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NO. 62436-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KATHLEEN HARDEE,

Petitioner,

v.

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

Respondent.

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Kathleen Hardee is the petitioner in this Court, and was appellant in the Court of Appeals. Kathleen Hardee was for 23 years a state-licensed operator of a home child care facility.

B. DECISION BELOW

The Court of Appeals' unpublished decision was filed on July 27, 2009 and is set forth in Appendix at A-2 through A-17. The Court of Appeals granted a timely motion for publication and denied a motion for reconsideration on September 3, 2009. The order publishing the opinion is Appendix at A-1.

C. ISSUES PRESENTED FOR REVIEW

1. Do the due process clauses of the Washington and federal constitutions require that a child care provider's state-issued license be revoked only upon the presentation of clear, cogent, and convincing evidence justifying revocation?

2. In an administrative appeal may a review judge reverse an ALJ's findings of fact and credibility determinations and substitute a new view of the evidence based solely on hearsay rejected by the ALJ?

D. STATEMENT OF THE CASE

Most of the pertinent facts are recited in the Court of Appeals' ruling. However, the findings of the Administrative Law Judge (ALJ) are

not included. They are reproduced in the Appendix at B-1 to B-10. At the administrative hearing, ALJ Rynold Fleck heard nine witnesses and viewed 23 exhibits. One Department of Early Learning (DEL) witness testified that he had once come in and seen William changing his daughter's diaper in the changing room while Hardee was in the living room with other children. Appendix at B-3 to B-4. Hardee testified that she had been changing the diaper, but had stepped forward to see who had come in, and that she is always within sight and hearing. *Id.* It is critical to note that this incident occurred before there was any allegation or indication of sexual misconduct by William.

Reviewing the case under a preponderance of evidence standard, ALJ Fleck found insufficient evidence to support the DEL revocation and rescinded it. Appendix at B-1. Among his findings were that there was no indication that William was a danger to young children prior to July 2006; he found insufficient evidence that William had been left unsupervised, and no evidence that any unauthorized persons were living in the home. *Id.* at B-8 to B-9. He described the evidence presented as "circumstantial." *Id.* DEL presented no evidence that Ms. Hardee did not understand or respect children, and ALJ Fleck found no evidence of any such qualities lacking. *Id.* Regarding the specific incident with the diaper change, that both Hardee's and the parent's version of events proved that

Hardee was never out of hearing of the child, which is what the applicable regulations required.

License revocations are public on the Licensed Child Care Information System (LCCIS); posted on the LCCIS website. www.DEL.wa.gov/esa/dccel. Revocations are recorded and reported as a “negative action”¹ and are reported on all background checks to prevent Ms. Hardee from future employment in a number of professions. The revocation of this license is a “negative action” which is reported on the DEL Director’s List of Crimes and Negative Actions. *Id.*

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court’s landmark decision in *Nguyen*, followed by its decision in *Ongom*, established that regardless of whether a professional is highly trained, credentialed, and paid, or is in a more accessible career, that person has a constitutionally protected liberty and property interest in his or her professional license. Because of the high stakes involved in proceeding to revoke such licenses, this Court held, the level of proof required must be clear, cogent, and convincing evidence.

¹ "Negative action" means a court order, court judgment or an adverse action taken by an agency, in any state, federal, tribal or foreign jurisdiction, which must be reported and checked on any background check. *See* WAC 170-06-0010(9).

In this case, contrary to RAP 13.4(b)(1) and (2), the Court of Appeals has issued a published ruling that directly conflicts with a ruling of this Court and is unconstitutional. Ignoring the fact that a child care license requires more professional training and credentialing than the registered nursing assistant in *Ongom* – which requires none – the Court of Appeals concluded that a child care giver’s license is more similar to the “occupational licenses” issued to an erotic dancer and is not of sufficient import to warrant the clear, cogent, and convincing standard of proof.

The Court of Appeals also contradicted its own prior holding, contrary to RAP 13.4(b)(2). Prior cases of the courts of appeal have made clear that other professions that are factually indistinguishable from child caregivers merit application of the clear, cogent and convincing standard. The Court of Appeals has also contradicted its prior holding that a review judge may not simply discard the considered findings of an ALJ and substitute his or her own view of the evidence.

This issue is of substantial public import under RAP 13.4(b)(4). Child care providers are a critical function of our communities and represent a significant segment of support for Washington’s economy as a whole. Adverse findings against child care licenses are permanently published by the state. Because of the sensitive nature of the mission they undertake, child care providers are highly susceptible to reputational

attacks, and even one incorrect finding will likely destroy all ability for child care givers to earn a living.

(1) The Court of Appeals' Opinion Conflicts With This Court's Authority that a State-Issued Professional License May Only Be Revoked Upon Presentation of Clear, Cogent, and Convincing Evidence

In this case, the issue is whether a child care license constitutes a "professional license" worthy of the level of protection that a doctor or a nursing assistant enjoys. The Court of Appeals held that it does not.

The State must provide due process when it deprives an individual of "life, liberty, or property." U.S. Const. amend. XIV, § 1; Wash. Const. art. I, § 3. This Court's landmark decision in *Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n*, 144 Wn.2d 516, 29 P.3d 689 (2001), *cert. denied*, 535 U.S. 904 (2002) established that a state-issued professional license may only be revoked upon the presentation of clear, cogent, and convincing evidence. Therefore, this Court has established that a person's ability to practice a chosen profession hinges upon the State's approval or denial of a license, deprivation of that license takes on constitutional magnitude and the clear, cogent and convincing standard applies.

However, the Court of Appeals was uncertain regarding whether to apply this standard when the profession was that other than a doctor or

other highly trained and credentialed professional. The Court of Appeals in *Ongom v. State, Dep't of Health Med. Quality Assurance Comm'n*, 124 Wn. App. 935, 104 P.3d 29 (2005) distinguished *Nguyen* based on the fact that a nursing assistant's license requires no education or training:

A physician completes many years of rigorous education, training, and examination at enormous expense, and generally expects the practice of medicine to be a permanent career. *Registered nursing assistants, by contrast, have no educational or training requirements at all, perform duties only as delegated and supervised by nurses, and are employed in a field plagued by chronic and frequent turnover. The legislature provided for a "voluntary certification of those who wish to seek higher levels of qualification" which requires some training and competency evaluation, but even so, the value of the license to the holder is markedly different for nursing assistants than for physicians. ...*

Ongom, 124 Wn. App. at 944 (emphasis added). The Court of Appeals also tried to justify using a lower standard of proof arguing, "By statute, any person can obtain a nursing assistant license by simply submitting an application and paying a nominal fee. In fact, an applicant need not even obtain the license before beginning work as a nursing assistant." *Id.*²

This Court in reversed the Court of Appeals in *Ongom v. State, Dep't of Health Med. Quality Assurance Comm'n*, 159 Wn.2d 132, 104

² Since *Nguyen*, the Court of Appeals used similar reasoning to either reject or apply the clear, cogent, and convincing standard in a number of other professional credentialing contexts. *See, e.g., Eidson v. Dep't of Licensing*, 108 Wn. App. 712, 32 P.3d 1039 (2001) (preponderance standard applied to real estate appraisers); *Nims v. Washington Bd. of Registration*, 113 Wn. App. 499, 53 P.3d 52 (2002) (clear, cogent and convincing applies to registered professional engineers).

P.3d 1029 (2006), *cert. denied*, 127 S. Ct. 2115 (2007), explicitly rejecting the notion that the amount of education and training involved in acquiring a license should be determinative of the level of proof required to revoke it. In reversing the Court of Appeals, this Court held that considerations of time and investment in obtaining the license were improper when contemplating the value of a particular license to the holder:

The time and money spent on training has so little bearing on disciplinary proceedings that it cannot, by itself, justify a higher or lower burden of persuasion. We reject the Court of Appeals conclusion that “the property interest in a nursing assistant's license, while not insignificant, is considerably more limited than the property interest in a license to practice medicine.” *The licenses may be different, but nurses and medical doctors have an identical property interest in licenses that authorize them to practice their respective professions.*

Ongom, 159 Wn.2d at 138-39 (emphasis added). “To the contrary,” this Court observed, “loss of reputation to one marginally qualified for a modest occupation is potentially *more damaging* than the loss of reputation for a highly qualified medical specialist ... who may have many more alternate career opportunities.” *Id.* at 139 (emphasis added).

There are three levels of state professional credentialing available:

(a) registration, (b) certification, and (c) licensure. RCW 18.22.030.

Ongom and *Nguyen* involved professionals from the lowest level

(registration) to the highest level (licensure) respectively. This case represents the mid-level credentialing, certification. WAC 170-296-1410.

Here, obtaining a child care license involves more stringent requirements than obtaining a nursing assistant's registration. Op. at 7; WAC 170-296-1410. A child care license is mandatory, while the license at issue in *Ongom* was voluntary. *Id.* A child care license requires 20 hours of training; a nursing assistant's license requires no training. *Id.* A child care license applicant must pass a background check, a nursing assistant need not do so. *Id.*

Despite the holding in *Ongom* that even a profession at the registration level merits the clear, cogent and convincing standard, the Court of Appeals has concluded in this case that *Ongom* holding is inapplicable to child care givers because a child care license is more like an occupational license, such as that issued to erotic dancers. Op. at 8. The Court of Appeals also held that only those licenses which include "(a) Graduation from an accredited or approved program, and (b) acceptable performance on a qualifying examination" merited the higher standard of proof. *Id.* at 8 n.18. This is *directly contrary* to *Ongom*, in which this Court held that a nursing assistant license – which requires no education or examination – merited the higher standard of proof. *Ongom*, 159 Wn.2d at 138-39.

The Court of Appeals has misread *Ongom* and allowed a due process violation to stand. Just as it did in *Ongom* before this Court intervened, the Court of Appeals has downplayed, and even denigrated, the nature of a child care license in an attempt to justify a lower standard of proof. The ruling is directly contrary to this Court's explicit holding in *Ongom*, and merits review.

The Court of Appeals departed from its own precedent applying *Nguyen* and *Ongom* in cases revoking similar kinds of state licenses. For example, in *Chandler v. State, Office of Ins. Comm'r*, 141 Wn. App. 639, 649, 173 P.3d 275 (2007), *review denied*, 163 Wn.2d 1056 (2008) this same court concluded with little hesitation that the license of an insurance agent may only be revoked upon the basis of clear, cogent, and convincing evidence.

Hardee relied upon *Chandler* below, but the Court of Appeals distinguished it on its facts, arguing that a child care license was an "occupational" license, rather than a "professional" license. Op. at 8. Again, the court likened a license to care for children to an "occupational" license, equating it with the licenses issued to erotic dancers. *Id.*

The Court of Appeals distinguished *Chandler* based on a purported distinction between an insurance agent's license and a child care provider's license. Op. at 8. However, the opinion contains no

explanation of why *Chandler* does not apply, nor did the Court of Appeals make any effort to distinguish between the two professions based on this Court's *Ongom* analysis. *Id.*

The Court of Appeals' rejection of its own decision in *Chandler* was accompanied by an interesting analysis of which occupations are "professions" and therefore worthy of heightened constitutional scrutiny. The Court of Appeals found those professions listed in RCW 18.118.020(2) worthy of heightened constitutional scrutiny, and distinguished them from child care-givers. Op. at 8 n.18. Some of the "professions" that the Court of Appeals found to be protected by the clear, cogent, and convincing standard of proof include: auctioneers, cosmetologists, barbers, manicurists, escrow agents, water well constructors, and art dealers. RCW 18.118.020(2).

The Court of Appeals' holding has implications for many licensed professionals beyond child care providers. It essentially reinstates the pre-*Ongom* regime, where the Court of Appeals may pick and choose which constitutional property and liberty to value based upon its evaluation of the merits of the particular profession involved.

- (2) The APA Requires That a Review Judge May Not Simply Disregard Wholesale the Factual and Legal Findings of the ALJ and Substitute Another View of the Evidence and an Incorrect View of the Law

RCW 34.05.464(4) requires the review judge to give “due regard” to the ALJ's opportunity to observe witnesses. Yet the review standard under WAC 170-03-0620(1) requires only that the review judge “consider” the ALJ's opportunity to observe the witnesses. Under either standard, a review judge acts outside the scope of her authority when she bases contradictory findings solely on hearsay evidence the ALJ rejected as lacking credibility. *Kabbae v. Dep't of Soc. & Health Servs.*, 144 Wn. App. 432, 445, 192 P.3d 903 (2008) citing *Costanich v. Dep't of Soc. & Health Servs.*, 138 Wn. App. 547, 559 (2007). The fact-finder may only base a finding exclusively on hearsay evidence if he or she determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. RCW 34.05.461(4).

In *Costanich*, the Court of Appeals reviewed the revocation of a foster care license. 138 Wn. App. at 551. *Costanich* was a licensed foster parent in Washington for over 20 years. *Id.* at 552-53. Before the abuse allegations, the most recent state evaluation described the *Costanich* foster home as a “unique and valuable resource ... unsurpassed by any foster home in the State.” *Id.* During the summer of 2001, DEL investigated an allegation that *Costanich* emotionally and physically abused her foster children. DEL reported there was inconclusive evidence of physical abuse, but the emotional abuse allegations were “founded.” This finding

was based primarily on two specific incidents. *Id.* K claimed that Costanich said “I’ll kill you bastard” to F, when she had to pull him off one of her female aides. The aide and F had gotten into an altercation because F was spying on her while she was sunbathing. K also said Costanich told P, the only African-American child in the house, to move his “black ass.” Additionally, he alleged Costanich had a general habit of swearing at the children and had called E a “cunt.” Later investigation resulted in allegations that Costanich also called E a “bitch.”

The ALJ in *Costanich*, after reviewing the evidence and hearing live witness testimony, initially concluded that Costanich’s behavior did not constitute emotional abuse and did not justify revocation of her license. *Id.* But the DEL review judge substituted his own view of the evidence for that of the ALJ, based primarily on the hearsay testimony and reports of the Child Protective Services (CPS) investigator, and upheld the DEL’s abuse finding and revocation. *Id.*

The Court of Appeals reversed, holding that the DEL review judge had improperly ignored the considered findings of the independent ALJ. *Id.* at 564. Among the improprieties the Court of Appeals noted:

- The review judge reversed mostly based on the hearsay evidence of the investigators, contradicting the ALJ’s findings based on direct evidence;

- The review judge claimed the ALJ “failed to make factual findings” when the ALJ in fact made findings;
- The review judge “substituted” her “view of the evidence” for the ALJ’s, when the ALJ’s were supported by substantial evidence;
- The review judge added findings, despite the fact that they were directly contradictory to the ALJ’s findings.

Id. at 556-60.

Admittedly, the court in *Costanich* applied a different WAC review standard than is applicable here,³ because that case involved a finding of abuse. *Id.* at 554-55. In abuse cases, the power of a review judge diminishes, and the review judge may only reverse the ALJ if there are irregularities, errors of law, or a lack of substantial evidence. *Id.*

However, the *Costanich* court did not discuss whether the lower WAC 170-03-0620(1) standard applicable here – that a review judge need only “consider” the ALJ’s opportunity to observe witnesses violates RCW 34.05.464(4). Nor did the *Costanich* opinion elaborate upon what review judge actions might violate 170-03-0620(1).

³ The new DEL regulations, adopted in 2006, state that “The review judge has the same decision-making authority as an ALJ, but must consider the ALJ’s opportunity to observe the witnesses.”

The *Costanich* court did observe that if the ALJ system is to have any meaning under the APA, some deference to the ALJ's factual findings is critical: "If the review judge could simply substitute his own view of the evidence for that of the ALJ in every case, review by an ALJ would be superfluous." *Costanich*, 138 Wn. App. at 555.

The lower WAC standard here violates the APA, either facially or as applied. The ALJ found no evidence to support Hardee's license revocation. However, based almost exclusively on DEL's hearsay evidence, the review judge found Hardee incapable and unqualified to care for children, and to have exposed them to unsupervised access to someone who later abused a child.

The DEL review judge ignored the ALJ's findings entered additional findings based upon hearsay that she claimed supported revocation. She also ignored the ALJ's implicit findings that the investigators' hearsay testimony and opinions regarding Hardee's fitness were not credible. She did not give due regard to the ALJ's opportunity to observe witnesses, making the ALJ's role irrelevant and violating the APA. *Costanich*, 138 Wn. App. at 555. She also reversed many critical factual findings based solely hearsay in violation of the scope of her authority. *Kabbae*, 144 Wn. App. at 445.

The review judge's findings have destroyed Hardee's reputation, and will preclude Hardee from her decades-held profession forever. Those same findings and conclusions that have destroyed her career were utterly rejected by the ALJ, the independent fact-finder who observed all of the witnesses. The ALJ made findings of fact, supported by substantial evidence – or rather a *lack* of substantial evidence – that there was nothing in the record that supported a license revocation. The ALJ's decision was based upon substantial evidence. The direct witnesses at the hearing attested to Hardee's fitness to be a care giver, and the ALJ accepted them. The ALJ also noted that there was no evidence to support a finding that Hardee ever left the children unsupervised, or had other persons staying in her home. That finding implicitly rejected DEL's hearsay evidence to the contrary.

If a review judge under WAC 170-03-0620(1) may simply discard every finding made by an ALJ and substitute his or her own findings, there is no need for an ALJ to be involved. The Legislature should simply discard the ALJ level from the review process and allow the DEL to make all of the factual findings and legal conclusion. However, the Legislature has not done that. The APA standard should govern, and the review judge should be required to give due regard to the ALJ's credibility determinations and rejection of hearsay.

