovered after the child has become an adult. However, if there is reasonable cause to believe other children are or may be at risk of abuse or neglect by the accused, the reporting requirement of subsection (1) of this section does apply.

(3) Any other person who has reasonable cause to believe that a child has suffered abuse or neglect may report such incident to the proper law enforcement agency or to the department of social and health services as provided in RCW 26.44.040.

(4) The department, upon receiving a report of an incident of alleged abuse or neglect pursuant to this chapter, involving a child who has died or has had physical injury or injuries inflicted upon him or her other than by accidental means or who has been subjected to alleged sexual abuse, shall report such incident to the proper law enforcement agency. In emergency cases, where the child's welfare is endangered, the department shall notify the proper law enforcement agency within twenty-four hours after a report is received by the department. In all other cases, the department shall notify the law enforcement agency within seventy-two hours after a report is received by the department. If the department makes an oral report, a written report must also be made to the proper law enforcement agency within five days thereafter.

(5) Any law enforcement agency receiving a report of an incident of alleged abuse or neglect pursuant to this chapter, involving a child who has died or has had physical injury or injuries inflicted upon him or her other than by accidental means, or who has been subjected to alleged sexual abuse, shall report such incident in writing as provided in RCW 26.44.040 to the proper county prosecutor or city attorney for appropriate action whenever the law enforcement agency's investigation reveals that a crime may have been committed. The law enforcement agency shall also notify the department of all reports received and the law enforcement agency's disposition of them. In emergency cases, where the child's welfare is endangered, the law enforcement agency shall notify the department within twenty-four hours. In all other cases, the law enforcement agency shall notify the department within seventy-two hours after a report is received by the law enforcement agency.

(6) Any county prosecutor or city attorney receiving a report under subsection (5) of this section shall notify the victim, any persons the victim requests, and the local office of the department, of the decision to charge or decline to charge a crime, within five days of making the decision.

(7) The department may conduct ongoing case planning and consultation with those persons or agencies required to report under this section, with consultants designated by the department, and with designated representatives of Washington Indian tribes if the client information exchanged is pertinent to cases currently receiving child protective services. Upon request, the department shall conduct such planning and consultation with those persons required to report under this section if the department determines it is in the best interests of the child. Information considered privileged by statute and not directly related to reports required by this section must not be divulged without a valid written waiver of the privilege.

(8) Any case referred to the department by a physician licensed under chapter 18.57 or 18.71 RCW on the basis of an expert medical opinion that child abuse, neglect, or sexual assault has occurred and that the child's safety will be seriously endangered if returned home, the department shall file a dependency petition unless a second licensed physician of the parents' choice believes that such expert medical opinion is incorrect. If the parents fail to designate a second physician, the department may make the selection. If a physician finds that a child has suffered abuse or neglect but that such abuse or neglect does not constitute imminent danger to the child's health or safety, and the department agrees with the physician's assessment, the child may be left in the parents' home while the department proceeds with reasonable efforts to remedy parenting deficiencies.

(9) Persons or agencies exchanging information under subsection (7) of this section shall not further disseminate or release the information except as authorized by state or federal statute. Violation of this subsection is a misdemeanor.

(10) Upon receiving reports of alleged abuse or neglect, the department or law enforcement agency may interview children. The interviews may be conducted on school premises, at day-care facilities, at the child's home, or at other suitable locations outside of the presence of parents. Parental notification of the interview must occur at the earliest possible point in the investigation that will not jeopardize the safety or protection of the child or the course of the investigation. Prior to commencing the interview the department or law enforcement agency shall determine whether the child wishes a third party to be present for the interview and, if so, shall make reasonable efforts to accommodate the child's wishes. Unless the child objects, the department or law enforcement agency shall make reasonable efforts to include a third party in any interview so long as the presence of the third party will not jeopardize the course of the investigation.

(11) Upon receiving a report of alleged child abuse and neglect, the department or investigating law enforcement agency shall have access to all relevant records of the child in the possession of mandated reporters and their employees.

(12) In investigating and responding to allegations of child abuse and neglect, the department may conduct background checks as authorized by state and federal law.

(13) If a report of alleged abuse or neglect is founded and constitutes the third founded report received by the department within the last twelve months involving the same child or family, the department shall promptly notify the office of the family and children's ombudsman of the contents of the

report. The department shall also notify the ombudsman of the disposition of the report.

(14) The department shall maintain investigation records and conduct timely and periodic reviews of all cases constituting abuse and neglect. The department shall maintain a log of screened-out nonabusive cases.

(15) The department shall use a risk assessment process when investigating alleged child abuse and neglect referrals. The department shall present the risk factors at all hearings in which the placement of a dependent child is an issue. Substance abuse must be a risk factor. The department shall, within funds appropriated for this purpose, offer enhanced community-based services to persons who are determined not to require further state intervention.

(16) Upon receipt of a report of alleged abuse or neglect the law enforcement agency may arrange to interview the person making the report and any collateral sources to determine if any malice is involved in the reporting.

