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NO. 57214-8-I

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

KATHIE COSTANICH,

Respondent,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES
FOR THE STATE OF WASHINGTON,

Appellant.

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I. INTRODUCTION

The Department of Social and Health Services (“DSHS” or “Department”) seeks review of the Superior Court’s order reversing the Department’s final administrative decision in the above-captioned matter. Kathie Costanich operated a foster home and cared for some of the most severely abused and neglected children in the foster care system. The Department revoked her foster care license and made a finding that she had emotionally abused the children¹ because she had, on a routine basis, used profanity to intimidate the children; telling them, among other phrases: “Just go clean your fucking room,” “Get your fucking asses up here,” “Get your fucking ass upstairs and do the laundry” and calling one child a “fucking bitch” and “fucking cunt.” Substantial evidence in the record and applicable law support the Department’s decision. The Department respectfully requests that the Superior Court decision be reversed and the Department’s final administrative decision be affirmed.

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¹ This case involves two separate actions that are based on the same factual information. One action is the revocation of Ms. Costanich’s foster care license pursuant to RCW chapter 74.15. The second action is an administrative finding that emotional abuse took place in the home. This finding was made pursuant to federal and state law. See discussion infra at 28-9.

II. ASSIGNMENT OF ERROR

A. Assignment of Error.

The Superior Court erred in reversing the Review Decision and Final Order of the DSHS Board of Appeals, and reinstating the Initial Decision by the Administrative Law Judge (hereafter "ALJ"), because there was substantial evidence to support the Department's factual findings, and the Department made no error of law, nor did the Department act arbitrarily or capriciously. The Court also erred by awarding attorney fees to Ms. Costanich.

B. Issues Pertaining to Assignment of Error.

(1) Whether the Superior Court committed error when it did not affirm the Department's decision that Ms. Costanich's verbal assaults on the children in her foster home violated foster care licensing regulations.

(2) Whether the Superior Court committed error when it did not affirm the Department's decision that Ms. Costanich's verbal assaults on the children in her foster home constituted emotional abuse.

(3) Whether substantial evidence in the record supported the factual findings in the DSHS Board of Appeals' Review Decision and Final Order.

(4) Whether Ms. Costanich met her burden of proof that the Department's action was in error or was arbitrary and capricious.

(5) Whether Ms. Costanich should receive attorney fees pursuant to the Equal Access to Justice Act. RCW 4.84.350.

III. STATEMENT OF THE CASE

A. The Foster Children in the Home.

When the allegations of emotional abuse were made, Ms. Costanich had six children in her home: Frank, age 17, Kevin, age 15, John, age 12, Patrick, age 10, Elizabeth, age 8, and Barbara, age 4. RP v. 1 at 78.² Ms. Costanich knew that these children had significant problems. *Id.* at 96. The Costanich home received approximately \$81,000 per year to care for the children and also received case aides, respite care and contracted providers for the children. AR at 3548, RP v. 1 at 82.

Prior to his placement in the Costanich home, Frank had grown up in a chaotic and abusive environment. Frank, at age 11, was placed in protective custody by the police. Frank had reported that his mother was using cocaine and hallucinating, and at one point, his stepfather had broken his mother's nose. His sister also reported sex abuse and that a friend of the stepfather was videotaping sex between adults and children.

² There are nineteen volumes of transcripts from the hearing below. They will be referred to by their volume number and page number, e.g. RP v. _ at _. The exhibits are part of the certified agency record provided to the court and they are consecutively numbered. References to the exhibits and other documents will be "AR at _."

AR at 806-7. According to social work reports, Frank has problems with verbal and physical aggression and interaction with his peers. AR at 795-812.

Kevin has been in the foster care system since 1996. His family life was described as “brutal and chaotic” with chronic instability, exposure to criminal behavior, drugs and sexual acts. His behavior was sexually aggressive and defiant. He received sexually aggressive youth therapy and in 1999 was placed in a Children’s Long-Term Inpatient Placement (CLIP)³ at Child Study and Treatment Center (CSTC). AR at 971-972. At CSTC, Kevin was diagnosed as having post traumatic stress disorder, remitting; major depression, improving; conduct disorder, related to long history of abuse; enuresis⁴, improving. AR at 1303.

John has mental health diagnoses of oppositional defiant disorder, depression, anxiety and attention deficit hyperactivity disorder. He has a bed-wetting problem, poor social skills and is physically and sexually aggressive. John is developmentally delayed and was originally placed in care because of allegations of sexual abuse. Within months of his placement in 1995, at age 6, the foster parent reported that he had

³ CLIP beds are highly specialized placements for children with severe mental health problems. They are limited in number and provide psychiatric inpatient care to children through the county mental health system. See <http://www.clipadministration.org/cliphome.html> (viewed March 3, 2006).

⁴ Enuresis is the medical term for bed-wetting during sleep.

attempted to have a dog lick his penis, touched another child inappropriately and engaged in acts of verbal and physical aggression with other children. AR at 2441-2459, 2468-69.

Patrick was originally placed in protective custody with his four siblings after they had shoplifted at a local store, returned home and set a mattress on fire. The children called 911. The police officers who responded to the fire reported that it was

“...the worst home they had ever seen . . .there was a terrible odor and it was covered in garbage and feces such that the floor could not be seen. There were soiled diapers scattered around the house. According to the police report the toilet was broken and apparently some type of styrofoam cup was being used as a scoop to scoop feces out of the toilet and into the sink...” AR at 2231.

Patrick was whipped and choked by his father and had nightmares and suicidal thoughts. He is in a self contained class for seriously behaviorally disturbed children. AR at 2180. His psychological evaluation stated that he is a “depressed and anxious boy” who has an “extremely negative self image that includes feeling devalued, rejected and inferior.” AR at 2254.

Elizabeth (“Izzie”) and Barbara are siblings and were the youngest children in the home. Izzie experienced considerable exposure to alcohol during her entire gestation period and has a “serious neurophysiological/neuropsychological disorder characterized by

neurological, language, learning, social and psychological issues.” AR at 3395-98. Their mother was a vagrant and prostitute. Izzie suffered from profound physical and emotional neglect. She had diagnostic impressions of dysthymic disorder⁵, mood disorder, sleep disorder, attention deficit hyperactivity disorder and a learning disorder. *Id.* She was taking a wide range of medications, receiving special education and being monitored for the need for anti-depressant and anti-anxiety medication. *Id.* Barbara was placed with the Costanich family at birth and, thus far, has no major developmental or mental health concerns. AR at 3524-26.

B. Procedural History.

Kathie Costanich was a licensed foster care parent in the State of Washington for over twenty years. RP v. 1 at 76. She cared for up to eight children at a time and these children were all victims of physical and sexual abuse and serious neglect in their biological homes. They suffered from severe behavioral problems, were sexually aggressive, developmentally delayed and medically fragile.

Kevin was a foster care child in the Costanich home. On July 10, 2001, the Department received a referral from Kevin’s therapist stating

⁵ Persons with dysthymic disorders experience a chronically depressed mood for at least two years; in children they may be irritable rather than depressed and the mood lasts at least a year. Some of the following symptoms are present: poor appetite, overeating, insomnia, low self-esteem, poor concentration and feelings of hopelessness. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 345 (4th Ed. 1994)

that Kevin had observed Ms. Costanich choking another foster child while at a lake vacation property in the summer of 2000. Kevin also reported that Ms. Costanich told Patrick, an African-American child in the home, to “move his black ass” and grabbed Patrick by the front of his neck. Kevin additionally reported that Ms. Costanich had a “potty mouth” and used words such as “cunt and fuck.” AR at 3391-94.

Sandy Duron was assigned by the Department to conduct an investigation of the allegations. Ms. Duron interviewed the children in the home, Ms. Costanich, and other individuals, such as case aides who had worked in the home. She issued a comprehensive report, concluding that the allegations of physical abuse in the home were unfounded, but the allegations of emotional abuse were “founded.”⁶ AR at 3329-3343.⁷

On December 18, 2001, the Department informed Ms. Costanich of the decision finding that she emotionally abused the children. AR at 3352. After an internal review, the Department upheld the finding of emotional abuse and Ms. Costanich requested an administrative hearing. AR at 3353. On August 16, 2002 the Department revoked Ms. Costanich’s foster care license based on the allegations of emotional

⁶ The Department, pursuant to RCW-26.44.050, has a duty to investigate allegations of child abuse and neglect. See *infra* at 28-9.

⁷ This report is called the “Summary Assessment” and contains the allegations, the records reviewed, summaries of the interviews conducted and conclusions regarding the allegations.

abuse. AR at 3359-76. She appealed the revocation of her license and both matters were heard by an Administrative Law Judge (“ALJ”).

The ALJ issued an Initial Decision overturning the Department’s decision. AR at 224-48. The Department appealed this decision and the Review Judge reversed the Initial Decision. AR at 1-80. The Review Judge correctly concluded that there was substantial evidence to support the contention that Ms. Costanich had sworn at the children in her home and that the Department’s finding of emotional abuse and the revocation of the Costanich foster license should be upheld. Ms. Costanich filed a Petition for Judicial Review in Superior Court, which reversed the final administrative decision of the Department and awarded her attorney fees pursuant to The Equal Access to Justice Act, RCW 4.84.350.

C. The Review Decision.

The Review Judge conducted an exhaustive review of the entire record and wrote an eighty (80) page opinion explaining his decision that there was substantial evidence to support the finding of emotional abuse and the revocation of the Costanich foster care license. AR at 1-80.⁸

The Review Judge determined that the allegations regarding threatening Frank, calling Elizabeth a “bitch” and a “cunt”, telling Patrick to get his “black ass” upstairs and swearing at the children were supported

⁸ For the convenience of the court the decision is attached as Appendix A.

by evidence in the record. This conclusion was based on the admissions of Ms. Costanich and a careful comparison of each child's statements with statements by adult witnesses. AR at 4-10, 23-51.

There is no factual dispute that Ms. Costanich told Patrick to "get his black ass upstairs." RP v. 1 at 120-22, v. 18 at 22, 67. Ms Costanich claims that it was part of a "joking situation" while another foster mother, who is African-American, was in the home. She told at least six other people about what she said, sometimes with Patrick present. RP v. 7 at 115; v. 13 at 167; v.15 at 66, 121, 175; v. 16 at 205. Patrick has been the subject of racial slurs at school and at home and, as recounted above, was an anxious and depressed child. RP v. 1 at 112-13; AR 3427 (he was called a "nigger" by the other children). Patrick stated that the term "black ass" was used to refer to him, and two of the other children reported hearing Ms. Costanich use the term "black ass" in the home. AR at 3394 (Kevin), AR at 3407 (Patrick) and AR at 3410 (Elizabeth).

The threat to kill Frank was based on Ms. Costanich's own admission that she "probably" cursed at him although she could not recall what she said, and consistent reports by Kevin who stated that she said "Stop fucking lying, tell the truth, I'll kill you bastard," and Frank who stated that "She told me to stop fucking lying and if I didn't tell the truth

about whether I was looking at Sarah she was going to kill me.” RP v. 1 at 110, AR at 3420, 3394.

The statements calling Elizabeth a “fucking bitch” and “fucking cunt” were based on a number of different sources. Costanich denied using the word “bitch” apart from the phrase “son of a bitch.”⁹ The “bitch” statements were corroborated by two adults who stated they were made when Elizabeth was in another room. RP v. 3 at 144, v. 9 at 116¹⁰. Four of the children, including Elizabeth, reported hearing the language used to refer to Elizabeth. Frankie, without prompting, stated that Costanich called Elizabeth a “fucken (sic) bitch”. AR at 3419. John made the exact same statement. AR at 3423. Barbara told Ms. Duron that Costanich tells Izzie to “Clean your dirty room you stupid bitch.” AR at 3417. Elizabeth reported being told to “go to your fucken (sic) room you little bitch” and “go to your room you little bitch,” and “Go clean your room you little bitch or sometimes says fucken (sic) bitch.” AR at 3410, 3411, 3415. As the Review Judge pointed out, the adults may have thought the children didn’t hear the references (or that they would not

⁹ Costanich originally denied using the word bitch except in the context of “son of a bitch.” RP v. 1 at 118. However, during the hearing four adults testified that they had heard her use the word “bitch.” AR at 24. Costanich later admitted using the word but infrequently. RP v. 18 at 66. An aide and good friend in the home reported that the aides, and Costanich, regularly referred to each other as “bitch” and that one of the aides was known as “little bitch.” RP v. 15 at 75. Ms. Costanich confirmed this. RP v. 1 at 65-6.

¹⁰ The Review Judge did not rely at all on the explicit statements of Crystal Hill, an aide in the home, that Kathie Costanich called Elizabeth a “bitch” and “cunt” and that this swearing really bothered Ms. Hill. AR at 3388-89, AR at 41.

report them) but the children were well aware of how Elizabeth was referred to. AR at 39.

Elizabeth also stated to the investigator that Costanich called her a “fucken (sic) cunt” and that she liked one of the aides because she did not call her a “fucken (sic) cunt or fucken (sic) bitch.” AR at 3410, 3412.

When the investigator was interviewing Frank about whether Costanich used certain phrases with Barb and Izzie, Frank spontaneously volunteered that the foster mother referred to Izzie as a “fucken (sic) bitch and cunt.” AR 3419. Kevin also heard Kathie tell Izzy, who was 8 years old, “Clean your fucking room you cunt.” AR at 3394. All of these reports were made independently and without knowing what the other children said.

There is no dispute that Ms. Costanich used foul language on a regular basis; in her opening statement, Ms. Costanich’s attorney stated that her client swore like a “truck driver” and everybody knew it.¹¹ RP v.1 at 60. Ms. Costanich, during her testimony stated:

Q. Do you acknowledge that you had a long time habit of swearing?

A. I definitely acknowledge that I’ve had a long time swearing. It’s never been a secret.

RP v. 1 at 117.

¹¹ A friend also stated that “Kathie has a truck driver mouth.” AR at 3389.

Q. Prior to the ceremony¹² then, did you regularly swear in the presence of your foster children?

A. Yes. Id. at 121.

Q. Okay. Is that representative of how you might be speaking to the children when you were using swear words?

A. I think I've only said "fucking asses" – I think that was almost an example for my sister that I said that like that. But most of the time it was "Just get your fucking ass in gear, just do it." Id. at 124.

Q. Have you ever called the children names when they think you can't hear them?

A. I don't know. Have I walked away and said "Fucking son of a bitch"? Plenty of times... Id. at 124.

Ms. Costanich was concerned enough about her swearing to take part in a Native American ceremony to stop swearing. Id. at 121. Many of the people who frequented her home stated that she swore on a regular basis. AR at 3422, 3426, 3740, 3389. A friend who had known her for ten years testified that she had heard her swear "frequently" and that she would use phrases like "Get your fucking ass upstairs and clean your room" when speaking to the children. RP v. 17 at 36-8. Ms. Costanich's husband, along with other witnesses, testified that the children were aware that she swore. RP v. 18 at 18.

After a complete review of the record, the Review Judge found that Costanich directed profanity at the children on many occasions. AR at 10.

¹² Ms. Costanich participated in a Native American ceremony to help her stop swearing. This ceremony took place some time after the allegations of emotional abuse were made by the Department. RP v. 1 at 121.

In order to make this finding the Review Judge compiled a list of the phrases reported by the children and the phrases reported by the adults, including Ms. Costanich. These lists contained striking similarities regarding the terms used and the context. The children reported the following phrases:

“Fuck you, go to your fucking room.” - P, Exhibit D-18, p. 4¹³
“Go clean your fucking room.” - P, Tr., v. 3, p. 62
“Clean your fucking room you little bitch.” - E, Ex. D-18, p. 7
“Fuck you, go to your fucking room.” - E, Ex. D-18, p. 7
“Clean your fucking room you cunt.” - K, Ex. D-15, p. 4
“Go to your room stupid fucker, bitch.” - B, Ex. D-19, p. 4
“Clean your dirty room you stupid bitch.” - B, Ex. D-19, p. 4
“Go to your fucking room.” - F, Exhibit D-20, p. 1
“Go clean your room little bitch, fucking bitch.” - E, Ex. D-19, p. 3
“Fuck you, shut your fucking mouth.” - J, Ex. D-21, p. 1
“Shut up little bitch, fucker, fucking bitch.” - E, Ex. D-19, p. 3
“Fucking bitch.” - F, Ex. D-20, p. 1
“Fucking bitch.” - J, Ex. D-21, p. 2
“You son of a bitch.” - P. Tr., v. 3, p. 6

The adults reported the following phrases:

“Get your fucking asses up here.” – App., Tr., v. 1, p. 118
“Let me get my fucking kitchen done.” – App., Tr., v. 1, p. 123
“Just get your fucking ass in gear.” – App., Tr., v. 1, p. 124
“Get this shit picked up.” - Ms. Hill, Tr., v. 3, p. 130
“I want that fucking room cleaned.” - Ms. Robertson, Tr., v. 14, p. 174
“Finish cleaning up your fucking room.” - Mrs. Robertson, Ex. A 99, p. 2¹⁴
“Damn it, I just got the damned thing fixed.” - Ms. Isley, Tr., v 15, p. 203
“Get your fucking ass upstairs and clean your room.” - Ms.

¹³ The exhibits cited by the Review Judge can be found in the record at AR 3391-3423.

¹⁴ This is located at AR 3740.

Carlton, Tr., v. 17, p. 37
“Go clean your fucking room.” – App.’s husband, Tr., v. 18, p. 84
“Get your fucking ass upstairs and do your laundry.” – App., Tr.,
v. 18, p. 64
“Just go clean your fucking room.” - App, Tr., v. 18, p. 65
“Go to your fucking rooms.” - T. McLaughlin, Ex. D-10, p. 1¹⁵
“Fucking son of a bitch.” (walking away) – App., Tr., v. 1, p. 124
“Fucking son of a bitch.” (walking away) - Ms. Hill, Tr., V. 3, p.
184
“What a little bitch.” (walking away) - S. McLaughlin, Tr., v. 9, p.
116
“Fucking bitch.” (walking away) - Ms. Hill, Tr., v. 3, p. 144
“That little bastard . . .” (in another room) - Ms. Isley, Tr., v. 15,
p. 201

Based on this evidence the Review Judge correctly concluded that Ms. Costanich had engaged in language that was emotionally abusive and that she had violated several licensing regulations and her foster care license should be revoked.

IV. STANDARD OF REVIEW

Judicial review of the Department’s decision below is governed by Washington’s Administrative Procedure Act (hereafter “APA”), RCW 34.05.570. In her Petition for Review Ms. Costanich has the burden of establishing the invalidity of agency action. RCW 34.05.570(1)(a).

“In reviewing administrative actions, [the appellate] court sits in the same position as the Superior Court, applying the standards of the APA directly to the record before the agency.”

¹⁵ This is located at AR 3379.

Tapper v. Employment Sec. Dep't, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The appellate court applies its review directly to the final administrative decision of the agency, rather than the underlying initial order. Tapper, 122 Wn.2d at 404-06 (citing RCW 34.05.464(4)).

A. Scope Of Review For The DSHS Review Judge.

The APA provides that a reviewing officer shall exercise all the decision-making power he or she would have had if that officer had presided over the initial hearing. RCW 34.05.464(4), Tapper, 122 Wn.2d at 404. In rendering a Review Decision and Final Order, the DSHS Board of Appeals Review Judge, as reviewing officer, “has the power to make his or her own findings of fact and in the process set aside or modify the findings of the ALJ.” Id. The Tapper court held that it is the findings by the reviewing officer, “to the extent they modify or replace the findings of the ALJ, which are relevant on appeal.” Id. at 406. In this matter the Review Judge provided extensive findings and reasoning for his findings. He explained why the Initial Decision was wrong when it did not find that the children were subjected to derogatory and humiliating comments and commands. The Review Judge applied the facts to the applicable law and correctly concluded that Ms. Costanich had emotionally abused the children and had violated multiple foster care regulations.

B. Review Of Factual Matters.

Review of factual findings must be based solely on the administrative record. RCW 34.05.558. Unchallenged findings of fact are treated as verities on appeal. Tapper, 122 Wn.2d at 407. The court will affirm challenged findings that are supported by “evidence that is substantial when viewed in light of the whole record before the court.” Bond v. Dept. of Social & Health Svcs., 111 Wn. App. 566, 572, 45 P.3d 1087 (2002); see also RCW 34.05.570(3)(e). Substantial evidence is that which is sufficient “to persuade a fair-minded person of the truth or correctness of the order.” City of Redmond v. Central Puget Sound Growth Management Hearings Board, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998) (citations omitted), see also Albertson’s Inc. v. Employment Security Dept., 102 Wn. App. 29, 15 P.3d 153 (2000).

The court must give deference to the party who prevailed at the administrative hearing below, and must accept “the factfinder’s views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.” Sunderland Family Treatment Serv. v. City of Pasco, 127 Wn.2d 782, 788, 903 P.2d 986 (1995); William Dickson Co. v. Puget Sound Air Pollution Control Agency, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). In this case, the prevailing party was the

Department and the relevant fact finder was the Review Judge. Tapper, 122 Wn.2d at 404-06.

C. Review Of Questions Of Law.

In reviewing a question of law, the reviewing court is restricted to the determination of whether the agency has “erroneously interpreted or applied the law.” RCW 34.05.570(3)(d). Issues of law are subject to de novo review by the court. Bond, 111 Wn. App. at 572. The court may substitute its judgment for that of the agency. However, where interpretation of law is in the agency’s area of expertise, the court accords substantial deference to the agency on review. City of Redmond, 136 Wn.2d at 46.

D. Review Of Order As Arbitrary And Capricious.

Washington’s APA allows a reviewing court to reverse an agency decision when the decision is arbitrary or capricious. Bond, 111 Wn. App. at 572; RCW 34.05.570(3)(i). This standard is highly deferential, and the court “will not set aside a discretionary decision absent a clear showing of abuse.” ARCO v. Util. & Transp. Comm’n, 125 Wn.2d 805, 812, 888 P.2d 728 (1995) (citations omitted). Action by an agency is arbitrary and capricious if it is “willful and unreasoning and taken without regard to the attending facts or circumstances.” Hillis v. Dep’t of Ecology, 131 Wn.2d 373, 383, 932 P.2d 139 (1997). “Where there is room for two opinions,” a decision reached after due consideration is not arbitrary and capricious

even if the reviewing court believes it to be in error. Hillis, 131 Wn.2d at 383.

V. SUMMARY OF ARGUMENT

This case is about a foster parent's emotional abuse of some of the most abused and vulnerable children in the child welfare system. Ms. Costanich was paid by the State to supervise, nurture and care for these children. A foster care license is a privilege, not a right. The legislature has declared that in foster care licensing actions the "health, safety and well-being of children must be the paramount concern..." Laws of 1995, ch. 302 §1. The licensing regulations provide that a foster home must provide a nurturing environment for children and must not use humiliating discipline practices. Ms. Costanich violated these regulations.

