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SUPREME COURT
OF THE STATE OF WASHINGTON

KATHLEEN HARDEE,

Petitioner,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,
DEPARTMENT OF EARLY LEARNING,

Respondent.

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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

AMICUS CURIAE BRIEF
OF THE NORTHWEST JUSTICE PROJECT

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Court granted our request to file an amicus curiae memorandum on December 12, 2009.

II. ISSUES OF CONCERN TO AMICUS CURIAE

1. The standard of proof in child care provider disciplinary proceedings must be “clear, cogent, and convincing evidence,” and not a “preponderance of the evidence.”

2. The court should conform Washington case law with Washington’s Administrative Procedure Act’s mandates of “due regard” for an Administrative Law Judge’s (ALJ) opportunity to observe witnesses, and that the agency’s reasons for overturning ALJ findings must be stated in the record to assure meaningful judicial review.

III. STATEMENT OF THE CASE

The facts of this case are described in the Court of Appeals decision at *Hardee v. Department of Social and Health Services*. 152 Wn. App. 48 (2009). Amicus curiae adopt the parties’ description of the facts.

IV. ARGUMENT

A. The Standard of Proof in Child Care Provider Disciplinary Proceedings Must Be “Clear, Cogent, and Convincing Evidence,” and Not a “Preponderance of the Evidence.”

This Court has previously held that the standard of proof required to revoke a person’s medical license is clear and convincing evidence, and

not a preponderance of the evidence. *Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n* 144 Wn.2d 516, 518, 29 P.3d 689, 689 (2001). This Court also applied the higher standard of proof to certified nursing assistants in *Ongom*.¹ *Ongom*, 159 Wn.2d at 137-38, 148 P.3d 1031-32. In the present case, the Court of Appeals has erroneously determined that child care workers are subject to the preponderance standard at license revocation proceedings, and not the clear and convincing standard. However, child care workers have the same liberty interest in protecting their license as medical doctors in protecting their medical licenses, and nursing assistants in protecting their certifications.

In assessing the nature of the child care licensee's protected interest, it is important for the Court to consider the role of child care providers in society and to consider how that role not only impacts the health, welfare, and safety of children, but how it impacts the economic realities of the many families who rely on child care services. A major concern for many parents is obtaining quality and affordable child day care, especially with the rise in families with two working parents.²

Indeed, the demand for child care has grown increasingly as women with

¹ This case involved a registered nursing assistant whose license was suspended by the Department of Health.

² Bureau of Labor Statistics, U.S. Dep't of Labor, 2010-11 Career Guide to Industries: Child Day Care Services (2010), available at <http://www.bls.gov/oco/cg/cgs032.htm> Accessed on 2/17/2010.

children have entered the workforce.³ As the need for such services rose, the child care industry began to fill the need of non-relative care.⁴

While previously, families relied heavily on care provided by a “stay at home parent”, today, parents of young children rely on a variety of arrangements which include family child care, in-home care, relative care, and child care centers.⁵ There are two main types of child care services which comprise the industry: center-based and family child care.⁶ According to the Bureau of Labor Statistics, formal child day care centers consist of “part and full day preschools, child care centers, school and community based pre-kindergartens and Head Start and Early Head Start centers.” Family child care involves providers who care for children in their homes for a fee.⁷ In the present case, the Appellant, Ms. Hardee, provided in-home family care.

³ Smith, Peggie R., “Welfare, Child Care, and the People Who Care: Union Representation of Family Child Care Providers,” *University of Kansas Law Review*, January 2007. 55 U. Kan. L. Rev. 321, 325.

⁴ Bureau of Labor Statistics, U.S. Dep’t of Labor, 2010-11 Career Guide to Industries: Child Day Care Services (2010), available at <http://www.bls.gov/oco/cg/cgs032.htm> Accessed on 2/17/2010.

⁵ Bureau of Labor Statistics, U.S. Dep’t of Labor, 2010-11 Career Guide to Industries: Child Day Care Services (2010), available at <http://www.bls.gov/oco/cg/cgs032.htm> Accessed on 2/17/2010.

