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COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON

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JENNIFER L. TOBIN, et al.,

Plaintiffs-Respondents

v.

THE STATE OF WASHINGTON, et al,

Defendants-Appellants.

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BRIEF OF RESPONDENTS

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### **III. INTRODUCTION**

As stated by the attorney who represented the Defendants before the trial court, this case involves the death of a “perfect little boy.” (RP 1977-78). (See, Appendix 1 - photo of Christopher and Gabriel Tobin). During the course of discovery, the Defendants, who were the State of Washington, and a number of State employees, described in more detail below, propounded an interrogatory to the Tobin parents which asked them to describe their injury. (The Defendants hereinafter will be referenced as “the State” unless otherwise specified). Christopher and Jennifer Tobin, the parents of this perfect little boy, responded in a manner that compellingly conveys the devastation caused when the State fails to protect our children. (Appendix 2) (RP 1757-59).

At the moment she learned Gabriel had been found in the waters of Lake Tapps, Jennifer Tobin released the primal scream of a mother who knew her child was gone. (RP 327) Her pain lives on forever, even in the conscious of the seasoned law enforcement personnel who were at the scene, who testified that this was the worst day of their lives. (RP 1141-42; 1149-50).

In this case, the State failed to meet its fundamental and primary obligation, which applies to all governmental entities, that is to protect our children. For this, the trial court and jury found that they should be held accountable. As shown below, this Court should find no differently and the Judgment in this matter must be affirmed.

As will be shown below, when analyzing the legal issues presented by this case, the State, in its opening brief, has provided a veiled invitation to this Court to decide this appeal based on an exceptionally skewed recitation of the facts which is contrary to the standards of review applicable to each and every issue that is currently before the Court. According to these Defendants, we should once again return to a primitive state where “the King can do no wrong.” Here, a daycare water safety regulation required a fence between daycares and accessible water hazards such as lakes. WAC 355-188-295(5). Yet despite acknowledging that the lake where this “perfect little boy” drowned was clearly accessible from the daycare, and a “huge hazard”, the appellants nevertheless seek to avoid accountability. Such efforts should be rejected. (RP687-90).

#### IV. COUNTER-STATEMENT OF THE ISSUES

1. Should the Appellate Court reject the State of Washington's contention that it is immune from liability under the doctrine of sovereign immunity, when by enacting RCW 4.92 et seq, the legislature intended to broadly abrogate the doctrine of sovereign immunity, and when under the facts and circumstances of this case, no discretionary policy making decisions are at issue, and a number of the exceptions to the public duty doctrine are applicable?
2. Is it necessary, under RCW 4.92 et seq, to establish first that there is a private analogy to governmental conduct, prior to finding the State of Washington liable in tort, when such a proposition was specifically rejected by our Supreme Court in the recent *Locke* opinion?
3. Did the Appellants waive any arguments with respect to issues regarding duty, breach, and proximate causation of injury, when they failed to assign error to the final Judgment entered in this case?
4. Did the Trial Court abuse its discretion by refusing to exclude evidence regarding the post-incident investigation conducted by DSHS regarding the death of Gabriel Tobin, when the facts gathered during the course of such an

investigation were highly relevant to the liability of co-defendant, Lisa Fish, the credibility of all defendants, and how fault should be allocated amongst the Defendants?

5. Did the trial court abuse its discretion in permitting evidence regarding the post-incident modification of the Washington Administrative Code, daycare water safety provisions, when such evidence was relevant to challenge the credibility of the Appellant's contention as to how such provisions should be applied and when, both before and after the modification of such provisions, and DSHS was requiring fencing or mitigation of water hazards in front yards, for such thing as ornamental pools and ponds, and required fencing for accessible water hazards?
6. Did the trial court abuse its discretion in admitting evidence regarding the post-incident investigation of Gabriel Tobin's death and the modification of the water hazard regulations applicable to daycares when a reasonable jury could have inferred that such an investigation and action were done in an effort to cover up the State's responsibility for the death of Gabriel Tobin,

and to create an appearance that the actions of Lisa Fish were solely to blame for such death?