(17) The department shall make reasonable efforts to learn the name, address, and telephone number of each person making a report of abuse or neglect under this section. The department shall provide assurances of appropriate confidentiality of the identification of persons reporting under this section. If the department is unable to learn the information required under this subsection, the department shall only investigate cases in which: (a) The department believes there is a serious threat of substantial harm to the child; (b) the report indicates conduct involving a criminal offense that has, or is about to occur, in which the child is the victim; or (c) the department has, after investigation, a report of abuse or neglect that has been founded with regard to a member of the household within three years of receipt of the referral.

(18) Upon receiving a report of alleged abuse or neglect involving a child under the court's jurisdiction under chapter 13.34 RCW, the department shall promptly notify the child's guardian ad litem of the report's contents. The department shall also notify the guardian ad litem of the disposition of the report. For purposes of this subsection, "guardian ad litem" has the meaning provided in RCW 13.34.030. [2008 c 211 § 4; 2007 c 387 § 3; 2005 c 417 § 1; 2003 c 207 § 4. Prior: 1999 c 267 § 20; 1999 c 176 § 30; 1998 c 328 § 5; 1997 c 386 § 25; 1996 c 278 § 2; 1995 c 311 § 17; prior: 1993 c 412 § 13; 1993 c 237 § 1; 1991 c 111 § 1; 1989 c 22 § 1; prior: 1988 c 142 § 2; 1988 c 39 § 1; prior: 1987 c 524 § 10; 1987 c 512 § 23; 1987 c 206 § 3; 1986 c 145 § 1; 1985 c 259 § 2; 1984 c 97 § 3; 1982 c 129 § 7; 1981 c 164 § 2; 1977 ex.s. c 80 § 26; 1975 1st ex.s. c 217 § 3; 1971 ex.s. c 167 § 1; 1969 ex.s. c 35 § 3; 1965 c 13 § 3.]

**Expiration date—2008 c 211 § 4:** "Section 4 of this act expires October 1, 2008." [2008 c 211 § 7.]

**Severability—2005 c 417:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2005 c 417 § 2.]

**Findings—Intent—Severability—1999 c 267:** See notes following RCW 43.20A.790.

**Short title—Purpose—Entitlement not granted—Federal waivers—1999 c 267 §§ 10-26:** See RCW 74.15.900 and 74.15.901.

**Findings—Purpose—Severability—Conflict with federal requirements—1999 c 176:** See notes following RCW 74.34.005.

**Application—Effective date—1997 c 386:** See notes following RCW 13.50.010.

**Finding—Intent—1996 c 278:** "The legislature finds that including certain department of corrections personnel among the professionals who are mandated to report suspected abuse or neglect of children, dependent adults, or people with developmental disabilities is an important step toward improving the protection of these vulnerable populations. The legislature intends, however, to limit the circumstances under which department of corrections personnel are mandated reporters of suspected abuse or neglect to only those circumstances when the information is obtained during the course of their employment. This act is not to be construed to alter the circumstances under which other professionals are mandated to report suspected abuse or neglect, nor is it the legislature's intent to alter current practices and procedures utilized by other professional organizations who are mandated reporters under RCW 26.44.030(1)(a)." [1996 c 278 § 1.]

**Severability—1987 c 512:** See RCW 18.19.901.

**Legislative findings—1985 c 259:** "The Washington state legislature finds and declares:

The children of the state of Washington are the state's greatest resource and the greatest source of wealth to the state of Washington. Children of all ages must be protected from child abuse. Governmental authorities must give the prevention, treatment, and punishment of child abuse the highest priority, and all instances of child abuse must be reported to the proper authorities who should diligently and expeditiously take appropriate action, and child abusers must be held accountable to the people of the state for their actions.

The legislature recognizes the current heavy caseload of governmental authorities responsible for the prevention, treatment, and punishment of child abuse. The information obtained by child abuse reporting requirements, in addition to its use as a law enforcement tool, will be used to determine the need for additional funding to ensure that resources for appropriate governmental response to child abuse are available." [1985 c 259 § 1.]

**Severability—1984 c 97:** See RCW 74.34.900.

**Severability—1982 c 129:** See note following RCW 9A.04.080.

**Purpose—Intent—Severability—1977 ex.s. c 80:** See notes following RCW 4.16.190.

**26.44.030 Reports—Duty and authority to make—Duty of receiving agency—Duty to notify—Case planning and consultation—Penalty for unauthorized exchange of information—Filing dependency petitions—Investigations—Interviews of children—Records—Risk assessment process. (Effective October 1, 2008.)** (1)(a) When any practitioner, county coroner or medical examiner, law enforcement officer, professional school personnel, registered or licensed nurse, social service counselor, psychologist, pharmacist, employee of the department of early learning, licensed or certified child care providers or their employees, employee of the department, juvenile probation officer, placement and liaison specialist, responsible living skills program staff, HOPE center staff, or state family and children's ombudsman or any volunteer in the ombudsman's office has reasonable cause to believe that a child has suffered abuse or neglect, he or she shall report such incident, or cause a report to be made, to the proper law enforcement agency or to the department as provided in RCW 26.44.040.