The children she cared for suffered from bed-wetting, fetal alcohol syndrome, anxiety, mood disorders and conduct disorders because of the abuse of their parents. Knowing this, Ms. Costanich nevertheless threatened to kill one child, told another to move his "black ass," called a young girl a "bitch" and a "cunt" and used phrases such as "Get your fucking asses up here," "Clean your fucking room you little bitch," and "Just go clean your fucking room."

These insidious verbal assaults violate common decency. More important, they are violations of foster care licensing regulations and

constitute emotional abuse according to Washington statutes and regulations. These assaults may not leave marks or bruises on a child's body but they are demeaning and humiliating; they corrode a child's psyche and damage their sense of security, safety, well-being and self-worth. They pose a grave risk to a child's emotional and social development and are unacceptable.

VI. ARGUMENT

A. The Department Properly Revoked Ms. Costanich's Foster Care License Because Her Humiliating and Degrading Language Directed At The Foster Children Violated Multiple Licensing Regulations.

There is overwhelming evidence that Ms. Costanich directed profane language at her foster children on a regular basis. She violated regulations that prohibit humiliating discipline and require foster homes to provide a nurturing and supportive environment. The Department properly applied the law to the facts of this case and revoked her foster care license.

1. The Department's Findings that Costanich Directed Profanity at the Foster Children in Her Home is Supported by Substantial Evidence.

The Review Judge's eighty page opinion documents his reasoning for the findings that support revocation of Ms. Costanich's foster care license. In it, he addressed the evidence presented, the rules regarding

hearsay and explanations about each child witness' ability to observe and remember events. AR 25-28. He reached his decision after a thorough review of the entire administrative record. He examined all of the statements on a case by case basis. He rejected many of the allegations made by the children. The majority of the children's statements that he relied on were corroborated by adult witnesses. AR at 23-51.

It is uncontested that Ms. Costanich swore at the children and swore extensively. During the administrative hearing, she admitted it freely and stated that it was no secret that she swore. RP v. 1 at 117. She admitted to a therapist that she knew it was a problem. AR at 3429. A woman who knew Ms. Costanich for 11 years stated that she had to stop bringing her young son to the home because of all the "yelling and profanity." AR at 3426.

The evidence supports the finding that Ms. Costanich swore at the children and used profanity to intimidate them. Costanich herself admitted using the phrases "Get your fucking asses up here," "Just get your fucking ass in gear," "Just go clean your fucking room," among others. RP v. 1 at 118, 124, v. 18 at 65. Other adults confirmed that she used statements that were clearly directed at the children: "Finish cleaning up your fucking room," AR at 3740. "Get this shit picked up," RP v. 3 at 130, "Go clean your fucking room." RP v. 18 at 84. Ms. Costanich's friend of many years

testified that she swore “frequently” and a typical phrase she used was “Get your fucking ass upstairs and clean your room.” RP v. 17 at 37.

The children’s statements to the investigator were similar and mimicked the language the adults used. Several of the children stated that Ms. Costanich swore all the time. AR at 3389-90; 3408; 3405, 3415. The children, without any prompting, were able to repeat the same phrases that they had all heard over and over: “Fuck you, go to your fucking room.” (Patrick) AR at 3407; “Clean your fucking room you little bitch,” (Elizabeth) AR at 3409; “Go to your fucking room,” (Frank) AR at 3419, “Go to your room stupid fucker, bitch,” (Barbara) AR at 3416, “Fuck you shut your fucking mouth,” (John) AR at 3422, “Clean your fucking room you cunt.” (Kevin) AR at 3394. The evidence is overwhelming that these phrases were used frequently toward the children and in their presence.

Ms. Costanich’s threat to Frank – “I’ll kill you, you bastard” – was made in a rage after she had to separate Frank from a young aide to whom he was being physically aggressive. Costanich could not remember what she said, but both boys who were present remembered. AR at 3391-92.

The statement to Patrick about getting his “black ass” up here was admitted by Ms. Costanich. She stated she used it only once or twice in a joking manner. However, she repeated the story constantly. Supra at 9. The children, in their interviews, repeated the language. Patrick, when

asked if Kathie used bad words replied “yeah, Kathie does all the time.” When asked what she says, he stated “She says things like ‘Fuck you, go to your fucking room, get your black ass down to your room.’” AR at 3407. Apparently Patrick did not consider the “black ass” reference a joking matter because he specifically included it in his response to a question about what “bad words” Kathie used.

Finally, there was substantial evidence that Elizabeth was called a “bitch” and a “cunt.” Two of the children spontaneously reported that Elizabeth was the person who was referred to in this manner and in similar contexts. Elizabeth confirmed that she was referred to in this manner.

Supra at 9-11.

There is ample evidence in the record to support the Review Judges’s finding that Ms. Costanich directed humiliating and insulting language on a regular basis toward the children in her foster home.

2. The Department Correctly Revoked the Costanich Foster Care License Because Ms. Costanich’s Verbal and Emotional Abuse of the Foster Children Violated Foster Care Licensing Regulations.

Being a foster parent for this state’s most vulnerable children is a privilege and not a right. Laws of 1995, ch. 302, §1. The Washington State legislature has declared that the purpose of the foster care system is “[t]o safeguard the health, safety, and well-being of children . . . receiving

care away from their own homes, which is *paramount* over the right of any person to provide care . . .” RCW 74.15.010 (1). (emphasis added).

When the legislature amended the statute regulating the foster care system in 1995 it stated:

The legislature further declares that no person or agency has a right to be licensed under this chapter to provide care for children. *The health, safety, and well-being of children must be the paramount concern in determining whether to issue a license to an applicant, whether to suspend or revoke a license, and whether to take other licensing action.*

Children placed in foster care are particularly vulnerable and have a special need for placement in an environment that is stable, safe, and nurturing. For this reason, *foster homes should be held to a high standard of care*, and department decisions regarding denial, suspension, or revocation of foster care licenses should be upheld on review if there are reasonable grounds for such action.

Laws of 1995, ch. 302, §1 (emphasis added).

The Department may revoke a foster care license if the licensee has failed to comply with the statutory or regulatory framework governing foster homes. RCW 74.15.130(1). Normally, the Department must prove its case by a preponderance of the evidence in denying or revoking a license *but not* for foster home licenses. RCW 74.15.130(3). The revocation of a foster home license “shall be upheld if there is *reasonable cause* to believe that . . . the licensee lacks the character, suitability or competence to care for children . . .” or fails to follow applicable regulations. RCW 74.15.031(2); Cf. RCW 74.031 (3) (emphasis

added). The legislature intended that vulnerable children, who have already suffered abuse and neglect, would receive high quality care in their foster homes.¹⁶

The Secretary of the Department has been delegated the authority to promulgate minimum regulations regarding the operation of foster homes.¹⁷ RCW 74.15.030. There are specific regulations regarding discipline that were violated by the Costanich home. Foster homes must provide written statements regarding the forms of discipline used in the home. WAC 388-148-0475. Ms. Costanich violated this regulation by not reporting her “disciplinary” techniques in a written statement to the Department. As the Review Judge points out she could not do so because they would be unacceptable *per se*. AR at 75.

Most importantly, certain forms of discipline are prohibited:

(1) You must not use cruel, unusual, frightening, unsafe or humiliating discipline practices, including but not limited to:

¹⁶ The administrative regulations regarding foster homes, in order to ensure safety, include training requirements, record keeping, health and safety regulations for firearms, first aid, transporting children and fire safety, physical requirements for housing, medical care and management, clothing and hygiene. WAC 388-148 et. seq. Foster parents are responsible for “the protection, care, supervision and nurturing of the child in placement,” RCW 74.13.330, and the legislature has established programs such as preservice training, respite care, a complaint resolution process and child care to assist foster parents in their roles. See RCW 74.13.250 et. seq.

¹⁷ The Review Judge relied on six different regulations in upholding the decision to revoke the license. This section will address the violation of four of those regulations. The other two regulations both relate to protecting children from abuse and neglect. See WAC 388-148-0095 and 388-148-0420. If the court upholds the Department’s findings regarding emotional abuse which is addressed in this brief, *infra* at 28-34, then the revocation of the foster home license would also be upheld pursuant to the aforementioned regulations.

- ...
- (f) Name calling, using derogatory comments;
- (g) Threatening the child with physical harm;
- (h) Threatening or intimidating the child.

WAC 388-148-0470.

The Costanich foster home violated this regulation by engaging in name calling, using derogatory comments and threatening a child. AR at 73. There is substantial evidence that profanity and name calling were common, everyday occurrences in the home. When they were asked whether profanity was used in the home, at least two witnesses laughed before they answered yes. AR 3419, 3426. Kevin reported the verbal abuse because it was getting worse and he was concerned that Ms. Costanich had an anger management problem. AR at 3391.

The common sense conclusion that this use of profanity is unacceptable in a licensed foster home is supported by the holding in Morgan v. DSHS, 99 Wn. App. 148, 992 P.2d 1023 (2000), review denied, 141 Wn.2d 1014 (2000), where the court found that a foster parent called a child “bitch” and swore at the foster children in the home. Id. at 155. In Morgan, the court held that

... the ALJ’s conclusion that Ms. Morgan used profanity with the children is also supported by the record. Her use of profanity to address the children constitutes

humiliating discipline in violation of WAC 388-73-046(2).

Id.¹⁸

Certainly, the profanity used by Ms. Costanich and directed at the children amounts to humiliating discipline. She engaged in name calling, including the use of derogatory comments, and she used profanity to threaten or intimidate children in her foster home. See WAC 388-148-0470.

Foster care regulations also require that a foster parent have the ability and personality to “meet the physical, mental, emotional, and social needs of the children...” in their care and to provide a “nurturing, respectful, supportive, and responsive environment.” WAC 388-148-0035 (1) and (5).¹⁹ Another regulation also authorizes the Department to revoke a license if the foster parent fails “to provide a safe, healthy and nurturing environment...” WAC 388-148-0100 (c).²⁰ Ms. Costanich violated all of these regulations.

By threatening Frank, swearing at the children and calling them names such as “black ass,” “bitch,” “little bitch,” and “cunt,” Ms. Costanich demonstrated that she did not have the ability to meet the

¹⁸ This WAC is essentially the same as the WAC 388-148-1470 that Ms. Costanich has violated.

¹⁹ This WAC was amended on May 6, 2004. WSR 04-08-073. The substance is the same.

²⁰ This WAC was amended on May 6, 2004. WSR 04-08-073. The substance is the same.

“mental, emotional and social” needs of the children. Four of the children suffered from depression or mood disorders yet they were constantly subjected to humiliating and insulting language. Several of the boys were sexually aggressive yet they were subjected to sexually inappropriate language. Patrick, the only African-American in the home, has a psychological evaluation that states he is anxious, has a negative self-image and feels inferior, yet Ms. Costanich refers to his “black ass” when telling him what to do. Ms. Costanich was oblivious to the demeaning and negative effects of the language used in the home.

Likewise, the above examples demonstrate that Ms. Costanich also failed to provide a safe, healthy and nurturing environment for the children. Her constant yelling, her profanity and her verbal assaults were, by their very nature, not nurturing. There is substantial evidence in the record that Ms. Costanich failed to meet the licensing standards established by the state and that revocation of her license was appropriate.

3. Ms. Costanich Failed to Meet Her Burden Of Proof That The Department’s Action Was Arbitrary Or Capricious

As noted above, the court will only set aside a discretionary decision if there is a “clear showing of abuse.” ARCO, 125 Wn.2d at 812. To reverse the Department, the court must determine that the

Department's decision was "willful and unreasoning and taken without regard to the attending facts or circumstances." Hillis, 131 Wn.2d at 383.

Ms. Costanich did not meet this high burden. The discretionary decision by DSHS to revoke Ms. Costanich's license was thoroughly reasoned, based on the facts and circumstances well-established throughout the record in the hearing below. Accordingly, the Department's revocation can not be set aside.

Ms. Costanich failed to meet her burden of providing any grounds for setting aside the Department's order revoking her license. Accordingly, the Superior Court had no legal basis to reverse the Department's order or reinstate the ALJ's initial decision. RCW 34.05.570(3); RCW 34.05.574(1). In the context of vulnerable adults, the court in Bond held that "One of our government's most sacred duties is to protect those unable to care for themselves." Bond, 111 Wn. App. 575. Here, as in Bond, the Department is required to protect foster children from verbal and emotional abuse in a foster home. Therefore the decision by the Department should be affirmed.

B. Substantial Evidence In the Record Supports The Department's Conclusion that Costanich's Degrading and Humiliating Remarks toward the Foster Children Constituted Emotional Abuse.

1. The Child Abuse Prevention and Treatment Act Requires Investigation and Reporting of Abuse and Neglect.

In order to receive federal funds for certain child welfare programs, the State of Washington complies with a federal statute, the Child Abuse Prevention and Treatment Act (CAPTA), which requires certain actions to be taken toward the goal of preventing child abuse and neglect. 42 U.S.C. § 5106a.²¹ Washington's CAPTA provisions are included in RCW chapter 26.44, the statute that governs the investigation and reporting of child abuse and neglect.

Pursuant to RCW 26.44.050, the Department is obligated to investigate a report of alleged abuse or neglect. When an investigation is completed the alleged perpetrator is notified of the Department's findings and their right to contest the findings. RCW 26.44.100. If the Department determines the allegation to be founded, a person named as the alleged perpetrator in the report may request an adjudicative hearing. RCW 26.44.125(4).²² The legislative intent is that the reports will be

²¹ 42 U.S.C. § 5106a governs grants to the states for child abuse and neglect prevention and treatment programs. Under it, the Secretary shall make grants to the states for purposes of assisting the states in improving the child protective services system of each state in areas such as the intake, assessment, screening and investigation of reports of abuse and neglect. *See* 42 U.S.C. § 5106a(1).

²² The standard of proof is preponderance of the evidence. RCW 26.44.020(19) states that "unfounded means available information indicates that, more likely than not, child abuse or neglect did not occur." Therefore, founded means that, more likely than not, child abuse or neglect did occur.

documented in an effort to prevent further incidents of abuse and to safeguard the general welfare of children. RCW 26.44.010.²³

2. Ms. Costanich's Verbal Assaults Against the Foster Children Constitute Emotional Abuse Under Washington Law.

Ms. Costanich directed profane and derogatory remarks at the children in her foster home and the Department properly concluded that these verbal assaults constitute emotional abuse under Washington law. RCW 26.44.020 defines "abuse or neglect" as "the injury, sexual abuse, sexual exploitation, negligent treatment, or maltreatment of a child by any person under circumstances which indicate that the child's health, welfare, and safety is harmed, excluding conduct permitted under RCW 9A.16.100." RCW 26.44.020(12). The statute defines negligent treatment or maltreatment as "an act or omission that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to the child's health, welfare, and safety." RCW 26.44.020(15).

The Review Judge relied on state regulations promulgated to implement the above statutes, which provide:

²³ The information can be used by the Department in determining whether persons can care for children as foster parents or child care providers, but is not available to others unless the subject of the investigation authorizes the release. RCW 26.44.100(2)(b); WAC 388-15-073(3); RCW 13.50.100.

Abusive, neglectful, or exploitive acts defined in RCW 26.44.020 include . . .

(d) Committing acts which are cruel or inhumane regardless of observable injury. Such acts include, but are not limited to, instances of extreme discipline demonstrating a disregard of a child's pain and/or mental suffering . . .

(g) Engaging in actions or omissions resulting in injury to, or creating a substantial risk to the physical or mental health or development of a child. . .

WAC 388-15-130(3)(d) and (g).²⁴ The Review Judge applied the facts to the above definitions and correctly concluded that the Department had produced substantial evidence to demonstrate that there was emotional abuse. AR at 57-69.

The totality of the verbal abuse in the home constitutes emotional abuse of the children. When they entered the home it was well known that they suffered from depression, behavioral problems and learning disabilities. Nevertheless, all of the children were subjected to derogatory and demeaning language on a regular basis. The referral from Kevin's therapist was prompted by the fact that things were getting worse and Ms. Costanich had anger problems. AR at 3391-92. As the Review Judge

²⁴ WAC 388-15-130 was repealed on February 10, 2003. WSR 02-15-098 and 02-17-045. The Review Judge applied the WAC in existence at the time of the hearing. Costanich would also be in violation of the new regulation which does not require a showing of actual physical or emotional harm and prohibits consistent behavior that creates a risk to a child's emotional development. WAC 388-15-009 (5)(c).

properly pointed out, there is no requirement that actual harm be demonstrated. AR at 64. See WAC 388-15-130(3)(d) and (g).

The threat to Frank was “menacing, intimidating, disrespectful and insulting.” AR at 64. Telling Patrick to move his “black ass,” calling Elizabeth a “bitch” and “cunt,” and swearing at the children using the following phrases: “Clean your fucking room you little bitch,” “Fuck you, go to your fucking room,” “Clean your fucking room you cunt,” “Clean your dirty room you stupid bitch,” “Fucking bitch” and “Fuck you, shut your fucking mouth,” constituted cruel and abusive statements that created a substantial risk to the mental health and development of the children. AR at 69. The children knew that they were being threatened and demeaned. However, there was nothing they could do about it; they were helpless because they relied on Kathie Costanich for everything – food, shelter, nurturing, and medical appointments.

The children recognized when they were treated differently by an adult. Elizabeth liked an aide in the home because she did not call her abusive names. AR at 3412. Frank stated that Costanich got “mad a lot and yelled a lot but you get used to it.” AR at 3423. The emotional consequences of the anger, the yelling and the profanity on young psyches are obvious. The best evidence of this is that a friend of Ms. Costanich *stopped* bringing her young child to the foster home with her because of

all of the yelling and profanity. AR at 3426. This happened *even though* the mother was with the child to protect him and he was not the subject of the yelling and profanity. The abused and neglected foster children were alone in the home with no adults to protect them or to remove them from the situation, or console them after the verbal assaults.

Words can hurt. They can injure even emotionally healthy individuals. These vulnerable children were subjected to derogatory, insulting and demeaning remarks and mental cruelty that created an increased risk to their already vulnerable psyches and constituted emotional abuse. These verbal assaults were cruel and they created a substantial risk to the mental health and development of the children in the home. These actions constitute emotional abuse pursuant to WAC 388-15-130 (3)(d) and (g).

3. The Department's Decision That Ms. Costanich Emotionally Abused the Foster Children was not Arbitrary or Capricious.

The decision to uphold the finding of emotional abuse was not “willful or unreasoning. . .” Hillis, 131 Wn.2d at 383. As with the revocation of Ms. Costanich’s foster care license, respondent has failed to meet her burden of proving that the Department’s CAPTA finding was arbitrary or capricious. There was a pattern of humiliating, demeaning and belittling the children which supports the Department’s finding that

Ms. Costanich's acts constituted emotional abuse of the children. Specifically, these acts are: Costanich threatened to kill Frank; Costanich told Patrick to move his black ass; Costanich called Elizabeth names; and Costanich swore at the children. Threatening to kill, using derogatory names, calling a young girl a bitch and cunt and swearing at children constitutes emotional abuse. These acts are cruel and presented a substantial risk to the children's mental health and development. Ms. Costanich's friend would not subject her own young child to the yelling and profanity prevalent in the home. AR at 3426. The foster children who had already suffered abuse and neglect should not have been subjected to this treatment. There was nothing arbitrary or capricious about the Department's finding of emotional abuse.

C. The Court Misapplied the Equal Access to Justice Act in Awarding Attorney Fees to Ms. Costanich.

This court awarded attorney fees to Ms. Costanich as the prevailing party under RCW 4.84.350(1), however, the award of fees to Ms. Costanich was inappropriate under the Equal Access to Justice Act and applicable law.

1. The Equal Access to Justice Act Requires the Citizens of the State to Pay Attorney Fees Only Under Unusual Circumstances.

Washington follows the American rule concerning attorney fees under which such fees are not recoverable absent specific statutory authority, contractual provision, or recognized grounds in equity.

Wagner v. Foote, 128 Wn.2d 408, 416, 908 P.2d 884 (1996). A statute awarding attorney fees against the state must be strictly construed because it constitutes a waiver of sovereign immunity and an abrogation of the American rule on attorney fees. Rettkowski v. Dep't of Ecology, 76 Wn. App. 384, 389, 885 P.2d 852 (1994).

The state legislature provided for a limited award of attorney fees against the state under the Equal Access to Justice Act (EAJA), RCW 4.84.340-.360, using the federal EAJA as a model. The U.S. Supreme Court, construing the federal EAJA, held that the award of attorney fees under the statute should be "unusual." Full Gospel Portland Church, et al. v. Thornburgh, 927 F. 2d 628, 632 (D.C. Cir. 1991).²⁵

2. The Department was Substantially Justified in its Action, therefore an Award of Attorney Fees is Inappropriate Under the EAJA.

The legislature requires those claiming attorney fees under Washington's EAJA to meet specific requirements before such expenses are awarded:

Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, *unless the court finds that the agency action was substantially justified* or that circumstances make an award unjust. A qualified party

²⁵ Federal decisions are considered persuasive authority in construing state acts which are similar to federal acts. Inland Empire Disturb. Sys., Inc. v. Utilities & Transp. Comm'n, 112 Wn. 2d 278, 283, 770 P.2d 624 (1989).

shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

RCW 4.84.350(1) (emphasis added).

DSHS must show that its action was “substantially justified” by only a preponderance of the evidence. See U.S. v. Yoffe, 775 F.2d 447, 450 (1st Cir. 1985).

The term “substantially justified” has been defined by the Court of Appeals to mean that the State’s position has a reasonable basis in law and fact. H&H P’Ship v. State, 115 Wn. App. 164, 62 P.3d 510 (2003). It has further been defined to mean “justified in substance or in the main—in other words, justified to a degree that could satisfy a reasonable person.” Plum Creek Timber Co. v. Washington State Forest Practices Appeals Bd., 99 Wn. App. 579, 595, 993 P.2d 287 (2000); Alpine Lakes Prot. Soc’y v. Department of Natural Res., 102 Wn. App. 1, 19, 979 P.2d 929 (1999).

Cases addressing the Federal EAJA (which uses the same language as Washington’s EAJA)²⁶ agree that a government action is substantially justified where it is a matter upon which “reasonable people could differ.” See Pierce v. Underwood, 487 U.S. 552, 108 S. Ct. 2541, 2541, 101 L. Ed. 2d 490 (1988). As argued above, the Department’s imposition of revocation in this matter was supported by multiple violations of licensing requirements.

²⁶ See 28 U.S.C. § 2412(d)(1)(A).

The Legislature charged DSHS with establishing and enforcing standards for the care of vulnerable children in foster care homes. RCW 74.15 et. seq. The legislature also expressed its intent that the “health, safety, and well-being of vulnerable children must be the paramount concern in determining whether to issue a license to an applicant, whether to suspend or revoke a license, or whether to take other licensing actions.” Laws of 1995, ch. 302, §1. In light of the violations in this case, and the legislative mandate to enforce the foster home regulations with an eye toward the protection of abused and neglected children, the Department’s choice of remedy in this case was substantially justified.

The Court therefore incorrectly awarded attorney fees to Ms. Costanich and should be reversed. The pervasiveness of the profanity and the inappropriate treatment of vulnerable foster children left the Department with no choice but to revoke Ms. Costanich’s foster care license and find that she had emotionally abused the children in her home.

