

83728-7

No. 62436-9-I

SUPREME COURT OF THE STATE OF WASHINGTON

KATHLEEN HARDEE,

Petitioner,

v.

THE STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, DEPARTMENT OF EARLY LEARNING

Respondent.

**SUPPLEMENTAL AMICUS CURIAE MEMORANDUM OF SEIU
LOCAL 925**

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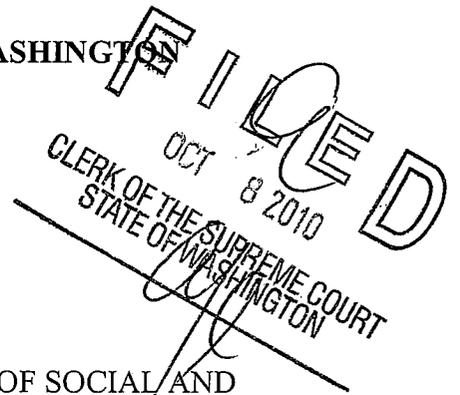


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I. INTRODUCTION

Washington's Service Employees International Union Local # 925 Early Learning Division (SEIU # 925) respectfully requests the Court reverse the Court of Appeals decision from Division I No. 62436-9-1 on the grounds that due process requires a clear and convincing standard of evidence when the Department of Early Learning (Department) revokes a child care provider's license.

II. IDENTITY AND INTEREST OF AMICUS

SEIU # 925 represents 10,000 licensed and license exempt child care providers throughout Washington. The members, primarily women, have special status as public employees for purposes of collective bargaining. The Court of Appeal's decision to consider a preponderance standard sufficient due process for these professional child care providers interests the union. A clear and convincing standard properly characterizes the weight of evidence the trier of fact should find when considering license revocation, an action fatal to the livelihood of these women.

III. STATEMENT OF THE CASE

The Court of Appeals Division I decided a preponderance standard applied to the revocation of a child care provider's license by the Department of Early Learning. The SEIU # 925 asks this Court to reverse that decision.

IV. ARGUMENT

Administrative agencies have tremendous unilateral power to destroy the financial viability and functional well being of an individual. *Hardee v. Dep't of Social & Health Servs., Dep't of Early Learning*, 152 Wn. App. 48, 54-55, 215 P.3d 214 (2009); *Islam v. State, Dept. of Early Learning*, 2010 WL 3294285; *Nguyen v. Department of Health Medical Quality Assurance Commission*, 144 Wn.2d 516, 29 P.3d 689 (2001), *cert. denied*, 535 U.S. 904, 122 S. Ct. 1203, 152 L. Ed. 2d 141 (2002), and *Ongom v. Department of Health, Office of Professional Standards*, 159 Wn.2d 132, 148 P.3d 1029 (2006), *cert. denied*, 550 U.S. 905, 127 S. Ct. 2115, 167 L. Ed. 2d 815 (2007).

In child care cases, a child care license may be a family's only viable means of support, financial and emotional. This support extends to the provider's family and to the family utilizing care while the parents are at work. A mom is able to provide financial income to her family while remaining at home with her children. Another family is able to remain in the work force knowing the family's children are receiving care. A preponderance standard of proof is not commensurate with such power. A clear and convincing standard recognizes the strength of the Department to protect the public without binding the agency to the weaknesses associated with the law enforcement standard of beyond a reasonable doubt.

Society risks less than it avails law enforcement when obligating the Department to prepare a case with clear and convincing evidence. Law

enforcement may not force a criminal suspect to speak, even when direct evidence implicates the offender of the most heinous disregard of human life. *State v. Braun*, 82 Wn.2d 157, 509 P.2d 742 (1973). Still, law enforcement's burden is to develop evidence beyond a reasonable doubt. We as a society tolerate this risk because we value the good name and freedom of every individual. *In re Winship*, 397 U.S. 358 (1970). The community does not respect or maintain confidence in the application of the law where there is doubt that the innocent are being condemned. *Id.*

An agency however, unburdened by such a heavy standard, has more power than law enforcement to stop dangerous people from violating the law. An agency holds the ultimate coercive tool: the credential, license, or permission that enables an individual to continue to function. A child care provider must cooperate and provide evidence or risk the agency revoking or suspending the individual's ability to operate. WAC 170-296-0140 and WAC 170-296-0370. Yet, the Department insists a light standard is essential to public safety. Law enforcement would certainly benefit if similarly empowered.

The judicial guardians of the constitution have not permitted the Legislature to stray that far. Few, if any, legislative sessions have tasked the Office of Financial Management with compilation of fiscal notes tallying the impact on state government from a heightened standard of care in the criminal arena. Legislative members do not commonly think they have the power to lower the criminal standard of proof. The

Legislature behaves differently in the administrative arena where it does legislate the standard, typically as requested by an agency in an agency request legislative proposal. RCW 43.215.300.

Recently, when confronted with a stakeholder legislative proposal to change the statutory standard to clear and convincing, state agencies rallied and tagged the proposal with a fiscal impact in excess of six million dollars. *See*, SB 6268 (<http://apps.leg.wa.gov> and the fiscal note at <https://fortress.wa.gov/ofm/fnspublic/legsearch.asp?BillNumber=6268&SessionNumber=61>). In a deficit budget cycle, agencies can outprice due process. Due process should not be based on fiscal cost.