7. Did the trial court abuse its discretion by refusing to instruct the jury with respect to rules relating to regulatory and/or statutory interpretation and/or construction, when there is no authority for the giving of such an instruction, and when the instruction proposed by the State was an incomplete and/or erroneous and inaccurate statement of the law?
8. Are the Appellants barred from arguing, under the law of the case doctrine, that the State of Washington had a mandatory obligation not to issue Lisa Fish a daycare license if she failed to meet minimum requirements when instruction No. 17 to the jury, which was not subject to exception, instructed the jury that such an obligation was mandatory?
9. Should those portions of Appellants' brief, which failed to acknowledge the existence of factual disputes regarding the evidence, when such factual disputes are clearly present within the record, be stricken and/or disregarded by the Appellate Court?

10. Did the trial court err in instructing the jury as to the terms of WAC 388-155-295 (5), and no other provisions of that regulation, when there was no contention that any other subsection of that regulation had been violated, nor were there any facts supporting the giving of instructions regarding other subparts of the regulation, and when the instruction given comported with the guidance given in WPI 60.01 et seq, and was consistent with RCW 5.40.050?
11. Did the trial court correctly determine as a matter of law that the language of RCW 74.15 et seq, creates a duty to protect children in daycares, thus providing liability under the “legislative intent” exception to the public duty doctrine?
12. Did the trial court correctly determine that under the “failure to enforce exception” to the public duty doctrine that the State of Washington breached the duty to both of the Plaintiff parents and the deceased child by licensing a regulatory non-compliant daycare, when under the terms of the statute and relevant regulations, the State and its employees had a mandatory obligation not to license daycares which failed to meet the minimum safety requirements?

13. Did the trial court correctly determine that “the special relationship” exception to the public duty doctrine was applicable in a number of instances in this case, when in reliance on information provided by the State of Washington, Jennifer Tobin placed her child, Gabriel, in what she believed to be a State licensed daycare which met minimum safety requirements (which proved not to be true), and when Lisa Fish relied on the directive of State licensor Berdecia in not taking measures which otherwise could have prevented Gabriel Tobin from exiting the front door of Mrs. Fish’s daycare, which was directly across the street from Lake Tapps, where upon exiting, he walked directly across the street and drowned in Lake Tapps?
14. Given the overwhelming evidence of negligence in this case, if any instructional or evidentiary errors occurred, were such errors harmless?
15. Does the law of the State of Washington hold the State of Washington, DSHS, and its employees accountable when it licenses a daycare which fails to meet minimum safety requirements, and when, as a proximate result thereof, a two and one-half year-old child loses his life, causing devastating injury to his parents and the community?

## V. STATEMENT OF FACTS

### 1. Factual Background.

#### A. The Licensing of Little Fish's Daycare and the Failure to Supervise Defendant, Amy Cichowski.

In late 2000, Lisa (Crespin) Fish applied for a family-home daycare license for her home, located at 6408 S. Island Drive, Bonney Lake, Washington, 98309. The processing of Ms. Fish's family home daycare licensing application was assigned to DCCEL employee Amy Cichowski, who held the job designation as a Social Worker III. ( Ex. "1" ord). As a Social Worker III attached to DCCEL, Ms. Cichowski's duty was to evaluate daycare homes or potential daycare providers' homes through a home study process and site inspection to ensure that health and safety requirements of the facility are met. Among the essential functions of this position was to evaluate child care homes, and the applicants, to make a determination whether they are suitable and safe. One of the fundamental skills which a Social Worker III must have includes the ability to engage in **risk-assessment and decision making.**