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VII. CONCLUSION

For the foregoing reasons, the Department requests the Court to affirm the Department's final administrative decision which revoked Ms. Costanich's foster care license and found that the children were subjected to emotional abuse.

RESPECTFULLY SUBMITTED this 9th day of March, 2006.

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APPENDIX A

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BOARD OF APPEALS

MAILED

AUG 11 2004

DSHS
BOARD OF APPEALS

In Re:)	Docket No. 04-2002-L-0195
)	
KATHIE COSTANICH)	REVIEW DECISION AND FINAL ORDER
11836 SE 284 TH STREET)	
KENT, WA 98031)	
)	Children's Administration- CPS Review
Appellant)	Child Care Agencies- Foster Care

I. NATURE OF ACTION

1. The Department notified the Appellant that she was the subject of a founded allegation of child abuse. The Department also revoked the Appellant's foster care license. The Appellant requested a hearing to contest both Department actions. Administrative Law Judge Rynold C. Fleck held a hearing over 19 days from September 23, 2002, through January 14, 2003, in response to the Appellant's request. The Administrative Law Judge (ALJ) issued the Initial Decision on January 16, 2004, overturning the Department's finding of abuse and revocation of the Appellant's license.

2. The Department filed a Petition for Review of the Initial Decision on March 8, 2004, within the extended time permitted by Order issued February 12, 2004. The Department assigned error to 13 Initial Findings of Fact and 35 Initial Conclusion of Law. The Department argued that the Initial Decision should be reversed.

3. The Appellant filed a Motion to Strike the Department's Petition for Review on March 16, 2004. The Appellant asked the Board of Appeals to strike all or part of the Department's Petition for Review.

4. The Board of Appeals issued an Order Denying Motion to Strike Petition for Review on March 24, 2004.

5. The Appellant filed a Response to the Department's Petition for Review on April 8, 2004, within the extended time permitted by Order issued March 9, 2004. The

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Appellant responded to each of the Department's assignments of error. The Appellant argued that the Initial Decision should be affirmed.

II. FINDINGS OF FACT

The undersigned has amended several Initial Findings of Fact below. Findings that are not supported by the evidence in the record have been struck through. Additional findings are indicated by underlining. The changes to the Initial Findings of Fact are explained in detail in the Conclusions of Law below. The remaining Initial Findings of Fact are supported by the evidence in the record and are adopted pursuant to RCW 34.05.464(8).

1. Kathie Costanich, the Appellant, was a licensed foster care provider in the State of Washington. She has been providing foster care for over 20 years.

2. Most recently, in the 1990s, DSHS has placed violent youth, sexually aggressive youth and medically fragile infants in her care.

3. On July 12, 2001, DSHS, in response to a referral, commenced an investigation of the Appellant who was the subject of that referral.

4. On July 14 ~~10~~, 2001, Kevin [K], a foster child in the Appellant's home, reported to his counselor, Richard Crabb, that he had observed Ms. Costanich choking another foster child, F, while at a lake vacation property in the Summer of 2000. K additionally reported that Ms. Costanich told an African-American foster child, Patrick [P], in her care to "move his Black ass" and grabbed ~~and choked him~~ P by the front of his neck. K also reported to Mr. Crabb that Ms. Costanich had a "potty mouth," using such terms as "cunt, asshole, and fuck."

5. Sandra Duron was assigned to perform the Child Protective Services (CPS) investigation. At the time in question, the Appellant had six children in her care: Frank [F], age 17, K, age 14 ~~15~~, John [J], age 13 ~~12~~, P, age 9 ~~10~~, Elizabeth [E], age 8, and Barbara [B], age 4. Each of the children suffered from specific and significant behavioral, physiological, or developmental problems. K, J, and P were identified as sexually active aggressive youth. J

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was also identified as developmentally delayed. Most of the children had been with the Appellant and her spouse as foster children for many years: F (10 years), K (2 1 1/2 years), J (5 4 years), E and B (since their infancy). P was a relatively new arrival, having been there for several months.

6. As a result of the DSHS investigation, DSHS issued ~~a letter~~ two letters to Ms. Costanich dated December 18, 2001, stating that the allegations of abuse had been determined to be founded for emotional abuse, but inconclusive for physical abuse. The Appellant requested internal Departmental review of the founded emotional abuse finding.

7. On March 14, 2002, DSHS issued a notice to the Appellant informing her that the ~~referral alleging abuse and neglect was determined founded~~ internal Department review had upheld the founded emotional abuse finding and that she had a right to a fair hearing to challenge that determination.

8. The Appellant filed a request for a fair hearing and administrative review of that determination by letter dated March 24, 2002.

9. On August 16, 2002, DSHS informed Ms. Costanich that her foster care license had been revoked.

SUMMER INCIDENT

10. During the summers, the Appellant and her foster children would make an annual trip to Lake Cavanaugh where there was a cabin owned by the Appellant's sister's husband. The Appellant and her foster children had a standing invitation and would spend as much as two months out of every summer at the cabin on the lake. The Appellant did this not only because she enjoyed it but because it was such a fun and good experience for the foster children. The lake has a great deal to offer, including swimming, boating, fishing, and the like. The Appellant and her natural family had been going to the cabin traditionally and the Appellant

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considered her foster children as the same as her children and never left the foster children when she went to the lake, but took them with her.

11. During the summer of 2000, when the family was at the lake an incident occurred with F, who was a foster child. A dispute arose between F and Sarah McLaughlin because F was utilizing the binoculars to intrude upon Sarah while she was sun bathing on the floating dock. After trying verbally to get F to stop, Sarah came back from the floating dock and confronted F, who made suggestive comments to her.

12. It was Kathie Costanich's experience with F that, when angry, he could display his anger physically. It became clear that a confrontation was imminent. Ms. Costanich restrained F by putting him in a chest lock, that is, putting her arm around the upper portion of his body, the top of his shoulders, to pull him away from Sarah. The Appellant did not grab F with her hands in a choking manner, but did physically restrain him when she believed he was about to take physical action with respect to Sarah. The confrontation had been building with name calling between Sarah and F. When verbal admonitions failed to stop that interaction and it became clear that physical violence was imminent, Ms. Costanich interceded. Ms. Costanich did not leave any lasting red marks or injure F in any fashion.

After the Appellant restrained F, F denied that he had been looking at Sarah McLaughlin with binoculars. The Appellant yelled, "Stop fucking lying, tell the truth, I'll kill you bastard."
This Finding is based on the consistent statements of F and K. F and K reported identical phrases while the adults who were present provided inconsistent accounts. The Appellant admitted yelling and swearing at F after the restraint, but the Appellant could not remember what she said. Sarah McLaughlin denied that the Appellant was swearing at F, but the Appellant has admitted swearing at F. Ms. Ewy denied that the Appellant said anything to F, but the Appellant has admitted yelling and swearing at F.

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13. Ms. Costanich had no intention of injuring F, but was only interceding, using her best judgment, knowing F's behavior. F had been with Ms. Costanich for some time and she was aware of the nature of his explosive behavior.

K alleged that Appellant's restraint left a mark on F's neck that lasted for two hours after the restraint incident. This allegation was not proven because the other people who were present at the lake (the Appellant, Ms. Ewy, and Sarah McLaughlin) did not see any marks on F's neck.

K alleged that the Appellant choked F until he turned blue. This allegation was not proven because no other witness saw F turn blue and F did not describe any of the symptoms associated with turning blue.

PHYSICAL PUNISHMENT

14. P is an African-American child who was born on June 30, 1991. He was placed in Ms. Costanich's care in November of 2000 and continued to reside with her until August of 2001. P was placed in Ms. Costanich's care by Darren L. Thames, a Social Worker III in the African-American Children's section (see Volume IV, Transcript of Hearing, page 5). P was placed with Ms. Costanich because she had the facilities to deal with sexually active aggressive youth. P had been so determined.

15. Mr. Thames knew Ms. Costanich by reputation and by prior placement. He believed that Ms. Costanich's foster home was a very good one.

16. P never complained to Mr. Thames about the Costanich foster care. See Volume IV, Transcript of Hearing, page 11. P never complained to Mr. Thames about his treatment at the Costanich home. He never reported being demeaned in any way. Nor did he report having urine-soaked sheets or diapers rubbed in his face. He did report, upon interview, that the term "Black Ass" had been used in reference to him. Mr. Thames believed he had a **000005** good relationship with P. He was surprised when allegations were made about Ms. Costanich.

~~He would have expected P. to report any problems. See Volume IV, Transcript of Hearing,~~
page 41.

17. ~~P himself testifies that during his tenure at Ms. Costanich's, he had a bed-wetting problem. He~~ P had a bed wetting problem and would sometimes hide his wet sheets and diapers. This resulted in his room smelling of urine. The boys' rooms at the Costanich's home were downstairs. The urine smell would permeate the entire area. The other boys would harass P and complain to Ms. Costanich.

18. The only rule that Ms. Costanich had with respect to the children who would wet their beds was that it was their obligation to clean it up. They would have to take off the sheets and pads and take them to the laundry. ~~P reports that, in fact, Ms. Costanich had raised her voice to him~~ P because of his failure to follow the rules about wet sheets.

19. ~~P does report that, on one occasion, Ms. Costanich touched his face with urine-soaked sheets. J and P alleged that the Appellant rubbed urine-soaked sheets in J's face as a form of punishment for wetting the bed. The Appellant denied that she rubbed urine-soaked sheets in J's face. This allegation was not proven because there were many discrepancies in the statements of J and P. J first said that he saw the Appellant rub urine-soaked sheets one time. In response to a leading question, J later said that the rubbing happened "sometimes" but he was not sure if he ever saw it. P never disclosed a sheet rubbing incident until he was asked a leading question during the hearing. P also did not mention any sheet rubbing incident when he talked to Ms. Dudley just after the sheet rubbing allegedly occurred.~~

P alleged that the Appellant slapped him, choked him, and picked him up by his shirt. K and J alleged that they heard or heard about this incident. The Appellant denied that she slapped, choked, or picked up P. This allegation was not proven because the statements of the children contained significant discrepancies. K and J were not sure what they had heard. P first stated that the Appellant slapped him and choked him because of wet sheets. P later

denied that the Appellant ever slapped him. P then alleged that the Appellant picked him up and dropped him because he got in trouble at school. P did not mention any such incident when he talked to Ms. Dudley just after the slapping and choking incident allegedly occurred.

20. P, under direct examination at the hearing, denied that he had ever heard Ms. Costanich use the term "nigger." Volume III of Transcript of Hearing, at pages 51 and 52. He confirmed on cross-examination that the wet sheets were not just placed up in his face demanding that he look at what he had done by hiding his wet sheets, but in fact, the sheets were put on his face. See Volume III of Transcript of Hearing, page 64. E alleged that the Appellant kicked her in the back. The Appellant denied that she kicked E. This allegation was not proven because E's statements changed over time and were not corroborated. E first alleged that the Appellant kicked her in private where no one else could see. E later alleged that the Appellant kicked her in the kitchen in front of everybody. No other witness reported seeing the Appellant kick E.

E alleged that the Appellant pulled her hair. The Appellant denied that she pulled E's hair. This allegation was not proven because there was no evidence in the record to corroborate E's allegation that the Appellant pulled her hair as a form of punishment. K alleged that he saw the Appellant pull E's hair. However, K could not have seen the Appellant pull E's hair because K was not allowed in E's room. The Appellant once accidentally pulled E's hair in an attempt to restrain E to prevent her from endangering herself.

E and B alleged that the Appellant spanked B. The Appellant denied that she spanked B. This allegation was not proven because the statements of both children changed significantly over time and the children's statements contradicted each other. E stated that the Appellant spanked B. When E was interviewed a second time, she did not mention spanking as one of the punishments in the home. B first stated that she got spanked by the Appellant. B

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later alleged that the Appellant and her husband spanked E, not B. There was no evidence in the record to corroborate E's or B's allegations.

LANGUAGE

21. A number of the parties gave testimony who had direct contact with Kathie Costanich acknowledged that she used profanity a great deal. P and J who testified confirmed this. Kathie Costanich confirms this. A number of the professionals including social workers, doctors, and teachers who place children, denied that they ever heard Ms. Costanich use profanity. The same is true of the medical professionals who testified.

22. The evidence is clear that Ms. Costanich used a number of swear words, including "fuck," "bitch," "asshole," and the like.

23. The witnesses also confirmed that ~~all of the foster children~~ also J, K, and F swore. The evidence is clear that those children came into the family swearing. Many had heard and used many of the terms that Ms. Costanich used throughout their lifetimes.

24. Ms. Costanich had a specific rule regarding use of profanity. That rule was that none was allowed by the children. If profanity was heard, discipline was meted out. The discipline varied from time-out to loss of video games to hand-copying pages from the encyclopedia.

25. A particular concern to DSHS found on performing this investigation was that Ms. Costanich used the term "Black Ass" with respect to P. ~~The only direct evidence comes from Ms. Costanich and Rosetta Robertson.~~ When P was not following instruction Ms. Robertson (who is African American) stated that had ~~Kathie Costanich~~ Ms. Robertson's mother been P's biological mother ~~she, Ms. Robertson's mother~~ would have told P when he was being obstinate about performing some job to "get his Black Ass to his room." It was after that comment, that Ms. Costanich utilized the term "Black Ass" when directing P to perform some duty. It was not part of her general communication with him, and ~~she reports that it happened~~ the Appellant

used the term when directing P once or twice. The Appellant also told the story of her conversation with Ms. Robertson to Mr. Yarkovsky, Ms. Dudley, Ms. Ewy, Ms. Minear, Ms. Cassaday-Smith, and Ms. Mayer.

J alleged that the Appellant said "Do it over you lazy nigger." The Appellant denied saying "Do it over you lazy nigger." This allegation was not proven because J later stated that he did not recall the Appellant making any such statement. No other witness heard the Appellant use the word "nigger" except to explain to the children that they should not use the word "nigger."

26. Ms. Robertson acknowledged pursuing Ms. Costanich as a resource and became a good friend or part of the family. Ms. Robertson reports that, although she heard profanity it was never directed at the children. The terms were directed to an object or at an extreme situation. See Ms. Robertson's testimony on December 11, 2002 (Transcript of Proceedings not ordered).

27. ~~All of the adult witnesses confirmed that Ms. Costanich's use of profanity, although in hearing distance of the children, was never directed at the children.~~ The Appellant called E a bitch. This Finding is based on the consistent statements of two adults and four children. Ms. Hill and Sarah McLaughlin heard the Appellant call E a bitch and a fucking bitch, although they thought E could not hear the Appellant. E, F, J, and B had heard the Appellant call E a bitch.

The Appellant called E a cunt. This Finding is based on the statements of three children. The Appellant denied using the word cunt. E, F, and K reported hearing the Appellant call E a cunt or a fucking cunt. The consistent statements of E, F, and K are more persuasive because E and F previously accurately reported the fact that Appellant called E a bitch. F's statement is particularly persuasive because all of F's statements were proven to be accurate 000009 and there was no reason to doubt F's ability to recall and report events.

The Appellant directed profanity at the children on many occasions. The Appellant said the following phrases to children in her home:

- "Get your fucking assess up here."
- "Let me get my fucking kitchen done."
- "Just get your fucking ass in gear."
- "Get this shit picked up."
- "I want that fucking room cleaned."
- "Finish cleaning up your fucking room."
- "Damn it, E just got the damned thing fixed."
- "Get your fucking ass upstairs and clean your room."
- "Go clean your fucking room."
- "Get your fucking ass upstairs and do your laundry."
- "Just go clean your fucking room."
- "Go to your fucking rooms."
- "Fucking bitch."
- "Clean your fucking room you little bitch."
- "Go clean your fucking room."
- "Fuck you, go to your fucking room."
- "Clean your fucking room you cunt."
- "Go to your room stupid fucker, bitch."
- "Clean your dirty room you stupid bitch."
- "Go to your fucking room."
- "Go clean your room little bitch, fucking bitch."
- "Fuck you, shut your fucking mouth."
- "Shut up little bitch, fucker, fucking bitch."
- "You son of a bitch."
- "Fucking son of a bitch." (said while walking away)
- "What a little bitch." (said while walking away)
- "That little bastard..." (said while walking away)

This Finding is based on the statements of eight adults and six children. The phrases reported by the adults corroborate the phrases reported by the children and vice versa. The phrases

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reported by the adults are similar, and in some cases identical, to the phrases reported by the children.

III. CONCLUSIONS OF LAW

1. **Jurisdiction for Review-** The Petition for Review of the Initial Decision in this matter was timely filed and is otherwise proper. WAC 388-02-0580. Jurisdiction exists to review the Initial Decision and to enter the final agency order. WAC 388-02-0560 to 0600.

ALLEGATIONS

2. This case involves a finding of child abuse and a foster care license revocation that resulted from the finding of child abuse. The two issues before the undersigned are whether the Appellant abused children and, if so, whether the Appellant's foster care license should be revoked. The Department relied on the following 13 allegations to support the abuse finding and the license revocation:

- The Appellant choked F at the lake until he turned blue.
- The Appellant left marks on F's neck that lasted for two hours.
- The Appellant yelled at F, "I'll kill you, you bastard."
- The Appellant rubbed urine-soaked sheets in P's face.
- The Appellant told P to "Get your black ass upstairs."
- The Appellant called E a "fucking bitch."
- The Appellant called E a "fucking cunt."
- The Appellant kicked E in the back.
- The Appellant spanked B.
- The Appellant pulled E's hair.
- The Appellant slapped and choked P.
- The Appellant told J, "Do it over you lazy nigger."
- The Appellant swore at the children in the home.

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GENERAL EVIDENTIARY PRINCIPLES

3. Prior to addressing each individual allegation, the undersigned outlines the general principles that will apply to the factual disputes in this case. The following 10 general evidentiary principles apply to the resolution of the 13 contested allegations.

4. **This decision addresses only the allegations that were contained in the Department's Notice.** In its finding letter and Notice of Revocation, the Department relied on the 13 specific allegations listed above. Therefore, this decision addresses only these 13 specific allegations. The parties elicited testimony about a number of other issues, such as the alleged placement of children in respite care without approval, the alleged failure to provide a supervision plan, and the Appellant's husband's vision problems. Because these allegations were not included in the Notice of Revocation, they are not properly before the undersigned and have not been considered. The finding letter and the Notice of Revocation (Exhibits D-3 and D-8) are the jurisdictional documents in this case. These two documents define and limit the issues to be adjudicated.

5. **The out-of-court statements of the children are admissible.** WAC 388-02-0475(2) states that, in Department hearings, "Admission of evidence is based upon the reasonable person standard. This standard means evidence that a reasonable person would rely on in making a decision." RCW 34.05.452(1) states "Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." Thus, the test for admissibility is a reasonable person test.

6. In this case, the Department sought to admit out-of-court statements from children describing alleged abuse. The sole question to determine admissibility is whether a reasonable person would rely on statements of alleged child victims to determine whether those alleged victims have been abused. The only possible answer to this question is yes. This is the

type of evidence that any reasonable person would use to determine whether abuse has occurred.

7. The Appellant argued in closing that the out-of-court statements the children made to Ms. Duron were not admissible.¹ This argument is not correct. The out of court statements to Ms. Duron satisfy the reasonable person test for admissibility and the statements were admitted during the hearing. Even if these statements may not have been admissible in a civil proceeding, they were admissible in this administrative proceeding. This does not mean that the statements of the children will be persuasive or will be sufficient to support a Finding of Fact. It simply means that the statements of the children are unquestionably admissible in a Department administrative proceeding.

8. **The undersigned cannot base a Finding of Fact on hearsay evidence unless the parties had an opportunity to question or contradict it.** Although WAC 388-02-0475(3) states that the ALJ may admit and consider hearsay evidence, the rule further states "The ALJ may only base a finding on hearsay evidence if the ALJ finds that the parties had the opportunity to question or contradict it." RCW 34.05.461(4) concurs, "Findings may be based on such evidence even if it would be inadmissible in a civil trial. However, the presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. The basis for this determination shall appear in the order." This rule and statute also apply to the undersigned when reviewing an Initial Decision.

9. In this case, Ms. Duron testified about numerous interviews she conducted as part of her investigation. The statements Ms. Duron reported were made outside of the hearing

¹ For example, the Appellant's representative stated there was "No-admissible evidence Ms. Costanich ever said the word cunt." Tr., v. 19, p. 75. This argument is not correct. The evidence of the use of the word cunt, while hearsay, was admissible in this administrative proceeding. The Appellant also argued that Ms. Duron's notes were not admitted for the truth of their content. See Appellant's Response, p. 1. Again, this argument is not correct. Ms. Duron's notes, like her testimony about her interviews, were substantively admissible in this administrative proceeding.

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and were admitted to prove the truth of the matter asserted. The Department did not assert that these statements were non-hearsay or that these statements were exempt from the hearsay rule based on any of the exceptions in Evidence Rules 801-804. Therefore, the statements reported by Ms. Duron are hearsay, would not have been admissible in a civil proceeding, and cannot form the sole basis for a Finding of Fact unless the Appellant had an opportunity to question or contradict the statements. For each allegation that turns on hearsay evidence, the Department must either submit some non-hearsay evidence to corroborate the hearsay evidence or the Department must prove that the Appellant's opportunity to confront witnesses and rebut evidence was not unduly abridged.

10. **While the undersigned must give due regard to the observations of the ALJ, the ALJ failed to record any observations about 48 of the 49 witnesses.** RCW 34.05.464(4) states, "In reviewing findings of fact by presiding officers, the reviewing officers shall give due regard to the presiding officer's opportunity to observe the witnesses." WAC 388-02-0600(1) also states that the undersigned must "consider the ALJ's opportunity to observe witnesses." However, the ALJ must record his/her observations. RCW 34.05.461(3) states, "Any findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified."

11. While the undersigned is cognizant of the need to give great deference to the ALJ's observations of the witnesses, the ALJ in this matter was virtually silent about his observations. Out of 49 witnesses who testified, the ALJ briefly commented on the demeanor of precisely one witness, Sarah McLaughlin. See Conclusion of Law 23. Ms. McLaughlin's testimony consists of 65 pages out of an approximately 3800-page transcript. Thus, the ALJ failed to comment on his observations about the vast majority of witnesses. In particular, the ALJ failed to comment on his observations of the Appellant and the two child witnesses, J and 000014 |

P.² While the ALJ's observations of Sarah McLaughlin are entitled to appropriate deference, the undersigned cannot speculate about the ALJ's observations of the other witnesses. Because the ALJ failed to record observations about the demeanor of other witnesses, the undersigned cannot defer to the ALJ's observations.

12. **The Findings of Fact must resolve all material issues of fact.** RCW 34.05.461(3) states, "Initial and final orders shall include a statement of findings and conclusions, and the reasons and basis therefor, on all the material issues of fact, law, or discretion presented on the record...." In this case, the Department alleged the 13 separate incidents of abuse listed above. These 13 incidents make up the material issues of fact presented in this record. Therefore, the Findings of Fact must resolve each of these 13 material issues.