⁶ Bureau of Labor Statistics, U.S. Dep’t of Labor, 2010-11 Career Guide to Industries: Child Day Care Services (2010), available at <http://www.bls.gov/oco/cg/cgs032.htm> Accessed on 2/17/2010.

In 2008, there were 859,200 child day care services wage and salary jobs in the United States. Additionally, there were 428,500 self-employed and unpaid family workers in the industry.⁸ While actual figures remain elusive, especially because of the underreporting associated with home-based child care, one study estimated that the number of child care workers caring for very young children at any given moment is 2.3 million.⁹ In Washington State, there are 7,479 licensed childcare facilities, the majority of which are small family childcare homes.¹⁰ These childcare facilities have a combined licensed capacity of 173,888.¹¹

Childcare services are critical to low-income people. Nearly sixty percent of low-income children under the age of six are in some type of non-parental child care. Twenty-five percent of those children are in such

⁷ Bureau of Labor Statistics, U.S. Dep't of Labor, 2010-11 Career Guide to Industries: Child Day Care Services (2010), available at <http://www.bls.gov/oco/cg/cgs032.htm> Accessed on 2/17/2010.

⁸ Bureau of Labor Statistics, U.S. Dep't of Labor, 2010-11 Career Guide to Industries: Child Day Care Services (2010), available at <http://www.bls.gov/oco/cg/cgs032.htm> Accessed on 2/17/2010.

⁹ Smith, Peggie R., "Welfare, Child Care, and the People Who Care: Union Representation of Family Child Care Providers," *University of Kansas Law Review*, January 2007. 55 U. Kan. L. Rev. 321, 326.

¹⁰ National Association for Regulatory Administration: 2007 Licensing Study, (2008), available at http://www.naralicensing.org/associations/4734/files/WA_Profile_2007.pdf

¹¹ National Association for Regulatory Administration: 2007 Licensing Study, (2008), available at http://www.naralicensing.org/associations/4734/files/WA_Profile_2007.pdf.

child care for over thirty-five hours a week.¹² Family child care options are important to low income parents and are preferred to child care centers for several reasons. Among these reasons are the convenience, affordability, and flexibility to parents' work schedules that family child care can provide.¹³ Moreover, because many low-income parents lack ready access to transportation, and because there is a shortage of child care centers in poor communities, family child care is critical.¹⁴

Under a due process analysis, the economic impact of a lower standard of proof is of significant importance, as ultimately a provider's livelihood is at stake, regardless of whether that person is a doctor or a child care worker. This court should therefore be concerned with the adverse economic impact of the preponderance of evidence standard on childcare providers' ability to continue earning a livelihood, and the low-income people who rely on their services to earn a living.

Though it is not required to do so under the *Ongom* analysis, this Court should still consider the training and credentialing involved in obtaining and maintaining a license for purposes of assessing the

¹² Acs, Gregory, "A Good Employee or a Good Parent? Challenges Facing Low-Income Working Families," *University of Saint Thomas Law Journal*, Spring 2007 4 U. St. Thomas L.J. 489, 504.

¹³ See *supra* note 7 at 327-29.

¹⁴ Collins, Ann. Reisman, Barbara. "Child Care Under The Family Support Act: Guarantee, Quasi-Entitlement, Or Paper Promise?" *Yale Law and Policy Review* (1993). 11 Yale L. & Pol'y Rev. 203, 208.

professionalization of the childcare field. Unlike with nursing assistants,¹⁵ a child care license is mandatory. WAC 170-296-0140. Child care providers must receive training and credentialing as part of their licensing requirements.¹⁶ There is an extensive process to obtain a child care license which includes an inspection, compliance with local codes and ordinances and renewal every three years.¹⁷ Additionally, the Department of Early Learning (DEL) heavily emphasizes the importance of the role of child care providers, by referring to them as “professionals” at several places on its website,¹⁸ and by encouraging their continued education.¹⁹

The *Hardee* court’s characterization of a child care license as an “occupational license” rather than a professional license, likening a child care license to the license required for erotic dancers in *Brunson v. Pierce County*, 149 Wn. App. 855, 865, 205 P.3d 968 (2009), not only devalues

¹⁵ WAC 246-841-400.