In the *Islam* decision, the court failed to consider individual due process and deferred instead to the Legislative decision to enact a preponderance standard concluding due process is a policy decision: “Islam would have us override the legislature’s judgment...” *Islam* at 5. Due process is not a policy choice to which the Legislature should be given special deference. *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998)(Distinguishing evidentiary standard of proof from challenge to constitutionality of a statute). This Court should invoke its inherent authority under the Constitution to set an appropriate weight of evidence to meet due process guarantees for child care licensees. *See, State v. Thorne*, 129 Wn.2d 736, 921 P.2d 514 (1996)(“the court has inherent power to require procedural due process”).

This Court has already recognized due process necessitates a clear

and convincing standard with agency license suspension or revocation action. *Nguyen*, 144 Wn. 2d at 534, and *Ongom*, 159 Wn.2d at 142. The risk of erroneously tarnishing the good name of a child care provider similarly warrants equal due process. Due process standards may not be compromised through agency lobbying efforts. The judicial branch of government is the appropriate guardian of constitutional due process standards.

Child safety is public policy of such paramount concern that the Legislature has given extraordinary power to the Department to set exacting standards of care. RCW 43.215.205 and WAC 170-296. Given the policy attention devoted to child safety, the good name and reputation of a provider is seriously compromised with a Department determination, or even suggestion, that the provider is unfit to hold a license. The social stigma associated with an erroneous outcome against a child care licensee carries equal weight in the civil sector as some criminal behavior in the criminal sector. Many crimes cause far less harm to the personal reputation and economic well being of an individual. For instance, a conviction for driving under the influence does not preclude a person from working for or on behalf of children. Not so in the case of a child care license revocation.

Crimes may carry the risk of incarceration, although alternative sentencing options reduce the number. RCW 9.94A.505 (9). Clearly there are many crimes where incarceration is not likely, but the standard

remains beyond a reasonable doubt. *Born v. Thompson*, 154 Wn.2d 749, 754, 117 P.3d 1098 (2005). The purpose of the standard is to minimize the risk of erroneous decisions. *Id.* Beyond a reasonable doubt is a higher standard than clear and convincing, thus the proposal before this Court is not to equate due process to the criminal standard. An argument to equate the standard would require a criminal burden of proof, not a mere clear and convincing standard. That is not what this Court is asked to do. This Court is simply asked to reduce the disparity in the weight of evidence when the risk of erroneously damaging the good name and reputation of a licensee is of equally high importance. The procedural and substantive integrity of the child care regulatory process suffers serious compromise where an innocent provider's good name is so easily tarnished.

The risk of error to the detriment of the child is low because concerned parents are not dependent upon the hearing process to protect their children. Parents will not wait for a final outcome before deciding whether to change care. The provider must utilize the lengthy and costly administrative process to clear her name. RCW 43.215.305. Long before any hearing, the parent may act immediately and remove a child from care regardless of the validity of the allegations. The risk of harm to the child is alleviated when the Department pursues charges and posts the pending action. Any parent concerned about the safety of a child would not wait for a final revocation to protect a child from harm. Parents do not apply standards of proof when making child care decisions.

Any child care license revocation has a chilling effect on the provider, including allegations other than abuse and neglect. A license revocation means the provider cannot provide safe care for a child. RCW 43.215.205. No part of society tolerates compromising child safety. The social stigma, emotional suffering, and financial consequences devastate individuals, families, and communities. An individual found to have put a child at risk of harm or otherwise behaved in an unfit manner to care for a child confronts closed doors in business, employment, and social settings.

Contrary to the court's thoughts in *Islam* license revocation results in financially independent individuals and families dependent on state supported financial support, whether it is unemployment or low income remuneration. In the face of revocation, the likelihood that an individual obtain a license in the future is so remote that the reality is the revocation has a permanent impact on the provider. See, RCW 43.215.205 and RCW 43.215.215. Emotional and physical health deteriorates burdening the health care system. Communities lose productive and valuable local services that families have relied upon. The SEIU # 925 works with these women and families routinely and recognize the close emotional and financial margins within which they operate. License revocation is devastating to families in the short term and in the long term.

The department has disparate power in the exercise of its discretion. For example, when judging a child care provider's competence, the investigator may report observing a child "soaked in urine" or the

investigator may report observing a child with a “wet diaper.” The verbiage selected paint dramatically different portraits. The investigator’s task includes recording observations of the requisite personal characteristics of a child care provider. WAC 170-296-0140. A caregiver characterized as “unresponsive” may merely be absent while attending a training course. A child care provider is so vulnerable and dependent upon the Department’s characterization that a clear and convincing standard is a reasonable fairness safeguard well within the confines of constitutional due process well articulated by this Court in past decisions.

V. CONCLUSION

Washington’s SEIU # 925 urges the Court to hold due process necessitates evidence sufficient to meet a clear and convincing standard to revoke a child care provider’s license.

Respectfully submitted this 22nd day of September 2010.

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CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the forgoing Supplemental Amicus Curiae Brief on all parties or their counsel of recorded by U.S. Postal Service postage prepaid on the date below as follows:

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

Dated this 22nd day of September 2010 at Fircrest, Washington.

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Attached please find a motion to file Amicus Brief and Amicus Brief of the SEIU in the following matter:

Case Name: Kathleen Hardee v. The State of Washington, DSHS, Dept. of Early Learning

Case Number: 62436-9-1

Filed by: Joan K. Mell, WSBA 21319, 253-566-2510, joan@3brancheslaw.com

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