13. The Initial Findings of Fact did not resolve each of the 13 material issues of fact. Many issues were not addressed in the Initial Findings of Fact. Other issues were identified but not resolved. WAC 388-02-0600(1) states that the review judge may change the Initial Decision to add Findings of Fact when "the ALJ failed to make an essential factual finding." In this case, the ALJ failed to make essential factual findings because the Initial Decision did not resolve all of the material issues of fact. The undersigned has added Findings of Fact, where necessary, to resolve each of the material issues of fact.

14. **The undersigned must amend the Initial Findings of Fact that are not supported by substantial evidence in the record.** WAC 388-02-0600(2) states that the review judge may change the Initial Decision when "The findings of fact are not supported by substantial evidence based on the entire record...." Thus, the undersigned must examine each Finding of Fact to determine if each Finding is supported by substantial evidence in the record.

² The ALJ questioned the reliability of the child witnesses' testimony. See Conclusions of Law 16-24. However, these comments were based on the children's answers, not on the ALJ's observations of the children.

If a Finding is not supported by substantial evidence in the record, then it must be changed on review.

15. The Appellant argued that “there is no allegation that the findings were not supported by substantial evidence in the record, only that they were wrong.” Appellant’s Response, p. 14. The Appellant’s distinction between Findings that are not supported by substantial evidence in record and Findings that are “wrong” is unclear. If a Finding is not supported by substantial evidence in the record, then it is wrong and must be changed. If a Finding is supported by substantial evidence in the record, then it is not wrong and cannot be changed under WAC 388-02-0600(2). In its Petition for Review, the Department argued that numerous Findings of Fact were wrong precisely because they were not supported by substantial evidence in the record. If the Department is correct, then the Findings must be changed.

16. The Appellant argued that “Changing the findings is not authorized on review.” This argument is not correct. WAC 388-02-0600(2) authorizes the undersigned to amend Findings of Fact on review when they are not supported by substantial evidence in the record and the undersigned has done so.

17. **The undersigned cannot consider prior unfounded or inconclusive allegations when adjudicating the Appellant’s appeal.** WAC 388-15-077(1) states, “According to RCW 74.15.130(2)(b), no unfounded, or inconclusive CPS finding of child abuse or neglect may be used to ... deny a license to care for children.”³ This rule applies to this case because the Department has attempted to revoke the Appellant’s license to care for children as a foster parent. Therefore, the undersigned cannot consider any prior allegations that resulted in an inconclusive or unfounded finding.

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³ WAC 388-15-077 was not adopted until February 10, 2003, six months after the Department’s revocation action in this case. WSR 02-15-098 and 02-17-045. However, the statute upon which the rule is based was enacted in 1998. Laws of 1998, ch. 314, § 6.

18. The Department attempted to rely on the Appellant's history of inconclusive and unfounded referrals to support the finding of child abuse in this case and to support the decision to revoke the Appellant's license. Such reliance is expressly prohibited by WAC 388-15-077. Although several Department witnesses attempted to justify the Department's reference to prior inconclusive and unfounded referrals, no Department witness was able to adequately distinguish WAC 388-15-077. In order to consider the Appellant's prior inconclusive and unfounded findings, the undersigned would have to ignore the plain language of WAC 388-15-077. While the Department may feel comfortable relying on prior inconclusive and unfounded findings when assessing risk and making decisions, the Department cannot rely on such findings in the hearing process. Therefore, the undersigned has not considered any prior inconclusive or unfounded findings in deciding this case.

19. **The behavior of the children in this case is of little value in determining whether the children were abused.** The Appellant argued that the children in her home could not have been abused because the children were thriving. The Department argued that the children must have been abused because the children improved when they left the Appellant's home. Neither argument is persuasive for two reasons.

20. First, there was conflicting evidence in the record. Many witnesses testified that the children excelled in the Appellant's home. Transcript (Tr.), v. 3, p. 23; v. 4, p. 36; v. 5, 82; v. 15, p. 196. However, some witnesses also testified that children improved after they left the Appellant's home. For example, Dr. Cowles testified that J did better in the Appellant's home than he had in the past, but that J did even better after he left the Appellant's home. Tr., v. 6, pp. 127, 131, 151. Mr. Heatherington concurred that J made a great deal of progress after he left the Appellant's home. Tr., v. 2, p. 48. In addition, B and E had been in the Appellant's home since infancy, so there is no way to compare the girls' behavior in any other home. **000017** the undersigned could not possibly find that all of the children had reached their optimum level

of functioning in the Appellant's home. Because of the ambiguity in the evidence, the children's behavior has little probative value in resolving the contested issues in this case.

21. Second, the connection between abuse and the resulting behavior is entirely speculative. The Appellant argued that the children could not have been abused because children who have been abused would necessarily exhibit increased behavioral problems. The Department argued that the children must have been abused because some of their behavioral problems decreased after they left the Appellant's home. However, these arguments presume that children are like machines and that all children will have an identical response to the same event. Children, like all humans, are much more complex. There could be an infinite number of reasons for a child's behavior that have nothing to do with the conditions in the child's home.

Dr. Cowles addressed this issue in his testimony:

Kids vary, from my point of view, in terms of their resiliency to [emotional abuse].... There are some children who are highly vulnerable to a certain situation so that if their emotions are discounted in situations where being able to have their feelings heard and understood is very important. There are some kids who- their behaviors will increase in response to that. They will become- they will act out more.

Tr., v. 6, p. 136. As Dr. Cowles explained, children vary in their resiliency. Just as some children may be destroyed by the smallest emotional slight, others may persevere despite significant abuse. Dr. Lund concurred:

I think it's possible for children to cope with virtually any kind of environment. I think there's a literature in the area of resilience that talks about children who survive really awful kinds of horrific things and seem to be relatively undamaged by them.

Tr., v. 8, p. 95. Dr. Cartwright also concurred:

[S]ome kids are more resilient. Some kids have more- are internally more sturdier in their sense of self and defensive network. That- terms such as this that particularly that's directed toward them by an authority figure who's attempting to assert control may not basically be as overwhelmed by the term. Whereas there are those kids again who are not as resilient, those kids who basically are sensitive.

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Tr., v. 4, p. 99. In other words, a child's behavior is not necessarily directly related to or predicted by the conditions in the child's home. Some children are particularly sensitive to abuse while others are remarkably resilient. Based on the statements of the three doctors, it is not possible to work backwards from a child's behavior to determine what is happening in the home. Children act out for many different reasons having nothing to do with abuse.

Conversely, some abused children are stable and highly functioning despite being abused.

Even if all of the children in the Appellant's home improved after they left the Appellant's home, that does not mean that they were being abused. Even if all of the children in the Appellant's home were highly functioning, this does not mean that they were not being abused.

22. Because of the conflicting evidence in the record and the complexity of children's behavior, the behavior of the children is not a reliable predictor of abuse in this case. In addressing the factual disputes below, the undersigned has relied far more on the statements of witnesses than on the perceived behavioral and developmental trends of the children in the home.

23. **Although several adult witnesses raised concerns about the tone and phrasing of Ms. Duron's notes, these concerns do not apply to the children's statements because the children's statements were recorded using near-verbatim reporting.** Several adult witnesses raised concerns about the accuracy of Ms. Duron's interview notes. These witnesses stated that they believed their statements to Ms. Duron had been misrepresented. The Appellant argued that Ms. Duron's notes were inherently unreliable because of the discrepancies cited by the witnesses.

24. As an initial matter, the undersigned notes that all of the adult witnesses who complained of being misrepresented testified during the hearing in this matter. Therefore, the adult witnesses had an opportunity to correct any discrepancies in Ms. Duron's notes and to 000019 ensure that the hearing record accurately reflects their testimony. The Appellant's argument is

not really an argument about the accuracy of the adult interviews because the deficiencies in the adult interviews have already been remedied through the adults' testimony. Rather, the Appellant's argument is an argument about the accuracy of the children's interviews. In other words, the Appellant argues that because there were discrepancies in the adult interview notes, there must also be discrepancies in the child interview notes. By attacking the integrity of the adult interview notes, the Appellant is attacking the integrity of the child interview notes. As explained below, the Appellant's argument is not persuasive.

25. The witnesses who complained about being misrepresented in Ms. Duron's notes were questioned extensively about their disagreements. The Department asked the witnesses if they disagreed with the content of the statements or if they disagreed with the way the statements were written. Most witnesses clarified that their primary concern was the way in which the statements were written. The witnesses who complained about the accuracy of Ms. Duron's notes made the following statements about the notes:

"[Ms. Duron] takes the answer and she twists it a little. She tweaks it. And makes it negative.... It was just everything was tweaked a little." Sarah McLaughlin, Tr., v. 9, p. 123.

"[I]t's kind of basically what- some of the questions are the same. Some of the answers are the same as when we did speak. Most of them, as I've said, just kind of changed a little." Sarah McLaughlin, Tr., v. 9, p. 126.

"[T]he basic content is what we spoke about." Sarah McLaughlin, Tr., v. 9, p. 127.

"I think that [Ms. Duron] was only listening to a piece of [my answers] and not the whole sentence. It was like she was picking a piece out of it and that was what she was hearing and she wasn't hearing the whole sentence...." Ms. Ewy, Tr., v. 13, p. 145.

"It's turned around from how it was actually said but most of the words are in there." Ms. Ewy, Tr., v. 13, p. 168.

"And I guess that's the kind of thing that concerned me, was when I seen this, was it wasn't so much that those weren't the things that necessarily were said, but the way that they were put in that report that concerned me." Ms. Isley, Tr., v. 15, p. 209.

"I guess the best way to state my concerns is it kind of takes on a different tone than what we had actually- or how it was actually said. And I guess that's kind of where my concern is, is it gives it a whole different tone." Ms. Isley, Tr., v. 15, p. 226.

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"Of course the actual words, I could not swear to them being right, wrong or otherwise, but the general gist is, yes, correct." Ms. Minear, Tr., v. 16, p. 200.

"Well, [the summary assessment is] not exactly accurate, but it's kind of like a summary. And it sounds a whole lot worse than what I would have said or how I would have said it." Ms. Minear, Tr., v. 16, p. 187.

"Basically [accurate]. I remember some of the questions and some of the answers. I wouldn't say that it's verbatim, that's for sure. I think a lot of it's been- and maybe when she did this, she wrote down what she was hearing, but it seems like we talked about a lot of things that- and a lot of comments were made that aren't included in here." Ms. Minear, Tr., v. 16, p. 189.

Thus, the concerns of the witnesses focused on the tone and phrasing of the notes rather than the actual content. Although the information was "tweaked a little" or "took on a different tone," it was "basically accurate." There is insufficient evidence in the record to conclude that Ms. Duron's notes are inherently unreliable.

26. The undersigned acknowledges that Ms. Duron reported one exchange that apparently never took place. Ms. Duron reported that Ms. Isley said that the Appellant said she would "chain the little shit to the bed," referring to a child on Ms. Isley's caseload. Exhibit D-23, p. 8. Ms. Isley testified that "This is a statement that I have no clue where it came from. It was not ever even discussed." Tr., v. 15, p. 207. Ms. Isley was adamant that she never made any such statement and she did not recognize any of the details about this statement in Ms. Duron's notes. Thus, Ms. Duron made a serious error when she was transcribing her notes of Ms. Isley's interview. There is no way of knowing where this statement came from but it apparently did not come from Ms. Isley. This error is alarming and does call into question the accuracy of Ms. Duron's notes. However, this error alone is not sufficient to prove that Ms. Duron's notes are inherently unreliable. As explained above, even Ms. Isley stated that her main concern was the tone of Ms. Duron's notes rather than the content.

27. With the exception of the "little shit" statement from Ms. Isley's interview, the 000021 discrepancies in the notes of the adult interviews can be explained by Ms. Duron's note taking

technique for adult witness interviews. Ms. Duron testified that she summarizes the statements of adults rather than attempting to record verbatim information. Tr., v. 6, p. 76. Given that Ms. Duron was not recording every word of her interviews with adults, it is hardly surprising that some of the witnesses disagreed with the tone of Ms. Duron's notes. By summarizing the adult interview statements, Ms. Duron has injected an element of subjectivity into her note taking. Instead of simply reporting the words of each witness, Ms. Duron has presented her abbreviated interpretation of each witness' statement.

28. However, Ms. Duron has removed the element of subjectivity from her interviews with children by using a different process for recording child interviews. Ms. Duron testified that when she interviews children she uses "near-verbatim" reporting. Ms. Duron explained:

When I interview a child, I try to write down every word that the child says during my investigation and my interview. I write my questions down and then I write the near verbatim is as close to verbatim as possible of what the child says.

Tr., v. 4, p. 137; see also Tr., v. 6, p. 57. Thus, there is little chance of misrepresentation because Ms. Duron is recording the child's actual words. By using near-verbatim reporting, Ms. Duron has significantly reduced the risk of error in her child interviews.

29. One child, F, wrote a letter complaining that Ms. Duron put words in his mouth, twisted his words around, and tried to make him say things that were untrue. Exhibit D-19. However, F did not state that anything in Ms. Duron's notes was inaccurate. While F may not have liked Ms. Duron's style of interviewing, F's letter did not challenge Ms. Duron's near-verbatim transcript of F's interview. There was no other evidence in the record to challenge the accuracy of Ms. Duron's child interview transcripts.

30. In sum, the Appellant has not proven that Ms. Duron's notes are inherently unreliable. Each of the adult witnesses who complained of being misrepresented by Ms. Duron was able to correct any discrepancies through testimony. The concerns about the tone and phrasing of the adult interview notes are not present in the child interview notes because Ms.

Duron uses a more precise process for recording child interviews. When resolving the allegations below, the undersigned presumes that the statements of the children reported in Ms. Duron's near-verbatim notes are the words of the children rather than the interpretation or summary of Ms. Duron.

31. **While the Appellant raised valid questions about each child's ability to accurately report events, the statements of each child must be evaluated on a case-by-case basis and cannot be dismissed entirely.** The Appellant argued that the children who were interviewed by Ms. Duron were unable to accurately report events. For this reason, the Appellant argued that the statements of the children should be rejected in their entirety. The Appellant's argument is not correct. The questions raised by the Appellant were not sufficient to justify rejecting the children's statements in their entirety. Instead, the statements of the children must be evaluated on a case-by-case basis.

32. Each of the six children accurately reported discrete events that were later confirmed by adult witnesses. For example, many of the children accurately reported the incident at the lake in which the Appellant restrained F. The children did not invent this incident because this incident was confirmed by many adult witnesses. While the details reported by the children differed from the details reported by the adults, the children were reporting an event that actually happened. In addition, many children accurately reported that P wet the bed frequently, that the Appellant used the term "black ass," and that the Appellant swore in the home. Again, there is no question that these events actually occurred because the Appellant testified to these facts. The children did not make up these incidents. This proves that each of the six children had the ability to recall and report events that actually happened. Therefore, the undersigned cannot conclude that the entire statement of any child should be disregarded. At the very least, each child's statement is made up of some statements that are accurate and 000023 other statements that are not accurate. The challenge in adjudicating this case is to determine

which statements are accurate and which statements are not accurate. Because all of the children have demonstrated an ability to report actual events, their statements cannot be rejected in their entirety.

33. This does not mean that the undersigned finds all of the statements of the children to be reliable. As explained in the discussion of individual allegations below, many of the children's statements are not reliable. However, the determination of reliability must be made on a case-by-case basis. The undersigned must evaluate each statement by considering each individual child's history, the facts and circumstances surrounding each child's statement, and the presence or absence of corroboration.

34. The Appellant also argued that the statements of the children should be disregarded because the statements contained inconsistencies. However, the presence of inconsistencies in a statement does not mean that the entire statement should be thrown out. Instead, the presence of inconsistencies should be considered when evaluating each individual allegation within the statement. Almost all of the witnesses in this matter, including the Appellant⁴, exhibited inconsistencies in their statements. If the undersigned were to ignore the testimony of each witness whose testimony contained inconsistencies, the undersigned would have to disregard the majority of the transcript. Instead of disregarding a witness' entire testimony, the undersigned considers specific inconsistencies when evaluating the reliability of the evidence.

35. Having concluded that the statements of the children must be evaluated on a case by case basis, the undersigned begins this process by addressing each child individually to determine whether the Appellant was correct that the children were inherently unreliable reporters.

⁴ For example, the Appellant first testified that she did not use the word "bitch" by itself. Tr., v. 1, p. 000024. Four adult witnesses later testified that they heard the Appellant use the word bitch by itself. Tr., v. 3, p. 144; v. 9, pp. 116-117, 162; v. 15, p. 75. The Appellant then changed her testimony to state that she used the word bitch by itself infrequently. Tr., v. 18, p. 66. Thus, the Appellant's testimony also contained inconsistencies.

36. E: The undersigned begins by discussing the evidence regarding E's memory. E has been diagnosed with Static Cerebral Encephalopathy as a result of in utero exposure to alcohol. E suffers from ongoing significant learning, language, and social difficulties. Exhibit D-16. Ms. Hartness, a fetal alcohol syndrome expert, testified about the symptoms that can result from in utero exposure to alcohol. However, Ms. Hartness also stated that all children with Static Cerebral Encephalopathy are different and Ms. Hartness did not have any knowledge about E's specific symptoms. Tr., v. 16, pp. 129-180. Therefore, Ms. Hartness' opinion is entitled to far less weight than the witnesses who have had regular contact with E.

37. E's teacher, Ms. Opland, testified that E consistently has trouble remembering tasks but that she does not have significant memory problems overall. Tr., v. 13, p. 197. E's psychiatrist, Dr. Vincent, testified that E would be able to remember things that she had experienced despite her diagnosis. Tr., v. 4, p. 54. Dr. Vincent also stated that E would generally be able to answer questions about events that had happened to her, although she might have trouble connecting events with time periods. Tr., v. 4, pp. 69-70. Thus, the adults who had the most contact with E did not express significant concerns about E's memory.

38. E was interviewed twice by Ms. Duron. E's statements in her two interviews indicate that she does have the ability to recall and accurately report information. For example, in the October 2001 interview, E spontaneously recalled talking to Ms. Duron almost three months earlier. Exhibit D-19, p. 1. E even remembered some of the specific questions from the previous interview. Exhibit D-19, p. 2. If E had the severe memory deficits alleged by the Appellant, then it seems unlikely that E would have been able to accurately recall detailed information about events that happened three months earlier.

39. Finally, no witness suggested any apparent motive for E to make up allegations about the Appellant. Although Ms. Hartness suggested that some children who have been exposed to alcohol in utero tend to tell stories, there is no evidence in the record that E had

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exhibited such behavior in the past. Thus, there is very little information in the record to challenge E's overall ability to remember and report events. This does not mean that all of E's statements are reliable. Each of E's statements will be evaluated individually below. This simply means that there is little evidence to support the Appellant's assertion that E is an inherently unreliable reporter.

40. B: The undersigned next addresses the evidence regarding B's memory.

Although B was also exposed to alcohol in utero, Dr. Vincent stated that B's language comprehension was normal and that her language expression was somewhat below normal. Tr., v. 4, p. 73. B's case manager, Mr. Chamberlin, stated that B was within the normal limits of socialization and that he was not aware that B had a problem with lying. Tr., v. 15, pp. 17-31. No witness alleged that B had a motive to make up allegations about the Appellant. While B's age at the time of the investigation (four years old) is certainly relevant when evaluating her statements, there was no other concrete evidence in the record to challenge B's ability to recall and report events. This does not mean that all of B's statements are reliable. Each of B's statements will be evaluated individually below. This simply means that there is almost no evidence in the record to support the Appellant's assertion that B is an inherently unreliable reporter.

41. J: The undersigned next addresses the evidence regarding J's memory. J is developmentally delayed and has had difficulty processing verbal information. Tr., v. 6, p. 130. J's psychologist, Dr. Cowles, testified that he does believe J knows the difference between the truth and a lie, although Dr. Cowles was not sure J knew the difference in the past. Tr., v. 6, p. 144. Dr. Cowles also testified that J would probably be able to repeat words that he had heard in the home. Tr., v. 6, p. 160.

42. Some evidence in the record challenges J's ability to accurately report information. For example, J admitted that he previously told a lie to get a child kicked out of the

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Appellant's home. Tr., v. 2, p. 113. The Appellant stated that J had told her lies in the past. Tr., v. 17, p. 85. J had made previous unfounded referrals in the past. Tr., v. 13, p. 29. While this does not necessarily mean that J lied about those referrals, this fact is at least relevant in evaluating J's statements. The King County Juvenile Court found J incompetent to comprehend charges brought against him in 2002. Tr., v. 15, p. 158. Again, this finding of incompetence is not definitive, but it is relevant in evaluating J's statements. Finally, J's story changed significantly from his interview to his testimony. For example, J told Ms. Duron that he saw the Appellant wipe urine-soaked sheets on P. In his testimony, J did not mention urine-soaked sheets until he was prompted to do so and then stated that he was not sure if he had seen the sheet incident. All of these factors raise significant concerns about J's ability to recall and report information accurately. Thus, the undersigned looks for corroboration when evaluating J's statements below.

43. P: The undersigned next addresses P's memory. There was no concrete evidence in the record to challenge P's ability to recall and report events. P's social worker, Mr. Thames, testified that he was surprised that P did not report his allegations about abuse to Mr. Thames. Tr., v. 3, p. 41. The Appellant argued that this failure to report to Mr. Thames indicates that P was lying about the allegations. However, P had previously failed to disclose abuse at the hands of his biological father. Tr., v. 3, pp. 23-24. Therefore, P's failure to disclose to Mr. Thames is of little significance in determining whether P's statements were accurate.

44. There were several discrepancies between P's interview with Ms. Duron and P's testimony during the hearing. For example, P told Ms. Duron that the Appellant had slapped him while P denied the slapping during his testimony. The discrepancies in P's statements raise questions about P's ability to recall events. However, these discrepancies must be balanced with the fact that there was no other concrete information in the record to challenge

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P's memory. This does not mean that all of P's statements are reliable. Each of P's statements will be evaluated individually below. This simply means that there is limited evidence in the record to support the Appellant's assertion that P is an inherently unreliable reporter.

45. K: The undersigned next addresses K's memory. K's therapist, Dr. Crabb, testified that K "doesn't always tell the truth at times." Tr., v. 9, p. 22. K's social worker confirmed that K has lied in the past. Tr., v. 5, pp. 114-115. K made previous referrals that were unfounded. Tr., v. 13, p. 102. While this does not necessarily mean that K lied about those referrals, this fact is at least relevant in evaluating K's statements.

46. The Appellant also raised questions about the timing of K's disclosure. At the time K disclosed his allegations to Dr. Crabb, K had just left the Appellant's home and was staying with his biological sister. K had expressed a desire to live with his sister, although it was not clear whether K actually wanted to live with his sister on the day he spoke to Dr. Crabb. In addition, K was angry that he had missed a court hearing in which his biological parents' rights had been terminated. The Appellant testified that K told him that he made the allegations so that he could go live with his sister. Tr., v. 17, p. 80. However, the Appellant's argument about the timing of K's disclosure is undercut by the fact that K maintained his story even after he realized that he would be removed from the Appellant's home over his own strong objection. K was moved to another foster home and did not go to live with his sister. Throughout this process, K did not change his story. Tr., v. 9, p. 32. If K were motivated to live with his sister, then one would expect that he would have changed his story when he realized he was moving to a stranger's foster home against his will. The fact that K did not change his story even after he was removed from the Appellant's home indicates that K was not lying in order to live with his sister. The Appellant's allegation about the timing of K's disclosure is inconclusive at best.