Ms. Cichowski had an extremely troubled employment-history with the State of Washington. Ms. Cichowski, within a short period of time after hire, experienced substantial personal problems which were so severe that by January of 2001 her supervisor, Defendant Quinlan, had put her on a corrective action plan to address issues relating to attendance and punctuality. She had too many cases to manage competently and could not perform her job despite a reduced workload. (*Id* 88-91.) Her supervisor, Ms Quinlan, was aware of her problems and that the internal EAP program was ineffectual. (*Id* 75.) Ms. Cichowski admits she was not doing her work. (*Id* 73-74.) Unfortunately, despite ineffectual corrective action efforts, Ms. Cichowski's performance deficiencies continued on and she was ultimately allowed to resign in lieu of termination in July, 2002. (Ex. 52). During this time period, Ms. Cichowski had an extensive and well-documented history predating the initial Fish inspection, of failing to attend critical training meetings, failing to show up for work, or was tardy on many occasions without legitimate excuse, she was falsely reporting her work activities, including misrepresenting that she had conducted home site visits, when in fact she had not. (Dep of Cichowski, p. 76,113) (Ex. Nos. 38-43, 50-56.) As a result of Ms. Cichowski's misconduct, several daycares were allowed to

operate with their licenses not properly renewed, and she was generally ill-informed about the requirements of her job. (*Id.*)

According to Ms Cichowski, she has no recollection of training on WAC updates concerning water hazards. (RP 414-416; 441 Although she recognized that safety of the children had to be a priority, she understood she did not have to consider water hazards when they were not on the daycare premises and in a play area. (RP 402-03;430).

She was aware she was to assure the daycare was a safe environment and that the daycare front door had to be unlocked from the inside. She was aware of the lake and acknowledged that if the children got out the (unlocked) front door it would be a safety hazard.

Defendant Quinlan, her supervisor, believed Ms Cichowski was an employee with serious honesty and performance problems. (Dep of Quinlan p 86-91). She concurs that Ms Cichowski, for a long period of time, was paid while performing no work, and was essentially stealing her pay check. (*Id* p 87.)

At the same time, Ms. Cichowski was missing necessary training sessions concerning the WAC applicable to family home daycares that was subject to

amendment. In the year 2000, WAC 388-155-295 (5) was promulgated. (Appendix No. 2). On February 26, 2001, Ms. Cichowski inspected Lisa Fish's home to determine whether it was a suitable facility for the operation of a family child care home. (Ex. 44). In order to reach the Fish residence, Ms. Cichowski, who was also assigned other daycares within the Bonney Lake/Lake Tapps areas, had to travel past Lake Tapps to get onto South Island Drive, the street on which Ms. Fish's home was located. (Ex. 118). On arrival at Ms. Fish's home, which is a manufactured home located on a fairly long and narrow lot, she knew that directly across the street from Ms. Fish's home and through a yard was Lake Tapps. (Appendix 4, 5 and 6) (Ex. 65-67).

In addition, upon arriving at the front porch of Ms. Fish's daycare, she noted that in a straight line from the front door of Ms. Fish's daycare was Lake Tapps. If one was to stand at the front door of the daycare facility, with your back to the front door, you would be looking directly at Lake Tapps through a gap between the properties of two waterfront homes. (*Id.*)

Upon arrival at the Fish home, Ms. Fish and Ms. Cichowski worked through a family child care home licensing study form. Initially, the form was provided to

Ms. Fish to make a determination as to whether she was being compliant with the regulatory requirements by placing various notations in a column under the heading of “App” for “applicant.” As the two worked through the form, Ms. Cichowski, under the heading of “Occp” made determinations as to whether or not in fact Ms. Fish was in compliance with the regulatory requirements. (RP 1253-54).

Unfortunately, the form that was being utilized at the time of Ms. Fish’s initial application inspection was a form initially adopted in 1997, which did not include the year 2000 amendments to WAC 388-155 et seq. (Ex. 44) (RP 435). At the time this sensible amendment was adopted, it was estimated that it would only raise the cost of all daycares \$2.09 per child. The purpose of the amendment was to ensure safety by having five foot high fencing at daycares “located on or near property that contains a water hazard such as a .....lake.....”. (Appendix 7) (Ex. 112) (RP 1170-1189). Because the form used by Ms. Cichowski was an obsolete form, it did not include the 2000 amendments inclusive of 295(5). Ms. Cichowski, when she conducted her inspection only enforced the regulations which were on the form.