¹⁶ WAC 170-296-0140; WAC 170-296-1410.

¹⁷ WAC 170-296-0125; 170-296-0160; 170-296-0260.

¹⁸ See “Washington Scholarships for Child Care Professionals,” <http://www.del.wa.gov/partnerships/development/scholarships.aspx>
“Other Early Learning Professional Development Activities,” <http://www.del.wa.gov/partnerships/development/activities.aspx>
“Building Bridges with Higher Education,” <http://www.del.wa.gov/partnerships/development/bridges.aspx>
“Professional Development Consortium,” <http://www.del.wa.gov/partnerships/development/consortium.aspx>

¹⁹ See “Washington Scholarships for Child Care Professionals,” <http://www.del.wa.gov/partnerships/development/scholarships.aspx>

the hard work of many child care providers, but it is indicative of a deeply concerning trend concentrating low wage working women in this field. Ninety-eight percent of all family child care workers are women,²⁰ and as a group, they are disproportionately poor.²¹ There is evidence that indicates that their hourly wages are extremely low despite the exceptionally long hours they work.²² Moreover, the field provides few job-related benefits.²³ Child care workers are also disproportionately more likely to be women of color.²⁴ To be sure, “the representation of women of color is more than 250 percent higher in the child care work force than it is in the work force at large.”²⁵

²⁰ Tuominen, Mary C. *We Are Not Babysitters: Family Child Care Providers Redefine Work and Care*, 2003 at 5. See also *supra* note 7 at 333.

²¹ Smith, Peggie R. “Welfare, Child Care, and and People Who Care: Union Representation of Family Child Care Providers,” *Kansas Law Review* (January 2007) at 333.

²² Ctr. For the Child Care Workforce, *Early Childhood Workforce Hourly Wage Data, Wage Data Fact Sheet* (2009), available at <http://www.ccw.org/storage/ccworkforce/documents/04-30-09%20wwd%20fact%20sheet.pdf>.

²³ Ctr. For The Child Care Workforce and the Human Services Policy Center, *Estimating the Size and Components of the U.S. Child Care Workforce and Caregiving Population: Key Findings from the Child Care Workforce Estimate (Preliminary Report)* (May 2002), at 29.

²⁴ Tuominen, Mary C. *We Are Not Babysitters: Family Child Care Providers Redefine Work and Care*, 2003 at 6.

²⁵ Smith, Peggie R. “Welfare, Child Care, and the People Who Care: Union Representation of Family Child Care Providers,” *Kansas Law Review* (January 2007) at 334-35.

Additionally, the Court should consider the fact that social views toward child care work also contribute to the poor compensation child care providers receive. These views regard the work as “unskilled,” and “menial.”²⁶ Child care is commonly dismissed as a type of “emotional work that lacks economic visibility and value.”²⁷ Despite the State’s view that child care workers are only entitled to the preponderance standard because a stigma or “slights to one’s reputation, even by the government, are tolerated from a due process standpoint...”²⁸ there is clearly a greater fundamental liberty interest in retaining a license that enables someone (with otherwise limited employment options) with the ability to earn a reasonable livelihood.

It is true that child care workers may not enjoy the automatic or widespread professional status that is associated with doctors. However, there have been significant strides toward gaining legitimacy as a profession for child care workers. The Council for Professional Recognition is a nonprofit organization that has worked toward improving

²⁶ Smith, Peggie R. “Laboring For Child Care: A Consideration of New Approaches to Represent Low-Income Service Workers,” *University of Pennsylvania Journal of Labor and Employment* (Spring 2006) at 591.

²⁷ Smith, Peggie R. “Laboring For Child Care: A Consideration of New Approaches to Represent Low-Income Service Workers,” *University of Pennsylvania Journal of Labor and Employment* (Spring 2006) at 591.