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47. In sum, there are several concerns about K's ability to recall and report information accurately. While the timing of K's disclosure was inconclusive, K has a history of telling lies. This does not mean that K's statements must be disregarded. However, the undersigned looks for corroboration when evaluating K's statements below.

48. F: Finally, the undersigned addressed F's memory. There was no evidence in the record to challenge F's memory. F was the oldest child in the Appellant's home and F had been in the home longer than any other child. F was significantly attached to the Appellant, as evidenced by the fact that he continued to live in the Appellant's home after he turned 18. *Tr., v. 1, p. 80*. No witness suggested that F had any motive to lie. No witness suggested that F had any cognitive deficits. F's only behavioral concern was aggression, an issue that did not affect F's ability to recall and report events. There is no evidence in the record to challenge F's memory or motivation.

49. F wrote a letter after his interview with Ms. Duron stating that Ms. Duron put words in his mouth, twisted his words around, and tried to make him say things that were untrue. Exhibit D-19. However, this letter does not state that anything in Ms. Duron's SER's was inaccurate. While F may not have liked Ms. Duron's style of interviewing, F's letter did not challenge Ms. Duron's transcript of his interview. If the Appellant believed that Ms. Duron's interview notes were inaccurate, then the Appellant was free to call F as a witness. However, F's letter alone is not sufficient to challenge the accuracy of Ms. Duron's notes. Therefore, there was no evidence to challenge the accuracy of F's statements. This does not mean that all of F's statements are reliable. Each of F's statements will be evaluated individually below. This simply means that there is no evidence in the record to support the Appellant's assertion that F is an inherently unreliable reporter.

50. Having addressed each of the children in the Appellant's home, the undersigned 000029 concludes that none of the children was an inherently unreliable reporter. The statements of

each child must be considered and the allegations therein must be evaluated on a case-by-case basis. The Initial Decision's Conclusion that all of the children suffered from cognitive deficits is clearly erroneous. See Initial Conclusion of Law 20. There were significant concerns about the ability of J and K to recall and report events accurately. However, there were only minimal concerns about the ability of E, B, and P to recall and report events accurately. There were no concerns about F's ability to recall and report events accurately. The foregoing general discussion about each child will be used to resolve specific factual disputes in the section addressing individual allegations below.

RESOLUTION OF DISPUTED ALLEGATIONS

51. The undersigned next addresses the incidents alleged in the Department's Summary Assessment and Notice of Revocation. In this section of the decision, the undersigned addresses each of the 13 allegations to determine if the facts supporting each allegation were proven by a preponderance of the evidence in the record. This section also explains each of the amendments to the Initial Findings of Fact. In analyzing each allegation, the undersigned applies the 10 general evidentiary principles described in the section above. In this section, the sole issue is whether the facts have been proven. The issues of whether each incident rose to the level of abuse or whether each incident represented a licensing violation will be addressed separately below.

52. **Incident at the Lake-** The first incident alleged by the Department was the argument at the lake. The basic facts of this incident were not contested. All witnesses who were present at the lake agreed that there was a confrontation between F and Sarah McLaughlin. The Appellant intervened because she was concerned that F might hurt Sarah McLaughlin. The Appellant grabbed F from behind by placing her arm around his upper-chest area. The Appellant pulled F backwards to keep F from lunging at Sarah McLaughlin. **000030** Findings of Fact 11-13 correctly reflect the uncontested facts surrounding the lake incident.

53. **Turning Blue-** There were several additional contested factual issues regarding the incident at the lake. First, the Department alleged that the Appellant choked F until he turned blue. As explained below, this allegation was not proven.

54. K told Mr. Crabb that the Appellant choked F until he turned blue. Exhibit D-15. K's account is not persuasive for three reasons. First, none of the other people who were present for the lake incident described F turning blue. If F had been choked until he turned blue, then one would assume that the other people standing nearby would have noticed F turning blue. Second, K's account is not logical. A person's airway must be restricted for a significant amount of time before the person begins to turn blue. However, all of the witnesses testified that the lake incident happened very fast. Because the incident happened very fast, there would not have been time for F to turn blue. Third, F did not describe any of the symptoms that would ordinarily accompany turning blue. For example, F did not describe sustained loss of air, dizziness, or lightheadedness. If F had been choked until he turned blue, then F should have experienced some of these symptoms. Therefore, the undersigned concludes that the Department failed to prove that the Appellant choked F until he turned blue. Because the Initial Decision failed to address this allegation, the undersigned has amended Initial Finding of Fact 12 to state that this allegation was not proven.

55. **Marks on F's Neck-** The second contested factual issue regarding the lake incident was the presence of marks on F. The Department alleged that the Appellant left marks on F's neck that lasted for two hours. As explained below, this allegation was not proven.

56. K told Mr. Crabb that he saw marks on F's neck that lasted for two hours. Exhibit D-15, p. 4. F also told Ms. Duron that he had a grip mark on his neck, but F was not asked how long the mark lasted.⁵ F was also not asked how he knew that he had marks on his

⁵ There was some discrepancy about whether F confirmed the duration of the marks. According to the interview transcript, Ms. Duron did not ask F how long the grip mark lasted. Exhibit D-20, p. 2. During her testimony, Ms. Duron again stated that F did not say how long the mark lasted. Tr., v. 12, pp. 132, 202. Ms. Duron later stated that she had an independent recollection that F said the marks lasted two hours.

neck, an area of his body that he could not see. Sarah McLaughlin and the Appellant testified that they did not notice any marks on F's neck. Tr., v. 9, p. 107; v. 18, p. 77. Ms. Ewy testified that F did not say anything about being hurt at the time of the incident. Tr., v. 13, p. 136.

57. It is certainly logical that F would have a faint mark on his upper chest just after the Appellant grabbed him. By all accounts, the Appellant was required to use a great deal of force to restrain F because F was larger than the Appellant and F was lunging forward. Direct pressure on skin almost always leaves a mark of some kind, however temporary. Nonetheless, the evidence of a mark that lasted two hours is not persuasive. K's statement is not supported by any other evidence in the record. If F did have a mark that lasted for two hours, it seems likely that the other people at the lake would have noticed the mark. The absence of corroboration is particularly significant because of the concerns about K's ability to accurately report information discussed above. Because K's testimony is contradicted by all of the other evidence in the record, the Department failed to prove this allegation. The undersigned has amended Finding of Fact 12 to state that the Appellant did not leave any lasting marks on F. The force from the Appellant's arm would have left some kind of mark, even if the mark only lasted for a matter of seconds or minutes. However, the Department failed to prove that the Appellant left a mark that lasted for two hours.

58. **Threat to Kill-** The third contested factual issue regarding the incident at the lake was whether the Appellant threatened to kill F. The Department alleged that the Appellant threatened to kill F and called him a bastard after the Appellant pulled F off of Sara McLaughlin. As explained below, this allegation was proven.

59. K and F gave virtually identical accounts of the Appellant's statement at the lake. K told Mr. Crabb that the Appellant yelled "Stop fucking lying, tell the truth, I'll kill you bastard." Exhibit D-15, p. 4. F told Ms. Duron "She told me to stop Fucking lying, and if I didn't tell her 000032

Tr., v. 12, p. 207. The next day, Ms. Duron again testified that F did not state how long the marks lasted. Tr., v. 13, p. 83. Because Ms. Duron's testimony was so conflicting, the undersigned relies on the interview transcript and finds that F did not say how long the marks lasted.

Appellant said "Stop fucking lying, tell the truth, I'll kill you bastard," after she pulled F off of Sara McLaughlin.

62. The undersigned notes that the statements of K and F are both hearsay statements because they were made outside of the hearing and are being used to prove the truth of the matter asserted. As explained above, this means that the Department must either submit some non-hearsay evidence to corroborate the hearsay evidence, or the Department must prove that the Appellant's opportunity to confront witnesses and rebut evidence was not unduly abridged. In this case, the Appellant did have an opportunity to confront K and rebut his statements. The Appellant effectively waived her opportunity to question and contradict K because the Appellant explicitly stipulated to the entry of K's declaration in lieu of his live testimony. Tr., v. 1, p. 12; v. 9, p. 57. If the Appellant wanted an opportunity to question K, she could have refused to stipulate to the entry of K's declaration in lieu of testimony. Without the stipulation, the Department may have elected to call K as a witness and the Appellant would have had an opportunity to cross-examine him. Even if the Department did not choose to call K as a witness, the Appellant could have called K as a witness in order to question him. Neither of these things happened because the Appellant agreed to the stipulation. Therefore, the undersigned cannot possibly conclude that the Appellant was denied the opportunity to cross-examine K. It would be absurd and illogical to suggest that a party can stipulate to the admission of a declaration in lieu of live testimony and then claim that she was unfairly denied the opportunity to cross-examine the declarant during live testimony. Therefore, neither WAC 388-02-0475(3) nor RCW 34.05.461(4) prevent the undersigned from relying on K's declaration despite the fact that the declaration and the corroborating statement from F both constitute hearsay evidence.

63. In sum, the preponderance of the evidence in the record indicates that the Appellant said "Stop fucking lying, tell the truth, I'll kill you bastard," after she pulled F off of

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Sara McLaughlin. Because the Initial Decision did not address this allegation the undersigned has amended Initial Finding of Fact 12 to add the essential Finding that the Appellant said "Stop fucking lying, tell the truth, I'll kill you bastard," to F.

64. **Urine Soaked Sheets-** The Department alleged that the Appellant rubbed urine-soaked sheets on P's face. As explained below, this allegation was not proven.

65. There were two witnesses to the alleged sheet rubbing incident. The first witness was J, who told Ms. Duron in October 2001 that he had seen the Appellant rub urine-soaked blankets in P's face one time. Exhibit D-21, p. 1. When J testified during the hearing in September 2002, J did not spontaneously raise the issue of the sheets. Instead, the Department raised the issue with the following leading question: "When P peed his bed, did you ever see anybody touch him with wet blankets or wet sheets?" Tr., v. 2, p. 105. J's testimony would have been much more reliable if he had raised the issue without such explicit prompting from the Department. J's story also changed from his October 2001 interview to his September 2002 testimony. For example, J testified that he saw the Appellant rub sheets in P's face "sometimes" rather than one time. Tr., v. 2, p. 105. More significantly, J testified that he did not think he was in the room when the Appellant rubbed the sheets in P's face. At the time of his testimony, J could not remember whether he had actually seen this incident. Tr., v. 2, p. 112. This testimony is in stark contrast to J's interview with Ms. Duron, in which he stated that he had seen the Appellant rub the sheets in P's face one time. As explained above, there are significant general concerns about J's ability to recall and report events accurately.

66. The second witness to the alleged sheet rubbing was P. At the time of P's July 2001 interview with Ms. Duron, he did not mention the sheet rubbing incident at all. Although P described an incident in which the Appellant got mad at him for not changing his sheets, he never mentioned anything about the Appellant rubbing wet sheets in his face. When P testified in September 2002, he did not spontaneously raise the issue of sheet rubbing. Instead, the

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the truth about whether or not I was looking at Sara she was going to kill me.” Exhibit D-20, p. 2. Thus, the statements of the two children who were present were remarkably similar.

60. In contrast, the statements of the adults who were present were incomplete and conflicting. The Appellant could not remember what she said but she was sure that she used profanity. Exhibit D-30, p. 2; Tr., v.1, p. 110. The Appellant also testified that she may have said stop lying, but she did not threaten F. Tr., v. 1, p. 110. Sarah McLaughlin testified that the Appellant did not swear. Tr., v. 9, p. 104. Ms. McLaughlin’s account is obviously incorrect because it is contradicted by the Appellant’s own statement that she was using profanity.⁶ Sarah McLaughlin believed that the Appellant told F to stop lying but Ms. McLaughlin denied that the Appellant threatened F. Tr., v. 9, pp. 104-105. Ms. Ewy testified that she did not hear the Appellant say anything. Tr., v. 13, p. 134. Ms. Ewy’s testimony is obviously incorrect because all of the other people who were present stated that the Appellant was speaking loudly to F.

61. Based on the preponderance of the evidence in the record, the undersigned concludes that the Department proved that the Appellant threatened to kill F. The statements reported by K and F were extremely detailed, virtually identical, and reported to two different witnesses. Although the undersigned has expressed concerns about K’s ability to report events, K’s statement about this allegation was corroborated by F. F’s statement provides significant reliability and support to K’s statement because there were no concerns about F’s ability to accurately report events. In addition, the Appellant was not able to effectively contradict the statements by K and F because she could not remember what she said. The statements by Ms. McLaughlin and Ms. Ewy were obviously incorrect because they were contradicted by the Appellant’s own statements. Therefore, the Department proved that the

⁶ The undersigned is cognizant of the fact that the ALJ specifically found that Ms. McLaughlin was credible based on her demeanor. While the undersigned would ordinarily defer to the observations of the ALJ, the undersigned cannot do so here because Ms. McLaughlin’s statement is contradicted by the Appellant’s own statement. While the remainder of Ms. McLaughlin’s testimony may be credible, her statement that the Appellant did not swear during the lake incident is not credible.

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Department raised the issue in the following leading question: "You mentioned that Kathie yelled at you sometimes if you hadn't changed your bed after the sheets were wet. Did Kathie ever touch you with the wet sheets?" Tr., v. 3, p. 55. Again, this testimony would have been much more reliable if it had come from the child. Absent a spontaneous statement, it is almost impossible to determine if P's testimony came from his memory or if he merely repeated the information in the question. In his testimony, P offered virtually no details about the incident, except to state that the Appellant rubbed the sheet in his face. For example, when P was asked if anyone saw the sheet rubbing, P said "I don't know." Tr., v. 3, p. 56.

67. The Appellant acknowledged that she had a confrontation with P about his failure to change his wet sheets. However, the Appellant denied that she rubbed the sheets in his face. Tr., v. 1, p. 114; v. 18, p. 23. Ms. Dudley, an aide who worked in the Appellant's home, testified that she helped P clean his room just after the Appellant confronted P about his failure to change his sheets. Ms. Dudley stated that P was upset about having to steam clean the carpet but P did not mention anything about the Appellant rubbing urine-soaked sheets in his face. Tr., v. 7, p. 106.

68. The evidence submitted by the Department in support of this allegation is not persuasive. J's story changed significantly from his interview to his testimony. The fact that P never mentioned the sheet rubbing incident in his original interview with Ms. Duron is also extremely significant. If the Appellant had rubbed urine-soaked sheets in P's face, one would expect that P would have described this event to Ms. Duron when they were discussing his wet sheets. It also seems extremely unlikely that P would not have mentioned the sheet rubbing incident to Ms. Dudley when he was complaining about having to steam clean his carpet.

Finally, the use of blatantly leading questions taints the testimony of both J and P. Other than J's original statement to Ms. Duron, there is no other spontaneous statement about this incident 000036 in the hearing record. Neither J nor P brought up this issue until they were prompted to so by

the Department. Therefore, the undersigned concludes that the Department failed to prove this allegation by a preponderance of the evidence. There is no reliable evidence that the Appellant rubbed urine-soaked sheets in P's face.

69. Initial Findings of Fact 19 and 20 repeat and summarize P's testimony regarding the sheet rubbing incident. However, the Initial Decision does not contain an ultimate Finding of Fact stating that the incident actually took place.⁷ Absent a Finding of Fact that actually resolves the factual dispute, the undersigned has no way of knowing whether the ALJ found that P's description of the incident was accurate. Therefore, the undersigned must enter a new Finding of Fact to resolve this contested factual issue. The undersigned has deleted all of the Findings that merely summarized P's testimony and entered a new Finding in Finding of Fact 19 that the sheet rubbing incident was not proven. To the extent that the Initial Decision found that the sheet rubbing incident took place, this Finding is not supported by any reliable evidence in the record and is not adopted.

70. **Black Ass-** The Department alleged that the Appellant told P to get his "black ass" downstairs. As explained below, this allegation was proven.

71. The facts of this allegation are not contested by the Appellant. The Appellant conceded that she told P to get his black ass downstairs two times on the day she had a discussion about the phrase "black ass" with Rosetta Robertson. Tr., v. 1, p. 120; v. 18, pp. 22, 67. The Appellant told several other witnesses, including Mr. Yarkovsky, Ms. Minear, Ms. Dudley, Ms. Cassaday-Smith, Ms. Mayer, and Ms. Ewy the story about using the phrase "black ass." Tr., v. 7, p. 115; v. 13, p. 167; v. 15, pp. 66, 121, 175; v. 16, p. 205.

72. Initial Finding of Fact 25 contains several statements that are not supported by substantial evidence in the record. First, the Finding states that the only evidence of the use of the term "black ass" comes from the Appellant and Ms. Robertson. As stated above, the 000037

⁷ Evidentiary Findings summarizing the evidence in the record are not sufficient without an ultimate Finding resolving the contested factual issue. *In Re Welfare of Woods*, 20 Wn. App 515, 516, 581 P.2d 587 (1978).

Appellant told six other witnesses about using the phrase towards P. Therefore, the undersigned has amended Initial Finding of Fact 25 to state that Mr. Yarkovsky, Ms. Minear, Ms. Dudley, Ms. Cassaday-Smith, Ms. Mayer, and Ms. Ewy heard the Appellant discussing the use of the phrase "black ass." In addition, the Initial Finding states that the Appellant would use the phrase "black ass" if she were P's biological mother. This statement is not correct. Ms. Robertson actually stated that if her own mother were P's mother, her mother would have told P to move his black ass. Tr., v. 14, p. 146. The undersigned has amended Initial Finding of Fact 25 to correct this discrepancy. The remainder of Initial Finding of Fact 25 accurately reflects the fact that the Appellant used the term "black ass" when directing P.

73. **Calling E a Bitch-** The Department alleged that the Appellant called E a bitch. As explained below, this allegation was proven.

74. Two adult witnesses testified to hearing the Appellant call E a bitch. First, Crystal Hill testified that the Appellant sometimes said "fucking bitch" about E when E was in another room. Tr., v. 3, p. 144. Second, Sara McLaughlin testified that the Appellant sometimes said "What a little bitch" about B and E when the children were in another room. Tr., v. 9, p. 116. Both Crystal Hill and Sarah McLaughlin testified that the children could not hear the Appellant call E a bitch because the children were in another room.

75. The Appellant testified that she did not call the girls in her home bitches. Tr., v. 18, p. 18. However, this testimony is explicitly contradicted by two of the Appellant's own witnesses, who heard the Appellant call E a bitch. In addition, the Appellant admitted to calling the children in her home sons of bitches as she was walking away. Tr., v. 1, p. 124. It seems an absurd distinction to admit to calling children sons of bitches but deny calling children bitches. Perhaps the Appellant meant that she did not call the girls in her home bitches to their faces. The Appellant was never specifically asked if she called E a bitch as she was walking

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away. Again, it seems unlikely that the Appellant would deny such an accusation because it was proven by two of her own witnesses.

76. Four different children told Ms. Duron that they had heard the Appellant call E a bitch. F and J both stated that they had heard the Appellant call E a "fucking bitch." Exhibit D-20, p. 1; D-21, p. 2. B told Ms. Duron that the Appellant said "Clean your dirty room you stupid bitch," to E. Exhibit D-19, p. 5. E had two interviews with Ms. Duron. In July 2001, E told Ms. Duron that the Appellant told her "Go to your fucking room you little bitch." E also said that she liked Crystal Hill because, unlike the Appellant, Ms. Hill did not call her a "fucking bitch." Exhibit D-18, pp. 7-9. In October 2001, E told Ms. Duron that the Appellant said, "Go clean your room you little bitch," and also called her a fucking bitch. Exhibit D-19, p. 3.

77. Although Ms. Hill and Ms. McLaughlin stated that the children could not hear the Appellant call E a bitch, they were obviously mistaken. At least four of the children in the home knew that the Appellant referred to E as a bitch. If the children were not able to hear the Appellant, then how would the children have known that the Appellant called E a bitch? If the children were lying, then how could the children have chosen a lie that matched the Appellant's actual words? If the Appellant did not call E a bitch, then why did two adults and four children all describe the same event? The most obvious answer to these questions is that the Appellant did call E a bitch and the children did hear. There is no other logical explanation. Even if the Appellant thought that she was being discrete in her name calling, the children were able to hear. Thus, the preponderance of the evidence in the record proves that the Appellant called E a "bitch" and a "fucking bitch." The statements of the four children on this point were spontaneous, consistent, and corroborative. The hearsay statements of the children were also corroborated by the non-hearsay testimony of Ms. McLaughlin and Ms. Hill.

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78. The Initial Findings of Fact did not address the issue of whether the Appellant called E a bitch. The undersigned has amended Initial Finding of Fact 27 to state that the Appellant called E a bitch and a fucking bitch.

79. **Calling E a Cunt-** The Department alleged that the Appellant called E a cunt. As explained below, this allegation was proven.

80. Three of the six children in the Appellant's home reported that the Appellant called E a cunt. K told Mr. Crabb that the Appellant said "Clean your fucking room you cunt." Exhibit D-15, p. 4. F told Ms. Duron that the Appellant called E a "fucking cunt." Exhibit D-20, p. 1. E told Ms. Duron that the Appellant calls her a "fucking cunt." Exhibit D-18, p. 7.

81. Ms. Duron reported that Crystal Hill said in an interview that the Appellant is "always calling E a fucking cunt...." Exhibit D-13, p. 1. When Ms. Duron contacted Crystal Hill again several weeks later, Ms. Hill confirmed that the Appellant called E a fucking cunt. Exhibit D-14, p. 2. However, Ms. Hill later wrote a letter to the Department disputing many of the details in Ms. Duron's interview notes. Although Ms. Hill did not explicitly repudiate her earlier statement that the Appellant called E a cunt, Ms. Hill implied that she did not agree with the statements in Ms. Duron's interview notes. Ms. Hill wrote, "In Ms. Duron's report she stated that I said Kathie swore all the time at E and this hurt her. Kathie does not swear all the time at the girls, I was speaking about one incident that occurred five years ago." Exhibit A-22, p. 2. In her hearing testimony, Ms. Hill stated that she was not sure whether she had even heard the Appellant use the word cunt. Ms. Hill stated:

It was something that happened years ago. Joanie was in the home. I don't know if it was Kathie, I don't know if it was Joanie. Kathie is cussing in her room. E and I were cleaning her room. Whether Kathie said the word 'cunt' she said 'crunt' she said 'shit' who knows. She was yelling in her room and then she came out and said 'Get you room cleaned.' What she actually said, I have no idea because we were in another room.

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Tr., v. 3, p. 130. Ms. Hill later stated, "Have I heard Kathie say the word 'cunt'? No. Have I heard Joanie say the word 'cunt'? Yes." Tr., v. 3, p. 148.