(3) Washington's Child Care Providers and Other Certified Professions Need and Deserve Clarity Regarding Actions Against Their Licenses

Under RAP 13.4(b)(4), when the Court of Appeals' legal interpretation has a broad public impact, the issue cries out for resolution by this Court. *See, e.g., Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 153 P.3d 846 (2007) (whether statute governing overtime pay applied to hours worked by in-state drivers working some hours outside the state); *Blaney v. International Association of Machinists And Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 87 P.3d 757 (2004) (whether WLAD entitles plaintiffs who prevail in discrimination lawsuits to an offset for the additional federal income tax consequences); *State v. Keller*, 98 Wn.2d 725, 657 P.2d 1384 (1983) (whether RCW 10.77.190(3) requires that the court find that an individual has *both* violated an express term of the conditional release *and* that he or she presents a substantial danger to others).

With respect to child care providers specifically, there are more than 7400 state-licensed child care facilities and at least 10,000 persons working in the profession in Washington. In addition, there are numerous other state-licensed private businesses that may be at risk for erroneous deprivation if this ruling is allowed to stand.

But this ruling affects more than just child care providers. Washington State licenses no less than 300 professions, only a handful of which are included in RCW 18.118.020(2). Appendix D. The Court of Appeals published opinion is not reversed, agencies and courts will continue to use subjective value judgments regarding particular types of professions in order to pick and choose which are worthy of heightened constitutional due process protections.

F. CONCLUSION

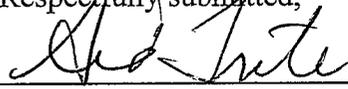
The Court of Appeals has stripped many due process protections that should apply to state-licensed child care givers. This Court should accept review, vacate the order revoking Hardee's day care license, and remand to DEL to make a determination based on the correct standard of proof. This Court should also instruct DEL review judges to give due regard to an ALJ's opportunity to observe witnesses, and to avoid making contradictory findings from the ALJ's based solely on hearsay evidence. Finally, this Court should award Hardee attorney fees for each level of judicial review.⁴

⁴ Under RAP 18.1, a prevailing party may be awarded attorney fees when allowed by applicable law. Hardee has challenged an agency action, and is therefore entitled to attorney fees under the Equal Access to Justice Act:

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

Dated this 2nd day of October, 2009.

Respectfully submitted,



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action was substantially justified or that circumstances make an award unjust. A qualified party 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). "Agency action" is defined as "licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits. RCW 4.84.340(3); RCW 34.05.010(3). DEL's action here falls under this statutory definition. "Qualified party" means . . . a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed five million dollars at the time the initial petition for judicial review was filed RCW 4.84.340(5). Hardee qualifies under this definition as well.

This Court has recently ruled that attorney fees of up to \$25,000 are available at each level of appellate review, including the superior court level. *Costanich v. State, Dep't of Social & Health Services*, 164 Wn.2d 925, 931, 194 P.3d 988 (2008). Hardee is entitled to attorney fees up to the statutory maximum incurred at each level of appeal in challenging DEL's improper action.

APPENDIX

A

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

KATHLEEN HARDEE,)	
)	No. 62436-9-I
Appellant,)	
)	ORDER GRANTING MOTION
v.)	TO PUBLISH
)	
STATE OF WASHINGTON,)	
DEPARTMENT OF SOCIAL AND)	
HEALTH SERVICES, DEPARTMENT)	
EARLY LEARNING,)	
)	
<u>Respondent.</u>)	

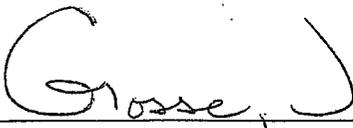
The respondent State of Washington, Department of Early Learning, has filed a motion to publish herein. The court has taken the matter under consideration and has determined that the motion should be granted.

Now, therefore, it is hereby

ORDERED that the motion to publish the opinion filed in the above-entitled matter on July 27, 2009 is granted. The opinion shall be published and printed in the Washington Appellate Reports.

Done this ____ day of _____, 2009.

FOR THE PANEL:



Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KATHLEEN HARDEE,)	
)	No. 62436-9-I

Appellant,)	
)	DIVISION ONE
v.)	
)	UNPUBLISHED OPINION
STATE OF WASHINGTON,)	
DEPARTMENT OF SOCIAL AND)	
HEALTH SERVICES, DEPARTMENT)	
EARLY LEARNING,)	
)	
Respondent.)	FILED: July 27, 2009

Grosse, J. — Due process is satisfied by application of the preponderance of the evidence standard to the revocation of a home child care license, as provided by RCW 43.215.300(2). Here, the review judge’s factual findings are supported by substantial evidence. The review judge correctly applied the law, and the factual findings support the review judge’s legal conclusions. We affirm the decision to revoke Kathleen Hardee’s home child care license.

FACTS

Kathleen Hardee provided child daycare services in her home pursuant to a home child care license issued by the Department of Social and Health Services.¹ In July 2006, the Department of Early Learning (the Department) received a referral from the King County Sheriff’s Office reporting that Hardee’s 19-year-old son, William, who lived with Hardee in her home out of which she operated the daycare, had been accused of having oral sex with a 3-year-old child he was babysitting. The child did not attend Hardee’s daycare and the incident did not take place at the daycare. William was charged with first degree rape of a child, pleaded guilty to first degree child

¹ Since July 2006, the regulation of child care agencies has been conducted by the Department of Early Learning.

molestation, and was incarcerated.

The Department summarily suspended Hardee's license the day it received the referral. On Hardee's motion, an administrative law judge (ALJ) stayed the suspension of the license pending a hearing.

The Department conducted an investigation after the July 2006 referral regarding the incident with Hardee's son. In November 2006, the Department revoked Hardee's license. The Department cited a number of incidents prior to July 2006 that showed the extent of William's mental and behavioral problems.² After William's conviction in 2001 of harassment, intimidation of a student, and fourth degree assault for threatening a person at school with a knife, Hardee agreed in writing to keep William off the premises during the hours the daycare center was in operation. In March 2003, Hardee signed a safety plan in which she agreed to never allow William to have unsupervised access to children. In October 2004, Hardee asked for a waiver of the regulation that would require William, because of his assault conviction, to be off the premises. Hardee assured the Department that William was never unsupervised when daycare children were present. The Department granted the waiver. The Department granted a second, similar waiver in April 2005, conditioned on William always being supervised and never being left unattended with children in the daycare.

In 2006, the Department determined that Hardee violated the conditions of the

² For example, the Department cited allegations of domestic violence between William and Hardee, which Hardee denied. It also cited incidents at school, where William threatened to bring an AK-47 into school, made a blow torch out of hair spray and a lighter, and threatened to slit the throat of a teacher who refused to return William's rabbit foot. The Department also noted incidents where William abused the family cat, pointed an air gun at a young child's head, and showed a daycare child how to start a fire using an aerosol can.

waivers and the safety agreement by allowing William to have unsupervised access to children in the daycare. One parent arrived at the daycare and found William changing his young daughter's diaper in a room with no other adult present. Another parent informed the Department that William was left alone with the children in the morning and afternoon while Hardee ran errands. The Department also claimed that persons were living in Hardee's home whom Hardee failed to report to the Department and who did not go through the required criminal background check. The final basis for the Department's decision to revoke Hardee's license was its conclusion that she operated her daycare after her license had been summarily suspended in July 2006.

Hardee requested an administrative hearing on the license revocation. After the hearing, the ALJ issued an initial decision finding that Hardee's license should not be revoked and rescinding the Department's revocation. The Department petitioned for review of the initial decision.

The review judge issued a review decision and final order reversing the ALJ's initial order and revoking Hardee's license. The review judge concluded that the Department proved that Hardee violated the 2003 safety agreement and the terms of the 2004 waiver and allowed William to have unsupervised access to a child under her care. The review judge also concluded that the Department proved that Hardee lacks the personal characteristics an individual needs to provide care to children. The review judge concluded that the Department did not prove that Hardee had people living in her home who had not been cleared to be there, but that the Department did prove that she allowed "numerous unidentified people" to be in and around the children she had under

her care "on a more or less regular basis." This was one basis for the review judge's conclusion that Hardee lacked the requisite characteristics to care for children.

Hardee petitioned for reconsideration of the final order. The review judge denied the petition for reconsideration. Hardee petitioned for review to the superior court. The superior court affirmed the review judge's decision and order, finding that the review judge correctly identified the errors in the ALJ's decision concerning evidence of licensing violations and that, but for such errors, the ALJ should have upheld the revocation of Hardee's license.

ANALYSIS

Standards of Review

Under the Administrative Procedure Act (APA), chapter 34.05 RCW, in reviewing an agency order in an adjudicative proceeding, a court may grant relief from the order only if it determines that: (1) the order, or the statute or rule on which the order is based, is unconstitutional on its face or as applied; (2) the order is outside the agency's statutory authority or jurisdiction; (3) the agency has engaged in an unlawful procedure or decision-making process or failed to file a prescribed procedure; (4) the agency erroneously interpreted or applied the law; (5) the order is not supported by substantial evidence when viewed in light of the whole record before the court; (6) the agency has not decided all issues requiring resolution by the agency; (7) a motion for disqualification was made and improperly denied; (8) the order is inconsistent with an agency rule; or (9) the order is arbitrary or capricious.³ As the party asserting the

³ RCW 34.05.570(3).

invalidity of the final order, Hardee has the burden of demonstrating invalidity.⁴

We apply the standards of the APA directly to the administrative record, sitting in the same position as the superior court.⁵ We review factual findings to determine whether they are supported by substantial evidence.⁶ In reviewing factual findings under this provision, we will overturn an agency's factual findings only if they are clearly erroneous and we are "definitely and firmly convinced that a mistake has been made."⁷

We review legal conclusions de novo to determine whether the review judge correctly applied the law, including whether the factual findings support the legal conclusions.⁸

"Constitutional challenges are questions of law subject to de novo review."⁹ Statutes are presumed constitutional, and the party challenging the constitutionality of a statute has a heavy burden to establish that the statute is unconstitutional beyond question.¹⁰ In order to declare a statute unconstitutional, the conflict between the statute and the constitution must be plain "beyond a reasonable doubt."¹¹

⁴ RCW 34.05.570(1)(a).

⁵ Montlake Cmty. Club v. Central Puget Sound Growth Mgmt. Hearings Bd., 110 Wn. App. 731, 733, 43 P.3d 57 (2002).

⁶ RCW 34.05.570(3)(e).

⁷ Port of Seattle v. Pollution Control Hearings Bd., 151 Wn.2d 568, 588, 90 P.3d 659 (2004) (quoting Buechel v. Dep't of Ecology, 125 Wn.2d 196, 202, 884 P.2d 910 (1994)).

⁸ Timberlane Mobile Home Park v. Human Rights Comm'n, 122 Wn. App. 896, 900, 95 P.3d 1288 (2004).

⁹ Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 215, 143 P.3d 571 (2006).

¹⁰ Amunrud, 158 Wn.2d at 215.

¹¹ Island County v. State, 135 Wn.2d 141, 146-47, 955 P.2d 377 (1998).

Review of Revocation

By statute, in an adjudicative proceeding regarding the revocation of a license to operate a daycare, the decision of the Department of Early Learning must be upheld if it is supported by a preponderance of the evidence.¹² Hardee argues that due process requires that review of a home child care license revocation be under the clear and convincing standard, not the preponderance of the evidence standard.

In arguing for the clear and convincing standard of review, Hardee relies on Ongom v. State, Dep't of Health, Office of Prof'l Standards¹³ and Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n.¹⁴ In Ongom, the court reversed the suspension of a nursing assistant's license where the agency relied on the preponderance of the evidence standard and held that the clear and convincing evidence standard applies. Similarly, in Nguyen, the court reversed the revocation of a medical license because the agency revoked the license under the preponderance of the evidence standard. Neither Ongom nor Nguyen compel application of the clear and convincing evidence standard of review here. Both of those cases involved a professional license of a particular individual. Here, as the Department argues, the license issued to Hardee was in the nature of a site license, obtainable by the licensee's completion of 20 clock hours of basic training approved by the Washington State training and registry system.¹⁵

In her reply brief, Hardee argues that under Chandler v. State, Office of Ins.

¹² RCW 43.215.300(2).

¹³ 159 Wn.2d 132, 104 P.3d 1029 (2006).

¹⁴ 144 Wn.2d 516, 29 P.3d 689 (2001).

¹⁵ WAC 170-296-1410(5)(c).

Comm'r,¹⁶ the clear and convincing evidence standard should apply to the revocation of her license. Chandler involved the revocation of an insurance agent's license. The review judge applied both the preponderance of the evidence standard and the clear and convincing evidence standard. This court, without comment or analysis, stated that the review judge was correct in applying both standards. We are not prepared to extend the rule of Ongom and Nguyen to the revocation of Hardee's home child care license based on Chandler. The court's opinion on this issue in Chandler is not useful given the absence of analysis, and it is clear from the opinion that, regardless of the standard of review, revocation of the appellant's license was proper. As noted, the Department's argument that Hardee's license is more of a site license rather than an operator's license is well taken. Further, Hardee's license is more in the nature of an occupational license than a professional license. See Brunson v. Pierce County,¹⁷ in which the court held that the preponderance of the evidence standard applied to the revocation of an erotic dancer's license. The court reasoned that an erotic dancer's license is an occupational license, not a professional license as that term is defined in chapter 18.118 RCW, which deals with the regulation of businesses.¹⁸ Accordingly, application of the preponderance of the evidence standard to the suspension of the license satisfied due process. We hold that the review judge correctly applied the standard to the revocation of Hardee's home child care license.

¹⁶ 141 Wn. App. 639, 173 P.3d 275 (2007).

¹⁷ 149 Wn. App. 855, 205 P.3d 963 (2009).

¹⁸ Under that chapter, a professional license is "an individual, nontransferable authorization to carry on an activity based on qualifications which include: (a) Graduation from an accredited or approved program, and (b) acceptable performance on a qualifying examination or series of examinations." RCW 18.118.020(8).

Fair Hearing

Hardee argues that the review judge, who is an employee of the Department, was biased against her because Hardee is an advocate for the unionization of daycare operators and trains daycare operators about the law and their rights. The Department argues that she failed to raise this claim below and cannot raise it on appeal. Hardee argues that by raising it in superior court, she adequately preserved it. However, under the APA, judicial review is limited to the agency record,¹⁹ and the record does not show that Hardee raised this claim at the administrative level.²⁰ We conclude that Hardee failed to preserve this issue for review, and note, further, that there is no evidence in the record to support Hardee's argument that the review judge was in any way biased against her.

Hardee also argues that only the ALJ was an impartial decision-maker because the ALJ is not employed by the Department, while the review judge is. There is no support for the proposition that the fact that the review judge is employed by the Department, without more, means that the review judge is biased and that review should be of the ALJ's initial order, not the review judge's final order. Indeed, the Supreme Court has held that there is no inherent unfairness in the combination of investigative and adjudicative functions, without more, that would run afoul of the appearance of fairness doctrine.²¹ In her reply brief, Hardee argues that the review

¹⁹ RCW 34.05.558. The court can take new evidence under the circumstances outlined in RCW 34.05.562, but those circumstances are not present here.

²⁰ Indeed, the declaration in which Hardee explains her union activities, and which she claims engendered bias on the part of the review judge, was submitted to the superior court in support of her petition for review, after the review judge issued the final order. There is no evidence that the review judge ever saw this declaration.

²¹ Matter of Johnston, 99 Wn.2d 466, 479, 663 P.2d 457 (1983).

judge's statement that the ALJ disregarded evidence and failed to determine the credibility of witnesses shows the review judge's bias. This is not, however, a demonstration of bias, but rather an appropriate evaluation by the reviewing body of the decision under review. There is nothing in the record to suggest that the review judge was biased against Hardee simply because of the former's affiliation with the Department.

Next, Hardee argues that the review judge improperly ignored the ALJ's findings, improperly determined the credibility of witnesses, improperly weighed the evidence, and improperly reviewed the matter de novo. This, she argues, violates the appearance of fairness and her right to a fair hearing.

RCW 34.05.464(4) governs review by a review judge of an initial order and provides in part:

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.

Similarly, the Department's regulations provide that the "review judge has the same decision-making authority as an ALJ, but must consider the ALJ's opportunity to observe the witnesses."²²

²² WAC 170-03-0620(1); Hardee's argument that RCW 34.05.461(5) limits the Department's power to weigh evidence is without merit. The statute provides: "Where it bears on the issues presented, the agency's experience, technical competency, and specialized knowledge may be used in the evaluation of evidence." First, the statute uses the term "may." Second, the issues in this case are not technical or require any specialized knowledge.

Despite these provisions giving the review judge the same decision-making authority as the ALJ, Hardee argues that the review judge had no authority to make credibility determinations or to weigh the evidence. The credibility issue pertains to the witness who testified about finding Hardee's son William changing the witness's daughter's diaper. The witness testified that it was not possible, given the layout of the house, for Hardee to have been able to observe William while he was changing the diaper; Hardee testified that William was always in her line of sight. The ALJ did not determine which witness's testimony was more credible. Accordingly, the review judge had no credibility determination to give "due regard to" under RCW 35.05.464(4). Further, because the review judge has the same authority as the ALJ, it was proper for the review judge to make her own credibility determination, particularly because this issue was central to one of the Department's findings as to Hardee's license violations.