(b) When any person, in his or her official supervisory capacity with a nonprofit or for-profit organization, has reasonable cause to believe that a child has suffered abuse or neglect caused by a person over whom he or she regularly exercises supervisory authority, he or she shall report such incident, or cause a report to be made, to the proper law enforcement agency, provided that the person alleged to have caused the abuse or neglect is employed by, contracted by, or volunteers with the organization and coaches, trains, educates, or counsels a child or children or regularly has unsupervised access to a child or children as part of the employment, contract, or voluntary service. No one shall be required

to report under this section when he or she obtains the information solely as a result of a privileged communication as provided in RCW 5.60.060.

Nothing in this subsection (1)(b) shall limit a person's duty to report under (a) of this subsection.

For the purposes of this subsection, the following definitions apply:

(i) "Official supervisory capacity" means a position, status, or role created, recognized, or designated by any nonprofit or for-profit organization, either for financial gain or without financial gain, whose scope includes, but is not limited to, overseeing, directing, or managing another person who is employed by, contracted by, or volunteers with the nonprofit or for-profit organization.

(ii) "Regularly exercises supervisory authority" means to act in his or her official supervisory capacity on an ongoing or continuing basis with regards to a particular person.

(c) The reporting requirement also applies to department of corrections personnel who, in the course of their employment, observe offenders or the children with whom the offenders are in contact. If, as a result of observations or information received in the course of his or her employment, any department of corrections personnel has reasonable cause to believe that a child has suffered abuse or neglect, he or she shall report the incident, or cause a report to be made, to the proper law enforcement agency or to the department as provided in RCW 26.44.040.

(d) The reporting requirement shall also apply to any adult who has reasonable cause to believe that a child who resides with them, has suffered severe abuse, and is able or capable of making a report. For the purposes of this subsection, "severe abuse" means any of the following: Any single act of abuse that causes physical trauma of sufficient severity that, if left untreated, could cause death; any single act of sexual abuse that causes significant bleeding, deep bruising, or significant external or internal swelling; or more than one act of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, or unconsciousness.

(e) The report must be made at the first opportunity, but in no case longer than forty-eight hours after there is reasonable cause to believe that the child has suffered abuse or neglect. The report must include the identity of the accused if known.

(2) The reporting requirement of subsection (1) of this section does not apply to the discovery of abuse or neglect that occurred during childhood if it is discovered after the child has become an adult. However, if there is reasonable cause to believe other children are or may be at risk of abuse or neglect by the accused, the reporting requirement of subsection (1) of this section does apply.

(3) Any other person who has reasonable cause to believe that a child has suffered abuse or neglect may report such incident to the proper law enforcement agency or to the department of social and health services as provided in RCW 26.44.040.

(4) The department, upon receiving a report of an incident of alleged abuse or neglect pursuant to this chapter, involving a child who has died or has had physical injury or injuries inflicted upon him or her other than by accidental means or who has been subjected to alleged sexual abuse,

shall report such incident to the proper law enforcement agency. In emergency cases, where the child's welfare is endangered, the department shall notify the proper law enforcement agency within twenty-four hours after a report is received by the department. In all other cases, the department shall notify the law enforcement agency within seventy-two hours after a report is received by the department. If the department makes an oral report, a written report must also be made to the proper law enforcement agency within five days thereafter.

(5) Any law enforcement agency receiving a report of an incident of alleged abuse or neglect pursuant to this chapter, involving a child who has died or has had physical injury or injuries inflicted upon him or her other than by accidental means, or who has been subjected to alleged sexual abuse, shall report such incident in writing as provided in RCW 26.44.040 to the proper county prosecutor or city attorney for appropriate action whenever the law enforcement agency's investigation reveals that a crime may have been committed. The law enforcement agency shall also notify the department of all reports received and the law enforcement agency's disposition of them. In emergency cases, where the child's welfare is endangered, the law enforcement agency shall notify the department within twenty-four hours. In all other cases, the law enforcement agency shall notify the department within seventy-two hours after a report is received by the law enforcement agency.

(6) Any county prosecutor or city attorney receiving a report under subsection (5) of this section shall notify the victim, any persons the victim requests, and the local office of the department, of the decision to charge or decline to charge a crime, within five days of making the decision.

(7) The department may conduct ongoing case planning and consultation with those persons or agencies required to report under this section, with consultants designated by the department, and with designated representatives of Washington Indian tribes if the client information exchanged is pertinent to cases currently receiving child protective services. Upon request, the department shall conduct such planning and consultation with those persons required to report under this section if the department determines it is in the best interests of the child. Information considered privileged by statute and not directly related to reports required by this section must not be divulged without a valid written waiver of the privilege.

(8) Any case referred to the department by a physician licensed under chapter 18.57 or 18.71 RCW on the basis of an expert medical opinion that child abuse, neglect, or sexual assault has occurred and that the child's safety will be seriously endangered if returned home, the department shall file a dependency petition unless a second licensed physician of the parents' choice believes that such expert medical opinion is incorrect. If the parents fail to designate a second physician, the department may make the selection. If a physician finds that a child has suffered abuse or neglect but that such abuse or neglect does not constitute imminent danger to the child's health or safety, and the department agrees with the physician's assessment, the child may be left in the parents' home while the department proceeds with reasonable efforts to remedy parenting deficiencies.