82. Ms. Hill's statements are filled with contradictions. It is not possible to determine whether Ms. Hill intentionally changed her story after her initial interview with Ms. Duron or whether Ms. Duron erroneously recorded Ms. Hill's remarks during the interview. The Department argued that Ms. Hill changed her story because she was afraid of the Appellant. Ms. Hill stated that she had no reason to fear the Appellant and Ms. Duron's notes were incorrect. Both possibilities are plausible. Ultimately, the undersigned must take note of the fact that Ms. Hill's hearing testimony was given under oath, was subject to cross-examination, and was recorded verbatim by a court reporter. For these reasons, Ms. Hill's testimony is entitled to greater weight than her interview statements. The undersigned gives greater weight to Ms. Hill's testimony that she is not sure that she has ever heard the Appellant use the word cunt. Thus, Ms. Hill's hearing testimony does not support the Department's allegation that the Appellant called E a cunt.

83. The Appellant denied using the word cunt. Tr., v. 18, p. 17. No other adult witness reported hearing the Appellant use the word cunt in any context.

84. In resolving this issue, several pieces of evidence challenge the accuracy of the Department's allegation. For example, two of the children in the Appellant's home did not recognize the word cunt. J was asked during his testimony if the Appellant ever used the word cunt. J replied, "Probably. I don't even know what that is." Tr., v. 2, p. 102. P also stated that he did not recognize the word cunt. Tr., v. 3, p. 32. If the Appellant had been using the word cunt around the children, one would expect that J and P would recognize this word.

85. In addition, the fact that no adult witness heard the Appellant say the word cunt is significant. The Appellant has not attempted to censor herself around adults in the past. It is clear that the Appellant was not concerned that people would think less of her because of her

use of profanity. If the Appellant used the word cunt regularly, one would expect that at least one adult witness would have heard this word. While this absence of adult corroboration is not conclusive evidence, it calls into question the Department's assertion that the Appellant was using the word cunt regularly in the home.

86. However, the preponderance of the evidence in the record indicates that the Appellant did call E a cunt. The questions about the reliability of this allegation are outweighed by the consistent statements of the three children. Two of the children (F and E) reported the Appellant using an identical phrase, "fucking cunt." Although this phrase is not terribly distinctive, the limited consistency of the two statements makes each statement more persuasive. In addition, F and E previously provided accurate statements about the Appellant's use of the word bitch. This indicates that F and E were capable of accurately remembering and reporting phrases that were unquestionably used by the Appellant. It is hard to imagine why the children would tell the truth about the Appellant's use of the word bitch and then make up a lie about the Appellant's use of the word cunt. The children's prior accurate reporting of the word bitch supports the statements of F and E.

87. The undersigned relies in particular on the statements of F. As explained above, F was the oldest child in the home and F did not have any cognitive deficits. F was very attached to the Appellant and did not have any apparent motive to lie. F's other statements have all been proven by other evidence in the record. Therefore, F's statements to Ms. Duron are entitled to a substantial amount of weight. When combined with the consistent statements of E and K, the three statements satisfy the preponderance standard of proof. The three statements of the children outweigh the Appellant's denial that she called E a cunt.

88. The allegation that the Appellant called E a cunt is based exclusively on hearsay statements. However, as explained above, the Appellant had an opportunity to question and 000042 contradict the statements of K and she chose not to do so. Neither WAC 388-02-0475(3) nor

RCW 34.05.461(4) prevent the undersigned from relying on K's declaration to support this allegation because the Appellant had an opportunity to question K. K's declaration, and the persuasive corroborating statements from F and E, may be used to support a Finding of Fact in this matter.

89. The Initial Findings of Fact did not address the issue of whether the Appellant called E a cunt. The undersigned has amended Initial Finding of Fact 27 to state that the Appellant called E a cunt.

90. **Kicking E in the Back-** The Department alleged that the Appellant kicked E in the back. As explained below, this allegation was not proven.

91. In her first interview with Ms. Duron, E stated that the Appellant kicks her in the back but nobody ever sees because the Appellant makes sure nobody looks. Exhibit D-18, p. 8. In her second interview with Ms. Duron, E again stated that the Appellant kicks her. Ms. Duron asked, "Has anybody ever seen her kick you?" E answered, "Yeah, who ever is in the kitchen or where ever I am when she does it." Exhibit D-19, p. 2. No other adult or child witness corroborated E's testimony. The Appellant denied that she had kicked E. Tr., v. 18, p. 18.

92. Based on the evidence in the record, the undersigned concludes that the Department failed to prove this allegation by a preponderance of the evidence. E's story changed from her first interview to her second interview. E first stated that no one saw her being kicked and later stated that everyone saw her being kicked. This discrepancy calls the accuracy of E's statements into question. In addition, there was no corroboration for E's statements. If E is correct that other people in the home have seen her being kicked, then there should be other statements from adults or children corroborating E's statement. Finally, E's statements to Ms. Duron are hearsay statements. Unlike K's declaration, the Appellant did not stipulate to accept E's statement in lieu of her live testimony. The Department failed to

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explain how the undersigned could base a Finding of Fact solely on E's hearsay statement without violating WAC 388-02-0475(3) and RCW 34.05.461(4).

93. The Initial Findings of Fact failed to resolve this allegation. Therefore, the undersigned has added a Finding to Initial Finding of Fact 20, stating that the Department failed to prove that the Appellant kicked E in the back.

94. **Spanking B-** The Department alleged that the Appellant spanked B. As explained below, this allegation was not proven.

95. In her first interview, E told Ms. Duron that the Appellant spanks B on her bottom with her hand. Exhibit D-18, p. 8. In her second interview, Ms. Duron asked E what happens to the other kids when they get in trouble and E did not say anything about spanking. Exhibit D-19, p. 2. In her first interview, B told Ms. Duron that the Appellant spanks her on her bottom when she gets in trouble. B stated that no one else spanks her except the Appellant. Exhibit D-18, pp. 4-5. In her second interview, B stated that E was the one who gets spanked and B stated that both the Appellant and her husband spank E. B later stated that only the Appellant spanks E. B never stated in her second interview that she got spanked. Exhibit D-19, pp. 4-5. No adult or child witness corroborated the statements of E and B. The Appellant repeatedly denied that she spanked E or B. Tr., v. 1, p. 131; v. 17, p. 92; v. 18, p. 18.

96. The statements of E and B are not persuasive. E and B both stated in July 2001 that the Appellant spanks B. However, both children changed their statements during the second interview. E did not mention spanking during her second interview and B's story changed completely. The statements by E and B are not reliable because the statements conflicted with each other. No other child or adult provided any corroborating evidence. Finally, E's and B's statements to Ms. Duron are hearsay statements. The Department failed to explain how the undersigned could base a Finding of Fact solely on E's and B's hearsay statements without violating WAC 388-02-0475(3) and RCW 34.05.461(4).

97. The Initial Findings of Fact failed to resolve this allegation. Therefore, the undersigned has added a Finding to Initial Finding of Fact 20, stating that the Department failed to prove that the Appellant spanked E or B.

98. **Pulling E's Hair-** The Department alleged that the Appellant pulled E's hair. As explained below, this allegation was not proven.

99. E told Ms. Duron that the Appellant pulls her hair. E said that the Appellant does it in E's room so no one else will see. Exhibit D-18, p. 7. K told Mr. Crabb that he had seen the Appellant grab E by the hair. No other adult or child reported seeing the Appellant pull E's hair. The Appellant denied that she ever pulled E's hair as a form of punishment. Tr., v. 1, p. 129; v. 18, p. 33.

100. Based on the preponderance of the evidence in the record, this allegation was not proven. There was no corroboration for E's statement. K's statement that he saw the Appellant pull E's hair is not believable because E stated nobody else saw the hair pulling. If nobody else saw the hair pulling, then K could not have any first hand knowledge about this allegation. In addition, E stated that the hair pulling took place in her room. K could not have seen the hair pulling because the boys were not allowed in the girls' room. Tr., v. 1, p. 91; v. 17, p. 82. Therefore, the undersigned disregards K's statement to Dr. Crabb. While E may have told K about the hair pulling, K could not have seen the hair pulling first hand.

101. E's hearsay statement is the only evidence in the record to support this allegation. As with the kicking and spanking allegations above, this means that the undersigned cannot enter a Finding of Fact about this allegation based solely on E's hearsay statement without violating WAC 388-02-0475(3) and RCW 34.05.461(4).

102. The Appellant did describe an incident in which she pulled E's hair. However, the Appellant's description does not support a Finding that the Appellant pulled E's hair as a 000045 form of punishment. The Appellant described an incident in which she accidentally grabbed E's

hair in an attempt to prevent E from hurting herself. According to the Appellant, E was running through the house with scissors and trying to climb up onto the bunk bed with scissors in her hand. The Appellant grabbed for E and caught her by the hair to prevent her from hurting herself. Tr., v. 1, p. 130. It is possible that E was referring to the same incident when she told Ms. Duron that the Appellant once pulled her hair because she was "walking with a knife."

Exhibit D-18, p. 9. If the incident described by E is the same as the incident described by the Appellant, then it was more of a restraint than actual hair pulling. This incident does not prove that the Appellant pulled E's hair as a form of punishment. There was insufficient evidence in the record to prove any other incidents of hair pulling.

103. The Initial Findings of Fact failed to resolve this allegation. Therefore, the undersigned has added a Finding to Initial Finding of Fact 20, stating that the Department failed to prove that the Appellant pulled E's hair as punishment.

104. **Slapping and Choking P-** The Department alleged that the Appellant slapped and choked P. As explained below, this allegation was not proven.

105. K made the following disclosure to Dr. Crabb:

K said that P was standing by his room door in the hall- K was at the doorway to his room. K says that Kathy grabbed P by the front of his neck, not choking, to get him to go into his room and clean it. K says P cried and Kathy put her hand over his mouth and told P to shut up and clean his room. K says that then he heard a sound like Kathy slamming P into something. He first said she hit P then changed his story to that he heard something that sounded like P being slammed into something.

(Emphasis added.) Thus, K's story changed even as he was disclosing it to Dr. Crabb. K did not disclose any details during his interview with Ms. Duron (Exhibit D-20, p. 2) and he did not testify, so there is no way of clarifying what K believes he heard.

106. When J was interviewed by Ms. Duron, J did not say anything about the Appellant hitting P. Exhibit D-21, pp. 1-2. When J testified during the hearing, he described a new incident that he had not described before: 000046

Sometimes P would maybe toss or something – I can't remember. But he might have said that he pushed -- she pushed him, but she just touched him and kind of like – kind of gave a light push, touch, saying not to do that again or something like that. And then he thought he'd fall back and land on the floor. I wasn't sure if there was a push or a touch or – I don't know.

J then clarified that he had not seen any of this happen. Tr., v. 2, p. 104.

107. When P was interviewed by Ms. Duron, he stated that the Appellant was angry with him because he did not change his sheets. P stated that the Appellant choked him and hit him on the face and shoulders. P also stated that K had seen the Appellant hit him on the face. Exhibit D-18, p. 2. When P testified during the hearing, his story changed significantly. For example, P testified that the Appellant hit him because he had gotten in trouble at school. Tr., v. 3, p. 54. This is in contrast to his interview with Ms. Duron, in which P stated that he had gotten in trouble because of wet sheets. P also stated that the Appellant picked him up by his shirt, dropped him on his legs, and twisted his ankle. When asked if the Appellant slapped his face, P said that she had not. Tr., v. 3, pp. 53-54. This is in contrast to his interview with Ms. Duron, in which P stated that the Appellant slapped and choked him.

108. The Appellant testified that she did not slap P during the wet sheet incident. Tr., v. 18, p. 19. Ms. Dudley came downstairs to help P after the Appellant confronted P about his wet sheets. P did not tell Ms. Dudley that the Appellant had choked him, slapped him, or picked him up by his shirt. Tr., v. 7, p. 106.

109. Having considered all of the evidence in the record, the undersigned concludes that the Department failed to prove this allegation by a preponderance of the evidence. There was great discrepancy in the evidence. K changed his story during his initial disclosure. Because K was not interviewed and did not testify, it is impossible to resolve the discrepancies in his statement. J's testimony is not particularly relevant because he admitted that he had not seen the incident he described. As explained above, there are significant questions about J's 000047 and K's ability to accurately recall and report events. P's account changed completely from his

interview to his testimony. While it is possible that P was describing two entirely different incidents, this possibility raises many other questions. If the Appellant actually picked P up by his shirt and dropped him on his ankle, then why did P not disclose this incident when he talked to Ms. Duron about punishments in the home? If the Appellant actually slapped P then why did P testify that the Appellant did not slap him? If P had forgotten about the slap by the time he testified, then why should his sudden memory of the ankle incident be considered reliable? P's

statement was far too contradictory to be considered reliable and there was no concrete evidence in the record to corroborate P's statements. Therefore, this allegation was not proven.

110. The Initial Findings of Fact failed to resolve this allegation. Therefore, the undersigned has added a Finding to Initial Finding of Fact 19, stating that the Department failed to prove that the Appellant slapped, choked, or picked up P.

111. **Calling J "Lazy Nigger"**- The Department alleged that the Appellant called J a "lazy nigger." As explained below, this allegation was not proven.

112. J told Ms. Duron that the Appellant once told him to "do it over you lazy nigger," when he did not clean the kitchen correctly. Exhibit D-21, p. 1. However, J could not recall any such statement during his testimony. The Department specifically asked J if the Appellant ever called him names when asking him to clean the kitchen over again. J replied, "No, I don't think so." The Department specifically asked J if the Appellant ever said "do it over you lazy nigger." J replied, "I can't remember." Tr., v. 2, p. 107.

113. P testified that he had heard the Appellant use the word "nigger" but he could not remember how she had used it. Tr., v. 3, p. 56. The Appellant testified that she did use the word "nigger," but only when she was explaining to the children that they were not permitted to use the word. The Appellant denied saying "do it over you lazy nigger," to J. Tr., v. 1, p. 127.000048

114. Because J could not testify that the Appellant called him a “lazy nigger,” the undersigned could not possibly find that this allegation was proven by a preponderance of the evidence. J’s prior statement to Ms. Duron is entitled to very little weight because J contradicted his own statement during his testimony. As explained above, there are serious concerns about J’s ability to recall and report events accurately. It is possible that J’s story changed because he was no longer able to recall the events he described to Ms. Duron. If this is true, then this memory lapse confirms the overall concerns about J’s ability to accurately recall events. It would be absurd to conclude J’s prior statements must be accepted as true because he has memory problems.

115. The Initial Findings of Fact failed to resolve this allegation. Therefore, the undersigned has added a Finding to Initial Finding of Fact 25, stating that the Department failed to prove that the Appellant told J to “do it over you lazy nigger.”

116. **Swearing at the Children-** The Department alleged that the Appellant swore at the children. As explained below, this allegation was proven.

117. The allegation that the Appellant swore at the children was the core of the Department’s emotional abuse allegation. During the hearing, the parties discussed the distinction between “swearing at” the children and “swearing around” the children. This distinction is important because there can be a world of difference between a parent saying “Fuck” when she stubs her toe and a parent saying “Fuck you, you fucking bitch” to a child. The former is virtually harmless while the latter is potentially devastating. Thus, it was vitally important to determine the precise context of the Appellant’s profanity. The fact that the Appellant has said a particular word in front of a child is not useful without knowing how the word was used. In order to resolve the allegations in this matter it is necessary to determine the full phrases and sentences said by the Appellant.

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118. Unfortunately, the Department rarely asked witnesses for context. The Department gave most witnesses a list of words and asked if they had heard the words in the home. The Department did not follow up with witnesses to determine the context in which each word was used. During the course of the hearing, there were very few instances in which a witness was asked to give a concrete, precise example of a full sentence uttered by the Appellant. Similarly, the Initial Decision did not even begin to try to determine the context of the words used by the Appellant. After 19 days of testimony from 49 witnesses and over 100 exhibits, the Initial Decision listed a mere three words, without any discussion of the context of the words. See Initial Finding of Fact 22. This Finding is woefully inadequate to resolve the central contested factual issue in this case. Therefore, the undersigned must supplement the Initial Decision with additional information from the hearing record.

119. The adult witnesses provided the following examples of phrases uttered by the Appellant towards the children in the home:

<u>PHRASE</u>	<u>SOURCE</u>
"Get your fucking assess up here"	Appellant, Tr., v. 1, p. 118
"Let me get my fucking kitchen done."	Appellant, Tr., v. 1, p. 123
"Just get your fucking ass in gear."	Appellant, Tr., v. 1, p. 124
"Get this shit picked up."	Ms. Hill, Tr., v. 3, p. 130
"I want that fucking room cleaned."	Ms. Robertson, Tr., v. 14, p. 174
"Finish cleaning up your fucking room."	Ms. Robertson, Exhibit A-99, p. 2
"Damn it, I just got the damned thing fixed."	Ms. Isley, Tr., v. 15, p. 203
"Get your fucking ass upstairs and clean your room."	Ms. Carlton, Tr., v. 17, p. 37
"Go clean your fucking room."	Appellant's husband, Tr., v. 18, p. 84
"Get your fucking ass upstairs and do your laundry."	Appellant, Tr., v. 18, p. 64
"Just go clean your fucking room."	Appellant, Tr., v. 18, p. 65
"Go to your fucking rooms."	T. McLaughlin, Exhibit D-10, p. 1
"Fucking son of a bitch." (walking away)	Appellant, Tr., v. 1, p. 124
"Fucking son of a bitch." (walking away)	Ms. Hill, Tr., v. 3, p. 184
"What a little bitch." (walking away)	S. McLaughlin, Tr., v. 9, p. 116
"Fucking bitch." (walking away)	Ms. Hill, Tr., v. 3, p. 144
"That little bastard...." (in another room)	Ms. Isley, Tr., v. 15, p. 201

The statements from the adult witnesses are remarkably consistent. Most statements include the word "fuck" and most statements include some instruction to the children to go to their rooms or clean their rooms. The statements from the adults again confirm that the Appellant

refers to children as bitch, son of a bitch, and bastard when she thinks the children cannot hear. Because these statements came from the Appellant's own witnesses, the undersigned finds that the Appellant said each of the phrases listed above.

120. The children who gave statements in this matter provided the following examples of phrases uttered by the Appellant towards the children in her home:

PHRASE	SOURCE
"Fuck you, go to your fucking room."	P, Exhibit D-18, p. 4
"Go clean your fucking room."	P, Tr., v. 3, p. 62.
"Clean your fucking room you little bitch."	E, Exhibit D-18, p. 7
"Fuck you, go to your fucking room."	E, Exhibit D-18, p. 7
"Clean your fucking room you cunt."	K, Exhibit D-15, p. 4
"Go to your room stupid fucker, bitch."	B, Exhibit D-19, p. 4
"Clean your dirty room you stupid bitch."	B, Exhibit D-19, p. 4
"Go to your fucking room."	F, Exhibit D-20, p. 1
"Go clean your room little bitch, fucking bitch."	E, Exhibit D-19, p. 3
"Fuck you, shut your fucking mouth."	J, Exhibit D-21, p. 1
"Shut up little bitch, fucker, fucking bitch."	E, Exhibit D-19, p. 3
"Fucking bitch."	F, Exhibit D-20, p. 1
"Fucking bitch."	J, Exhibit D-21, p. 2
"You son of a bitch."	P, Tr., v. 3, p. 65

The examples of phrases provided by the children are also remarkably consistent. The first eight phrases, which were provided by five different children, are almost identical. In addition, the phrases provided by the children are very similar to the phrases provided by the adults. Like the phrases provided by the adults, most of the phrases provided by the children include the word "fuck" and involve the Appellant telling the children to go to their rooms or to clean their rooms. The children confirm the Appellant's use of the words "bitch" and "son of a bitch."

121. Some of the phrases provided by the children are, in fact, identical to the phrases provided by the adults. For example, E stated that the Appellant said "Clean your fucking room little bitch." The adult witnesses confirmed that the Appellant said "clean your fucking room" and that the Appellant called E a "little bitch." Thus, every word of the statement reported by E has been confirmed by the other evidence in the record.

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122. The most striking difference between the statements of the adults and the statements of the children is the use of the phrase "fuck you." Three of the children reported hearing the Appellant direct this phrase towards a child while none of the adults reported hearing this phrase directed towards a child. The children's reports that the Appellant said "fuck you" are persuasive for several reasons. The evidence in the record indicates that the Appellant used the word fuck frequently. The Appellant did not hesitate to use the word fuck when speaking to the children. Ms. Dudley testified that she heard the Appellant use the phrase "fuck you" in another context. Tr., v. 7, pp. 116-117. Thus, it is not difficult to believe that the Appellant said "fuck you" to the children. In addition, virtually all of the other phrases provided by the children match up with the statements provided by the adults. In each example provided by the children, the words "fuck you" are attached to a phrase that the Appellant has admitted to using. If the children were going to lie about hearing the Appellant say "fuck you," the children would have to be extremely astute to realize that their lie would be more convincing if it were paired with a phrase that the Appellant had already admitted saying. In other words, the children would have to understand that "Fuck you, clean your fucking room," would be more persuasive to adults than "fuck you" by itself. There is no evidence in the record to indicate that the children were devious enough to coordinate their statements in this way. Instead, it seems much more likely that P, E, and J were reporting phrases that they had actually heard the Appellant say. Therefore, the undersigned finds that all of the phrases reported by the children are persuasive. The children's consistent statements are corroborated by each other and by the phrases reported by the adults.

123. The statement in Initial Finding of Fact 27 that the Appellant's use of profanity "was never directed at children," is baffling and is not supported by the evidence in the record. The undersigned has listed 17 phrases that were directed at children and reported by eight different adult witnesses. The undersigned has listed 14 additional phrases that were directed

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at children and reported by six different children. Based on these phrases, it is not clear how the Initial Decision could possibly find that profanity was not directed at children. Based on these phrases, there can be no question that the Appellant directed profanity at children on numerous occasions. Initial Finding of Fact 27 has been deleted and replaced with the phrases reported in the hearing record. The list of phrases provides a precise and concrete picture of the Appellant's actual use of profanity and proves that the profanity was directed at children.

THE DEPARTMENT'S ASSIGNMENTS OF ERROR

124. The Department alleged several additional errors in the Initial Findings of Fact that were not related to a specific allegation. The undersigned resolves these additional assignments of error in numerical order.

125. **Initial Finding of Fact 4-** The Department raised four arguments regarding Initial Finding of Fact 4. First, the Department noted that K made a report to Dr. Crabb on July 10, 2001, not July 11, 2001. The Department is correct that Dr. Crabb's referral, dated July 11, 2001, states that K made a disclosure "last night." Exhibit D-15. The date of the referral has been amended to July 10, 2001.

126. The Department's second argument was that K did not say that the Appellant choked P. This argument is correct. K stated that the Appellant "grabbed P by the front of the neck, not choking...." Exhibit D-15, p. 4. The undersigned has amended Initial Finding of Fact 4 to conform to the evidence in the record.

127. The Department's third argument was that K did not use the word "asshole." The Department is correct that this word does not appear in the referral from Dr. Crabb. Exhibit D-15. Initial Finding of Fact 4 has been amended accordingly.