(RP 437-39; 524). In other words, because she was using an obsolete form, Ms. Cichowski did not consider or enforce subsection 295(5).<sup>1</sup> (Appendix 8)

However, during the course of her inspection, Ms. Cichowski was aware of the fact that the fence in the backyard play area was not completed. (Ex. 16 and 17). The home safety form indicated the entire yard would be fenced. (Ex. 44). As a condition for the issuance of an initial license, Ms. Cichowski required that the fence be completed. On completion, Ms. Fish was lead to believe she had all fencing required. (RP 1255). Based on such knowledge, it is obvious that Ms. Cichowski was aware that fencing can be required at home daycares as a condition to issuance of a license.

Despite the fact that Ms. Cichowski was utilizing an obsolete form, and had failed to enforce any fencing requirements between the daycare obviously located near a body of water, Ms. Fish's application was accepted, and she was ultimately issued a daycare license for six children under the age of six, signed off by both Ms.

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Strangely, in or around the same time frame, discovery revealed that Ms. Cichowski did use an appropriately updated form when conducting home studies at other residences. Under such circumstances, Ms. Cichowski knew of the broad water safety provisions set forth in subsection (5).

Cichowski and her supervisor, Ms. Quinlan, despite Ms. Quinlan being a recognized regulatory expert and a person who had fully reviewed the file. (Ex. 17; 116). After finally seeing pictures of the daycare location, Ms Quinlan acknowledged that Lake Tapps was a “huge hazard,” and was accessible, thus meeting the requirements of WAC 295 (5). (RP 687-90). She also acknowledged fencing is necessary because you cannot assume 100% supervision by the provider. (RP 691; 837-838).

Ultimately, Ms Cichowski was terminated from her employment in July 2002. Defendant Victor Berdecia was then assigned her caseload. Mr. Berdecia, on assuming Ms Cichowski’s caseload, was never informed that there had been deficiencies in Ms Cichowski’s work performance, nor with respect to the licenses she had issued. (RP 565-68). The jury assessed Ms. Cichowksi 10% responsibility for Gabriel’s death. (CP 4080-85).

**B. Victor Berdecia and the 2004 Licensing of Little Fish’s Daycare.**

In December 2003, Lisa Fish re-applied for the renewal of her daycare license. Mr. Berdecia conducted an inspection of Little Fish’s on March 29, 2004. (Ex. 45). Just like Ms. Cichowski, Mr. Berdecia recognized that a water hazard, Lake Tapps, was directly across the street from the daycare. (RP 572-73).

Mr. Berdecia used an updated licensing checklist this time, that had a section for water hazards and specific reference to the five foot high fencing requirement to prevent access to a water hazard such as the lake as reflected in WAC subsection 295(5). (Appendix No. 8). When, Ms. Fish initially filled out the form, she incorrectly indicated that she was in compliance with the five foot fencing requirement. (**Id**) However, instead of complying with the directives of the form, Mr. Berdecia put a slash mark in the box concerning the fencing requirement, which according to him meant that the requirement was not applicable, or that it simply did not matter. (RP 576; 744-45). The slash mark placed by Mr. Berdecia was not the correct way of filling out the form, nor a correct mark on the form. (RP 744-45).

During the inspection of Little Fish's, Ms. Fish noticed that Mr. Berdecia was more interested in talking to her about a piano, and was not paying much attention to daycare issues, or doing much of an inspection. (RP 1288-90). They specifically discussed the requirement that she had to keep her front door unlocked as required by regulation to ensure that the children would be able to get out of the daycare in the case of an emergency. (RP 1257-1261). Mr. Berdecia duly noted this conversation within a "Service Episode Report" (SER). (Ex. 21) (Appendix No. 9). Ms. Fish

recalled discussing the fact that children had been able to get out the front door and she had grave concerns. Mr. Berdecia, at trial, admitted Gabriel was discussed.<sup>2</sup> Ms. Fish, in a post-death letter to DSHS, admitted Gabriel was the topic of conversation. (Ex. 26). (RP 578-87). Despite the fact that Ms. Fish asked Mr. Berdecia for guidance, he provided her no solutions and again directed her to keep the daycare front door unlocked. (Ex. 21 and 24). He did not take the issue to his supervisor, Ms. Quinlan. Nevertheless, she would have had access to the SER and would have reviewed the incorrectly filled-out licensing form. *Id.* Lisa Fish was confused and frustrated by these directions, and did not know what to do. (CP 335-338).