²⁸ State’s Answer to Amici Curiae at 7.

“performance and recognition of professionals in early childhood care and education.”²⁹ The Council administers the Child Development Associate (CDA) National Credentialing Program. The Program is intended “to assess and credential early childhood care and education professionals based on performance.”³⁰ More than 200,000 caregivers have obtained the CDA Credential since the beginning of the program.³¹ There are forty-nine states, including Washington State, which have incorporated the CDA Credential into their child care center licensing regulations.³²

Because of the credentialing, education, and development afforded to child care providers, the Court should determine that a child care provider is entitled to the same due process protections in retaining her license that would be extended to a physician, nursing assistant, barber or cosmetologist. While the State argues the preponderance of evidence standard of proof provides sufficient due process protection,³³ the State’s

²⁹ Council for Professional Recognition, History & Mission of the Council for Professional Recognition & CDA, available at http://www.cdacouncil.org/ab_his.htm.

³⁰ Council for Professional Recognition, History & Mission of the Council for Professional Recognition & CDA, available at http://www.cdacouncil.org/ab_his.htm.

³¹ Council for Professional Recognition, History & Mission of the Council for Professional Recognition & CDA, available at http://www.cdacouncil.org/ab_his.htm.

³² Council for Professional Recognition, History & Mission of the Council for Professional Recognition & CDA, available at http://www.cdacouncil.org/ab_his.htm. See also WAC 170-296-1410.

³³ State’s Answer to Amici Curiae, at 2-3.

view is inconsistent with its emphasis on high standards of conduct and performance and professional development for child care providers. If the State truly considers child care providers to be “professionals,” then it stands to reason that they are engaged in a profession and are therefore entitled to the same protection as a nursing assistant.

While it may be for the legislature to determine the nature and the level of public interest when it comes to child care licensing, it is for the Court to determine the due process that applies to child care workers. In the recent case of *Islam v. State of Washington, Dept. of Early Learning*, Wash.App. Div. 1, No. 63362-7-I/8-9, the Court of Appeals Division I applied the three part *Mathews v. Eldridge* analysis, and upheld the preponderance of evidence standard of proof. The court held that “it is for the legislature, not the courts, to decide to what degree maintaining the availability of child care centers is in the public interest.” *Islam* at 63362-7-I/9-10. The court further reasoned that, as a “legislative judgment,” the “State’s interest in protecting children has a higher priority than the State’s interest in an ample supply of child care centers.” *Islam* at 63362-7-I/10. There, the Court of Appeals only considered one aspect of the work of child care providers when it weighed the first prong of the *Mathews* test: “the private interest that will be affected by the official action.” The Court of Appeals did not address any of the other considerations discussed in

this brief, such as the professionalization of child care work. The nature of the private interest at stake in child care license proceedings outweighs the nature of the government interest.

This Court should determine that the government's interest in protecting the public from "incompetent" or "abusive" child care providers is not any greater or less than the State's interest in protecting the public from incompetent or abusive doctors or nursing assistants. Someone who is tasked with caring for children is inherently responsible for their health, safety, and welfare.³⁴ The direct impact that a child care provider has on the children in his or her care is equal to, if not greater than, the impact that a nurse's assistant has on the people in his or her care.

This Court should overrule the Court of Appeals ruling and determine that Ms. Hardee has a fundamental liberty interest in her child care license, and therefore is entitled to a "clear, cogent, and convincing" standard of proof. This Court should also determine that RCW 43.215.300(2) is unconstitutional and violates due process under the law insofar as it establishes the standard of proof in child care license revocation hearings to be "preponderance of the evidence."

³⁴ WAC 170-296-1260.

B. The Court Should Conform Washington's Case Law with the Administrative Procedure Act's Mandate of "Due Regard". The Agency's Reasons for Overturning ALJ Findings Must Be Stated in the Record to Assure Meaningful Judicial Review.