128. The Department's fourth argument was that Finding of Fact 4 should include all of the information from the referral. However, the referral document is already part of the

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hearing record. Initial Finding of Fact 4 adequately summarizes the information in the referral. There is no need to include every detail from the referral document in the Findings of Fact.

129. **Initial Finding of Fact 5-** The Department noted several minor factual errors in Initial Finding of Fact 5. The Department is correct that the information in Initial Finding of Fact 5 is not supported by substantial evidence in the record. The undersigned has amended Initial Finding of Fact 5 to correct the ages of the children, the words that make up the acronym SAY, and the length of time the children have been in the home.

130. **Initial Findings of Fact 6 and 7-** The Initial Decision incorrectly characterized the two letters sent by the Department to the Appellant. As explained in RCW 26.44.125, the appeal of a founded allegation of abuse or neglect is a two-step process. The alleged perpetrator is first entitled to review by management-level staff within the Department. If the internal review process upholds the finding, the alleged perpetrator is then entitled to request a hearing to contest the finding. The Department sent letters to the Appellant to notify her that the allegation of emotional abuse had been designated as founded (Exhibit D-3), while the allegation of physical abuse had been designated as inconclusive (Exhibit D-4). The Appellant requested and the Department completed an internal, management-level review of the emotional abuse finding. The Department notified the Appellant in the March 14, 2002, letter (Exhibit D-5) that the internal review process had upheld the emotional abuse finding. Initial Findings of Fact 6 and 7 have been amended to reflect this process.

131. **Initial Finding of Fact 14-** The Department correctly noted that the acronym SAY stands for "sexually aggressive youth," not "sexually active youth." Initial Finding of Fact 14 has been amended accordingly.

132. **Initial Finding of Fact 16-** The Department raised two arguments regarding Initial Finding of Fact 16. First, the Department argued that Mr. Thames never stated that he would have expected P to report any problems. The Department is correct. Although Mr. 000054

Thames stated that he had a good relationship with P, he never stated that he would have "expected P to have reported problems." Tr., v. 3, p. 41. Therefore, the undersigned has deleted this statement from Initial Finding of Fact 16.

133. Second, the Department asked that Initial Finding of Fact 16 be amended to include all of the information from Mr. Thames' testimony. The undersigned declines to add any additional information because the Finding adequately summarizes Mr. Thames' testimony. Mr. Thames' entire testimony is already in the hearing record. There is no need to include every detail of P's history or Mr. Thames' opinions in the Findings of Fact.

134. **Initial Finding of Fact 17-** Initial Finding of Fact 17 has been amended to delete the preface "P himself testifies...." The necessary Finding is that P had a bed wetting problem, not that P testified that he had a bed wetting problem.

135. **Initial Finding of Fact 18-** The undersigned has amended Initial Finding of Fact 18 to remove the preface "P reports that...." The Appellant herself conceded that she had yelled at P about the wet sheets. See Tr., v. 1, p. 115. The necessary Finding is that the Appellant yelled, not that P reported that the Appellant yelled.

136. **Initial Finding of Fact 20-** The first sentence of Initial Finding of Fact 20 has been deleted because it is not relevant to the allegations in this matter. There was no allegation that the Appellant had called P a nigger. The allegation in this matter was that the Appellant had called J a nigger. It is not clear why this statement was included in the Initial Findings of Fact.

137. **Initial Finding of Fact 21-** The Department argued that Initial Finding of Fact 21 was misleading because it implies that many witnesses have not heard the Appellant swear.

However, Initial Finding of Fact 21 is supported by substantial evidence in the record. Thirty-four witnesses were asked if they had heard the Appellant swear. Twenty-seven of these witnesses testified that they had heard the Appellant swear. However, seven witnesses

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testified that they had not heard the Appellant swear. These witnesses included social workers (Mr. Thames, Ms. Timentwa-Wilson, Mr. Bulzomi), doctors (Dr. Cowles, Dr. Adler), and teachers (Mr. Chamberlin, Ms. Opland). Therefore, Initial Finding of Fact 21 has not been amended.

138. **Initial Finding of Fact 23-** The Department argued that Initial Finding of Fact 23 was incorrect in stating that all of the children in the Appellant's home swore. The Department is correct. E and B came to live in the Appellant's home before they could talk. Therefore, they could not have come into the home swearing. In addition, there was no evidence in the record that P swore. The undersigned has amended this Finding to remove any reference to E, B, or P.

139. There was extensive evidence in the record that J, K, and F swore. Tr., v.1, p. 156; v. 2, p. 119; v. 3, p. 195; v. 9, p. 74; v. 15, pp. 82, 152. The Appellant and Ms. Robertson testified that the boys come into the home swearing. Tr., v. 14, p. 157; v. 18, p. 72. The remaining sentences in Initial Finding of Fact 23 are supported by substantial evidence in the record and have not been amended.

140. **Initial Finding of Fact 24-** The Department alleged that Initial Finding of Fact 24 should be amended to state that the Appellant was the only person who was allowed to swear in the home and that the children recognized this as a double standard. It is not clear why this fact is relevant to the issues in this case. This "double standard" issue was never raised as an allegation in the Finding of Abuse or the Notice of Revocation. The Department has not explained why a parent would not be permitted to have different behavioral standards for adults and children. Parents impose double standards for their children frequently. As one witness noted, the Appellant smoked but did not allow the children to smoke. Tr., v. 9, p. 145. While the children may have been confused about why they were not allowed to smoke, this double

standard could hardly be considered abuse. Therefore, the undersigned declines to amend Initial Finding of Fact 24.

ABUSE ALLEGATION

141. Having resolved each of the contested factual issues above, the undersigned next addresses the issue of whether the proven facts support a finding of emotional abuse. Specifically, the Department proved that four events occurred: the Appellant restrained and threatened F; the Appellant told P to move his black ass; the Appellant called E names; and the Appellant swore at the children. The undersigned addresses each of these four incidents to determine whether each incident satisfies the definition of abuse.

142. **Applicable Law-** The Department alleged that the Appellant's actions violated the definition of abuse in former WAC 388-15-130(3)(d) and (g)⁸, which states:

Abusive, neglectful, or exploitive acts defined in RCW 26.44.020 include...

(d) Committing acts which are cruel or inhumane regardless of observable injury. Such acts include, but are not limited to, instances of extreme discipline demonstrating a disregard of a child's pain and/or mental suffering....

(g) Engaging in actions or omissions resulting in injury to, or creating a substantial risk to the physical or mental health or development of a child....

Thus, the question before the undersigned is whether the Appellant's actions satisfy the specific definition of abuse cited in the Department's notice. If the Appellant's actions do satisfy the definition of abuse, then the Department's finding of abuse must be upheld.

GENERAL PRINCIPLES

143. Prior to determining whether each proven incident satisfies the definition of abuse, the undersigned outlines the general principles that will apply to all four incidents. The following three general principles will apply to the four incidents that were proven above.

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⁸ WAC 388-15-130 was repealed on February 10, 2003. WSR 02-15-098 and 02-17-045. However, the undersigned applies the rule that was in effect at the time the alleged abusive act took place.

144. **The behavior of the children in this case does not determine whether the Appellant's acts constituted abuse.** While the behavior of the children in the Appellant's home is relevant, the children's behavior is not necessarily a reliable predictor of abuse. This general principle has been carried over from the general evidentiary principles above. See Conclusions of Law 19-22, above. Just as the children's behavior does not necessarily predict whether events actually happened, the children's behavior also does not predict whether the Appellant's actions rose to the level of abuse.

145. As explained above, there is conflicting evidence in the record about the progress of the children. Some children excelled in the Appellant's home, while some children excelled after they left the Appellant's home. Dr. Cowles, Dr. Lund, and Dr. Cartwright explained that children vary in their resiliency. Some children are extremely resilient in the face of abuse while other children are injured easily. Therefore, the behavior of the children is not a reliable predictor of abuse. Because of the complex factors that make up each child's behavior, the undersigned cannot work backwards from a child's level of functioning to determine whether that child has been subjected to substantial risk of harm.

146. In determining whether the Appellant's actions satisfy the definition of abuse, the undersigned analyzes the Appellant's actions rather than the perceived behavioral and developmental trends of the children. The children's behavior, while relevant, is not a reliable indicator of whether the Appellant's actions rose to the level of abuse.

147. **The definition of abuse requires proof of substantial risk to the health of a child but does not require proof of actual harm.** WAC 388-15-130(3)(d) states that cruel or inhumane acts are abusive "regardless of observable injury." WAC 388-15-130(3)(g) states that acts that "create a substantial risk" to the health or development of a child are abusive. These definitions of abuse do not require proof of injury. The definitions could not be any more explicit. A mere risk of injury is sufficient to prove abuse regardless of any actual harm to the

child. Therefore, neither the ALJ nor the undersigned can require the Department to provide proof of actual harm.

148. The Initial Decision erroneously required proof of actual harm. In interpreting WAC 388-15-130(3), the Initial Decision subtly but firmly changed the requirements of the definition. Initial Conclusion of Law 40 states:

We must speculate about the risk of injury where the risk of injury is emotional or psychological due to profanity used around minor children. None of the experts who provided testimony on behalf of DSHS could say with any degree of certainty that there was a risk of harm. They spoke in terms of possibility not in terms of likelihood. All of these professionals who had direct contact with the children determined they were thriving in the [Appellant's] home environment. This is clearly a statement that the use of profanity around these children did not constitute a risk of harm because there was no harm.

(Emphasis added.) In the underlined sentence, the Initial Decision concluded that the absence of actual harm proves that the children were never at risk of harm. In other words, the Initial Decision concluded that the Department was required to prove actual harm in order to prove that the risk or harm existed. This conclusion is erroneous and turns the definition of abuse on its head. WAC 388-15-130(3)(d) and (g) do not require proof of actual harm to prove abuse. The Initial Decision cannot require proof of actual harm under another name.

149. The Initial Decision reiterated the requirement of proof of harm several times. Initial Conclusion of Law 44 states:

The undersigned ALJ concludes that, for there to be a founded allegation of mental abuse, there must be a showing, and not just a probability of injury. In this case, all of the evidence by all of the experts who dealt with these children specifically, concluded that they were thriving in the [Appellant's] home and that there was no evidence of mental abuse associated with the use of profanity. The same is true of mental abuse.... Therefore, the allegation of mental abuse ... is unfounded.

Initial Conclusion of Law 48 states:

'Risk of harm' must be construed in terms of probabilities not possibilities. The evidence from Dr. Lund and Dr. Cartwright speaks only in terms of possibilities. Many things are possible. What we do know is that there was no harm to these children by virtue of the conduct of [the Appellant]. For that reason, we cannot

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conclude that harm is probable. Therefore, the actions of [the Appellant] did not constitute placing the children at risk of harm.

(Emphasis added.) These Conclusions represent a fundamental misunderstanding or misinterpretation of WAC 388-15-130(3)(d) and (g). In a case without obvious observable injury, the risk of harm must be determined by examining the alleged abusive act itself, not the reaction of the child. If the alleged abusive act was cruel or placed the child at substantial risk, then the act was abusive regardless of the reaction of the child.

150. In this case, the ALJ failed to examine the Appellant's acts to determine if they were cruel or posed a substantial risk to the children in the home. Instead, the ALJ considered only the observed reactions of the children. The Initial Decision concluded that there could be no risk of harm without proof of actual harm. This conclusion is erroneous because it ignores the plain language of WAC 388-15-130(d) and (g). When addressing the allegations below, the undersigned examines the risk posed by each alleged abusive act. The undersigned is not permitted to require the Department to prove that any child was actually harmed.

151. **The expert opinions of Dr. Cartwright and Dr. Lund are entitled to very little weight because the experts relied on allegations that were not proven.** The Department provided Dr. Cartwright and Dr. Lund with information about the Appellant's home. The Department asked Dr. Cartwright and Dr. Lund to draw conclusions based on the information provided by the Department. However, the information provided by the Department was not accurate.

152. Dr. Cartwright was asked, "And if the allegations made in the documentation you were given were untrue, what is the value of your report?" Dr. Cartwright answered, "Worthless." Tr., v. 4, p. 119. Dr. Lund similarly qualified his evaluation. Dr. Lund was asked if he identified any parenting problems in the materials he reviewed. Dr. Lund replied, "To the extent that the materials I reviewed provide an accurate reflection of certain conditions in the home, yes I did." Tr., v. 8, p. 81. Thus, both Department experts conceded that their opinions

were only as reliable as the information provided to them. This conclusion is logical because the experts relied entirely on the reports provided by the Department.

153. The information provided to the experts in this case was not accurate. For example, the Department told Dr. Cartwright and Dr. Lund that the Appellant called children nigger, that the Appellant wiped urine-soaked sheets on a child, and that the Appellant kicked, slapped, spanked, and choked children in the home. None of these allegations were proven.

In addition, the Department gave Dr. Cartwright and Dr. Lund information about the Appellant's history of unfounded and inconclusive referrals. The ALJ and the undersigned are not permitted to rely on unfounded referrals when adjudicating a license.

154. Because the Department's experts relied on information that was not accurate, their opinions are of little value in determining whether the Appellant's actions were abusive. It is not possible to determine whether the experts would have come to the same conclusions if they were only given information about proven allegations. For example, Dr. Cartwright continually referred to the sheet-wiping incident and the physical abuse allegations when rendering her opinion. It is not clear whether Dr. Cartwright would have changed her opinion had she known that the sheet-wiping and physical abuse allegations were unfounded. When Dr. Cartwright was asked if the children were placed at substantial risk, this question was based on harsh language and inappropriate physical discipline. Tr., v. 4, p. 129. Similarly, Dr. Lund emphasized his concerns about the Appellant's physically intimidating behavior, such as hitting and choking. Tr., v. 8, p. 86. There is no way of knowing if Dr. Lund would have changed his opinion had he known that the allegations of hitting and choking were not proven.

155. Because the Department's experts relied on allegations that were not proven, the experts' conclusions are entitled to little weight. The experts were not asked to render separate opinions about each alleged abusive act. The experts' overall opinions are of questionable value because they are inevitably based on a mix of accurate and inaccurate information. 0000b1

SPECIFIC INCIDENTS

156. The Department proved that four incidents actually happened. Applying the three general principles outlined above, the undersigned addresses each incident to determine if it satisfies the definition of abuse in WAC 388-15-130(3). If any of the incidents satisfy the definition of abuse in WAC 388-15-130(3), then the Department has proven that the Appellant abused a child. For the purposes of this section, the sole issue is whether the Appellant has abused a child. The issue of whether the Appellant's license should be revoked will be addressed separately below.

157. **Lake Incident-** The lake incident contains two parts. First, the Department proved that the Appellant restrained F by grabbing him around the upper part of his chest. Second, the Department proved that the Appellant yelled a threat at F after she restrained him. The undersigned addresses these two parts separately.

158. **Restraint of F-** The first part of the lake incident was the restraint of F. The Appellant's restraint of F does not satisfy the definition of abuse. Although the Appellant may have upset F by restraining him, the restraint was necessary based on the facts and circumstances surrounding the incident.

159. At the time of the restraint, F was about to assault Sarah McLaughlin, who was much smaller than F. Tr., v. 1, p. 154. Had the Appellant not intervened, F could have seriously injured Sarah McLaughlin and F could have been arrested and prosecuted. By intervening to pull F off of Ms. McLaughlin, the Appellant was acting in F's best interests and was also acting to protect the safety of her employee. The Appellant's restraint of F was permitted by WAC 388-148-0480(2)(a), which states:

In foster homes, in emergencies and only when the child's behavior poses an immediate risk to physical safety may you use physical restraint. The restraint must be reasonable and necessary to ... [p]revent a child on the premises from harming themself or others....

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The Appellant's restraint of F was appropriate, permitted by law, and did not create a substantial risk to F.

160. The Appellant demonstrated the restraint she used on F for Ms. Duron, who testified that the amount of force the Appellant used in her demonstration was excessive. The Department's argument is not persuasive because the conditions under which the Appellant restrained F were far different than the conditions under which the Appellant demonstrated on Ms. Duron. When the Appellant grabbed F, she was attempting to restrain a 17-year-old young man who was at least six inches taller than she was. Tr., v. 17, p. 89. F was lunging forward in an attempt to grab Sarah McLaughlin. Taking into consideration F's strength, size, and forward momentum, it must have taken a great deal of force to pull F backwards off of Sarah McLaughlin. In contrast, the Appellant demonstrated her restraint technique on Ms. Duron when Ms. Duron was sitting in a chair motionless. Tr., v. 1, p. 117. The demonstration on Ms. Duron did not adequately reflect the reality of the situation at the lake. Therefore, Ms. Duron's conclusion about the amount of force used by the Appellant is entitled to very little consideration. Had the Appellant used less force, the Appellant may not have succeeded in restraining F and both she and Ms. McLaughlin may have been injured. The Department failed to provide any reliable evidence to indicate that the Appellant used excessive force in restraining F.

161. **Threat to Kill F-** The second part of the lake incident was the Appellant's statement, "Stop fucking lying, tell the truth, I'll kill you bastard." This statement does satisfy the definition of abuse because it created a substantial risk to the mental health of F.

162. It should be self-evident that a parent-figure's threat to kill a child is potentially devastating to the child's mental health. Even at age 17, a child looks to his/her parents for a sense of protection and security. By telling F that she would kill him, the Appellant put F on notice that he could not depend on her for his own safety. Even if F did not necessarily believe

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that the Appellant would actually kill him, the Appellant's threat sent a powerful message to F that he should watch his back in the future. The Appellant's threat was likely to be viewed by F as menacing, intimidating, and demeaning.

163. The Appellant also called F a bastard. At age 17, F was probably aware that people use the word "bastard" to refer to someone for whom they have no respect. In its everyday usage, the word bastard usually refers to someone who is despicable and worthy of contempt. By calling F a bastard, the Appellant informed F that she did not respect him, did not value him, and did not care for him. This is precisely the wrong message for a parent to send to a 17-year-old child who is attempting to develop self-worth and self-esteem.

164. The conclusion that the Appellant's statement, "I'll kill you bastard," created a substantial risk to F's mental health was not based on the expert testimony of Dr. Cartwright or Dr. Lund. As explained above, the value of the experts' opinions was questionable. However, the impact of a statement such as "I'll kill you bastard," from a parent-figure to a child does not require any expert analysis. Just as the undersigned does not need an expert to explain that driving drunk or leaving unloaded guns in the home places children at risk, the undersigned also does not need an expert to explain that death threats and name calling place a child at risk. Some actions are so inherently perilous that they do not require an expert to point out the obvious. While the assessment of risk is an inherently speculative process, it is clear that the statement "I'll kill you bastard," poses a substantial risk to a child's mental health and development. Although the actual harm will vary from child to child, this statement is the kind of statement that will always pose a serious danger to a child's mental health.

165. The Appellant is correct that there is no evidence that F's mental health was permanently damaged by the Appellant's threat. However, WAC 388-15-130(3)(g) does not require proof of actual injury. The Appellant's statement to F was menacing, intimidating, 000064, demeaning, disrespectful, and insulting. There could be any number of reasons why F did not

exhibit actual injury from the Appellant's threat. For example, F may be particularly resilient or he may have developed an ability to hide or ignore his feelings. Whatever the reason for the absence of observable injury, the Appellant's threat still satisfies the definition of abuse in WAC 388-15-130(3).

166. **"Black Ass"**- The Department proved that the Appellant told P to move his black ass. There are several important factors to consider when assessing this allegation.

First, the Appellant conceded that she told P to move his black ass while she was angry. Tr., v. 18, p. 22. Although the Appellant later attempted to characterize the black ass incident as a joke or a clumsy attempt to bond with P, this was clearly not the case. The Appellant was angry and yelling at P when she told him to move his black ass. P must have been aware that the Appellant was using the phrase in anger and not in jest. Second, there had been problems with other children in the home making racist comments to P in the past. For example, Sarah McLaughlin stated that K made a comment about P being dirty because he was African-American and that F sometimes called P a nigger. Tr., v. 9, p. 111. The Appellant confirmed that F and J called P a nigger. Tr., v. 17, p. 84. P was sensitive to the racial comments he heard in the home and P had come into the Appellant's home with low self-esteem. Tr., v. 7, p. 116; v. 3, p. 22. Third, the Appellant told the story of telling P to move his black ass at least six times, sometimes in front of P.

167. Taking into consideration the factors noted above, the undersigned concludes that the Appellant's statement, "move your black ass," created a substantial risk to P's mental health and development. P was the only African-American person in the Appellant's home. P had been subject to teasing about his skin color. There was no reason to mention P's skin color when instructing P. By telling P to move his black ass, the Appellant demeaned P and left the impression that she was teasing P about his skin color. The Appellant's claim that she was merely trying to bond with P is without merit. P could only have experienced the Appellant's

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comments as belittling and disrespectful. The fact that Ms. Robertson was present the first time the Appellant used the phrase black ass does not excuse the Appellant's continued use of the phrase. Even if Ms. Robertson was comfortable telling P to move his black ass, this does not mean that the Appellant should have adopted Ms. Robertson's phrase when speaking to P. Ms. Robertson could not give the Appellant "permission" to use the phrase black ass simply because Ms. Robertson is African-American. Instead, the Appellant should have realized that this phrase was likely to be hurtful to P.

168. By repeating the story at least six times, the Appellant again made P the butt of a joke. Each time the Appellant told the story, she reinforced the fact that P was different than the other children in the home. The story is "funny" only because P is African-American. By singling out a sensitive child with low self-esteem as the butt of a joke, and repeating the story for the entertainment of numerous adult visitors, the Appellant belittled and degraded P. Even if P did not show the effects of this belittling, the Appellant placed P's mental health at substantial risk. By using the phrase black ass and repeating the phrase numerous times, the Appellant placed P at risk of being teased by the other children. The Appellant's use of the phrase black ass was notorious in the home because four of the six children (E, K, P, and F) were aware that the Appellant used the phrase. By using the phrase black ass, the Appellant gave the other children in the home ammunition to use against P the next time they wanted to tease him. The racial teasing P endured in the home was dangerous to P's mental health and the Appellant encouraged this teasing. Therefore, the Appellant placed P's mental health at risk and the Appellant abused P.

169. **Calling E Names-** The Department proved that the Appellant called E a bitch and a cunt. This conduct represents cruel and inhumane acts and created a substantial risk of injury to E's mental health.

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170. E, age eight, knew that the woman who she thought of as a mother referred to her as a bitch and a cunt. E was also aware that these words are taboo because they are used to express severe contempt, hatred, and insult. It is difficult to imagine a more devastating, damaging, and demoralizing scenario for a young girl, particularly at an age in which E was beginning to define her own self-image. These words had the potential to completely undermine and obliterate E's self-esteem. By using these words toward E, the Appellant created an overwhelming risk to E's mental health by sending an incredibly demeaning message.

171. Even if the Appellant did not believe that E could hear her when she said these words, the Appellant still created a risk by referring to E as a bitch and cunt in the first place. The Appellant should have known that the children in the home would eventually hear her referring to E as a bitch and a cunt. Even if E had not heard the Appellant say the words, the Appellant should have known that the other children would hear and repeat the words to E. By referring to E as a bitch and a cunt, the Appellant committed cruel acts and she created an enormous risk to E's mental health and development.