(9) Persons or agencies exchanging information under subsection (7) of this section shall not further disseminate or release the information except as authorized by state or federal statute. Violation of this subsection is a misdemeanor.

(10) Upon receiving a report of alleged abuse or neglect, the department shall make reasonable efforts to learn the name, address, and telephone number of each person making a report of abuse or neglect under this section. The department shall provide assurances of appropriate confidentiality of the identification of persons reporting under this section. If the department is unable to learn the information required under this subsection, the department shall only investigate cases in which:

(a) The department believes there is a serious threat of substantial harm to the child;

(b) The report indicates conduct involving a criminal offense that has, or is about to occur, in which the child is the victim; or

(c) The department has a prior founded report of abuse or neglect with regard to a member of the household that is within three years of receipt of the referral.

(11)(a) For reports of alleged abuse or neglect that are accepted for investigation by the department, the investigation shall be conducted within time frames established by the department in rule. In no case shall the investigation extend longer than ninety days from the date the report is received, unless the investigation is being conducted under a written protocol pursuant to RCW 26.44.180 and a law enforcement agency or prosecuting attorney has determined that a longer investigation period is necessary. At the completion of the investigation, the department shall make a finding that the report of child abuse or neglect is founded or unfounded.

(b) If a court in a civil or criminal proceeding, considering the same facts or circumstances as are contained in the report being investigated by the department, makes a judicial finding by a preponderance of the evidence or higher that the subject of the pending investigation has abused or neglected the child, the department shall adopt the finding in its investigation.

(12) In conducting an investigation of alleged abuse or neglect, the department or law enforcement agency:

(a) May interview children. The interviews may be conducted on school premises, at day-care facilities, at the child's home, or at other suitable locations outside of the presence of parents. Parental notification of the interview must occur at the earliest possible point in the investigation that will not jeopardize the safety or protection of the child or the course of the investigation. Prior to commencing the interview the department or law enforcement agency shall determine whether the child wishes a third party to be present for the interview and, if so, shall make reasonable efforts to accommodate the child's wishes. Unless the child objects, the department or law enforcement agency shall make reasonable efforts to include a third party in any interview so long as the presence of the third party will not jeopardize the course of the investigation; and

(b) Shall have access to all relevant records of the child in the possession of mandated reporters and their employees.

(13) If a report of alleged abuse or neglect is founded and constitutes the third founded report received by the department within the last twelve months involving the same child

or family, the department shall promptly notify the office of the family and children's ombudsman of the contents of the report. The department shall also notify the ombudsman of the disposition of the report.

(14) In investigating and responding to allegations of child abuse and neglect, the department may conduct background checks as authorized by state and federal law.

(15) The department shall maintain investigation records and conduct timely and periodic reviews of all founded cases of abuse and neglect. The department shall maintain a log of screened-out nonabusive cases.

(16) The department shall use a risk assessment process when investigating alleged child abuse and neglect referrals. The department shall present the risk factors at all hearings in which the placement of a dependent child is an issue. Substance abuse must be a risk factor. The department shall, within funds appropriated for this purpose, offer enhanced community-based services to persons who are determined not to require further state intervention.

(17) Upon receipt of a report of alleged abuse or neglect the law enforcement agency may arrange to interview the person making the report and any collateral sources to determine if any malice is involved in the reporting.

(18) Upon receiving a report of alleged abuse or neglect involving a child under the court's jurisdiction under chapter 13.34 RCW, the department shall promptly notify the child's guardian ad litem of the report's contents. The department shall also notify the guardian ad litem of the disposition of the report. For purposes of this subsection, "guardian ad litem" has the meaning provided in RCW 13.34.030. [2008 c 211 § 5. Prior: 2007 c 387 § 3; 2007 c 220 § 2; 2005 c 417 § 1; 2003 c 207 § 4; prior: 1999 c 267 § 20; 1999 c 176 § 30; 1998 c 328 § 5; 1997 c 386 § 25; 1996 c 278 § 2; 1995 c 311 § 17; prior: 1993 c 412 § 13; 1993 c 237 § 1; 1991 c 111 § 1; 1989 c 22 § 1; prior: 1988 c 142 § 2; 1988 c 39 § 1; prior: 1987 c 524 § 10; 1987 c 512 § 23; 1987 c 206 § 3; 1986 c 145 § 1; 1985 c 259 § 2; 1984 c 97 § 3; 1982 c 129 § 7; 1981 c 164 § 2; 1977 ex.s. c 80 § 26; 1975 1st ex.s. c 217 § 3; 1971 ex.s. c 167 § 1; 1969 ex.s. c 35 § 3; 1965 c 13 § 3.]