Even if, as Hardee argues, the ALJ's ruling in her favor amounted to an implicit credibility determination, the review judge had the authority to change this determination under RCW 35.05.464(4). The court in Regan v. State, Dep't of Licensing,²³ held that a reviewing officer has the authority "to modify or replace an ALJ's findings, including findings of witness credibility" and stated that the statute does not require a reviewing judge to defer to the ALJ's credibility determinations, but rather authorizes the reviewing judge to make his or her own independent determinations based on the record.²⁴

We reject Hardee's arguments that the review judge exceeded her authority and

²³ 130 Wn. App. 39, 121 P.3d 731 (2005).

²⁴ Regan, 130 Wn. App. at 59.

violated the appearance of fairness doctrine in reviewing the ALJ's decision. The review judge acted within the authority granted by RCW 34.05.464(4) and WAC 170-03-0620(1).²⁵

Review Judge's Findings of Fact and Conclusions of Law

A. ALJ's consideration of the evidence.

Hardee attacks as unsupported the conclusion that the ALJ "failed to consider a significant portion of the evidence presented by the Department." This statement appears, as Hardee cites, at page 97 of the administrative record and is part of the Department's argument in its petition for review. It is not part of the review judge's opinion and cannot be the subject of an argument for reversal of the review judge's opinion.

B. Findings about William.

Hardee argues that the review judge's findings that Hardee allowed her son William unsupervised access to children in the daycare, in violation of the safety plan, is not supported by the evidence.²⁶ However, the record shows that a parent testified that, when he came to Hardee's house to pick up his daughter, he found William alone in the changing room, changing his daughter's diaper. Hardee disputed the parent's version of this event, and testified that she had been changing the daughter's diaper,

²⁵ We do not address Hardee's argument that the Department is equitably estopped from sanctioning her for one day of unlicensed daycare. The review judge did not base her decision on Hardee's unlicensed operation of the daycare. Nor do we address Hardee's argument that RCW 34.05.464(4) and WAC 170-03-0620(1) are unconstitutional. Hardee provides no authority in support of this argument. We do not address constitutional arguments unsupported by adequate briefing. Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 169, 876 P.2d 435 (1994).

²⁶ In the safety plan, Hardee agreed that William would never "be allowed any unsupervised contact with the child care children."

but had to leave to see who was at the front door and asked William to stand by the baby to make sure she would not fall. She claimed she could see both William and the parent from her position in the hallway at all times. The ALJ did not resolve the dispute in the testimony. In finding the parent's version of events more credible, the review judge noted the testimony in the record showing that, if Hardee was positioned in the hallway as she testified, she could not possibly have been able to see both the parent and William at the same time. Harriet Martin, who issued the license for Hardee's daycare, testified that a Department investigator reported that "a couple of parents" saw William watching daycare children unsupervised while Hardee was not present or off the premises running errands. We will not disturb the review judge's credibility determination and findings about Hardee allowing William unsupervised access to daycare children because they are supported by substantial evidence.

C. Unauthorized persons in the home.

To the extent Hardee is arguing that one basis for the review judge's decision to revoke her license was the determination that Hardee allowed unauthorized persons to live in her house, her argument is unfounded. The review judge concluded that the Department failed to prove that Hardee had people living in her home who the Department had not cleared to live there.

D. Unlicensed daycare.

We do not address Hardee's argument that the Department is equitably estopped from revoking her license on the ground that she operated a daycare without a license because the review judge did not base the decision to revoke Hardee's

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license on any unlicensed operation of the daycare.

E. Lack of necessary characteristics.

The review judge concluded that Hardee lacks two of the characteristics required of persons providing care to children: “an understanding of how children develop socially, emotionally, physically, and intellectually” and “a disposition that is respectful of a child’s need for caring attention from a care giver.”²⁷ The review judge based this conclusion on the facts that Hardee allowed William “extensive and intimate contact with the children under her care” and Hardee’s choice to allow “a steady stream of unidentified adults through her home during child care hours.” We conclude that these findings are supported by substantial evidence in the record and support the review judge’s conclusion.

We reject Hardee’s claim that the review judge has no authority to revoke her license on a “vague claim of character.” Possession of the requisite characteristics should be of the utmost importance in licensing a home child care provider. The review judge provided specific evidence to support the conclusion; the conclusion was not vague.

Hardee argues that because there is no rule banning visitors to the home of a child care provider during daycare hours, the fact that she had visitors is not a proper basis for a finding as to her character. But, the review judge did not base her conclusion as to Hardee’s character on a rule banning visitors. Rather, the review judge concluded that the presence of numerous visitors during daycare hours compromised Hardee’s ability to adequately supervise and care for the daycare children as well as her ability to supervise William. The testimony of several witnesses

²⁷ Citing WAC 170-296-0140(2)(a), (f).

supports the finding that a number of other people, such as friends of Hardee's son and daughter-in-law as well as others, were in and around the house during daycare hours. While recognizing the potential for tension between a licensee's expectations about having visitors and entertaining family and friends and the licensee's obligation to comply with licensing requirements, the review judge concluded that Hardee's "allowing of all this traffic through her home casts doubt on whether she has an understanding of how children develop socially, emotionally, physically, and intellectually."

The review judge found Hardee's apparent lack of understanding of the seriousness of William's mental problems even more indicative of Hardee's lack of the requisite characteristics of a child care provider. Hardee's agreement to the safety plan shows at least some recognition on her part of the seriousness of William's problems. Yet, the evidence shows that she allowed William unsupervised access to the children and, after getting a waiver from the Department and after William's convictions, allowed William to play with the daycare children and help with clean-up activities. Given the evidence of William's behavioral problems, and particularly the fact that he was convicted of sexually assaulting a 3-year-old girl, the review judge did not err in finding that Hardee's allowing William access to the daycare children shows a lack of good judgment as to what is in the best interests of the children. This evidence also supports the review judge's determination that Hardee lacks an understanding of how children develop and lacks the characteristics necessary to provide child care. We will not disturb the review judge's determination.

We affirm the decision revoking Hardee's home child care license. Hardee is

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not entitled to attorney fees pursuant to RCW 4.84.350. Accordingly, we deny her request for an award of attorney fees.

Grosse, J

WE CONCUR:

Dwyer, A.C.J.

Edenfor, J

B

BEFORE THE WASHINGTON STATE OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES

In Re:

KATHLEEN HARDEE

Appellant.

Docket No. 07-2006-L-0410

INITIAL ORDER

(Child Care Agencies-Day Care)

MAILED
SHS - SEATTLE

AUG 14 2007

OFFICE OF
ADMINISTRATIVE HEARINGS

RYNOLD C. FLECK, Administrative Law Judge (ALJ), conducted a hearing in the above-noted matter, covering May 7, 2007 through May 10, 2007. The Appellant, Kathleen Hardee, appeared and gave testimony. The Appellant was represented by Deborah Rosser and Cassandra Clemans of APRE. Patricia Allen, Assistant Attorney General (AAG), represented the Department of Social and Health Services (DSHS).

The following parties were called as witnesses for the Appellant: Kathieen Hardee, Anthony White, Susan White, and Brandy Nelli. The following parties were called as witnesses for DSHS: Harriet Martin, Joel Sexton, Don Eykel, Mack Junior, Kathleen Hardee, and Patricia Eslava-Vessey.

All of DSHS's Exhibits 1 through 23 were admitted into evidence. The Appellant's Exhibits A through R were admitted into evidence, with the exception of Exhibit O, which was withdrawn.

These matters were continued to June 15, 2007, to allow the parties' representatives to submit closing arguments in writing.

ISSUE

Whether or not the Appellant's in-home day care license should be revoked.

RESULT

The Appellant's license should not be revoked. DSHS's revocation is hereby rescinded.

FINDINGS OF FACT

1. Kathleen Hardee has been providing in-home day care services under a license from the State of Washington since at least the year 2000. She was most recently

relicensed in May of 2004, for the address 16434 Marine View Drive S.W., Burien, Washington, for a maximum of 12 children, with a maximum number of children under two years of age of 4. This license was effective through May of 2007.

2. On July 5, 2006, DSHS issued a letter to the Appellant suspending her license immediately, based upon an allegation that William, who is the Appellant's adult son, had committed an act constituting abuse or neglect on a minor child for whom he baby sat.

3. On October 9, 2006, DSHS issued a letter notice informing the Appellant that her in-home child care license had been revoked, referring to historical occurrences, and then citing several specific bases for the revocation, including providing unauthorized child care, violation of a 2003 safety plan, and allowing unauthorized persons to live at the residence of the day care.

4. In early 2002, DSHS issued a letter notice to the Appellant revoking her day care license. The basis of that revocation was episodes of violence between Appellant and her adopted child, William, which occurred in 2000 and 2001. None of the allegations in that revocation arise out of activities associated with the day care, but primarily out of the interaction between William and the Appellant. Out of concern of what might be observed or how that action might impact children in day care, DSHS decided to revoke the license. This revocation was rescinded because William was out of Ms. Hardee's residence.

5. William returned to the Appellant's home in 2003.

6. On March 23, 2003, the Appellant issued an e-mail to Harriet Martin from Hardee's Day Care which specifically provides the following:

As per your request:

1. William has never, nor will be allowed any unsupervised contact with the child care children.
2. I will notify the department immediately, of any incident that puts the child care children at risk.

Safety Plan for prevention of risk to child care children:

1. Children will be removed from situation immediately. I have assistants that are with me throughout the day, the children will be removed to a safe area, i.e., separate room, outside (weather permitting), (with assistant present) and/or William will also be removed from the premises.

2. I will be responsible for removing William and if necessary 911 will be called for assistance. (I have been trained in passive restraint to deal with any risky behaviors from William)

My first responsibility is for the safety and well being of the children I care for, they will not be subjected to any form of risky behavior.

Williams leaves for school at 7:00 AM and does not return until 3:30 to 4:00 PM. William will probably be attending summer school. He is working after school for a family friend, participates in activities at The Purple Door (Burien teen center), attends counseling twice a week after school and participates in Youth group at our church. He is very active with outside interests. He is working hard to continue his success in the community and has great family and friend support.

Exhibit 7.



7. There is no duration on time on this e-mail commitment.

8. On December 17, 2004, a licensing waiver was issued by Division of Child Care and Early Learning (DCEL) to Kathleen Hardee which identifies the duration of the waiver as "now" to "ongoing." The specific provision of the waiver is to allow William to be present while the Appellant is providing care for children in the Appellant's home. As part of the waiver request is included the statement that William would never have unsupervised contact with the child care children.

9. Subsequently, in May of 2005, a licensing waiver request was approved for the time period May 1, 2004 through May 1, 2007, to allow William to be on the premises as a background check was returned which showed an assault for gross misdemeanor and malicious charge. This waiver was granted subject to William being supervised and never left unattended with children in the child care home.

10. An investigation into the July 5, 2006 allegation which resulted in the summary suspension of the Appellant's license determined that the incidents of alleged neglect or abuse occurred at someplace other than the day care facility and at hours other than day care hours. The investigation resulted in a determination that William had confessed to the behavior which was the subject of the referral from that date.

11. The investigation also brought into question whether or not the Appellant had allowed unsupervised contact by William with the day care children. Sometime in the recent past, Lila S. was a child in the care of Ms. Hardee. One evening when Lila's father came to pick

up Lila, he saw William in an activity that he described as changing Lila's diapers. Lila's father did not think that it was appropriate for a teenage boy to be changing a child's diaper. Ms. Hardee immediately assured Lila's father that it would not happen again. There is a conflict in testimony regarding how this particular incident occurred. Lila's father testified that he entered the house, went to the dining room to sign out the child, observed Ms. Hardee with other children around her, sitting on a couch some distance from the washroom where the changing table was located. He was informed that Lila was being changed; at which time, Ms. Hardee went to the changing room, reached that room before Lila's father, and finished the process. Ms. Hardee, however, indicates that she is the one who changed the diapers and had left because she heard someone coming into the house. She left the child with William just to do up the tabs on the diapers, because she heard someone coming into the house. William was in her view at all times during this activity.

Carly 2007 — 12. Prior to the July 5, 2006 referral there had been no indication in William's behavior that he was a danger to young children. Nothing in his behavior had indicated any kind of sexually aggressive behavior. All of the records, including the licensing waivers and the prior revocations deal with conflict between William and Kathleen Hardee. See Exhibits 4 and 5.

13. A witness, Dawn Eykel, whose two children, Mieke and Garrett, were with Ms. Hardee in her day care between April of 2005 and June or July of 2006, recalls observing people other than the Appellant and William at the residence on occasion. She would drop her children off at approximately 7:45 in the morning. Her son was there for the mornings; her daughter was there for all day. She did not know the name of the other adult present, nor was she aware of whether or not that party was anything more than visiting for short periods of time.

14. On July 5, 2006, as indicated above, DSHS issued a summary suspension, informing the Appellant that she needed to terminate her day care activities immediately.

15. After having discussed this with her licensor, the Appellant believed that she was able to provide family and friends in-home care at the family or friend's home itself. On July 7, 2006, the day following the closure of her day care, the Appellant took her granddaughter, Lila, and Elias and performed one day of care at the home of the parents of one of the children.

16. The Appellant became aware that that was not what DSHS had determined to be friends and family care and terminated that activity. She never provided any day care for pay thereafter, until the summary suspension was lifted.

17. There is testimony that the Appellant was observed driving a van that had children in it. There is nothing that indicates that the Appellant was providing day care for those children she was transporting.

CONCLUSIONS OF LAW

1. There is jurisdiction to hear this matter pursuant to the Revised Code of Washington (RCW) 43.215.300 and Washington Administrative Code (WAC) 170-296-0480.

2. WAC 170-296-0140 reads as follows:

WHAT PERSONAL CHARACTERISTICS DOES AN INDIVIDUAL NEED TO PROVIDE CARE TO CHILDREN?

- (1) An individual must have specific personal characteristics to have a:
 - (a) License;
 - (b) Certification;
 - (c) Primary staff position; or
 - (d) Assistant and volunteer position.
- (2) These characteristics are:
 - (a) An understanding of how children develop socially, emotionally, physically, and intellectually;
 - (b) The ability to plan and provide care for children that is based on an understanding of each child's interests, life experiences, strengths, and needs;
 - (c) The physical ability to respond immediately to the health, safety and emotional well-being of a child;
 - (d) Reliability and dependability;
 - (e) Truthfulness;
 - (f) A disposition that is respectful of a child's need for caring attention from a care giver; and
 - (g) Ethical business practices with clients, staff, the department and the community.

3. WAC 170-296-0190 reads as follows:

AFTER WE RECEIVE THE BACKGROUND INFORMATION WE:

- (1) Compare the background information with convictions/actions posted on the DSHS secretary's list of disqualifying convictions/actions for economic services administration (ESA). The complete list can be found at [http://www1.dshs.wa.gov/esa/dccel/pdf/Crime\)and\)Backg_Chex.pdf](http://www1.dshs.wa.gov/esa/dccel/pdf/Crime)and)Backg_Chex.pdf) [http://www1.dshs.wa.gov/pdf/esa/dccel/Crime_and_Backg_Chex.pdf].
- (2) Review the background information using the following rules:
 - (a) A pending charge for a crime is given the same weight as a conviction;

- (b) If the conviction has been renamed it is given the same weight as the previous named conviction. For example, larceny is now called theft;
- (c) Convictions whose titles are preceded with the word "attempted" are given the same weight as those titles without the word "attempted"; and
- (d) The crime will not be considered a conviction for the purposes of the department when it has been pardoned or a court of law acts to expunge, dismiss, or vacate the conviction record.

(3) Conduct a character, competence and suitability assessment of you, your family members, staff, volunteer or any one else living at the same address as you if an individual is not automatically disqualified by a conviction record, pending charges and/or findings of abuse, neglect, exploitation or abandonment of a child or vulnerable adult.

(4) Notify you whether or not we are able to approve you, family members residing with you, staff, volunteer or anyone else living at the same address as you to have access to children in a licensed facility.

4. WAC 170-296-1410 reads as follows:

What are the required staffing qualifications for child care?

(1) You, a primary staff person, assistant, volunteer, and other person associated with the operation of the business who has access to the child in care must:

- (a) Meet the qualifications in WAC 388-296-0140;
- (b) Not have committed or been convicted of child abuse or any crime involving physical harm to another person; and
- (c) Not have been disqualified from working in a licensed child care setting or have had a license revoked.

(2) The licensee must:

- (a) Be eighteen years of age or older;
- (b) Be the primary child care provider;
- (c) Ensure compliance with minimum licensing requirements under this chapter; and
- (d) Have completed one of the following prior to or within the first six months of obtaining an initial license:
 - (i) Twenty clock hours or two college quarter credits of basic training approved by the Washington state training and registry system (STARS);
 - (ii) Current child development associate (CDA) or equivalent credential or twelve or more college quarter credits in early childhood education or child development; or
 - (iii) Associate of arts or AAS or higher college degree in early childhood education, child development, school age care, elementary education or special education.

(3) Child care staff must be:

- (a) Fourteen years of age or older if an assistant; or
- (b) Eighteen years of age or older if a primary worker and assigned sole responsibility for the child in care.

(4) You and your staff must meet the following qualifications:

Position	Qualifications	Back-ground Check	TB Test	STARS Training	First Aid and CPR	HIV/AIDS and bloodborne pathogens training
Licensee	Eighteen years of age	X	X	X	X	X
Primary child care staff	Eighteen years of age	X	X	X Basic 20 hour training to be completed within the first six months of employment	X	X
Child care assistant/volunteer	Fourteen years of age; (directly supervised by the licensee or a primary staff)	X	X	Recommended	If counted in staff to child ratio	X

5. WAC 170-296-0180 reads as follows:

Am I required to have a criminal history background check?