172. Like the threat allegation above, this allegation requires no expert testimony. There is no question that calling an eight-year-old girl a bitch and a cunt will place her mental health at serious risk. The impact of such language on young children is neither mysterious nor highly technical. The undersigned does not require a doctor or other expert to state the painfully obvious fact that referring to an eight-year-old girl as a bitch and a cunt is fundamentally dangerous behavior.

173. The evidence about E's behavior and progress in the home was mixed. While Dr. Vincent stated that E did well in the Appellant's home (Tr., v. 4, p. 36), there was no way of knowing whether E was reaching her potential because E had never lived in any other home. Dr. Vincent also testified that E was lacking in self-confidence. Tr., v. 4, p. 56. Even if E was

not showing any other signs of injury from the Appellant's name calling, the Department need not prove that E was actually injured. The Department need only prove that E was at substantial risk of injury. As with the threat allegation above, E's lack of obvious observable injury does not change the fact that the Appellant's name calling placed E's mental health at substantial risk. E may have been particularly resilient or she may have found some other way of dealing with her feelings. By calling E a bitch and a cunt, the Appellant abused E.

174. **Swearing at Children-** The Department proved that the Appellant swore at the children on many occasions. Finding of Fact 27 reflects all of the specific phrases that the Appellant said to the children.

175. The resolution of this allegation is somewhat complicated because the phrases used by the Appellant vary in the risk posed to the children. For example, the Appellant's statement "go to your fucking room," is likely to have less impact on a child's mental health than "fuck you, go to your fucking room you bitch." The latter statement includes name calling and is more menacing and aggressive. Even Ms. Duron testified that she did not believe that the phrase "go to your fucking room" is abusive. Tr., v. 12, pp. 180-181.

176. However, the undersigned need not determine where to draw a precise line between phrases that are abusive and those that are not abusive. In this case, some of the phrases used by the Appellant are so potentially damaging that they are per se abusive. There is no need to define the precise boundary between abusive and non-abusive statements because the Appellant has far surpassed that boundary. For example, the Department proved that the Appellant made the following statements to children:

"Clean your fucking room you little bitch."

"Fuck you, go to your fucking room."

"Clean your fucking room you cunt."

"Clean your dirty room you stupid bitch."

"Fucking bitch."

"Fuck you, shut your fucking mouth."

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These statements are hostile, demeaning, and insulting. A child could only experience these statements as threatening and disrespectful. Coming from a child's parent-figure, these statements would inevitably jeopardize the child's sense of self-esteem and self-worth. By making these statements to the children, the Appellant sent the message that she does not respect the children and she does not value the children. Even if the children did not show any observable injury, the Appellant placed all of the children at substantial risk by saying the phrases listed above.

177. In conclusion, the Appellant's conduct satisfies the definition of abuse in WAC 388-15-130(3)(d) and (g). By saying, "I'll kill you bastard," to a child, telling a child to move his "black ass," calling a child a bitch and cunt, and swearing at children, the Appellant committed acts which are cruel and which created a substantial risk to the mental health and development of the children in her home. Therefore, the Appellant has abused children and the Department's abuse finding is upheld.

LICENSING VIOLATIONS

178. In addition to the abuse allegations, the Department alleged that the Appellant violated eight specific foster care licensing rules. The undersigned addresses each rule separately in the order in which they appear in the Department's Notice of Revocation.

179. **Personal Characteristics-** WAC 388-148-0035⁹ states:

If you are requesting a license, certification, or a position as an employee, volunteer, intern, or contractor in a foster home, group care facility, staffed residential home, or child-placing agency you must have the following specific personal characteristics:

(1) You must demonstrate that you have the understanding, ability, physical health, emotional stability and personality suited to meet the physical, mental, emotional, and social needs of the children under your care....

(3) You must have the ability to furnish the child with a nurturing, respectful, supportive, and responsive environment.

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⁹ WAC 388-148-0035 was amended on May 6, 2004. WSR 04-08-073. However, the undersigned must apply the rule that was in effect at the time of the Department's action in this matter. In addition, the amendment did not change the substance of the provisions cited by the Department.

The Department alleged that the Appellant violated this rule by failing to demonstrate that she had the personal characteristics necessary to retain a foster care license. As explained below, this allegation was proven.

180. The fact that the Appellant abused children who were living in her home is conclusive evidence that the Appellant does not have the understanding and ability to meet the needs of children in her care. If the Appellant did have the understanding and ability to meet the needs of the children in her care, then she would not have threatened children, sworn at children, and called children names. Although the Appellant has a long and award-winning history of providing care to children, the Appellant's history cannot cancel out the fact that she abused children in her care.

181. In addition, the Appellant failed to provide the children in her care with a nurturing, respectful, and supportive environment. When the Appellant threatened to kill F, she was not providing a nurturing environment to him. When the Appellant called E a bitch and a cunt, the Appellant created a disrespectful and harmful environment for E. When the Appellant swore at the children, she failed to provide a nurturing and respectful environment. Therefore, the Appellant violated WAC 388-148-0035.

182. **License Denial-** WAC 388-148-0095 states:

- (1) A license must be denied, suspended or revoked if the department decides that you cannot provide care for children in a way that ensures their safety, health and well-being.
- (2) The department must, also, disqualify you for any of the following reasons...
 - (b) You have been found to have committed child abuse or neglect or you treat, permit or assist in treating children in your care with cruelty, indifference, abuse, neglect, or exploitation, unless the department determines that you do not pose a risk to a child's safety, well-being, and long-term stability.

The Department alleged that the Appellant violated this rule because she has been found to 000070 have committed child abuse. This allegation was proven. The Appellant has been found to

have abused children. WAC 388-148-0095(2)(b) requires the revocation of the Appellant's license. Although WAC 388-148-0095(2)(b) contains an exception, this provision is not applicable to this case because the Department has not determined that the Appellant no longer poses a risk to children.

183. **Losing a License-** WAC 388-148-0100¹⁰ states:

(1) The department may suspend or revoke your home or facility license if you:

Exceed the conditions of your home or facility license by...

(c) Failing to provide a safe, healthy and nurturing environment for children under your care; or

The Department alleged that the Appellant violated this rule by failing to provide a nurturing environment for children. This allegation was proven. Although the Appellant undoubtedly had a positive impact on the children in her home, the Appellant also abused the children in her home by threatening them, calling them names, and swearing at them. Because the children in the Appellant's home were subject to abuse, the undersigned cannot possibly conclude the Appellant was providing a healthy environment for the children. The Appellant's good reputation cannot cancel out the fact that she placed the children in her home at substantial risk of harm. Even if some of the children were thriving, swearing and name calling are incompatible with a nurturing environment. Therefore, the Appellant violated WAC 388-148-0100.

184. **Abuse and Neglect-** WAC 388-148-0420 states:

As part of ensuring a child's health, welfare and safety, you must protect children under your care from all forms of child abuse and neglect (see RCW 26.44.020(12) and chapter 388-15 WAC for more details).

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¹⁰ WAC 388-148-0100 was amended on May 6, 2004. WSR 04-08-073. However, the undersigned must apply the rule that was in effect at the time of the Department's action in this matter. In addition, the amendment did not change the substance of the provisions cited by the Department.

The Department alleged that the Appellant violated this rule by abusing children. This allegation was proven because the Appellant failed to protect the children in her home from her own abusive conduct.

185. **Nondiscrimination-** WAC 388-148-0425 states "You must follow all state and federal laws regarding nondiscrimination while providing services to children in your care." The Department alleged that the Appellant violated this rule by using racially derogatory terms in the home. As explained below, this allegation was not proven.

186. The rule cited by the Department requires proof that the Appellant violated a state or federal law regarding discrimination. In other words, it is not sufficient that the Appellant "discriminated" in the general sense of the word. The rule requires proof that the Appellant violated a specific legal standard contained in some other law. However, the Department did not cite any specific law regarding discrimination that the Appellant allegedly violated. Presumably, the Department believes that using the term "black ass" violates some state or federal law regarding discrimination. Absent a citation, the undersigned has no way of verifying whether the Department's assertion is correct. If the Department believed that the Appellant's conduct violated some other law, then the Department should have included a citation in the notice. The undersigned declines to speculate about the possible basis for this alleged violation.

187. **Discipline-** WAC 388-148-0465 states:

(2) Discipline must be based on an understanding of the child's needs and stage of development.

(3) Discipline must be designed to help the child under your care to develop inner control, acceptable behavior and respect for the rights of others.

(4) Discipline must be fair, reasonable, consistent, and related to the child's behavior.

The Department alleged that the Appellant violated this rule by grabbing a child, pulling a child's hair, kicking a child, and rubbing a urine-soaked sheet in a child's face. These allegations were

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not proven. As explained above, the Department failed to prove all of these allegations by a preponderance of the evidence in the record. The only physical act proven by the Department was the restraint of F at the lake. However, this restraint was necessary to protect F and Ms. McLaughlin and was permitted by WAC 388-148-0480(2)(b). Therefore, the lake incident could not be characterized as inappropriate discipline. The Department failed to prove that the Appellant used inappropriate physical discipline.

188. **Forbidden Disciplinary Practices-** WAC 388-148-0470 states:

(1) You must not use cruel, unusual, frightening, unsafe or humiliating discipline practices, including but not limited to:

- (a) Spanking children with a hand or object;
- (b) Biting, jerking, kicking, hitting, or shaking the child;
- (c) Pulling the child's hair;
- (d) Throwing the child;
- (e) Purposely inflicting pain as a punishment;
- (f) Name calling, using derogatory comments;
- (g) Threatening the child with physical harm;
- (h) Threatening or intimidating the child....

The Department alleged that the Appellant violated this rule by using physical discipline, by calling children names, and by threatening a child. This allegation was proven. Although the Department failed to prove that the Appellant used physical discipline in the home, the Department proved that the Appellant called the children names such as bitch and cunt. The Department proved that the Appellant swore at the children on several occasions. The Department also proved that the Appellant threatened F at the lake when she said "I'll kill you bastard." Therefore, the Appellant violated the precise explicit prohibitions in WAC 388-148-0470(1).

189. The Initial Decision incorrectly stated that the disciplinary practices listed in WAC 388-148-0470(1) might be cruel or frightening. See Initial Conclusion of Law 35. Instead, the rule states, "You must not use cruel, unusual, frightening, unsafe or humiliating discipline practices, including but not limited to...." Pursuant to the unambiguous language in the rule,

the listed disciplinary practices are per se cruel and frightening. The listed disciplinary practices are also forbidden in all circumstances. In this case, the Appellant used the prohibited disciplinary practices of name calling and threatening. Therefore, the Appellant violated WAC 388-148-0470(1). That is the end of the analysis. There is no need to decide whether name calling and threatening are cruel and frightening because the rule already states that these practices are per se cruel and frightening. There is no need to decide whether the children were harmed by the name calling and threatening because the rule states that these practices are forbidden, regardless of the impact on any particular child.

190. The conclusion that the Appellant violated WAC 388-148-0470 is also supported by the decision in *Morgan vs. DSHS*, 99 Wn. App. 148, 992 P.2d 1023 (2000). In *Morgan*, the court found that a foster parent called a child a bitch and swore at children. The court concluded that the foster parent's use of profanity to address the children constituted humiliating discipline. The court further concluded that the foster parent's use of profanity violated former WAC 388-73-046(2), a rule that is virtually identical to current WAC 388-148-0470(1).¹¹ *Morgan* at 155. Therefore, the *Morgan* decision compels a conclusion that the Appellant's name calling and swearing at children violated WAC 388-148-0470. Although the *Morgan* court did not cite specific phrases other than the word "bitch," the phrases used by Ms. Morgan could hardly be worse than the phrases used by the Appellant, such as "Clean your fucking room you little bitch."

191. The Appellant attempted to distinguish the *Morgan* decision by arguing that the *Morgan* case was primarily about physical discipline and neglect. This argument is not persuasive because the *Morgan* court specifically isolated the profanity issue from the other issues in the last paragraph of the decision. The court stated:

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¹¹ Former WAC 388-73-046(2) stated "Cruel and unusual discipline, discipline hazardous to health, and frightening or humiliating discipline shall not be administered." Current WAC 388-148-0470(1) states "You must not use cruel, unusual, frightening, unsafe or humiliating discipline practices...."

In addition, the ALJ's conclusion that Ms. Morgan used profanity with the children is also supported by the record. Her use of profanity to address the children constitutes humiliating discipline in violation of WAC 388-73-046(2).

Morgan at 155. The *Morgan* court held that the use of profanity alone is sufficient to prove a violation of the minimum licensing requirements.

192. **Discipline Statement-** WAC 388-148-0475 states:

(1) You must provide a written statement with your application and reapplication for licensure describing the discipline methods you use.

(2) If your discipline methods change, you must immediately provide a new statement to your licensor describing your current practice.

The Department alleged that the Appellant violated this rule by using discipline methods other than the methods described in her statement of discipline. This allegation was proven. This allegation is somewhat illogical because WAC 388-148-0475 requires a foster parent to file a new statement if discipline methods change. The Appellant is accused of using discipline methods that are absolutely prohibited. The Appellant could not possibly have filed a discipline statement saying that she was using name calling as discipline because this conduct is prohibited. Nonetheless, it is technically correct that the Appellant was using discipline practices other than the practices listed in her statement of discipline.

193. **Conclusion-** The Appellant violated the following six foster care licensing rules:

WAC 388-148-0035- Personal Characteristics
WAC 388-148-0095- License Denial
WAC 388-148-0100- Losing of License
WAC 388-148-0420- Abuse and Neglect
WAC 388-148-0470- Forbidden Discipline
WAC 388-148-0475- Discipline Statement

RCW 74.15.130(2) states:

In any adjudicative proceeding regarding the denial, modification, suspension, or revocation of a foster family home license, the department's decision shall be upheld if there is reasonable cause to believe that: *

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(a) The applicant or licensee lacks the character, suitability, or competence to care for children placed in out-of-home care, however, no unfounded report of child abuse or neglect may be used to deny employment or a license;

(b) The applicant or licensee has failed or refused to comply with any provision of chapter 74.15 RCW, RCW 74.13.031, or the requirements adopted pursuant to such provisions....

In this case, the Appellant violated six licensing rules. Therefore, the Department has proven that there is reasonable cause to believe that the Appellant failed or refuse to comply with the requirements of chapter 74.15 RCW and chapter 388-148 WAC. Based on RCW 74.15.130(2), the undersigned must uphold the Department's chosen remedy of revocation of the Appellant's license. The Appellant's foster care license shall be revoked.

ADDITIONAL ISSUES

194. The Appellant raised three additional issues regarding the Department's actions in this case. The undersigned addresses these three additional issues below.

195. **Equitable Estoppel-** The Appellant argued that the Department should be equitably estopped from revoking her license because the Department has always known that the Appellant swears. The Appellant argued that the Department should not be permitted to characterize her swearing as abuse because the Department previously concluded that the Appellant's swearing was not abusive.

196. The Appellant's equitable estoppel argument is not persuasive. The Court of Appeals has previously ruled that the doctrine of equitable estoppel cannot be used to prevent the Department from performing its health and safety function when licensing facilities. In *Bond v. Department of Social and Health Services*, 111 Wn. App. 566, 45 P.3d 1087 (2002), an adult family home provider argued that the Department should be equitably estopped from citing a rule violation if the Department knew about the violation but failed to cite it in a previous inspection.

Bond at 575. The court categorically rejected this argument:

Bond cannot prove that the exercise of governmental functions will not be impaired by applying estoppel here because DSHS is mandated to enforce licensing requirements for adult family homes. As stated in its brief, "[I]t would be unconscionable for the Department to be estopped from enforcing fire safety regulations in an adult family home." Br. of Respondent at 35.

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The role of government, particularly when vulnerable adults are involved, is to ensure compliance by providers with all safety regulations. The government must step in the shoes of the guardian of the client and protect him/her from any serious threat, particularly those that are known and visible. Government functioning will be irreparably impaired if DSHS is estopped by previous oversight and unwarranted indications of tolerance from requiring its caregivers to meet updated safety regulations. Thus, we hold that DSHS is not estopped from enforcing fire and safety regulations.

Bond at 576 (emphasis added).

197. The Appellant's argument in this case is almost identical to the argument of the adult family home provider in *Bond*. The Appellant argued that the Department's previous oversight and tolerance of the Appellant's swearing should prevent the Department from citing the Appellant's swearing as a violation of the foster home licensing rules. As explained by the court in *Bond*, this argument would irreparably impair government functioning. If the Department were prevented from citing health and safety violations, the Department would be unable to meet its responsibilities to protect children in licensed facilities. Even if the Department previously turned a blind eye to the Appellant's swearing, the Department cannot be equitably estopped from entering a finding of abuse against the Appellant at this time.

198. In addition, there was no evidence in the record that the Department knew about the extent of the Appellant's swearing until Ms. Duron began her investigation. For example, the Department did not know that the Appellant referred to E as a bitch and a cunt. The Department did not know that the Appellant said things such as "Fuck you, go to your fucking room." Therefore, the Appellant cannot prove that the Department previously approved of the specific language that was proven in this case.

199. **Compliance Agreement-** The Appellant argued that the Department should not be permitted to revoke the Appellant's license because the Department had previously entered into a compliance agreement with the Appellant and the Appellant complied with the agreement. This argument is without merit. The Appellant failed to cite a single rule or statute that prevents the Department from taking additional action after entering into a compliance

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agreement. Although the Appellant does not think that this practice is fair, the Appellant has not cited a rule or statute to support her argument.

200. RCW 74.15.130(2)(b) states that the undersigned must uphold the Department's revocation action in every case in which the Department proves that the Appellant failed to comply with licensing rules. RCW 74.15.130(2)(b) is not limited to cases in which the Department has not entered into a compliance agreement. The undersigned must comply with RCW 74.15.130(2)(b) regardless of the number of compliance agreements signed by the Department. The undersigned must uphold the Department's decision if the Department proves that the Appellant violated Department rules. In this case, the Department proved that the Appellant violated Department licensing rules and the undersigned must uphold the Department's revocation action. The presence or absence of a compliance agreement has absolutely no bearing on the revocation of the Appellant's license.

201. **Investigation Protocols-** The Appellant noted that the Department failed to comply with numerous protocols regarding investigations. The Appellant also noted that the Department failed to comply with several rules regarding investigations. However, the Appellant was never able to explain the relevance of the Department's failure to comply with the protocols and rules regarding investigations. The Appellant was unable to cite any statute or rule that gives the ALJ or the undersigned any authority over the Department's performance of its investigative function.

202. WAC 388-02-0215(1) states that the ALJ must "hear and decide the issues de novo (anew) based on what is presented during the hearing." In other words, the ALJ must decide the issues as if the Department had never made a decision. In this case, the ALJ was able to hear 49 witnesses and to review over 100 exhibits that were admitted into the record.

Once the ALJ was able to evaluate the evidence in the hearing record de novo, the Department's investigation was no longer relevant. For example, the Appellant complained that

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the Department did not interview the children's doctors and therapists. This fact does not matter because all of the doctors and therapists testified during the hearing. The Appellant complained that the Department did not complete a risk assessment. This fact does not matter because the ALJ made his own de novo assessment of the risk to the children. The Appellant complained that the Department did not comply with the timelines for investigations. The Appellant was never able to explain how these time deadlines were relevant to the allegations that were before the ALJ for a de novo determination. The Appellant complained that the Department did not timely notify the Appellant about the investigation. The Appellant did not explain how this was relevant to a determination of the facts. The Appellant complained that the Department improperly considered unfounded referrals. This fact does not matter because the ALJ ignored the unfounded referrals when he completed a de novo determination of the issues in this case.

203. In sum, the Appellant never provided an answer to the question "So what?" Even if the Department violated all of the rules for investigations, what difference does that make to the ALJ's de novo determination of the facts? The ALJ completed a new investigation of the facts through the hearing process. Even if there were flaws in the original investigation, these flaws were corrected in the hearing process. Even if the Department did not interview all of the witness, the ALJ corrected this error by allowing all of the witnesses to testify. Even if the Department improperly considered information, the ALJ corrected this error by ignoring the improper information.

204. Neither the ALJ nor the undersigned has any authority to sanction the Department for failing to follow the rules. The only thing the ALJ and the undersigned can do is to go forward with a de novo determination of the facts. That is what happened in this case.

205. **Conclusion-** The Department proved that the Appellant abused children by saying "I'll kill you bastard" to a child, telling a child to move his "black ass," calling a child a

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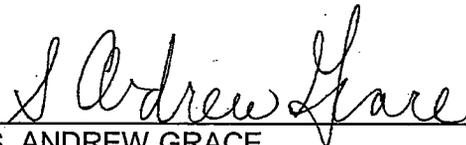
bitch and cunt, and swearing at children. Therefore, the Department's finding of emotional abuse #1228061 is upheld. The Initial Decision's Conclusion to the contrary is in error and is not adopted. The Department also proved that the Appellant violated six foster care licensing rules. Therefore, the Appellant's foster care license shall be revoked. The Initial Decision's Conclusion to the contrary is in error and is not adopted.

The procedures and time limits for seeking reconsideration or judicial review of this decision are in the attached statement.

IV. DECISION AND ORDER

1. The Initial Decision is reversed.
2. The Department's finding of emotional abuse #1228061 is upheld. The Appellant abused children by saying "I'll kill you bastard" to a child, telling a child to move his "black ass," calling a child a bitch and cunt, and swearing at children.
3. The Appellant's foster care license shall be revoked because the Appellant violated six foster care licensing rules.

Mailed on August 11, 2004.


S. ANDREW GRACE
Review Judge

Attached: Reconsideration/Judicial Review Information

Copies have been sent to: Kathie Costanich, Appellant
Carol Farr, Appellant's Representative
Carol Clarke, Program Administrator
Diane Dorsey, AAG, Seattle AGO, Department Representative
Rynold C. Fleck, ALJ, Seattle OAH

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NO. 57214-8-I

COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

KATHIE COSTANICH,

Petitioner,

v.

STATE OF WASHINGTON,
DSHS,

Respondent/ Appellant.

DECLARATION OF
SERVICE

I, Rachel Taylor, declare as follows:

I am a Legal Assistant employed by the Washington State
Attorney General's Office. On March 9, 2006 I sent a copy of

1) **Brief of Appellant** 2) **This Declaration of Service** to the
following:

Carol Farr
Leonard W. Moen & Associates
Suite 100
1107 SW Grady Way
Renton, Washington 98055-1217

via US Mail, postage pre-paid
 via ABC Legal Messenger
 via Facsimile

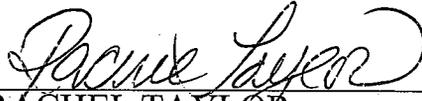
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FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON

ORIGINAL

I declare under penalty of perjury, under the law of the State of Washington that the foregoing is true and correct.

DATED this 4th day of March, 2006.



RACHEL TAYLOR
Legal Assistant II