Mr. Berdecia again recommended that Ms. Fish's noncompliant daycare have its license renewed. The supervisor, Ms. Quinlan, again reviewed the licensing documentation and signed off on the renewal license, even though Mr. Berdecia did not correctly fill out the form, and improperly used a slash mark on the checklist concerning the water hazard safety. She also did not address the documented

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Also, Assistant Police Chief Dana Powers recalls that Ms. Fish told Mrs. Tobin on the day of his death, that Gabriel had previously gotten out the front door. Mrs. Tobin was not made aware of this until the day of Gabriel's death. (RP 348-49).

concerns of Ms. Fish concerning the front door of the daycare, and the ability to keep children safely inside. (RP 680).

According to Ms Fish, it was never mentioned to her that she should have fenced her front yard, between the mandatorily unlocked front door and Lake Tapps, until after the death of Gabriel Tobin. (RP 1261). Surplus fencing was available in the Fish's garage and if asked, a fence would have been erected immediately at little additional cost, in order to acquire the license. (RP1271-73; 968-70).

Ultimately, Mr. Berdecia resigned from his employment under threat of termination after it was discovered that he was sexually harassing daycare providers. (Dep of Berdecia, p. 52.) The trial court excluded the reasons for Mr. Berdecia's firing, but did allow evidence that during the course of the investigation of Mr. Berdecia, several daycare providers spontaneously volunteered that Mr. Berdecia conducted very poor inspections. The terms utilized by the providers included such terms as: "cursory," "poor," and even "shoddy" inspections. (Ex. 9) ( Appendix No. 12). Ms. Quinlan could not explain why she was unaware of Mr. Berdecia's poor performance. They jury assessed Mr. Berdecia with 13% of the responsibility for Gabriel's death. (CP 4080-4085).

**C. The Life and Death of Gabriel Tobin.**

Gabriel Tobin was born March 29, 2002, and was the first-born son of plaintiffs Jennifer and Christopher Tobin. Both of the Tobin parents were employed at the time and following a period of maternity leave, Mrs. Tobin returned to her employment. Mrs. Tobin, prior to placing Gabriel in a daycare, contacted a state referral number in the phone book. Mrs. Tobin spoke to her family and friends about how it was important that the daycare be State licensed. (RP 660; 1730-31). She was provided the names of several potential daycares within the Bonney Lake area, near her home. She inspected several licensed daycare facilities that she found unsuitable and even dirty. Eventually, she had the opportunity to meet Ms. Fish, found the facility to be clean and that Ms. Fish appeared to be a caring daycare provider. On July 13, 2004, Christopher dropped his son Gabriel off at Little Fish's daycare. As Ms. Fish was distracted in the backyard, attending to two children involved in a dispute, Gabriel exited the front door at Little Fish's daycare, which due to the command of the State was very insecure. (Ex. 22, 25, 52-54; 85).<sup>3</sup>

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The State ultimately took efforts to revoke Ms. Fish's daycare license under allegations that she had been neglectful in having her attention on the children in the

Under WAC 388-155-120, a daycare provider must maintain the children within their care under both **visual or auditory** supervision. Ms. Fish denied that the children were outside of her range. As a practical matter it would be a factual impossibility for a single adult to maintain constant visual surveillance of six children. If one assumes that a daycare provider can provide constant and uninterrupted surveillance of the children within their charge, there would simply be no reason to require fencing under any set of circumstances. (RP 837-38).

Upon discovering Gabriel missing after a frantic search, Ms. Fish called Jennifer Tobin and told her that Gabriel was missing, and then called 911 to report the missing child. Mrs. Tobin, called her husband Christopher and both she and her husband drove frantically to Ms. Fish's home.