(1) At the time you apply for a license you must submit a completed background check form and finger print card if required to the background check central unit (BCCU) for each person who will have unsupervised access to children in your care. This includes:

- (a) You;
- (b) Members of your household sixteen years and older;
- (c) Staff;
- (d) Volunteers; and
- (e) Other persons living at the same address as you.

(2) When you plan to have new staff or volunteers, you must require each person to complete and submit to you by the date of hire a criminal history and background check form:

- (a) You must submit this form to the BCCU for the employee and volunteer, within seven calendar days of the employee's or volunteer's first day of work, permitting a criminal and background history check.
- (b) The employee and volunteer must not have unsupervised access to the children in care until they have been cleared by a full background check.
- (c) We must discuss the result of the criminal history and background check information with you, when applicable.

6. WAC 170-296-0110 reads as follows:

Who needs to become licensed?

(1) Individuals and agencies that provide care for children must be licensed, unless specifically exempt under RCW 74.15.020(2).

(2) The person claiming an exemption must provide the department proof of the right to the exemption if we request it.

(3) We must not license a home that is legally exempt from licensing. However, at the applicant's request, we must investigate and may certify the home as meeting licensing and other requirements. We must apply the same requirements and procedures for certification that we apply for licensure.

(4) We may certify a family home child care for payment without further investigation if the home is:

(a) Licensed by an Indian tribe; or
(b) Certified by the federal Department of Defense. The home must be licensed or certified in accordance with national or state standards or standards approved by us and be operated on the premises over which the entity licensing or certifying the home has jurisdiction.

(5) The individuals and agencies wanting to care for children whose child care is paid for by the state child care subsidy program must:

(a) Be licensed or certified;
(b) Follow billing policies and procedures in Child Care Subsidies, A Booklet for Licensed and Certified Providers, DSHS 22-877(X); and
(c) Bill the department at the person's or organization's customary rate or the DSHS rate, whichever is less. (See WAC 388-290-0190 (2) and (3) for exceptions.)

7. RCW 43.215.300(2) reads as follows:

(2) In any adjudicative proceeding regarding the denial, modification, suspension, or revocation of any license under this chapter, the department's decision shall be upheld if it is supported by a preponderance of the evidence.

8. There is nothing in the evidence that has been presented that indicates that the Appellant has ever allowed contact by William with the children in the day care that is unsupervised and/or unattended. Although there is some conflicting testimony of whether or not William changed one of the children's diapers, it is clear that Ms. Hardee was within view and/or could hear any activities between William and the child whose diaper he was changing. This single episode does not constitute or support the allegation that the Appellant allowed William to violate any safety plan and/or any conditions associated with waivers allowing William to be on premises during day care hours.

*WAC says
unattended*

9. Although there is testimony that individuals were observed at the home, there is nothing to support the allegation that, in fact, there were individuals, male or female, residing at the residence where the day care was located who had not had a valid background check. Although there may be testimony that others were observed there, that is all that the testimony rises to -- that there were other people who might have been there on an irregular or temporary basis. There is no evidence that these parties resided there or had contact with the children.

10. RCW 43.215.010(2)(c) reads as follows:

(2) "Agency" does not include the following:

....

(c) Persons who care for a neighbor's or friend's child or children, with or without compensation, where the person providing care for periods of less than twenty-four hours does not conduct such activity on an ongoing, regularly scheduled basis for the purpose of engaging in business, which includes, but is not limited to, advertising such care[.]

Although it was the Appellant's intention to continue to provide what is called family and friends care for some of those children who were being caused problems by virtue of the closure of her day care, the one day's activities appear to have the result of a misunderstanding between the Appellant and her licensor. When advised of the problem, the Appellant immediately terminated that activity. She did not dispute DSHS's interpretation; she merely resigned herself to stopping the care.

11. Based upon the foregoing, clearly there is a great deal of what might be characterized as circumstantial evidence or evidence which might create an inference regarding the Appellant's behavior. No one can fault DSHS in taking prompt action where children might be at risk. DSHS has a duty to protect those children who are being cared for through a franchise created by the state. DSHS must be vigilant in its duty to protect those children.

12. In light of the actual facts that have been proven, DSHS has failed to establish that the Appellant was in violation of any waiver or any security plan that might have been in existence with respect to William and his supervision. William did not have any unsupervised contact with the children in the day care, nor was he left with their care unattended.

13. There is no evidence that supports the proposition that the Appellant allowed individuals to reside at the day care residence without a background check.

14. Although the Appellant did provide one day of unlicensed care, it was based upon a misunderstanding that she had regarding the family and friends care and such violation does not rise to the level to warrant a revocation of her license. Based upon the foregoing, the Appellant's license should not be revoked. DSHS's revocation is hereby rescinded.

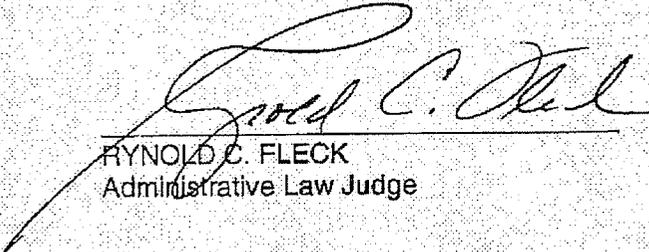
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DECISION

Based upon the foregoing, the Appellant's license should not be revoked. DSHS's revocation is hereby rescinded.

SERVED on the date of mailing.



RYNOLD C. FLECK
Administrative Law Judge

RCF:jfk

Enclosure(s)

cc: Kathleen Hardee, Appellant
Patricia Allen, AAG, Department Representative
Cassandra Clemans, Appellant Representative
Rachael Langen, Program Admin.
Deborah Rosser, Appellant Representative
Community Services Division, Child Care - Day Care, Program Admin.

NOTICE TO PARTIES

This decision becomes the final administrative decision unless a party files a petition for review. A petition must be received within 21 calendar days of the mailing date of this decision at the Board of Appeals. A petition form and instructions are attached.

[reversed]

C

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BOARD OF APPEALS

FOR THE DEPARTMENT OF EARLY LEARNING

MAILED
JAN 18 2008
DSHS
BOARD OF APPEALS

In Re:) Docket No. 07-2006-L-0410
)
KATHLEEN HARDEE) REVIEW DECISION and FINAL ORDER
)
)
Appellant) Child Care Agencies -Day Care

I. NATURE OF ACTION

1. The Department of Early Learning (the Department)¹ revoked the Family Home Child Care license of Kathleen Hardee (the Appellant). The Appellant objected. Administrative Law Judge (ALJ) Rynold Fleck conducted an administrative hearing and issued an Initial Order on August 14, 2007. The Initial Order reversed the Department's revocation action.

2. On August 30, 2007, the Department filed a Petition for Review of the Initial Order and argued as follows:

Comes now the Department of Early Learning (Department or DEL), by and through Patricia L. Allen, Assistant Attorney General, and petitions for review of the Initial Decision entered on August 14, 2007, by Administrative Law Judge Rynold Fleck in the above-referenced action. (Copy attached as Exhibit A). The Department respectfully requests that the initial decision be reversed and that the Department's revocation of Appellant's family home child care license be upheld.

I. Introduction

This matter came before the Office of Administrative Hearings (OAH) on [the Appellant's] request for an administrative hearing regarding the Department's revocation of her family home child care license. A hearing was held before the Honorable Rynold Fleck on May 7-10, 2006.

II. Issues on Review

Whether the Administrative Law Judge (ALJ) erred in determining that the Department did not establish licensing violations sufficient to revoke Appellant's license.

¹ That part of the Department of Social and Health Services (DSHS) responsible for regulating child care agencies was transferred to the Department of Early Learning in July 2006 pursuant to the Laws of 2006, Chapter 265 § 301. In this Review Decision and Final Order, the term "Department" means DSHS prior to July 2006 and the Department of Early Learning after that date. DSHS continues to provide administrative appellate review of Initial Orders under RCW 34.05.464 for the Department pursuant to an Interagency agreement.

Appendix A

III. Assignments of error

A. The ALJ failed to consider a significant portion of the evidence presented by the Department in support of its allegations. ALJ Fleck did not mention the testimony of Investigator Junior at all in his findings and omits testimony of relevance to his determinations from [day care parent DE] and Harriet Martin.

B. The ALJ erred to make credibility determinations regarding the testimony of key witnesses at hearing. Finding of Fact 11, to which the Department assigns error, mentions conflicting testimony between [the Appellant] and [Lila's father], but does not reconcile the conflict through use of a credibility determination of other means.

C. The ALJ erred in determining that [the Appellant] did not violate the waiver granted to her to allow her son [William] to reside in her home.

D. The ALJ erred in determining that [the Appellant] did not violate the minimum licensing requirements by violating her safety plan, allowing unauthorized individuals to stay in the home, and providing unlicensed care. Finding of Fact 13, to which the Department assigns error, misstates the testimony of witness [day care parent DE] regarding her knowledge of unknown persons staying in the child care home. Findings of Fact 15 and 16, to which the Department assigns error, fails to consider evidence in the record regarding [the Appellant's] unlicensed care of children, and is thus insufficient.

E. The ALJ erred in failing to address the Department's contention that [the Appellant's] actions showed a lack of the personal characteristics required of licensees under WAC 170-296-0140.

F. The Department assigns error to Conclusions of Law 8 and 12. In both of these Conclusions of Law, the ALJ erroneously states that there is no evidence in the record to support the allegations that [the Appellant's son William] was left unattended or unsupervised with children in violation of safety plans agreed to by [the Appellant]. The Department presented evidence by a witness to one instance of William being left, according to this witness, out of sight in another room with a child care child. ALJ Fleck determined, without explanation, that even if such conduct had occurred, it was not unattended because William was at least within hearing distance of [the Appellant]. It is unclear whether that finding is based on an assumption about the size of [the Appellant's] home or testimony, but in either case, this finding is not consistent with the wording of the agreements signed by [the Appellant]. Leaving a child in another room where he could not be observed should be considered as leaving him unattended, in violation of the safety plan in place.

G. The Department assigns error to Conclusions of Law 9 and 13. In both of these Conclusions of Law, the ALJ erroneously states that there is no evidence in the record to support the allegations that any unauthorized individuals resided in [the Appellant's] child care home. The ALJ does not take into account in any way the statements of DLR/GPS Investigator Junior, who testified that he spoke with two witnesses, [day care parent DE] and [day care parent BD], who reported to him that unknown individuals were living in the child care home. The ALJ also ignores without explanation the testimony of [day care parent DE] at hearing confirming that a person was introduced to her while she was using the child care, and [the Appellant] told her that this person would be staying with her. [Day care parent DE] assumed the person was living in the home. Finally, there is no mention in the ALJ's decision of testimony by Licensor Harriett Martin that she did not complete background checks on anyone other than [the Appellant] and her sons during the time period at issue in this case. The

evidence from Investigator Junior, [day care parent DE], and Licensor Martin was at least worthy of consideration and mention on the issue of whether any unauthorized persons were living in [the Appellant's] child care home.

H. The Department assigns error to Conclusion of Law 14. In this Conclusion of Law, the ALJ erroneously states that the one instance of unlicensed child care by [the Appellant] is insufficient to support revocation of her family home child care license. This finding is based on insufficient consideration by ALJ Fleck, who did not take into account Investigator Junior's report that [day care parent BD] had asked [the Appellant] to stop providing care in her home, and said [the Appellant] asked her not to tell CPS about the care. ALJ Fleck did not weigh this evidence against [the Appellant's] account to determine which was more credible. Had he done so, it is possible that the conclusion might have been different. [The Appellant] may have only provided one day of care, but evidence from Investigator Junior shows she was intending to provide more if a location was available for the care. This would support revocation of [the Appellant's] family home child care license.

IV. Statement of Facts

[The Appellant] has been a licensed family home child care provider for 22 years. Testimony of [the Appellant]. It was undisputed at hearing that the Department had had concerns about [the Appellant's] son [William] since approximately 2000. Exhibit 1-6; 10-11; Testimony of Harriett Martin [and] Testimony of [the Appellant]. There was also agreement between the parties as to some, but not all, of the conduct reported by the Department between William and his mother. Id. The areas of agreement show that William had aggressive behaviors towards his mother in 2002-2003. The Department was concerned that William's behavior could be observed or experienced by child care children. Testimony of Harriett Martin [and] Testimony of Patricia Eslava Vessey. One interaction between the Department and [the Appellant] occurred when William had been showing a child care child how to start a fire with an aerosol can. Exhibit 1. In 2002, a revocation action was initiated against [the Appellant] based on William's presence in the home, but this action was settled when William left the home for a period of time.

When William returned to his mother's home in 2003, the Department requested a safety plan to ensure that child care children would be safe if he were in the home. Testimony of Harriett Martin [and] Exhibit 6. The Appellant promised that "William has never, nor will be allowed any unsupervised contact with the child care children." Exhibit 7. The Department later executed two waivers to allow William to reside in [the Appellant's] home, even though he had a disqualifying crime. Testimony of Harriett Martin, Testimony of Patricia Eslava Vessey, [and Exhibits 10 and 11. The first waiver provided that "William is always supervised while children are present." Exhibit 10. The second indicated that "William is required to always be supervised and never left unattended with children in the child care home." Exhibit 11.

On July 5, 2006, there was a report of sexual abuse of a child by [William]. That report was assigned to DLR/CPS because it was not clear whether or not the abuse happened on child care premises or during child care hours. DLR/CPS Investigator Mack Junior was assigned to the referral. Testimony of Mack Junior. The Department investigation of this referral included interviews with many people, including [the Appellant]; [BD], the Appellant's older son; [BN], fiancée of [BD]; [day care parent BD], mother of Lila, a child in the child care; [day care parent JS], father of Lila; and [day care parent DE], parent of another child at the child care. Testimony of Mack Junior, [and] Exhibits 17-19. After investigation, the Department determined that the

referral was not founded as to [the Appellant] because the incident with William did not happen with a current child care child or during child care hours. Exhibit 17. However, Investigator Junior noted in his Investigative Assessment (IA) that there were some licensing concerns that arose during the investigation, including the possibility that William had had unsupervised access to child care children in violation of the safety plan; unknown individuals residing in the home; and [the Appellant] providing unlicensed care after her license was summarily suspended on July 5, 2006. Exhibit 17.

Investigator Junior recorded his interviews with parents and other witnesses in his IA, but also in Service Episode Records (SERs) created near the time of each conversation. These SERs, admitted as Exhibit 19, reveal that both [day care parents DE and BD] reported to him that William had been left in charge of child care children in the morning and afternoon while [the Appellant] dropped off or picked up school age children. [Day care parents DE and BD] also recalled an unknown person living in the child care home. Exhibit 19. [Day care parent DE] further reported on attempts by [the Appellant] to provide child care after being summarily suspended. She told Investigator Junior that [the Appellant] wanted to provide more than one day of care, but [day care parent DE] would not allow it. Id. She also said that [the Appellant] had instructed her not to tell CPS about the one day of child care provided. Id.

The Department investigation into the licensing allegations, based on Inspector Junior's IA, resulted in valid licensing findings for Character, Supervision, and Other Issues. Exhibit 21. Accordingly, the Department revoked [the Appellant's] family home child care license. [The Appellant] timely appealed the Department's decision to the Office of Administrative Hearings. A hearing was held before Administrative Law Judge Rynold Fleck on May 7-10, 2007. The Appellant was personally present for the entire hearing, and was also represented by lay representatives Deborah Rosser and Cassandra Clemens of APRE.

[Day care] parents [JS and DE] both testified at the hearing. JS gave a clear account of finding [the Appellant] on a couch several rooms away from where he found [William] changing his daughter's diaper. Testimony of [JS]. [JS] stated he had a clear recollection of events and [the Appellant] was not in the room where William and his daughter were. Id. [DE] testified that she had met a man at [the Appellant's] home who was not one of [the Appellant's] sons, but was introduced to her by [the Appellant] as staying at the home. Testimony of [DE]. She did not repeat her statements to Investigator Junior that William had been left alone with child care children. Id.

The Department subpoenaed [day care parent BD], who had spoken to Investigator Junior about unlicensed care by [the Appellant] in her home, occasions when William was left unsupervised with child care children, and an unknown person residing in the child care home. [Day care parent BD] did not appear as scheduled during the hearing. It was later learned that [day care parent BD] had move to another part of the state. The Department did not pursue her further as a witness, in part due to the fact that her statements to Investigator Junior had been admitted into evidence through Investigator Junior's testimony and his notes, which were Exhibits 17 and 19 for the Department.

ALJ Fleck issued the Initial Decision in this case on August 14, 2007. The Initial Decision overturned the revocation of [the Appellant's] family home child care license. There was no mention of Investigator Junior's testimony in ALJ Fleck's decision beyond a note in the first paragraph that he was called as a witness. The decision recited the testimony of [day care parent JS] and [the Appellant] in Finding of Fact 11, but is silent on which of the two irreconcilable accounts regarding William's contact with Lia should be believed. The ALJ words

Conclusion of Law 8 in such a way that it is made regardless of which witness was correct about the incident. ALJ Fleck also left out information from the testimony of [day care parent DE] and Harriett Martin regarding un-cleared persons residing in [the Appellant's] child care home.

V. Argument

A. Standard of Review for Child Care License Revocations.

Review of Initial Orders is governed by RCW 34.05.464 and WAC 170-03-0550 through 170-03-0620. In child care licensing revocation matters, the review judge has the same decision-making authority as the ALJ, but the review judge must consider the ALJ's opportunity to observe the witnesses. WAC 170-03-0620910.