**Effective date—2008 c 211 § 5:** "Section 5 of this act takes effect October 1, 2008." [2008 c 211 § 8.]

**Effective date—Implementation—2007 c 220 §§ 1-3:** See notes following RCW 26.44.020.

**Severability—2005 c 417:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2005 c 417 § 2.]

**Findings—Intent—Severability—1999 c 267:** See notes following RCW 43.20A.790.

**Short title—Purpose—Entitlement not granted—Federal waivers—1999 c 267 §§ 10-26:** See RCW 74.15.900 and 74.15.901.

**Findings—Purpose—Severability—Conflict with federal requirements—1999 c 176:** See notes following RCW 74.34.005.

**Application—Effective date—1997 c 386:** See notes following RCW 13.50.010.

**Finding—Intent—1996 c 278:** "The legislature finds that including certain department of corrections personnel among the professionals who are mandated to report suspected abuse or neglect of children, dependent adults, or people with developmental disabilities is an important step toward improving the protection of these vulnerable populations. The legislature intends, however, to limit the circumstances under which department of corrections personnel are mandated reporters of suspected abuse or neglect to only those circumstances when the information is obtained during the course of their employment. This act is not to be construed to alter the circum-

stances under which other professionals are mandated to report suspected abuse or neglect, nor is it the legislature's intent to alter current practices and procedures utilized by other professional organizations who are mandated reporters under RCW 26.44.030(1)(a)." [1996 c 278 § 1.]

**Severability—1987 c 512:** See RCW 18.19.901.

**Legislative findings—1985 c 259:** "The Washington state legislature finds and declares:

The children of the state of Washington are the state's greatest resource and the greatest source of wealth to the state of Washington. Children of all ages must be protected from child abuse. Governmental authorities must give the prevention, treatment, and punishment of child abuse the highest priority, and all instances of child abuse must be reported to the proper authorities who should diligently and expeditiously take appropriate action, and child abusers must be held accountable to the people of the state for their actions.

The legislature recognizes the current heavy caseload of governmental authorities responsible for the prevention, treatment, and punishment of child abuse. The information obtained by child abuse reporting requirements, in addition to its use as a law enforcement tool, will be used to determine the need for additional funding to ensure that resources for appropriate governmental response to child abuse are available." [1985 c 259 § 1.]

**Severability—1984 c 97:** See RCW 74.34.900.

**Severability—1982 c 129:** See note following RCW 9A.04.080.

**Purpose—Intent—Severability—1977 ex.s. c 80:** See notes following RCW 4.16.190.

**26.44.031 Unfounded referrals—Report retention. (Effective until October 1, 2008.)** To protect the privacy in reporting and the maintenance of reports of nonaccidental injury, neglect, death, sexual abuse, and cruelty to children by their parents, and to safeguard against arbitrary, malicious, or erroneous information or actions, the department shall not maintain information related to unfounded referrals in files or reports of child abuse or neglect for longer than six years except as provided in this section.

At the end of six years from receipt of the unfounded report, the information shall be purged unless an additional report has been received in the intervening period. [1997 c 282 § 1.]

**26.44.031 Records—Maintenance and disclosure—Destruction of screened-out, unfounded, or inconclusive reports—Rules—Proceedings for enforcement. (Effective October 1, 2008.)** (1) To protect the privacy in reporting and the maintenance of reports of nonaccidental injury, neglect, death, sexual abuse, and cruelty to children by their parents, and to safeguard against arbitrary, malicious, or erroneous information or actions, the department shall not disclose or maintain information related to reports of child abuse or neglect except as provided in this section or as otherwise required by state and federal law.

(2) The department shall destroy all of its records concerning:

(a) A screened-out report, within three years from the receipt of the report; and

(b) An unfounded or inconclusive report, within six years of completion of the investigation, unless a prior or subsequent founded report has been received regarding the child who is the subject of the report, a sibling or half-sibling of the child, or a parent, guardian, or legal custodian of the child, before the records are destroyed.

(3) The department may keep records concerning founded reports of child abuse or neglect as the department determines by rule.

(4) An unfounded, screened-out, or inconclusive report may not be disclosed to a child-placing agency, private adoption agency, or any other provider licensed under chapter 74.15 RCW.

(5)(a) If the department fails to comply with this section, an individual who is the subject of a report may institute proceedings for injunctive or other appropriate relief for enforcement of the requirement to purge information. These proceedings may be instituted in the superior court for the county in which the person resides or, if the person is not then a resident of this state, in the superior court for Thurston county.

(b) If the department fails to comply with subsection (4) of this section and an individual who is the subject of the report is harmed by the disclosure of information, in addition to the relief provided in (a) of this subsection, the court may award a penalty of up to one thousand dollars and reasonable attorneys' fees and court costs to the petitioner.

(c) A proceeding under this subsection does not preclude other methods of enforcement provided for by law.

(6) Nothing in this section shall prevent the department from retaining general, nonidentifying information which is required for state and federal reporting and management purposes. [2007 c 220 § 3; 1997 c 282 § 1.]

**Effective date—Implementation—2007 c 220 §§ 1-3:** See notes following RCW 26.44.020.

**26.44.032 Legal defense of public employee.** In cases in which a public employee subject to RCW 26.44.030 acts in good faith and without gross negligence in his or her reporting duty, and if the employee's judgment as to what constitutes reasonable cause to believe that a child has suffered abuse or neglect is being challenged, the public employer shall provide for the legal defense of the employee. [1999 c 176 § 31; 1988 c 87 § 1.]