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backyard while there were other children in the living room of the house apparently watching a movie. There were also allegations that Ms. Fish was within a garden area outside of line of sight from her home, weeding her garden at the time Gabriel exited the residence. Ms. Fish has indicated that she was actually in the backyard and while attending to two children who were having a dispute, pulled a few weeds out of her lawn. She indicated that she was within line of sight of the back of the home, all the doors and windows were open given that it was a warm summer day, and that she was never outside of at least auditory range of the children within the living room of the daycare. (Ex. 26). The jury assessed her 19% of the responsibility for the death of Gabriel Tobin.

Mrs. Tobin arrived before the Sheriff Search and Rescue Team and Mr. Tobin arrived shortly thereafter. They both joined in the search. Bonney Lake Police were on the scene. (RP 1145-55). Within a short period of time, Sheriff divers arrived and started to search the lake area, at the same time a land search was being conducted by other officers. Tragically, a Sheriff's diver, Micah Lundborg, found Gabriel's body under the neighbor's dock, pulled up the boards, and was able to retrieve Gabriel, who was face down in the water because his diaper caused him to float upside down. Gabriel at that time was blue and was not breathing. (RP 1135-1144).

Jennifer and Christopher Tobin were standing approximately 150 feet away in the neighbor's yard, across from Ms. Fish's daycare, when Gabriel was found. They could see the deputies carrying Gabriel's lifeless body from the dock to the emergency medical technicians who were present. Realizing that her son was gone, Mrs. Tobin screamed, her legs buckled, and she collapsed where she was standing on the grass. (RP 365-66). Prior to that, both Mr. and Mrs. Tobin were held back by the police while Gabriel was being placed into an ambulance. The EMT's attempted to resuscitate Gabriel, and they continued to do so all the way to Mary Bridge Hospital in Tacoma, about 25 minutes away. The ambulance arrived at Mary

Bridge Hospital and Gabriel was immediately taken into the emergency room. Unfortunately, it was too late, and Gabriel was pronounced dead on arrival.

Jennifer and Christopher Tobin arrived at the Mary Bridge Hospital by car. They rushed into the emergency room only to be met by a social worker. They were told it was too late and that Gabriel was dead. At that time, they were allowed to hold Gabriel's blue, lifeless little body. They did so for hours. (RP 663-664).

**D. The Aftermath - The Investigation of Lisa Fish, and Probable Cover-Up.**

On the day of Gabriel's death, Little Fish's daycare was shut down and the State began proceedings to revoke her daycare license. Ms. Fish voluntarily turned in her license and abandoned any subsequent daycare business. Nevertheless, the State moved forward with summary suspension proceedings, and by October 15, 2004, there was a decision revoking her license because Ms. Fish had "failed to meet minimum licensing requirements." (Ex. 25). In addition, she was found to have been neglectful because she had failed to maintain continuous visual or auditory contact with the children under her care. Ms. Fish responded to the allegations of October 15, 2004, by letter, and denied that she had failed to maintain visual and auditory

contact with the children, and asserted that her back windows and doors were open and she could see and hear both the children inside and outside. She also denied that she was in her garden area weeding, and asserted that she had pulled a few weeds that were simply underfoot. (Ex. 26). She also indicated that she did not hear Gabriel go through the unlocked front door, which had been approved by Mr. Berdecia, despite her concerns specifically about Gabriel and the door in her effort to reach out to Mr. Berdecia for guidance. *Id.* At trial, she could not recall if she specifically mentioned Gabriel to Berdecia.

Despite the clear deficiencies within the licensing file that are self-evident and which are discussed above, no efforts were made to investigate the conduct of DCCEL and the actions of Mr. Berdecia, Ms Cichowski and/or Ms. Quinlan, which contributed to Gabriel's death. (RP 1521). Nevertheless, DSHS exonerated itself in its final report on the matter. (Ex. 42) (RP 1574-75).

During the course of discovery, it was revealed that there was no internal mechanism within the Department of Social and Health Services, DCCEL, for the investigation of licensor misconduct as it related to a death within a daycare facility. (RP 1521).