The review judge also has the authority to remand cases to the ALJ for further action. WAC 170-03-0610(50). In conducting the review, the review judge considers the petition for review, responsive pleadings, the initial order, and the evidence given at the original hearing. WAC 170-03-0570(4).

B. The Health, Safety, and Welfare of Child Care Children is Paramount in Licensing Actions.

A clear understanding of the legislative goals in the area of Child Care Licensing can be found in the intent clause of the 2006 legislature creating the Department of Early Learning, RCW 43.215, which provided:

- (3) The purpose of this chapter is:
 - (a) To establish the department of early learning;
 - (b) To coordinate and consolidate state activities relating to child care and early learning programs;
 - (c) **To safeguard and promote the health, safety, and well-being of children receiving child care and early learning assistance.**

RCW 43.215.005 (2006) (emphasis added)

This language was strengthened in 2007 to mirror the provisions which had been set forth for child care licensing in RCW 74.15.010 prior to July 1, 2006, when it was part of the Department of Social and Health Services. The revised version reads:

- (3) The purpose of this chapter is:
 - (a) To establish the department of early learning;
 - (b) To coordinate and consolidate state activities relating to child care and early learning programs;
 - (c) **To safeguard and promote the health, safety, and well-being of children receiving child care and early learning assistance, which is paramount over the right of any person to provide care.**

RCW 43.215.005(3) (2007 amendment in bold)

The language of the intent clause, especially as amended in 2007, shows that the Department must always act with the safety and well-being of the children in its care as the primary concern.

C: Burden of Proof.

With regard to administrative proceedings concerning revocation of a family home child care license, the Department's burden of proof is preponderance of the evidence. The specific language imposing this burden of proof is found in RCW 43.215.300(2), which reads:

In any adjudicative proceeding regarding the denial, modification, suspension, or revocation of any license under this chapter, the department's decision shall be upheld if it is supported by a preponderance of the evidence.

D. The Department's Revocation of Appellant's License Should Be Upheld.

1. The evidence as whole supports a finding that licensing violations occurred.

In the instant case, the facts presented support the Department's finding that licensing violations by the Appellant more likely than not did occur. The testimony of [the Appellant] herself, Licensor Martin, [day care parents DE and JS] provides direct evidence that [the Appellant] participated in unlicensed child care; that she left her son William in another room with a young child in violation of her safety plan; that there was an unidentified and un-cleared individual living in the child care home; and that [the Appellant] provided unlicensed care. This represents three licensing violations, only one of which was found by the ALJ. Through selective consideration of the evidence, the ALJ dismissed the Department's conclusions that [the Appellant] violated her safety plan and had an unauthorized person living in the home. These findings should be reversed on appeal.

a. Evidence shows that [the Appellant] left William unattended with child care children on more than one occasion.

ALJ Fleck found only one possible instance in which William could have been unattended with a child care child. This is despite significant evidence from Investigator Junior that two different parents, [day care parents DE and BD], both said to him that William was completely alone with child care children in mornings and afternoons when [the Appellant] would pick up and drop off school age children. [The Appellant] flatly denied those allegations.

ALJ Fleck did not consider the evidence from Inspector Junior, even to dismiss it with a finding that [the Appellant] was more credible. This evidence, coupled with [day care parent JS] account of William being unsupervised with Lila, shows that three different individuals reported that William was being left with child care children. The weight of the evidence shows that William was unsupervised or unattended in violation of the safety plan, and that this likely happened many times, rather than just once. ALJ Fleck wrongly focused on only one incident with respect to this violation, and did not properly consider all of the evidence presented. A full reading of the evidence shows that [the Appellant] did violate her safety plan by leaving William unsupervised/unattended with child care children, and consequently violated WAC 170-296-0370(2)(c), WAC 170-296-1360, and WAC 170-296-1410.²

b. Evidence was presented that an unauthorized person was living in the child care home.

² The child care licensing regulations were re-codified in July of 2006 after DCCCEL became DEL. The numbering remained the same except for the WAC Chapter, which changed from 388 to 170. For clarity, because the action against [the Appellant's] license occurred after July 1, 2006, all references will be to WAC 170.

ALJ Fleck's Finding of Fact 13 indicates that witness [day care parent DE] was aware of people other than [the Appellant] and William in the home, but was not aware of whether they were doing anything more than visiting. This finding ignores [day care parent DE's] statements in testimony regarding the man she was introduced to at the child care home. [Day care parent DE] testified that she did not know the man, but that he was introduced to her by [the Appellant] as staying there. She took from that that he was living in the home. This evidence in support of the Department's finding that a licensing violation took place was left out of the ALJ's decision for unknown reasons. However, on review, all evidence should be considered, and ALJ Fleck's erroneous Finding of Fact 13 should be revised to include all of [day care parent DE's] evidence.

Finding of Fact 13 is another finding in which the relevant testimony and evidence from Investigator Junior was disregarded in its entirety, and without explanation. According to Investigator Junior's testimony and SERs, [day care parents DE and BD] were clear in their statements to him that someone other than [the Appellant] and her sons was staying at the child care home. [Day care parent DE] reported that there was a "male friend" who had brown hair, was about 5'9," and was in his mid-20's staying at the home while he looked for work. Exhibit 19. [Day care parent DE] also said that a man in his mid-20's, possibly named Joe, was seen at the home. She reported that she "knew" a man other than [the Appellant's] sons was living in the child care home. Exhibit 19. This information, added to what [day care parent DE] said at the hearing, is sufficient to show that a person other than [the Appellant] and her sons had lived at the child care home. It was not included in Finding of Fact 13, even to be discounted as not credible in the face of [the Appellant's] denial. This was an error by the ALJ, and warrants reversal. Substantial evidence supports a finding that an unidentified male was living in [the Appellant's] home. Licensor Harriett Martin made it clear in her testimony that she had not authorized any such person to reside in the home. Consequently, this supports a finding that [the Appellant] violated licensing requirements.

c. Evidence showed one day of unlicensed care and an intent to provide further care in violation of licensing requirements.

The ALJ properly found that [the Appellant] violated licensing requirements by providing unlicensed care in the home of a parent, [day care parent BD]. However, the ALJ then went on to conclude that this one day of care was based entirely on a misunderstanding between [the Appellant] and her licensor, and as such, it did not support a license revocation. The ALJ's Findings of Fact 15 and 16 are void of any reference to the testimony and SERs of Investigator Junior, which again provide evidence that [the Appellant's] motivations may have been to continue providing care illegally. [Day care parent BD] was clear in her statements to Investigator Junior that she refused to allow [the Appellant] to continue providing care, although [the Appellant] was interested in doing so. Exhibit 19. [Day care parent BD] also said that [the Appellant] told her not to tell CPS about the care. *Id.* Neither of those statements, which were in direct conflict with [the Appellant's] testimony, was addressed in any form in ALJ Fleck's decision.

Findings of Fact 15 and 16 also failed to consider documentary evidence which seems to contradict [the Appellant's] version of events. [The Appellant] testified that her one day of unauthorized child care was the Friday of the week she was suspended, which would have been July 7, 2006. She said that after that, Licensor Martin called her and told her it was inappropriate, so she stopped. However, the SERs entered into the record by Licensor Martin and Investigator Junior show that the unlicensed care was discovered on July 19, 2007, more than a week later. Exhibit 19. This evidence was not explored by the ALJ in his finding, and it

tends to show that [the Appellant's] account is unreliable and self-serving. The evidence should have been discussed in the decision, if only to discredit it in some way. ALJ Fleck's Findings of Fact 15 and 16 omit evidence critical to the proper evaluation of the case, and should be overturned. In the alternative, the case should be remanded for entry of complete findings.

The ALJ erroneously discounted important Department evidence of licensing violations, even though hearsay is allowed into evidence per WAC 170-03-0400(20). This decision was partially responsible for the incorrect result in this case. Had all of the evidence been properly considered, the outcome of this case could have been different. When the evidence is considered appropriately, it supports the Department's allegations of licensing violations by the preponderance standard.

2. The licensing violations found by the Department support revocation.

The Department found, and the evidence supports, three different licensing violations by [the Appellant]. First, she left her son William, known to have mental illness and violent reactions, at least towards [the Appellant], unattended around child care children. Reports of parents indicated that this had happened more than once, but the testimony of [day care parent JS] shows a particular example of that behavior. [The Appellant's] disregard of a safety plan designated for her convenience to allow William to remain in her home is unacceptable. As shown by the testimony of Licensor Martin and Licensor Supervisor Eslava Vessey, the Department must be able to trust licensees to follow all licensing requirements, even when not monitored closely. [The Appellant] violated that trust, and licensing requirements, when she allowed William to have unsupervised contact with child care children.

[The Appellant] also violated licensing requirements, specifically WAC 170-296-0180 and WAC 170-296-0550, by allowing an unknown individual to live in the child care home without a background check. To this day, there is no way for the Department to know if the person reported in the home by [day care parents DE and BD] had any criminal or other history that would have posed a risk to children. [The Appellant] failed to properly ensure the safety of children in her care, another action warranting license revocation.

Finally, [the Appellant] participated in at least one day of unlicensed care after she was summarily suspended. She excuses her conduct as a misunderstanding, but as a 22-year licensee, [the Appellant] should have been well aware of the applicable licensing regulations. Furthermore, evidence offered by the Department tends to show that [the Appellant's] violation was not ongoing only because her attempts to continue to provide care were thwarted by [day care parent BD]. This licensing violation, supported by ALJ Fleck, supports revocation.

3. The standard of review is met to warrant reversal of the ALJ's finding on revocation.

a. The ALJ did not properly weigh and consider all of the evidence admitted.

The ALJ should have considered all of the evidence in this case when reaching a decision, nor did he properly determine credibility when required to reach a result. His failure to do so calls the result into question. Such questionable findings should not be allowed to stand on appeal. In the alternative, if the findings are not reversed, the case should be remanded to ALJ Fleck for full consideration of all evidence presented and a decision based on that evidence.

b. Finding of Fact 11 was not adequate due to a lack of credibility determination.

In Finding of Fact 11, ALJ Fleck addresses testimony at the heart of the controversy in this case, but fails to reach a conclusion as to which of two conflicting reports is more credible. WAC 170-03-0530(4) requires credibility findings in a case such as this. Instead, ALJ Fleck's finding merely recites an outline of the testimony from [the Appellant] and [day care parent JS] regarding what happened when he picked his child Lila up and found her with William, reaching no conclusion of any kind. This is inadequate for a case in which a primary allegation, whether William was unsupervised or unattended with Lila that day, can only be answered with a determination of which version of the story should be accepted. As noted below, Conclusion of Law 8 is unsupported without a credibility determination at this point. Accordingly, ALJ Fleck's Finding of Fact 11 is insufficient and should not be accepted on review.

In the absence of a credibility determination, the review judge may evaluate the evidence in the record as presented. ALJ Fleck clearly was unwilling to discount [day care parent JS'] testimony, and so it may be considered as of equal weight to [the Appellant's]. There is no indication that [day care parent JS] had a motive to lie about the incident he described, and his testimony was emphatic on the point that [the Appellant] was not near or within sight of William. Also, evidence not considered by the ALJ, in the form of statements to Investigator Junior from [day care parents DE and BD], support the notion that William was often left alone with child care children, consistent with what [day care parent JS] reported that he saw.

A full reading of the evidence shows that it is more likely than not that [the Appellant] was where she, by her own admission, often was at the end of a day of child care: on her couch, which was a considerable distance away from the changing area where William and Lila were. Finding of Fact 11 should be amended to find that William and Lila were alone in the changing area out of [the Appellant's] sight. In the alternative, this matter should be remanded to ALJ Fleck under WAC 170-296-0530(4) to supply the vital missing credibility determination on this issue. And additional omission in this case was the ALJ's failure to consider significant evidence from Investigator Junior, who interviewed many witnesses during his DLR/CPS investigation, supports the Department's allegations. This evidence was ignored entirely in ALJ Fleck's decision. The ALJ committed an error of law by not fully considering the evidence presented.

c. Conclusion of Law 8 was not supported by substantial evidence.

A key conclusion of law that was made by ALJ Fleck in the Initial Decision was not supported by substantial evidence based on the entire record. In Finding of Fact 8, ALJ Fleck discounted the safety plan developed by the Department for [the Appellant] with the comment that even if the child William had been out of sight while with the child Lila, he was within hearing, and so was not unattended with the child. The ALJ provides no further reasoning to support his view that the word "unattended" should be interpreted in this manner. Webster's Online Dictionary³ defines the word unattended as:

1. Unattended. a. Adjective.

1. Not watched; "she dashed out leaving the bar unattended; "a fire left unattended."

2. Lacking accompaniment or guard or escort; "unattended women;" "problems unattended with danger."

³ Definition found at <http://www.websters-online-dictionary.org/definilion/Unattended>.

3. Lacking a caretaker; "a neglected child;" "many casualties were lying unattended."

This definition, applied to the ALJ's finding that William may only have been within hearing range, would lead to a conclusion that [the Appellant] had violated her safety plan.

Unfortunately, the lack of precision in ALJ Fleck's Conclusion of Law 8 makes the foregoing exercise nearly useless. In his efforts to avoid making a credibility determination between [the Appellant] and [day care parent JS], the ALJ has created a finding which may or may not support the Department's finding of a licensing violation, depending on which aspect is accepted. If William was, as [day care parent JS] described, several rooms away from [the Appellant] with a wall between, then he was unattended with Lila by the common definition quoted above. This is regardless of whether he was within hearing distance, a term not defined by the ALJ, which could include the ability to hear all sounds or might be limited only to a shout or scream, given the nature of [day care parent JS] description. If, on the other hand, [the Appellant's] testimony that William was within her sight when she dealt with [day care parent JS], then that incident might not be considered one in which William was unattended with Lila. At the least, a refinement of this finding, with a clear credibility determination, is necessary. However, given the clear testimony of [day care parent JS], a witness not discredited by the ALJ, Finding of Fact 8 should be reversed altogether and replaced with a finding that William was unattended, in violation of [the Appellant's] safety plan. This licensing violation provides support for the Department's decision to revoke [the Appellant's] family home child care license.

In addition to the incident described by [the Appellant] and [day care parent JS], there is evidence in the record that William was alone with children at other times when [the Appellant] was picking up or dropping off school-age children. Both [day care parents BD and DE] commented to Investigator Junior that William had been alone with child care children in the mornings and afternoons. Testimony of Investigator Junior, Exhibit 19. Investigator Junior wrote these conversations down in his SERs on the day each conversation took place, and also noted them in his testimony. Id. [Day care parent BD] did not come forward as a witness at the hearing, and [day care parent DE] did not repeat her statements about William when she testified. However, Investigator Junior's information was admitted at trial, and it was not considered in any way as the ALJ found only one possible incident where William could have been unattended with children in violation of the safety plan.

ALJ Fleck does comment that the one licensing violation he found did not warrant revocation. A full consideration of the record, including all licensing violations supported by the evidence, shows that [the Appellant] has demonstrated poor character in allowing her son William to be unattended around child care children, allowing unqualified individuals to live in her home, and providing unlicensed child care. Her decisions, any one of which could have resulted in harm to a child, show that she is not reliable and does not operate her child care business in an open and truthful way. WAC 170-296-0140 supports the revocation action taken by the Department. ALJ Fleck's decision to the contrary should be reversed, or at least remanded for entry of findings and conclusions on all allegations brought by the Department.

A full consideration of all evidence presented shows that the Department has met its burden of proving that there is reasonable cause to believe that [the Appellant's] family home care license should be revoked based on three separate licensing violations. Accordingly, the Department respectfully requests that the Review Judge uphold the revocation of the Appellant's family home child care license.

VI. CONCLUSION

ALJ Rynold Fleck erred when he overturned the Department's revocation of the Appellant's family home child care license as not supported by the evidence. The Department respectfully requests that the Review Judge reverse the Initial Decision [and] uphold the Department's revocation of the Appellant's license.

4. On September 11, 2007, the Appellant filed a response to the Department's petition for review and argued as follows:

Comes now the Appellant, by and through her Lay Representatives of Record, Deborah Rosser and Cassandra Clemens, and provides the Court with the following Memorandum in Opposition to the Department's Petition of the Initial Order entered in this matter on August 14, 2007, which rescinded the Department's revocation of the Appellant's family home childcare license.

This matter came before the Office of Administrative Hearings as a result of [the Appellant's] timely request for appeal of the Department's revocation action against her licensure. A full hearing on the merits of the case was held before ALJ Rynold Fleck on May 7 through May 9, 2007, and not on May 7 through the 10th, in the year 2006 as the Department's petition asserts.

ALJ Fleck heard and decided the issues de novo based on what was presented during the hearing. The hearing record will reflect that the ALJ's decision in this matter is not in error and the Department did not meet their burden.

RCW 43.125.300(2) In any adjudicative proceeding regarding the denial, modification, suspension, or revocation of any license under this chapter, the department's decision shall be upheld if it is supported by a preponderance of the evidence.

The Department's petition for review should be denied and the Initial Order affirmed.

The undersigned will address each section of the Department's petition entitled:
Assignment of Error III.