**Findings—Purpose—Severability—Conflict with federal requirements—1999 c 176:** See notes following RCW 74.34.005.

**26.44.035 Response to complaint by more than one agency—Procedure—Written records.** (1) If the department or a law enforcement agency responds to a complaint of alleged child abuse or neglect and discovers that another agency has also responded to the complaint, the agency shall notify the other agency of their presence, and the agencies shall coordinate the investigation and keep each other apprised of progress.

(2) The department, each law enforcement agency, each county prosecuting attorney, each city attorney, and each court shall make as soon as practicable a written record and shall maintain records of all incidents of suspected child abuse reported to that person or agency.

(3) Every employee of the department who conducts an interview of any person involved in an allegation of abuse or neglect shall retain his or her original written records or notes setting forth the content of the interview unless the notes were entered into the electronic system operated by the department which is designed for storage, retrieval, and preservation of such records.

(4) Written records involving child sexual abuse shall, at a minimum, be a near verbatim record for the disclosure interview. The near verbatim record shall be produced within

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fifteen calendar days of the disclosure interview, unless waived by management on a case-by-case basis.

(5) Records kept under this section shall be identifiable by means of an agency code for child abuse. [1999 c 389 § 7; 1997 c 386 § 26; 1985 c 259 § 3.]

**Application—Effective date—1997 c 386:** See notes following RCW 13.50.010.

**Legislative findings—1985 c 259:** See note following RCW 26.44.030.

**26.44.040 Reports—Oral, written—Contents.** An immediate oral report must be made by telephone or otherwise to the proper law enforcement agency or the department of social and health services and, upon request, must be followed by a report in writing. Such reports must contain the following information, if known:

- (1) The name, address, and age of the child;
- (2) The name and address of the child's parents, stepparents, guardians, or other persons having custody of the child;
- (3) The nature and extent of the alleged injury or injuries;
- (4) The nature and extent of the alleged neglect;
- (5) The nature and extent of the alleged sexual abuse;
- (6) Any evidence of previous injuries, including their nature and extent; and

(7) Any other information that may be helpful in establishing the cause of the child's death, injury, or injuries and the identity of the alleged perpetrator or perpetrators. [1999 c 176 § 32; 1997 c 386 § 27; 1993 c 412 § 14; 1987 c 206 § 4; 1984 c 97 § 4; 1977 ex.s. c 80 § 27; 1975 1st ex.s. c 217 § 4; 1971 ex.s. c 167 § 2; 1969 ex.s. c 35 § 4; 1965 c 13 § 4.]

**Findings—Purpose—Severability—Conflict with federal requirements—1999 c 176:** See notes following RCW 74.34.005.

**Application—Effective date—1997 c 386:** See notes following RCW 13.50.010.

**Severability—1984 c 97:** See RCW 74.34.900.

**Purpose—Intent—Severability—1977 ex.s. c 80:** See notes following RCW 4.16.190.

**26.44.050 Abuse or neglect of child—Duty of law enforcement agency or department of social and health services—Taking child into custody without court order, when.** Upon the receipt of a report concerning the possible occurrence of abuse or neglect, the law enforcement agency or the department of social and health services must investigate and provide the protective services section with a report in accordance with chapter 74.13 RCW, and where necessary to refer such report to the court.

A law enforcement officer may take, or cause to be taken, a child into custody without a court order if there is probable cause to believe that the child is abused or neglected and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order pursuant to RCW 13.34.050. The law enforcement agency or the department of social and health services investigating such a report is hereby authorized to photograph such a child for the purpose of providing documentary evidence of the physical condition of the child. [1999 c 176 § 33. Prior: 1987 c 450 § 7; 1987 c 206 § 5; 1984 c 97 § 5; 1981 c 164 § 3; 1977 ex.s. c 291 § 51; 1977 ex.s. c 80 § 28; 1975 1st ex.s. c 217 § 5; 1971 ex.s. c 302 § 15; 1969 ex.s. c 35 § 5; 1965 c 13 § 5.]

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**Findings—Purpose—Severability—Conflict with federal requirements—1999 c 176:** See notes following RCW 74.34.005.

**Severability—1984 c 97:** See RCW 74.34.900.

**Effective dates—Severability—1977 ex.s. c 291:** See notes following RCW 13.04.005.

**Purpose—Intent—Severability—1977 ex.s. c 80:** See notes following RCW 4.16.190.

**Severability—1971 ex.s. c 302:** See note following RCW 9.41.010.

**26.44.053 Guardian ad litem, appointment—Examination of person having legal custody—Hearing—Procedure.** (1) In any judicial proceeding under this chapter or chapter 13.34 RCW in which it is alleged that a child has been subjected to child abuse or neglect, the court shall appoint a guardian ad litem for the child as provided in chapter 13.34 RCW. The requirement of a guardian ad litem may be deemed satisfied if the child is represented by counsel in the proceedings.