The Administrative Procedure Act (APA) requires Agency Review Judges to give "due regard" to the findings of the Administrative Law Judge. RCW 34.05.464(4); RCW 34.05.461(3). That meaningful standard has been watered down to nothing by this case and *Northwest Steelhead and Salmon Council of Trout Unlimited v. Washington State Dept. of Fisheries*, 78 Wn. App. 778, 896 P.2d 1292 (1995). This court should rectify that situation so that superior court judges have adequate and correct guidance on how "due regard" should be applied.

When the original hearing officer and the administrative review judge agree on the relevant findings of fact, "due regard" need not be expressed. However, in a case such as this, where the agency review judge changes fact findings made by an Administrative Law Judge (ALJ), RCW 34.05.464(4) and RCW 34.05.461(3) require the reviewing court to apply heightened scrutiny. Heightened scrutiny is no less important when the reviewing agency relied on hearsay rejected by the ALJ to overturn her original factual findings, as happened in the case at hand. Without "due regard," the ALJ's fact findings are merely an advisory opinion to the agency – something that the legislature did not intend.

C. RCW 34.05.464(4) Demands That the Reviewing Agency Show “Due Regard” For the ALJ’s Opportunity to Observe Witnesses.

Washington’s Administrative Procedure Act gives great weight to an ALJ’s findings of fact. Although RCW 34.05.464(4) provides that an agency reviewer has all of the decision-making powers of an ALJ, the statute further requires “due regard” be given to the ALJ’s “opportunity to observe the witnesses.”³⁵ This important constraint means the agency’s decision-making power is not identical to that of the initial hearing officer. Anticipating the significance of the due regard issue, this Court observed in *Tapper v. Employment Security Dep’t*:

Some federal courts have suggested that *where the reviewing officer ignores or reverses the credibility findings of the hearing officer, heightened scrutiny should apply to substantial evidence review of any substituted findings of fact. See, e.g., Sorenson v. Bowen*, 888 F.2d 706, 711 (10th Cir.1989). *Given the particular solicitude of RCW 34.05.464(4) for the credibility findings of the hearing officer, some such rule would seem to be warranted.* However, since this is not a substantial evidence case, we do not address the question of what such a rule would look like. Cf. RCW

³⁵ RCW 34.05.464(4) states:

The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the reviewing officer upon notice to all the parties. *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.*

(Emphasis added.) The Washington Administrative Code similarly requires a Department of Early Learning (DEL) review judge to consider the ALJ's opportunity to observe the witnesses. WAC 170-03-0620(1).

34.05.461(3) (“Any findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified”).

122 Wn.2d 397, 405 n. 3, 858 P.2d 494, 499 n. 3 (1993) (emphasis added).

This substantial evidence case now provides the court with an opportunity to formulate a rule that gives meaning to RCW 34.05.464(4)’s “due regard” language. The Court of Appeals’ failure to analyze the meaning of this key language renders that language superfluous and relieves the agency from having to take into account the critical issue of witness credibility.³⁶ This failure is an error of law that runs directly contrary to the intent of the legislature and must be reversed.

D. RCW 34.05.464(4) is a Plain, Clear and Unambiguous Directive to the Reviewing Agency to Give “Due Regard” to the ALJ’s Credibility Findings.

It is a fundamental rule of statutory construction that “[w]hen statutory language is clear, we assume that the legislature ‘meant exactly what it said’ and apply the plain language of the statute.” *Stroh Brewery Co. v. Dep’t of Revenue*, 104 Wn. App. 235, 239, 15 P.3d 692, 694 (quoting *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351, 354 (1997)), *review denied*, 144 Wn.2d 1002 (2001). Here, the legislature said that the

³⁶ The Court of Appeals in *Hardee* cited *Regan v. Dep’t of Licensing*, 130 Wn.App. 39, 121 P.3d 731 (2005), for the proposition that a reviewing officer has the authority to overturn an ALJ’s findings of fact, including determinations of credibility. *Hardee*, 152 Wn. App. at 59, 215 P.3d at 220. *Regan* involved the revocation of a bail bond license where the reviewing agency overturned the ALJ’s factual findings. Although *Regan* apparently raised a general challenge as to whether the agency’s findings were supported by substantial evidence, “due regard” for the ALJ’s findings is not mentioned as being at issue. *Regan* at 57.