III. A. The Department's petition assigns error to the ALJ's consideration of Investigator Mack Junior's testimony. The hearing record and exhibits submitted by both the Appellant and the Department provides this Review Board evidence that Mack Junior's testimony was flawed and that any investigation performed by Mack Junior in this matter was deficient. The record will demonstrate that Licensor Martin testified that she relied on Mac Junior's investigation when imposing licensing findings against the Appellant. Ms. Martin also testified that no one from her agency, including herself, conducted an investigation. The record will reflect the inconsistencies in Mack Junior's testimony, as well as the characterization of his investigation. The record will provide this Review Board evidence that the Department's assignment of error to ALJ Fleck's consideration of [day care parent DE's] testimony is also without merit. The Department's objection to the ALJ's determination of [day care parent DE's] testimony does not make the ALJ's finding flawed.

III. B ALJ Fleck's *Finding of Fact 11* attached a credibility determination to [day care parent JS] and [the Appellant's] testimony. The ALJ's finding of fact stated that although there were differences in the testimony, William was in [the Appellant's] view at all times during this activity

thereby the ALJ found [the Appellant's] testimony credible. The record will support this finding of fact.

III. C. The Department's attempt to attach error to Judge Fleck's determination that [the Appellant] did not violate the waiver agreement is without merit. Just because the finding is contrary to the Department's opinion does not make the ALJ's finding flawed. The record will support this finding.

III. D. Attaching error to the ALJ's **Finding of Fact 13** regarding the ALJ's determination that [the Appellant] did not allow unauthorized individuals to stay in the home is without merit. The record will support the ALJ's determination. **Finding of Fact 15 and 16** are not in error as the Department asserts. The ALJ considered all the evidence de novo. Just because the finding is contrary to the Department's opinion does not make the ALJ's finding flawed. The record will support this finding of fact.

III. E. The ALJ had the opportunity to hear testimony, observe the witnesses, and review the evidence presented by the Department regarding their contention that [the Appellant] lacked the personal characteristics required of a licensee under WAC 170-296-0140 and found that the Department did not meet their burden. Just because the finding is contrary to the Department's opinion does not make the ALJ's finding flawed. The record will support this finding of fact.

III. F. The ALJ's **Conclusions of Law 8 and 12** are supported by the record. The ALJ had the opportunity to consider [day care parent JS'] testimony as well as [the Appellant's] testimony, observe the witnesses as they testified, as well as review and consider the exhibits. Judge Fleck reviewed exhibits including a diagram of the Appellant's home, pictures of the location of sign in/sign out sheets, and where [the Appellant] was standing when [day care parent JS] arrived at the home. [The Appellant's] son, William, was not out of sight or hearing. Just because the finding is contrary to the Department's opinion does not make the ALJ's finding flawed. The record will support this finding of fact.

III. G. **Conclusions of Law 9 and 13** are not in error. The record will reflect [day care parent DE's] testimony supports the conclusions made by the ALJ. [Day care parent DE] stated that she saw other "older men" and that these "older men" were in their 20's. [Day care parent DE] also testified that these men were not caring for the children. [Day care parent DE] testified that she observed a friend in the home during day care hours 4-5 times a month. The Department erroneously states in their petition that [day care parent DE] testified that she was introduced to a man as living in [the Appellant's] home. [Day care parent DE] did not provide any such statement in her testimony. That statement was reported by Mack Junior to have been made by [day care parent BD] who failed to appear as a witness for the Department. Despite the Department's position, any person "assuming" something is not legally sufficient as fact.

The Department's contention that Ms. Martin did not perform background checks on anyone other than the Appellant and her sons is erroneous. Licensor Martin testified to doing a background check on the Appellant's assistant, [her son's fiancée BE].

III. H. The assignment of error to Conclusion of Law 14 is without merit. The record will reflect that [the Appellant] testified that she provided care in [day care parent BD's] home for one day. [The Appellant] also testified that she did not ask [day care parent BD] not to tell CPS, as [the Appellant] was providing care under the legally recognized license exempt care "family, friends, and neighbor care" (FFN). Licensor Martin testified that Licensor Martin had informed [the

Appellant] she would be able to provide care under "FFN." [Day care parent BD] did not testify to the contrary and in fact failed to testify at all as a witness for the Department and under subpoena. Mack Junior's testimony that [the Appellant] had *intended* to provide care for more than one day is irrelevant. Mack Junior testified that [the Appellant] provided care for one day only.

The Department's Statement of Facts appears to be their attempt to present their case in chief a second time. The Department had the same opportunity as the Appellant to present their case before Judge Fleck on May 7, 8, and 9, 2007. The fact that the ALJ ruled not to affirm the Department's action against this provider is not sufficient grounds for a review by this tribunal. The Department's case against the Appellant was flawed and deficient. Investigator Junior's testimony conflicted with his Investigative Report submitted as evidence through various exhibits. The Department's witnesses, Licensor Martin and Supervisor Elsalava-Vessey testified they had not conducted an investigation and relied on Mack Junior's investigation and conclusions to be thorough and accurate. The hearing identified the lack of a thorough investigation by DLR/CPS Investigator Mack Junior; therefore, DEL's reliance on Mack Junior's investigative assessment for subsequent adverse licensing findings/actions resulted in licensing findings/actions without a factual or legal basis.

The Department's petition states that they did not pursue [day care parent BD] as a witness, yet the record will reflect that the Department had [day care parent BD] scheduled as a witness, subpoenaed [day care parent BD] to appear as a witness, and inconvenienced the Appellant's witnesses by having witnesses reschedule their appearances to accommodate the expected arrival of [day care parent BD].

The Department did not prove that [the Appellant] left her son William unattended around child care children. The ALJ correctly found in favor of the Appellant.

The Department did not prove that [the Appellant] allowed an unknown individual to reside in the child care home without a background check. The ALJ correctly found in favor of the Appellant.

The Department did not prove that one day of Family Friends and Neighbor care (FFN) and an *intent* to provide further care is a violation of any licensing requirements. The ALJ correctly found in favor of the Appellant.

ALJ Fleck properly weighed and considered all evidence admitted. ALJ Fleck met the requirements of WAC 170-03-0530, which provides that:

An ALJ initial decision must:

- 1. Identify the hearing decision as a DEL case;*
- 2. List the name and docket number of the case and the names of all parties and representative;*
- 3. Find the specific facts determined to exist by the ALJ, based on the hearing record, and relied on by the ALJ in resolving the dispute;*
- 4. Explain why evidence is credible when the facts or conduct of a witness is in question;*

5. State the law that applies to the dispute;
6. Apply the law to the facts of the case in the conclusions of law;
7. Discuss the reasons for the decision based on the facts and the law;
8. State the result;
9. Explain how to request changes in the decision and the deadlines for requesting them;
10. State the date the decision becomes final; and
11. Include any other information required by law or DEL program rules.

There is no requirement that the ALJ include a credibility determination in his findings of fact unless a finding is based substantially on credibility of evidence or the demeanor of a witness.

RCW 34.05.461 provides:

(1) Except as provided in subsection (2) of this section:

- (a) If the presiding officer is the agency head or one or more members of the agency head, the presiding officer may enter an initial order if further review is available within the agency, or a final order if further review is not available;
- (b) If the presiding officer is a person designated by the agency to make the final decision and enter the final order, the presiding officer shall enter a final order; and
- (c) If the presiding officer is one or more administrative law judges, the presiding officer shall enter an initial order.

(2) With respect to agencies exempt from chapter 34.12 RCW or an institution of higher education, the presiding officer shall transmit a full and complete record of the proceedings, including such comments upon demeanor of witnesses as the presiding officer deems relevant, to each agency official who is to enter a final or initial order after considering the record and evidence so transmitted.

(3) 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. The order shall also include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief. An initial order shall include a statement of any circumstances under which the initial order, without further notice, may become a final order.

(4) Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. Findings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. 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.

(5) Where it bears on the issues presented, the agency's experience, technical competency, and specialized knowledge may be used in the evaluation of evidence.

(6) If a person serving or designated to serve as presiding officer becomes unavailable for any reason before entry of the order, a substitute presiding officer shall be appointed as provided in RCW 34.05.425. The substitute presiding officer shall use any existing record and may conduct any further proceedings appropriate in the interests of justice.

(7) The presiding officer may allow the parties a designated time after conclusion of the hearing for the submission of memos, briefs, or proposed findings.

(8)(a) Except as otherwise provided in (b) of this subsection, initial or final orders shall be served in writing within ninety days after conclusion of the hearing or after submission of memos, briefs, or proposed findings in accordance with subsection (7) of this section unless this period is waived or extended for good cause shown.

(b) This subsection does not apply to the final order of the shorelines hearings board on appeal under RCW 90.58.180(3).

(9) The presiding officer shall cause copies of the order to be served on each party and the agency.

In this case the ALJ relied on the evidence admitted and testimony given.

The Department's case was frothed with inconsistent testimony, a lack of corroborative detail, conclusory statements, hearsay allegations, and decisions made by speculation and assumptions reliant on a flawed investigation.

The standard of review is governed under RCW 34.05.46. The standard of review is governed under RCW 34.05.464 and WAC 170-03-0550 through WAC 170-03-0620. If this Board grants the Department's request for review, a full consideration by this Review Board will show that ALJ Fleck's decision is not flawed and was properly rendered.

If this Board grants the Department's request for review, a full consideration by this Review Board will show that ALJ Fleck's decision is not flawed and was properly rendered.

The Appellant respectfully asks that the Review Judge deny the Department's Request for Review and uphold the ALJ's initial decision to rescind the revocation of the Appellant's license.

II. FINDINGS OF FACT

1. The Appellant has been providing in-home child care services since at least 2000 pursuant to a Family Home Child Care license issued by the Department. She was most recently relicensed in May of 2004 for the address 16434 Marine View Drive S.W., Burien, Washington, for a maximum of 12 children, with a maximum number of children under two years of age being four. This license was effective through May of 2007.⁴

2. On July 5, 2006, the Department received a referral from the King County Sheriff's Office reporting that William, the Appellant's 19-year old son who resided in her home, had been accused of engaging in oral sex with a three-year old child that he babysat. And on July 5, 2006, the Department was advised that William had confessed to having engaged in oral sex with a three-year old girl for whom he occasionally babysat outside of daycare hours and for whom he was paid pursuant to a separate arrangement. William was subsequently incarcerated and charged with two counts of Rape of a Child in the First Degree.⁵

3. On July 5, 2006, the Department served notice on the Appellant informing her that her license was summarily suspended.⁶ The Appellant objected, filed a request for hearing on July 7, 2007, and asked for a stay of the suspension. By Order on Motion to Grant Stay issued August 2, 2007, the ALJ stayed the summary suspension action.

4. The Department subsequently decided to revoke the Appellant's childcare license. The basis of that decision was the information the Department obtained in its investigation into the referral it had received from the King County Sheriff's office, the most significant of which was that the Appellant had allowed William to have unsupervised access to children in her care in violation of a safety agreement the Department had entered into with her. The Appellant's violation of the safety agreement was of great concern to the Department because of William's history of inappropriate behavior towards other children, because of his past violence, and because of his mental health diagnosis.⁷

⁴ Exhibit 9.

⁵ Exhibit 17, pp. 2 and 7.

⁶ Exhibit 12.

⁷ Testimony of Licensing Supervisor Patricia Eslava Vesse, Transcript of the Proceeding (TR), Vol. III, pg. 34.

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5. On November 9, 2006, the Department served notice on the Appellant informing her that her Family Child Day Care Home license was being revoked. The notice referenced historical facts and interactions between the Appellant and the Department. The notice also cited various legal bases and rule violations in support of the revocation. These include: the Appellant's violation of her March 23, 2003, safety plan and the 2005 waiver; WAC 170-296-0370(2)(c) (requiring licensees to follow compliance agreements); WAC 170-296-1360 (requiring supervision by the Appellant or staff); [WAC] 170-296-1410 (setting forth requirements for staff members); WAC 170-296-0180 (allowing persons to live in the home without a criminal background check); WAC 170-296-1410 (allowing "Joe" to have unsupervised access to children under care without a background check); WAC 170-296-0550 (failure to report major changes of members of the household); WAC 170-296-0140 (lacking the specific characteristics necessary to be a child care provider); and WAC 170-296-0110 (operating a child care facility without a license).⁸

6. The Appellant objected to her license being revoked and filed a request for hearing on December 6, 2006.

7. The Appellant's adopted son William, born February 23, 1987,⁹ has had severe learning disabilities from a young age and was suspended from school and faced expulsion multiple times. When he was in the seventh grade, William was diagnosed with depression and started on Paxil. He also took Adderall at the time for Attention Deficit Hyperactivity Disorder (ADHD). However, his symptoms worsened. He began to have psychotic symptoms which worsened and were "pretty severe."¹⁰

8. In April 2001, William, then thirteen years old, had shown one of the Appellant's day care children how to start a fire using an aerosol can. The Appellant told the investigating licenser that William had been diagnosed as having ADHD, had been involved with conflicts at school, has learning disabilities, had attempted suicide in November 2000, and had been

⁸ Exhibit 22.

⁹ Exhibit 16, pg. 2.

¹⁰ Testimony of Catherine Stabio Fisher, TR, Vol. III, pg. 96.

admitted to Fairfax Hospital.¹¹ The Appellant further said that the medication William had been using to treat his ADHD had aggravated his behavior, he had finally been diagnosed with bipolar disorder in December 2000 and taken off the ADHD medication, his behavior had improved, and William and her family were in counseling. In August 2001, William was convicted of Harassment, Intimidation of a student, and Assault VI for an incident where he had threatened a student or a teacher with a knife at school.¹²

9. In 2001 William was receiving mental health services through Highline and West Seattle Mental Health facilities and through the Ruth Dykeman Children Family Services.¹³ He became a patient of Catherine Stabio Fisher, a Psychiatric Nurse Practitioner at Highline West Seattle Mental Health Center, in 2003 and was her patient for about three years. Ms. Fisher treated William's conditions of ADHD and bipolar disorder. At the time he became her patient, William was taking Depakote, Zyprexa, Tenex, Seroquel, and Lamictal for mood stabilizing. Ms. Fisher last saw William in early June of 2006 for a psychiatric evaluation. Ms. Fisher saw no indication during her relationship with William or in his history that he would act sexually inappropriate at any time.¹⁴ During the time William was being seen by Ms. Fisher, he was also receiving cognitive behavioral therapy.¹⁵

10. In a November 2001 letter, the Department notified the Appellant that William must be off the premises during daycare hours "due to the history of his many disturbing behaviors." This letter also told her that "this is a serious matter and the first time William is left on the premises will result in an immediate revocation of the child care home" license.¹⁶ The Appellant's response was to send her licenser, Harriet Martin, a supervision plan for William during the hours of her child care operation.¹⁷

11. William's behavior continued to escalate. The Appellant testified that in her 22

¹¹ Exhibit 1.

¹² Testimony of Licenser Martin, TR, Vol. I, pp. 84-85.

¹³ Testimony of the Appellant, Transcript of Proceedings (TR), Vol. 1, pp. 32, 35.

¹⁴ Testimony of Catherine Stabio Fisher, TR, Vol. III, pp. 94-96.

¹⁵ Testimony of Catherine Stabio Fisher, TR, Vol. III, pp. 98.

¹⁶ Exhibit 2.

¹⁷ Exhibit 3.

years of providing child care, there had never been a complaint made against her.¹⁸ However, the Department received eleven referrals of family violence during the period 2000-2002¹⁹ from Family Reconciliation Services, Child Protective Services, and the Appellant herself.

12. On January 15, 2002, the Department issued a notice to the Appellant revoking her Family Day Care license. The notice cited numerous episodes of violence between the Appellant and William that had occurred in 2000 and 2001, Williams' deteriorating behavior and volatility in school, reports from his psychiatrist about his extremely hard to handle behaviors his negative attention seeking behavior, his threats to other children in school, his interaction with the day care children, his lack of understanding of the consequences of his actions, the fact that he "has gouged the eyes out of all of his stuffed animals," his inappropriate conduct with the family cat, and so on.²⁰ The Department withdrew this notice when William left the Appellant's home in June 2002 to reside in a group home for children needing extensive psychiatric care and schooling. William returned to the Appellant's home at the end of March 2003.²¹

13. In a March 19, 2003, letter, Licensor Martin informed the Appellant that, "The department requires that you not allow your son William unsupervised contact with child care children." Licensor Martin further informed the Appellant that, "The department requires that you set up a safety plan to prevent risk to children and the steps you would take when a child is put at risk should something occur on the premises during child care hours. Please submit this plan in writing by March 24, 2003."²² The safety plan represented the Department's ability to trust the Appellant to keep the children safe. It was the Department's assurance that the situation would be handled and supervision of the children would be appropriate.²³

14. On March 23, 2003, the Appellant e-mailed²⁴ Licensor Martin as follows:

As per your request:

¹⁸ Testimony of the Appellant, TR, Vol. III, pg. 105.

¹⁹ Testimony of Supervisor Eslava Vesse, TR, Vol. III, pg. 13.

²⁰ Exhibit 4.

²¹ Testimony of the Appellant, TR, Vol. I, pg. 37.

²² Exhibit 6.

²³ Testimony of Supervisor Eslava Vesse, TR, Vol. III, pg. 28.

²⁴ Exhibit 7.

1. William has never, nor will be allowed any unsupervised contact with the child care children.
2. I will notify the department immediately, of any incident that puts the child care children at risk.

Safety Plan for prevention of risk to child care children:

1. Children will be removed from situation immediately. I have assistants that are with me throughout the day, the children will be removed to a safe area, i.e., separate room, outside (weather permitting), (with assistant present) and/or William will also be removed from the premises.
2. I will be responsible for removing William and if necessary 911 will be called for assistance. (I have been trained in passive restraint to deal with any risky behaviors from William).