(2) At any time prior to or during a hearing in such a case, the court may, on its own motion, or the motion of the guardian ad litem, or other parties, order the examination by a physician, psychologist, or psychiatrist, of any parent or child or other person having custody of the child at the time of the alleged child abuse or neglect, if the court finds such an examination is necessary to the proper determination of the case. The hearing may be continued pending the completion of such examination. The physician, psychologist, or psychiatrist conducting such an examination may be required to testify concerning the results of such examination and may be asked to give his or her opinion as to whether the protection of the child requires that he or she not be returned to the custody of his or her parents or other persons having custody of him or her at the time of the alleged child abuse or neglect. Persons so testifying shall be subject to cross-examination as are other witnesses. No information given at any such examination of the parent or any other person having custody of the child may be used against such person in any subsequent criminal proceedings against such person or custodian concerning the alleged abuse or neglect of the child.

(3) A parent or other person having legal custody of a child alleged to be abused or neglected shall be a party to any proceeding that may impair or impede such person's interest in and custody or control of the child. [1997 c 386 § 28; 1996 c 249 § 16; 1994 c 110 § 1; 1993 c 241 § 4. Prior: 1987 c 524 § 11; 1987 c 206 § 7; 1975 1st ex.s. c 217 § 8.]

**Application—Effective date—1997 c 386:** See notes following RCW 13.50.010.

**Intent—1996 c 249:** See note following RCW 2.56.030.

**Conflict with federal requirements—1993 c 241:** See note following RCW 13.34.030.

**26.44.056 Protective detention or custody of abused child—Reasonable cause—Notice—Time limits—Monitoring plan—Liability.** (1) An administrator of a hospital or similar institution or any physician, licensed pursuant to chapters 18.71 or 18.57 RCW, may detain a child without consent of a person legally responsible for the child whether or not medical treatment is required, if the circumstances or conditions of the child are such that the detaining individual has reasonable cause to believe that permitting the child to continue in his or her place of residence or in the care and

custody of the parent, guardian, custodian or other person legally responsible for the child's care would present an imminent danger to that child's safety: PROVIDED, That such administrator or physician shall notify or cause to be notified the appropriate law enforcement agency or child protective services pursuant to RCW 26.44.040. Such notification shall be made as soon as possible and in no case longer than seventy-two hours. Such temporary protective custody by an administrator or doctor shall not be deemed an arrest. Child protective services may detain the child until the court assumes custody, but in no case longer than seventy-two hours, excluding Saturdays, Sundays, and holidays.

(2) Whenever an administrator or physician has reasonable cause to believe that a child would be in imminent danger if released to a parent, guardian, custodian, or other person or is in imminent danger if left in the custody of a parent, guardian, custodian, or other person, the administrator or physician may notify a law enforcement agency and the law enforcement agency shall take the child into custody or cause the child to be taken into custody. The law enforcement agency shall release the child to the custody of child protective services. Child protective services shall detain the child until the court assumes custody or upon a documented and substantiated record that in the professional judgment of the child protective services the child's safety will not be endangered if the child is returned. If the child is returned, the department shall establish a six-month plan to monitor and assure the continued safety of the child's life or health. The monitoring period may be extended for good cause.

(3) A child protective services employee, an administrator, doctor, or law enforcement officer shall not be held liable in any civil action for the decision for taking the child into custody, if done in good faith under this section. [1983 c 246 § 3; 1982 c 129 § 8; 1975 1st ex.s. c 217 § 9.]

**Severability—1982 c 129:** See note following RCW 9A.04.080.

**26.44.060 Immunity from civil or criminal liability—Confidential communications not violated—Actions against state not affected—False report, penalty.** (1)(a) Except as provided in (b) of this subsection, any person participating in good faith in the making of a report pursuant to this chapter or testifying as to alleged child abuse or neglect in a judicial proceeding shall in so doing be immune from any liability arising out of such reporting or testifying under any law of this state or its political subdivisions.

(b) A person convicted of a violation of subsection (4) of this section shall not be immune from liability under (a) of this subsection.

(2) An administrator of a hospital or similar institution or any physician licensed pursuant to chapters 18.71 or 18.57 RCW taking a child into custody pursuant to RCW 26.44.056 shall not be subject to criminal or civil liability for such taking into custody.

(3) Conduct conforming with the reporting requirements of this chapter shall not be deemed a violation of the confidential communication privilege of RCW 5.60.060 (3) and (4), 18.53.200 and 18.83.110. Nothing in this chapter shall be construed as to supersede or abridge remedies provided in chapter 4.92 RCW.

**26.44.180 Investigation of child sexual abuse—Protocols—Documentation of agencies' roles.** (1) Each agency involved in investigating child sexual abuse shall document its role in handling cases and how it will coordinate with other local agencies or systems and shall adopt a local protocol based on the state guidelines. The department and local law enforcement agencies may include other agencies and systems that are involved with child sexual abuse victims in the multidisciplinary coordination.

(2) Each county shall develop a written protocol for handling criminal child sexual abuse investigations. The protocol shall address the coordination of child sexual abuse investigations between the prosecutor's office, law enforcement, the department, local advocacy groups, and any other local agency involved in the criminal investigation of child sexual abuse, including those investigations involving multiple victims and multiple offenders. The protocol shall be developed by the prosecuting attorney with the assistance of the agencies referenced in this subsection.