reviewing agency must give "due regard" to the ALJ's first-hand opportunity to hear and observe witnesses, that is, to defer to the ALJ's credibility determinations. That a trier of fact is in the best position to make credibility determinations is a bedrock principle recognized by courts in all contexts. The Florida Court of Appeals grappling with the same issue under its Administrative Procedure Act put it thus:

"In determining whether substantial evidence supports the agency's substituted findings of fact, a reviewing court will naturally accord greater probative force to the hearing officer's contrary findings when the question is simply the weight or credibility of testimony by witnesses, or when the factual issues are otherwise susceptible of ordinary methods of proof, or when concerning those facts the agency may not rightfully claim special insight."

McDonald v. Dep't of Banking and Fin., 346 So.2d 569, 579 (Fl. App. 1977).

As far back as 1951 the United States Supreme Court recognized that this principle of deference was pertinent to the administrative hearing process:

"... on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown."

Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 494, 71 S.Ct. 456, 468 (cite omitted).

The legislature required “due regard” to ensure the integrity of the administrative hearing process. The ALJ is impartial and independent of DEL. RCW 34.12.010; WAC 170-03-0020(2). The DEL review judge is an agency employee or designee of DEL and is presumed to have institutional bias.³⁷ “Due regard” to the initial fact finder is an important safeguard built in by the legislature to protect the integrity of the hearing process.

E. The Substantial Evidence Test Accords Deference to the Initial Fact Finder.

On judicial review, the court reviews factual findings to determine whether they are supported by substantial evidence when the record is considered as a whole. RCW 34.05.570(3)(e).³⁸ The substantial evidence test was designed to accord deference to the initial fact finder specifically when credibility determinations are at issue. *State v. Hill*, 123 Wn.2d 641, 646, 870 P.2d 313, 316 (1994); *Moore v. Ross*, 687 F.2d 604, 609 (2nd Cir. 1982); *Chen v. Mukasey*, 510 F.3d 797, 801 (8th Cir. 2007).

By contrast, the decision by the Court of Appeals in this case gives unwarranted deference to “facts” distilled from a cold record by a review

³⁷ See *Doolin Security Savings Bank v. Federal Deposit Insurance Corp.*, 53 F.3d 1395, 1407 (1995).

³⁸ In *Chen v. Mukasey*, a federal Board of Immigration Appeals case, the Eight Circuit provides a very helpful discussion regarding the application of the substantial evidence standard in administrative law forums. 510 F.3d 797, 801-02 (8th Cir. 2007).

judge who, without consideration of the witness' demeanor and presentation, substituted his findings for that of an ALJ who had carefully observed the witnesses over the course of a four day hearing. In so doing, the review judge and the Court of Appeals completely disregarded the explicit legislative mandate contained in the statute to give "due regard" to the ALJ's credibility determinations.

F. RCW 34.05.461(3), RCW 34.05.464(8) and Constitutional Due Process Demand That the Agency Reasons for Overturning an ALJ's Findings be Stated in the Record to Assure Meaningful Judicial Review.

The holding by the Court of Appeals indicates that the only relevant query is whether the reviewing agency's findings are supported by substantial evidence. However, meaningful review requires the superior court to examine each material instance where the review judge departs from factual findings made by the ALJ.

The "regard" shown by the agency to the ALJ's findings must be clearly explained on the record. The "due regard" problem with the Court of Appeals' ruling below is compounded by Division I's ruling in *Northwest Steelhead and Salmon Council of Trout Unlimited v. Washington State Dept. of Fisheries*, which states:

"Under *Tapper*, it is clear that the Department Director was authorized under RCW 34.05.464(4) to substitute his own findings of fact for those of the ALJ. Given this authorization, there simply is no need for agency heads to provide reasons for modifying a

hearings officer's findings. The only requirement is that the agency head's substituted findings be supported by substantial evidence in the record.