My first responsibility is for the safety and well being of the children I care for, they will not be subjected to any form of risky behavior.

William leaves for school at 7:00 AM and does not return until 3:30 to 4:00 PM. William will probably be attending summer school. He is working after school for a family friend, participates in activities at The Purple Door (Burien teen center), attends counseling twice a week after school and participates in Youth group at our church. He is very active with outside interests. He is working hard to continue his success in the community and has great family and friend support.

15. The Appellant testified that she was not aware that the Department was still concerned about William being in her home after her license was renewed in May 2004 because the issue was never brought up when she was relicensed.²⁵ However, in May 2004 or shortly thereafter, Licensor Martin communicated with the Appellant about not allowing William to have unsupervised access to child care children. Because of the Department's continuing concerns regarding William being in the home and being unsupervised, this topic was an ongoing discussion between the Appellant and Licensor Martin. Licensor Martin wanted to ensure that the Appellant was following her safety plan.²⁶

16. In October 2004, the Appellant asked the Department to waive the regulation(s) that disqualified William from being present in her home while she provided child care because of his earlier assault conviction,²⁷ a conviction that disqualified him from being unsupervised

²⁵ Testimony of the Appellant, TR, Vol. I, pg. 45.

²⁶ Testimony of Licensor Martin, TR, Vol. I, pp 130-131.

²⁷ Testimony of Supervisor Eslava Vesse, TR, Vol. III, pg. 29.

around children.²⁸ In her waiver request the Appellant stated that William would never have unsupervised contact with the child care children. The Appellant further stated in her waiver request that the duration of her requested waiver was from "now" to "ongoing."²⁹ The Department did not immediately respond to the Appellant's request for waiver.

17. In April 2005, Licensor Martin renewed the Appellant's request that the Department waive the regulation(s) that disqualified William from being present in the Appellant's home while she provided child care. In May 2005, the Department granted the Appellant a waiver for the period May 2004 through May 2007 upon the condition that William was always supervised and never left unattended with children in the child care home.³⁰

18. In February 2006, the Appellant asked Licensor Martin to authorize William to be her day care assistant.³¹ Licensor Martin told the Appellant that she would need to staff this request with her supervisor and that the Appellant would need to check with the doctor about Williams' medication and what his behavior is like when he's not taking his medication. The Department never approved William to be an assistant for the Appellant.³²

19. CPS Investigator Mack Junior was assigned to the referral the Department received from the King County Sheriff's office on July 5, 2006. Investigator Junior interviewed the Appellant, the Appellant's son Davis, Davis' fiancé, and some of the parents of children in the Appellant's facility. The investigation also brought into question whether or not the Appellant had allowed William to have unsupervised contact with the day care children.

20. During the Department's investigation, several day care parents reported having seen William unsupervised and having seen him watching children without the Appellant present. DB, the mother of Lila, a three-year old child who attended the Appellant's day care, told Investigator Mack Junior that on three or four different occasions, she saw William left alone with the children in the morning and the afternoon while the Appellant was running errands.³³

²⁸ Testimony of the Appellant, TR, Vol. 1, pp. 45-48.

²⁹ Exhibit 10.

³⁰ Exhibit 11.

³¹ Exhibit P.

³² Testimony of Licensor Martin, TR Vol. II, pp. 42-43; Exhibit J.

³³ Exhibit 17, pg. 3; Exhibit 13; and testimony of Investigator Junlor, TR, vol. II, pg. 62.

DB reported that the Appellant's oldest son had had a male friend staying at the Appellant's home when Lila first started at the facility and that this male friend helped the Appellant watch the children. DB reported that the Appellant had told her this male friend was approved to be in the home³⁴ and that he was living in her home while he was looking for a job. DB reported that she thought this man's name was "Joe" but was not sure, that he was in his mid-twenties, and that she had seen him in the home during daycare hours four or five times per month.³⁵

21. DE, the mother of two children who attended the Appellant's day care, told Investigator Junior that in addition to the Appellant, the Appellant's son William, the Appellant's son Davis, and Davis' fiancé Brandy, there were two other older gentlemen that were at the Appellant's home occasionally in the morning when she dropped her children off or when she picked her children up after school. DE noted that these gentlemen were not caring for children.³⁶ DE reported that one man would be sitting on the couch with a cup of coffee when she dropped her children off. DE further reported that when she first signed up to use the Appellant's day care facility, she saw another gentleman in the home. The Appellant had told her at that time that the man had been approved by the state to be there and that he was staying with her for a while. DE's understanding was that the man lived there.³⁷

A witness, DE, whose two children were with the Appellant in her day care between April of 2005 and June or July of 2006, recalls observing people other than the Appellant and William at the residence on occasion. She would drop her children off at approximately 7:45 in the morning. Her son was there for the mornings; her daughter was there all day. She did not know the name of the other adult present, nor was she aware of whether that party was anything more than visiting for short periods of time.

22. JS, the father of Lila, a child in the Appellant's care, did not think that the Appellant's provision of child care seemed very professional because "...there was another young guy there" and because of "...people kind of hanging around. Her son was there, the

³⁴ Exhibit 17, pg. 3.

³⁵ Exhibit 13, Exhibit 17, pg. 3; and testimony of Investigator Junior, TR, Vol. II, pg. 63.

³⁶ Exhibit 15.

³⁷ Testimony of Dawn Eykel, TR Vol. II, pp. 8-9.

other son, I think, and the daughter-in-law would kind of come and go."³⁸

23. The Appellant denied that anyone other than her son William, her son Davis, Davis' girlfriend Brandy, and Davis' daughter Kaitlyn lived in her home between January 2006 and July 5, 2006.³⁹ The Appellant identified "Joe" as being a friend of her older son Davis who became a family friend. Joe would sometimes come over to the Appellant's home to visit. He was usually in the garage working on cars with Davis. Joe did come into the house but was not allowed in the house during daycare hours, he sometimes came for dinner during the week, and he sometimes would stay over the weekend. The Appellant denied that Joe ever had unsupervised access to children. The Appellant denied that she ever left the children under the sole supervision of any unidentified person while she ran errands.⁴⁰ The Appellant denied ever having left William alone in the daycare and denied having violated the 2003 safety plan. She denied that any other adult males ever lived in her house.⁴¹ The Appellant claims that William help with lunches⁴² but did not have unsupervised access to the children and that he did not change the children's diapers. She claimed that he has never changed a child's diaper,⁴³ he has never been a primary caregiver for the children, and he has never been unsupervised.⁴⁴

24. During this investigation, the Department became aware of an incident that occurred on June 14, 2006,⁴⁵ involving William and Lila, a two and one-half year old child in the Appellant's care. The testimony is in conflict regarding this incident.

25. Concerning this incident, JS, Lila's father, testified that when he came to pick up Lila in the evening, he saw something that struck him as odd, and it seemed even more odd and frustrating to him once the Appellant's facility was closed and he found out why. JS had entered the Appellant's house through the front door and gone into the living room. He saw the Appellant and a couple of other children she was attending to in the living room on the couch by

³⁸ Testimony of Joel Saxton, TR, Vol. I, pp 106-107.

³⁹ Testimony of the Appellant, TR, Vol. I, pg. 26.

⁴⁰ Testimony of the Appellant, TR, Vol. III, pp. 110-111; and Vol. I, pp. 26-27.

⁴¹ Testimony of the Appellant, TR, Vol. I, pg. 27.

⁴² Testimony of Inspector Junior, TR, Vol. II, pp. 56-57.

⁴³ Testimony of the Appellant, TR, Vol. I, pg. 25.

⁴⁴ Testimony of the Appellant, TR, Vol. I, pg. 50.

⁴⁵ Testimony of the Appellant, TR Vol. III., pg.118.

the window off to his right. Normally Lila would be playing and he would see her when he walked in. This time he could not see Lila. JS stood there, said hello, and asked the Appellant where Lila was. She answered that Lila was in being changed. JS wondered to himself who else worked there. JS said okay and started walking toward the changing room and found William changing Lila's diaper. JS did not really know William and was not comfortable with the idea of William or any teen age boy changing his daughter's diapers. It seemed strange to JS, and JS had a weird feeling about it at the time. As he went toward the changing room to find Lila, the Appellant immediately got up, rushed toward the changing area with him, and made it to the changing area before JS did. William immediately left and did not finish changing the diaper. William did not say hello. He did not say anything. He did not even look at JS. "It wasn't like he finished changing her diaper and handed her to me and goes 'your daddy's here.' It was just strange."⁴⁶ The Appellant finished putting the diaper on Lila. JS saw no other individual in the room where Lila was after William left or before the Appellant entered. As he left he told the Appellant he did not want his daughter being changed by a teen-age boy or by anyone else. She answered that it was not a problem and that she would make sure it didn't happen again. She reassured JS that William had had a background check and had been licensed by the state.⁴⁷ JS took Lila and left.

26. Concerning this incident, the Appellant testified that she, the children, and William had all just returned to the house from playing outside.⁴⁸ She had gone into the bathroom and was changing Lila's diaper and William was in the same room helping Kaitlyn, his niece, wash her hands. The dogs started barking, which meant someone was coming to the front door. She asked William to step over to the changing area so Lila would not fall off and because she had not done up the tabs yet on Lila's diaper, which was already under Lila. The Appellant stepped three feet out of the bathroom into the hall and then into the kitchen doorway to see who had come in the front door and saw that it was Mr. Sexton. He asked her where Lila

⁴⁶ Testimony of Joel Sexton, TR, Vol. I, pp. 107-109.

⁴⁷ Testimony of Joel Sexton, TR, Vol. I, pp. 109-114.

⁴⁸ Testimony of the Appellant, TR, Vol. III, pg. 120.

she found Kira asleep on the sofa, William asleep on the sofa, and Kaitlyn in her crib in the bedroom.

29. Because there is a conflict in the testimony presented by the Appellant and that presented by JS, Lila's father, regarding the incident with Lila and William, a credibility finding is necessary. Based on the totality of the evidence, the reasonableness of the parties' versions of events, and logic, it is found that the Appellant's version of the events is not credible. And it is found that the Appellant allowed William unsupervised access to Lila on June 14, 2006.

JS' description of William's reaction at being found alone with Lila rings true. As described by JS, William responded as a guilty person would or as a person with deep shame would respond. He would not speak to JS nor look JS in the eye. He exited the room immediately. William's behavior is indicative of William engaging in something he knew he should not be doing. Given that William sexually abused another girl of the same age only ten days later the very first time he was left alone with this girl, it is possible that William was either touching Lila inappropriately or thinking of doing so when he was discovered alone with Lila unexpectedly by JS.

JS' description of the Appellant racing ahead of him to get to the bathroom first also rings true. The degree to which JS was upset by the incident is more consistent with his having observed or experienced something greater than just William diapering his daughter. It is consistent with JS having seen the Appellant outrace him to the bathroom in order to conceal William's presence alone with his child or in order to conceal her own behavior in allowing William to be alone with Lila. It is consistent with JS having observed William acting guiltily or shamefully. And given that William had just had a psychiatric evaluation, it would be consistent with JS having seen overt symptoms of mental illness or decompensation in William. The Appellant herself acknowledges that JS was so upset that she called Lila's mother to persuade the mother that JS had misunderstood what he had seen in order to prevent Lila's parents from removing her from the Appellant's facility. The Appellant testified that had JS left her home saying that he trusted her, but it is apparent that JS called Lila's mother immediately and

reported his concerns. It is more likely than not that the Appellant left William alone with Lila to change her diaper.

30. On July 5, 2006, as indicated above, the Department issued a summary suspension, informing the Appellant that she needed to terminate her day care activities immediately. After having discussed this with Licensor Martin, the Appellant believed that she was able to provide family and friends in-home care at the family or friend's home itself. On July 7, 2006, the day following the closure of her day care facility, the Appellant provided one day of child care at the home of BD, a parent of one of the children normally under her care. On this date, the Appellant provided care to her granddaughter Kaitlyn, to Elias, who was another little boy, and to BD's daughter Layla.

31. The Appellant became aware that that was not what the Department had determined to be friends and family care and terminated that activity. She never provided any day care for pay thereafter until the summary suspension was lifted.

32. There is testimony that the Appellant was observed driving a van that had children in it. There is nothing that indicates that the Appellant was providing day care for those children she was transporting.

III. CONCLUSIONS OF LAW

1. The Appellant's petition for review was timely filed with the DSHS Board of Appeals and is otherwise proper. WAC 170-03-0570 through 0590. Jurisdiction exists for the undersigned DSHS Review Judge to review the Initial Order and to issue the Department's Review Decision and Final Order in this matter. RCW 34.05.464.

2. When making a decision, the ALJ and the Review Judge must first apply the DEL rules adopted in the Washington Administrative Code. WAC 170-03-0220(1). If no DEL rule applies, the ALJ and the Review Judge must decide the issue according to the best legal authority and reasoning available, including federal and Washington state constitutions, statutes, regulations, and published appellate court decisions. WAC 170-03-0220(1) and (2). The ALJ's authority is limited to determining whether the sanction imposed or taken by DEL was

warranted or justified under the evidence presented at the hearing. The ALJ does not have the authority to substitute or impose an alternative sanction, remedy, or action. WAC 170-03-0350(1). And the Review Judge has the same decision-making authority as an ALJ but must consider the ALJ's opportunity to observe the witnesses. WAC 170-03-0620(1).

3. In Finding of Fact 12 of the Initial Order, the ALJ found that, "Prior to the July 5, 2006, referral there had been no indication in William's behavior that he was a danger to young children." This is not an accurate statement of the evidence of record. There may have been no indication that William would act in sexually appropriate ways, but there is unequivocal evidence that he was a danger to young children. In August 2001, William was convicted of Harassment, Intimidation of a student, and Assault VI for an incident where he had threatened a student or a teacher with a knife at school. In 2001 William had endangered a child under the Appellant's care by showing that child how to start a fire with an aerosol can. And there was no evidence presented that the effects of William's bipolar disorder, his use of mind altering psychotropic drugs, and his psychotic episodes would only endanger adults and not children.

4. In Finding of Fact 11 of the Initial Order, the ALJ found that, "William was in her [the Appellant's] view at all times during this activity [changing Lila's diapers]. However, this is not an accurate statement of the evidence of record. If the Appellant's version of the diaper-changing incident were credible, and the undersigned has found it not credible, then at best, the Appellant's positioning herself in the hallway between the changing room and the kitchen would have allowed the Appellant to see William if she were looking in his direction. The Appellant could not physically have looked through the kitchen and seen JS come into the dining room, sign the In-out register, and come forward towards the changing room if she had kept her eyes on William at all times. The Appellant would have needed eyes in the back of her head to have been able to see both forward into the dining room and backward into the changing room at the same time.

5. In Finding of Fact 4 of the Initial Order, the ALJ found that, "None of the allegations in that [2002 license] revocation [action] arise out of activities associated with the

day care, but primarily out of the interaction between William and the Appellant." This is not an accurate statement of the evidence of record. The January 15, 2002, license revocation notice cites to a vast list of incidents involving William's disruptive behavior at school, his threats to other children in school, his interaction with the day care children, his overall volatility, his lack of understanding of the consequences of his actions, the fact that he "has gouged the eyes out of all of his stuffed animals," his inappropriate conduct with the family cat, and so on.

6. The ALJ erred in failing to enter a finding as to which version of the diaper-changing incident was more credible, the Appellant's or JS'. This is a critical failure because the testimony was in conflict and because the outcome of this case hinges, at least in part, on what happened during that incident. The undersigned has the same decision-making authority of the ALJ under WAC 170-03-0620(1) and has entered a credibility finding in this Review Decision and Final Order. The undersigned must consider the ALJ's opportunity to observe the witnesses under WAC 170-03-0620(1). However, unless the ALJ translates that opportunity into findings as to witness credibility, witness demeanor, or witness conduct, the undersigned has no way of knowing what the ALJ's opportunity to observe the witnesses afforded the ALJ.

7. The Initial Order's Conclusion of Law 8, premised on the ALJ's conclusion that, "There is nothing in the evidence that has been presented that indicates that the Appellant has ever allowed contact by William with the children in the day care that is unsupervised or unattended," is factually inaccurate. The ALJ's statement in Conclusion of Law 12 that the Department failed to establish that the Appellant violated her waiver or her security plan and the statement that William did not have any unsupervised contact with children under care are also factually inaccurate. The undersigned has specifically found that the Appellant allowed William unsupervised access to Lila on June 14, 2006. Because the Appellant did so, she violated her March 23, 2003, safety plan and the conditions of the waiver the Department granted her in 2005.

8. The Department did not prove that the Appellant had people living in her home that had not been cleared by the Department to be there. However, the Department did prove

that the Appellant allowed numerous unidentified people to be in and around the children she had under care on a more or less regular basis. Parents of the Appellant's day care children reported seeing numerous unidentified men in and about her home, and the Appellant herself acknowledged in her interview with the sheriff's office that her son Davis' friend Anthony came to her house on numerous occasions and that there were constantly other people around and in and out of her house. And clearly "Joe" was around the Appellant's home during child care hours, contrary to the Appellant's testimony, or the parents of her day care children would not have seen him or been able to report his presence to the Department. With her two sons coming and going, her son's fiancé and their child coming and going, and these various unidentified adults coming and going, it is reasonable to conclude that the Appellant's ability to adequately supervise and provide care to her day care children was compromised, as was her ability to constantly monitor William's whereabouts and activities. While there will undoubtedly be tension between a Family Home Child Care licensee's expectations of how she can use her own home to entertain family and friends and her obligation to comply with licensing regulations, the Appellant's allowing all this traffic through her home casts doubt on whether she has an understanding of how children develop socially, emotionally, physically, and intellectually.