(3) Local protocols under this section shall be adopted and in place by July 1, 2000, and shall be submitted to the legislature prior to that date. [1999 c 389 § 4.]

**26.44.185 Investigation of child sexual abuse—Revision and expansion of protocols—Child fatality, child physical abuse, and criminal child neglect cases.** (1) Each county shall revise and expand its existing child sexual abuse investigation protocol to address investigations of child fatality, child physical abuse, and criminal child neglect cases and to incorporate the statewide guidelines for first responders to child fatalities developed by the criminal justice training commission. The protocols shall address the coordination of child fatality, child physical abuse, and criminal child neglect investigations between the county and city prosecutor's offices, law enforcement, children's protective services, local advocacy groups, emergency medical services, and any other local agency involved in the investigation of such cases. The protocol revision and expansion shall be developed by the prosecuting attorney in collaboration with the agencies referenced in this section.

(2) Revised and expanded protocols under this section shall be adopted and in place by July 1, 2008. Thereafter, the protocols shall be reviewed every two years to determine whether modifications are needed. [2007 c 410 § 3.]

**Short title—2007 c 410:** See note following RCW 13.34.138.

**26.44.190 Investigation of child abuse or neglect—Participation by law enforcement officer.** A law enforcement agency shall not allow a law enforcement officer to participate as an investigator in the investigation of alleged abuse or neglect concerning a child for whom the law enforcement officer is, or has been, a parent, guardian, or foster parent. This section is not intended to limit the authority or duty of a law enforcement officer to report, testify, or be examined as authorized or required by this chapter, or to perform other official duties as a law enforcement officer. [1999 c 389 § 9.]

**Findings—Intent—1999 c 389 § 9:** "The legislature finds that the parent, guardian, or foster parent of a child who may be the victim of abuse or neglect may become involved in the investigation of the abuse or neglect. The parent, guardian, or foster parent may also be made a party to later court

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proceedings and be subject to a court-ordered examination by a physician, psychologist, or psychiatrist. It is the intent of the legislature by enacting section 9 of this act to avoid actual or perceived conflicts of interest that may occur when the parent, guardian, or foster parent is also a law enforcement officer and is assigned to conduct the investigation of alleged abuse or neglect concerning the child." [1999 c 389 § 8.]

**26.44.195 Negligent treatment or maltreatment—Offer of services—Evidence of substance abuse—In-home services—Initiation of dependency proceedings.** (1) If the department, upon investigation of a report that a child has been abused or neglected as defined in this chapter, determines that the child has been subject to negligent treatment or maltreatment, the department may offer services to the child's parents, guardians, or legal custodians to: (a) Ameliorate the conditions that endangered the welfare of the child; or (b) address or treat the effects of mistreatment or neglect upon the child.

(2) When evaluating whether the child has been subject to negligent treatment or maltreatment, evidence of a parent's substance abuse as a contributing factor to a parent's failure to provide for a child's basic health, welfare, or safety shall be given great weight.

(3) If the child's parents, guardians, or legal custodians are available and willing to participate on a voluntary basis in in-home services, and the department determines that in-home services on a voluntary basis are appropriate for the family, the department may offer such services.

(4) In cases where the department has offered appropriate and reasonable services under subsection (1) of this section, and the parents, guardians, or legal custodians refuse to accept or fail to obtain available and appropriate treatment or services, or are unable or unwilling to participate in or successfully and substantially complete the treatment or services identified by the department, the department may initiate a dependency proceeding under chapter 13.34 RCW on the basis that the negligent treatment or maltreatment by the parent, guardian, or legal custodian constitutes neglect. When evaluating whether to initiate a dependency proceeding on this basis, the evidence of a parent's substance abuse as a contributing factor to the negligent treatment or maltreatment shall be given great weight.

(5) Nothing in this section precludes the department from filing a dependency petition as provided in chapter 13.34 RCW if it determines that such action is necessary to protect the child from abuse or neglect.

(6) Nothing in this section shall be construed to create in any person an entitlement to services or financial assistance in paying for services or to create judicial authority to order the provision of services to any person or family if the services are unavailable or unsuitable or if the child or family is not eligible for such services. [2005 c 512 § 6.]

**Finding—Intent—Effective date—Short title—2005 c 512:** See notes following RCW 26.44.100.

**26.44.200 Methamphetamine manufacture—Presence of child.** A law enforcement agency in the course of investigating: (1) An allegation under \*RCW 69.50.401(a) relating to manufacture of methamphetamine; or (2) an allegation under RCW 69.50.440 relating to possession of ephedrine or any of its salts or isomers or salts of isomers, pseudoephedrine or any of its salts or isomers or salts of isomers,

[Title 26 RCW—page 147]

# WASHINGTON STATE ATTORNEY GENERAL

**October 06, 2014 - 4:19 PM**

## Transmittal Letter

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Court of Appeals Case Number: 45748-2

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Objection to Cost Bill

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# WASHINGTON STATE ATTORNEY GENERAL

October 06, 2014 - 4:22 PM

## Transmittal Letter

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Court of Appeals Case Number: 45748-2

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