78 Wn. App. 778, 785-86, 896 P.2d 1292, 1297 (1995)..

This is directly contrary to the mandates of RCW 34.05.461(3) and RCW 34.05.464(8) – both of which require a reviewing agency to fully disclose their reasons and the basis for their decision.³⁹ “[A]ny administrative agency must describe its reasoning with ‘such clarity as to be understandable’...” *Chen*, 510 F.3d at 801 (cites omitted). Unless the agency fully explains its reasons for overturning an ALJ’s findings of fact, judicial review cannot be meaningful. Agency departures from the ALJ’s findings must be examined by the reviewing court. *Sorenson v. Bowen*, 888 F.2d 706, 711 (10th Cir. 1989); *Jackson v. Veterans Administration*, 768 F.2d 1325, 1331-32 (Fed. Cir. 1985); *Awolsesi v. Ashcroft*, 341 F.3d 227, 233 (3rd Cir. 2003).

³⁹ RCW 34.05.461(3) states in pertinent part:

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*, including the remedy or sanction and, if applicable, the action taken on a petition for a stay of effectiveness. Any findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified. Findings set forth in language that is essentially a repetition or paraphrase of the relevant provision of law shall be accompanied by a concise and explicit statement of the underlying evidence of record to support the findings.

(Emphasis added.) RCW 34.05.464(8) regarding the review of initial orders states “A final order shall include, or incorporate by reference to the initial order, all matters required by RCW 34.05.461(3).” This mandate was important enough for the legislature to include twice.

When witness credibility and demeanor are at issue, as they are here, the importance of this requirement is magnified. *See, e.g., Peak v. Pa. Commonwealth, Unemployment Compensation Bd. of Review*, 509 Pa. 267, 278, 501 A.2d 1383, 1389 (1985); *Moore v. Ross*, 687 F.2d 604, 609 (2nd Cir. 1982); *Awolsesi*, 341 F.3d at 233.

Further, when an agency rewrites an ALJ's findings of fact regarding credibility, satisfying the substantial evidence test alone is not sufficient to meet Fourteenth Amendment Constitutional due process requirements. An agency's redetermination of witness credibility from a cold record violates due process unless the reasons are explained in "sufficient detail to permit meaningful appellate review." *Peak*, 509 Pa. at 278. *See also Moore*, 687 F.2d at 610.

Under Washington's Administrative Procedure Act (APA) and the Constitution, the agency cannot overturn an ALJ's finding of fact absent an articulated or obvious reason. Unless the agency is held to this requirement, an agency Review Judge could completely ignore an ALJ's factual findings. RCW 34.05.461(3) requires the reviewing agency to identify each fact to be replaced, state the replacement, and how consideration of the record as a whole justifies the replacement. The reviewing agency must demonstrate on the record the "due regard" shown for the ALJ's opportunity to observe witnesses. RCW 34.05.464(4).

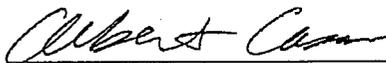
V. CONCLUSION

Due process of law requires a showing of clear, cogent and convincing evidence before the government can deprive child care providers of their licenses. This Court should also find RCW 43.215.300(2) unconstitutional and violates due process insofar as it establishes the standard of proof in child care license revocation hearings to be "preponderance of the evidence."

In the alternative, Washington's APA requires the reviewing court to determine whether a review judge, who changes an ALJ's findings of fact, has demonstrated "due regard" to the ALJ's opportunity to observe witnesses on the record. This showing requires the review judge to explicitly state on the record the facts which contradict the ALJ's credibility finding and explain how that warrants overturning the finding when the record is considered as a whole.

For all of the stated reasons, this Court should reverse the Court of Appeals and reinstate the ALJ's Initial Decision, or remand for further proceedings consistent with due process and Washington's APA.

Respectfully submitted this 28th day of September, 2010,



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