9. Even more troubling than allowing a steady stream of adult visitors through her home during child care hours is the Appellant's apparent lack of understanding of the seriousness of William's mental health problems. The Appellant claimed that she was unaware that the Department had any concerns about William after it renewed her license in 2004, even though Licensur Martin was in constant dialog with her about William and even though the Appellant's application to have William approved as an assistant was not granted. The Appellant's testimony is either false, or it indicates that she was wearing blinders and could not acknowledge to herself the seriousness of William's problems. William has a psychotic mental illness. He takes mood-altering psychotropic drugs. He has had years of psychiatric treatment and cognitive and behavioral therapy up until the time he sexually abused a child. He has criminal convictions for assaultive conduct and a history of violent behaviors. William was not

an authorized care provider, so why was he, a 19-year old man, playing outside with the Appellant's day care children, preparing their lunches, washing their hands, and diapering them? Why did the Appellant allow William extensive and intimate contact with the children under her care? Why did she think it was in the children's best interests to have William constantly around? And why did she think he would be a good assistant child care provider?

10. The undersigned concludes that the Appellant lacks the personal characteristics an individual needs to provide care to children and that she does not meet the requirement of WAC 170-296-140(2)(a) and (f).⁵⁵ The Appellant lacks an understanding of how children develop socially, emotionally, physically, and intellectually, and she lacks a disposition that is respectful of a child's need for caring attention from a care giver. The choice the Appellant made to allow William extensive and intimate contact with the children under her care promoted William's wellbeing rather than the children's, and the choice she made to allow a steady stream of unidentified adults through her home during child care hours promoted her wellbeing and that of her family members rather than the children's.

11. The Department has proven that the Appellant violated her 2003 safety agreement and the terms of her 2004 waiver. The Department has proved that the Appellant allowed William to have unsupervised access to a child under her care. The Department has proven that the Appellant lacks the personal characteristics an individual needs to provide care to children. The Initial Order's conclusions of law are contrary to the evidence of record, are not supported by the findings of fact of this decision, and are not adopted. The Initial Order shall be reversed.

⁵⁵ WAC 170-296-0140, What personal characteristics does an individual need to provide care to children, states: (1) An individual must have specific personal characteristics to have a: (a) License; b) Certification; (c) Primary staff position; or (d) Assistant and volunteer position. (2) These characteristics are: (a) An understanding of how children develop socially, emotionally, physically, and intellectually; (b) The ability to plan and provide care for children that is based on an understanding of each child's interests, life experiences, strengths, and needs; (c) The physical ability to respond immediately to the health, safety and emotional well-being of a child; (d) Reliability and dependability; (e) Truthfulness; (f) A disposition that is respectful of a child's need for caring attention from a care giver; and (g) Ethical business practices with clients, staff, the department and the community.

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

IV. DECISION AND ORDER

The Initial Order is reversed. The Appellant's Family Home Child Care license is revoked.

Mailed on January 18, 2008.



CHRISTINE STALNAKER
Review Judge

Attached: Reconsideration/Judicial Review Information

Copies have been sent to: Kathleen Hardee, Appellant
Deborah Rosser, Appellant's Representative
Cassandra Clemans, Appellant's Representative
Patricia Allen, AAG, Department's Representative
DEL Contact
Rynold C. Fleck, ALJ, Seattle OAH

D

A | B | C | D | E | F | G | H | I | J | K | L | M
N | O | P | Q | R | S | T | U | V | W | X | Y | Z

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Acupuncturists - *(Department of Health)*
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Administrators (Telecommunications) - *(Department of Labor and Industries)*
Adult Family Homes - *(Department of Social and Health Services)*
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Adult Treatment Homes (Private) - *(Department of Health)*
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Agents (Real Estate) - *(Department of Licensing)*
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Agricultural Engineers - *(Department of Licensing)*
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Alcohol Treatment Facilities - *(Department of Health)*
Alcoholism Hospital & Alcoholism Treatment Facilities - *(Department of Health)*
Ambulance Services and Vehicles - *(Department of Health)*
Ambulatory Surgical Centers - *(Department of Health)*
Amusement Ride Inspectors - *(Department of Labor and Industries)*

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Animal Massage - *(Department of Health)*
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(Department of Licensing)

Trade Names Frequently Asked Questions (FAQs) -

(Department of Licensing)

Business Licensing Guide - *(Department of Licensing)*

 MLS License Fee Sheet - *(Department of Licensing)*

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Juvenile Detention Centers, Home & Institutions - (*Department of Health*)

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K

Kick Boxers (Professional Athletics) - (*Department of Licensing*)

Kidney Dialysis Centers - (*Department of Health*)

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L

Labor Camps - (*Department of Health*)

Laboratory Accreditation - (*Department of Ecology*)

Laboratories (Medical Test Sites) - (*Department of Health*)

Landscape Architects - (*Department of Licensing*)

Land Surveyors - (*Department of Licensing*)

Lawyers - (*Washington State Bar Association*)

Licensed Practical Nurses - (*Department of Health*)

Life Settlements Brokers (Insurance) - (*Office of the Insurance Commissioner*)

Limited Liability Company Renewals - (*Department of Licensing*)

Limousines - (*Department of Licensing*)
Liquor - (*Liquor Control Board*)
Loan Companies (Consumer) - (*Department of Financial Institutions*)
Loan Modification Services - (*Department of Financial Institutions*)
Loan Originators - (*Department of Financial Institutions*)
Lottery Retailers - (*Department of Licensing*)

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M

Managers (Professional Athletics) - (*Department of Licensing*)
Manicurists - (*Department of Licensing*)
Manufactured/Mobile Home Communities - (*Department of Licensing*)
Manufacturing Engineers - (*Department of Licensing*)
Maritime Cranes - (*Department of Labor and Industries*)
Marriages - (*Department of Health*)
Marriage Therapists - (*Department of Health*)
Massachusetts Trust Renewals - (*Department of Licensing*)
Massage Practitioners - (*Department of Health*)
Master Business License - (*Department of Licensing*)
Matchmakers (Professional Athletics) - (*Department of Licensing*)
Mechanics (Elevator) - (*Department of Labor and Industries*)
Mechanical Engineers - (*Department of Licensing*)
Medical Interpreters - (*Department of Social and Health Services*)
Medical Quality Assurance Commission - (*Department of Health*)
Medical Test Sites - (*Department of Health*)
Medicare Certified Facilities & Services - (*Department of Health*)
Mental Health Counselors - (*Department of Health*)
Mental Health Facilities (Adult Residential) -

(Department of Health)

Mental Hospitals (Eastern and Western State) -

(Department of Health)

Metallurgical Engineers - *(Department of Licensing)*

Midwives - *(Department of Health)*

Migrant Worker Labor Camps - *(Department of Health)*

Mining Engineers - *(Department of Licensing)*

Minor Work Permits - *(Department of Licensing)*

Miscellaneous State Facilities (Food Services) -
(Department of Health)

Mobile Operators (Cosmetology) - *(Department of Licensing)*

Mortgage Brokers - *(Department of Financial Institutions)*

Morticians - *(Department of Licensing)*

Motels - *(Department of Health)*

Motorcycles - *(Department of Licensing)*

Motor Fuel Distributors - *(Department of Licensing)*

Motor Vehicles - *(Department of Licensing)*

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N

Nail Salons - *(Department of Licensing)*

Naturopathic Physicians - *(Department of Health)*

Notaries Public - *(Department of Licensing)*

Nuclear Engineers - *(Department of Licensing)*

Nursery Retailer/Wholesaler - *(Department of Licensing)*

Nurses - *(Department of Health)*

Nursing Assistants - *(Department of Health)*

Nursing Home Administrators - *(Department of Health)*

Nursing Pools - *(Department of Health)*

Nutritionists - *(Department of Health)*

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O

Occupational Therapists - *(Department of Health)*

Occupational Therapy Facilities - *(Department of Health)*

Health)

Ocularists - *(Department of Health)*

Off-Road Vehicle Dealers - *(Department of Licensing)*

On-site Wastewater Treatment Designers -
(Department of Licensing)

Operators of Solid Waste Incinerators and Landfill
Facilities - *(Department of Ecology)*

Opticians - *(Department of Health)*

Optometrists - *(Department of Health)*

Orthopedics - *(Department of Health)*

Orthotists - *(Department of Health)*

Osteopathic Physicians - *(Department of Health)*

Osteopathic Physician Assistants - *(Department of
Health)*

Outpatient Rehabilitation Facilities - *(Department of
Health)*

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P

Paramedics - *(Department of Health)*

Parking Privileges (Disabled) - *(Department of
Licensing)*

Pest Inspectors - *(Department of Agriculture)*

Pesticide Dealers - *(Department of Licensing)*

Pesticides - Commercial Applicator License -
(Department of Agriculture)

Pesticides - Commercial Operator License -
(Department of Agriculture)

Pesticides - Private Applicator License - *(Department
of Agriculture)*

Pesticides - Private Commercial Applicator License -
(Department of Agriculture)

Pesticides - Public Operator License - *(Department of
Agriculture)*

Pet Food Registration - *(Department of Agriculture)*

Petroleum Engineers - *(Department of Licensing)*

Pharmacists - *(Department of Health)*

Pharmacist Assistants - *(Department of Health)*

Physical Therapists - *(Department of Health)*

Physical Therapy Facilities - *(Department of Health)*

Physicians - *(Department of Health)*
Physicians (Naturopathic) - *(Department of Health)*
Physicians (Osteopathic) - *(Department of Health)*
Physicians (Podiatric) - *(Department of Health)*
Physicians (Professional Athletics) - *(Department of Licensing)*
Physician Assistants - *(Department of Health)*
Physician Assistants (Osteopathic) - *(Department of Health)*
Physicians Office Laboratory - *(Department of Health)*
Piercers (Body) - *(Department of Licensing)*
Plumbers - *(Department of Labor and Industries)*
Plumbing Contractors - *(Department of Labor and Industries)*
Podiatric Physicians - *(Department of Health)*
Practical Nurses - *(Department of Health)*
Prisons (State Department of Corrections) - *(Department of Health)*
Private Adult Treatment Homes - *(Department of Health)*
Private Investigators - *(Department of Licensing)*
Promoters (Professional Athletics) - *(Department of Licensing)*
Prosthetists - *(Department of Health)*
Psychiatric Hospitals (Private) - *(Department of Health)*
Psychologists - *(Department of Health)*
Pump Installers - *(Department of Labor and Industries)*
Pump Installer Contractors - *(Department of Labor and Industries)*

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R

Radioactive Materials - *(Department of Health)*
Radiological Technologists - *(Department of Health)*
Real Estate - *(Department of Licensing)*
Real Estate Appraisers - *(Department of Licensing)*
Real Estate Brokers - *(Department of Licensing)*
Real Estate Salespersons - *(Department of Licensing)*

Referees (Professional Athletics) - *(Department of Licensing)*
Registered Counselors - *(Department of Health)*
Registered Nurses - *(Department of Health)*
Registered Nurse Practitioners (Advanced) -
(Department of Health)
Rehabilitation Centers - *(Department of Health)*
Rehabilitation Facilities (Outpatient) - *(Department of Health)*
Rental Cars - *(Department of Licensing)*
Reporters (Court) - *(Department of Licensing)*
Residential Treatment Facilities - *(Department of Health)*
Rehabilitation Facilities
Resorts - *(Department of Health)*
Respiratory Therapists - *(Department of Health)*
River Outfitters - *(Department of Licensing)*
Rural Health Care Facilities and Clinics - *(Department of Health)*

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S

School Bus Drivers - *(Department of Licensing)*
Schools of Cosmetology - *(Department of Licensing)*
Schools for Deaf and Blind - *(Department of Health)*
Scrap Processors (Vehicles) - *(Department of Licensing)*
Seconds (Professional Athletics) - *(Department of Licensing)*
Securities Brokers - *(Department of Financial Institutions)*
Security Guards - *(Department of Licensing)*
Seed Dealers - *(Department of Licensing)*
Sellers of Travel - *(Department of Licensing)*
Senior EMS Instructors - *(Department of Health)*
Sewage Systems (Large Onsite) - *(Department of Health)*
Sex Offender Treatment Providers - *(Department of Health)*
Shellfish Harvest (Commercial) - *(Department of*

Health)

Shellfish (Commercial) - *(Department of Health)*
Shelters (Crisis, Homeless, Youth, Domestic violence)
- *(Department of Health)*
Ship Design Engineers - *(Department of Licensing)*
Shopkeepers - *(Department of Licensing)*
Snowmobile Dealers - *(Department of Licensing)*
Social Workers - *(Department of Health)*
Soldiers' Homes - *(Department of Health)*
Special Fuel Dealers - *(Department of Licensing)*
Special Fuel Bulk Users - *(Department of Licensing)*
Speech and Hearing - *(Department of Health)*
State Mental Hospitals (Eastern and Western State) -
(Department of Health)
Stockbrokers - *(Department of Financial Institutions)*
Structural Engineers - *(Department of Licensing)*
Surgical Centers (Ambulatory) - *(Department of Health)*
Surgical Technologists - *(Department of Health)*
Surplus Line Brokers (Insurance) - *(Office of the Insurance Commissioner)*
Surveyors - *(Department of Licensing)*

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T

Talkie-Tooters (Logging Radios) - *(Department of Labor and Industries)*
Tattoo Artists - *(Department of Licensing)*
Tax Registration - *(Department of Licensing)*
Taxis - *(Department of Licensing)*
Taxidermy - *(Department of Fish and Wildlife)*
Telephone Solicitors - *(Department of Licensing)*
Telecommunications Administrators - *(Department of Labor and Industries)*
Telecommunications Contractors - *(Department of Labor and Industries)*
Temporary Worker Housing - *(Department of Health)*
Tenant Support Programs (Developmentally Disabled)
- *(Department of Health)*
Therapists (Marriage and Family) - *(Department of*

Health)

Therapists (Massage) - *(Department of Health)*
Therapists (Occupational) - *(Department of Health)*
Therapists (Physical) - *(Department of Health)*
Therapists (Respiratory) - *(Department of Health)*
Timekeepers (Professional Athletics) - *(Department of Licensing)*
Timeshares - *(Department of Licensing)*
Tobacco Product Retailers - *(Department of Licensing)*
Tobacco Product Distributors - *(Department of Licensing)*
Tow Trucks - *(Department of Licensing)*
Trade Name Registration - *(Department of Licensing)*
Trainees (Electrical) - *(Department of Labor and Industries)*
Transient Accommodations - *(Department of Health)*
Transporters (Vehicles) - *(Department of Licensing)*
Trappers - *(Department of Fish and Wildlife)*
Trauma Service Designation - *(Department of Licensing)*
Travel Agents - *(Department of Licensing)*
Treatment Facilities (Alcohol) - *(Department of Health)*
Truck Drivers - *(Department of Licensing)*

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U

Underground Storage Tanks - *(Department of Licensing)*
Unemployment Insurance - *(Department of Licensing)*
Used Vehicle Battery Collectors - *(Department of Licensing)*

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V

Vehicles - *(Department of Licensing)*
Vehicle Dealers - *(Department of Licensing)*
Vehicles For Hire - *(Department of Licensing)*
Vehicle Manufacturers - *(Department of Licensing)*
Vehicle Transporters - *(Department of Licensing)*

Vehicle Wreckers - *(Department of Licensing)*
Vessels - *(Department of Licensing)*
Vessel Dealers - *(Department of Licensing)*
Veterans' Homes - *(Department of Health)*
Veterinarians - *(Department of Health)*
Veterinarian Technicians - *(Department of Health)*

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W

Waste Tire Carriers - *(Department of Licensing)*
Waste Tire Storage Site Owners - *(Department of Licensing)*
Wastewater Plant Operators - *(Department of Ecology)*
Water Systems (Public) - Group A - *(Department of Health)*
Water Works Operators - *(Department of Health)*
Weighing and Measuring Devices - *(Department of Licensing)*
Well Construction and Operators - *(Department of Ecology)*
Well Drillers - *(Department of Labor and Industries)*
Whitewater River Outfitters - *(Department of Licensing)*
Work Training Release Centers - *(Department of Health)*
Wreckers (Vehicles) - *(Department of Licensing)*
Wrestlers (Professional Athletics) - *(Department of Licensing)*

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X

X-Ray Facilities - *(Department of Licensing)*
X-Ray Machines - *(Department of Licensing)*
X-Ray Technicians - *(Department of Health)*

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Y

Youth Shelters - *(Department of Health)*

DECLARATION OF SERVICE

On said day below I emailed and deposited in the U. S. mail a true and accurate copy of the following document: Petition for Review, Cause No. 62436-9-I, to the following:

Carol Farr
The Law Offices of Leonard W Moen & Associates
947 Powell Ave SW Ste 105
Renton, WA 98057-2975

Patricia Allen
WA State Attorney General
800 5th Ave Ste 2000
Seattle, WA 98104-3188

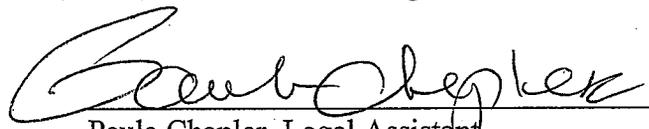
Jay Geck
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Original sent with filing fee check by ABC Legal Messengers for filing with:
Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 2, 2009, at Tukwila, Washington.


Paula Chapler, Legal Assistant
Talmadge/Fitzpatrick