One of the reviews performed concerning the untimely death of Gabriel Tobin was a “Child Fatality Review” (CFR). Within the Child Fatality Review (which ultimately was published on the Department’s website), had as its participants Mary Kay Quinlan and Victor Berdecia, despite obvious conflict of interest. Significantly, when the fatality review was ultimately completed and the reviewers were placed in the position of making recommendations with respect to preventative measures that would help to prevent future deaths, the following was written (Ex. 42) (Appendix No. 13):

*Post-Fatality Discussion On Increased Preventability Through Changes In WAC:*

*The CFR panel spent time discussing possible additional requirements to the licensing WACs which could reduce the probability of similar incidents occurring. This included requiring five foot fences around some yet undetermined yardage for any daycare near a water source (lake, river, pond) or high vehicle traffic area. The problem would be that some areas have residential covenants that do not allow fencing of front yards. Another idea was to suggest requiring laser alarms or other types of door alarms that go off whenever someone enters or exits a daycare home or center. While these discussions were well-intentioned, the CFR panel concluded that fences and alarms still cannot take the place of*

*adequate supervision. The case under review, the issue is clearly “supervision” which is already sufficiently outlined in WAC and MLR.*

In other words, within the concluding section of the published Child Fatality Review, substantial misinformation was presented. It appears this was provided by Defendant Quinlan. As previously discussed, at the time this death occurred, there was already a WAC requirement that a five foot high fence exist between an in-home daycare facility and bodies of water. See, WAC 388-155-295(5).<sup>4</sup>

After this death, Ms Quinlan told Ms. Tobin that Mr. Berdecia had failed to properly apply regulations as they applied to off premise water hazards. (RP 1746-47). The jury assessed supervisor Quinlan with 20% responsibility for Gabriel Tobin’s death. However, when the absence of a fence was brought up internally and by the members of the community, no mention was made of WAC 308-155-295(5), which within

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Also, a Community Death Review was done under the auspices of the Tacoma Pierce County Department of Health. Also, it’s results are statutorily exempt from discovery. Ms. Quinlan was part of the CDR. (RP 1517-34).

three (3) months was amended. (Dep of Reeves, p.80-90.) (Ex. 64). The rule now is more unclear than before. (RP 883-927; 1012 - 1131).

As is evident by Defendants' motion for summary judgment, the defendants in this case still desire to deny accountability for their obvious and knowing failures with respect to the licensing of Ms. Fish's daycare which directly caused the death of Gabriel Tobin. As a result of this tragic death, no one within the State was punished at all. No one even received a reprimand or downward score on their performance evaluations. No one knows how many more deadly daycare are out there.

## **2. Procedural History**

Initially, suit was filed against Lisa Fish, the daycare provider, under Pierce County Number 05-2-04837-4. During the course of discovery in that suit, substantial information was learned regarding Ms. Fish's interactions with the State and in particular, her efforts to secure the front door from which Gabriel exited to his death. As such, on or about October 10, 2006, a lawsuit against the State of Washington and the individual named defendants was initiated under Pierce County Cause Number 06-2-12148-7. Thereafter an amended Complaint was filed. ( CP 3-

26). Prior to answering, the defendants sought removal to the US District Court, because the Complaint contained a claim pursuant to 42 USC Section 1983 against the individual defendants based on a “deliberate indifference”. ( CP 31-32)

The primary discovery in this case occurred while this matter was before the United State District Court. Ultimately the District Court Judge dismissed the deliberate indifference claim on the grounds of “qualified immunity” and the negligence claims set forth within the Complaint were remanded back to the State Supreme Court. ( CP 33-1926) On return to the Superior Court, consistent with a Stipulated Order on or about February 8, 2008, the two above-referenced lawsuits were consolidated.

On or about March 13, 2008, Plaintiffs moved for Partial Summary Judgment on the issues of Duty and Breach. (CP 1944-2902) Nearly 1,000 pages of documentation was provided to the Superior Court for its determination as to whether or not due to multiple exceptions of the Public Duty Doctrine, it could be found that the State of Washington owed a duty to these Plaintiffs and, as a matter of law, such a duty was breached.

On or about March 28, 2008, the State through counsel filed a Motion for Summary Judgment seeking dismissal on all Plaintiffs' claims due to an absence of duty. ( CP 2903-3055) On the Cross-motions for Summary Judgment, substantial responses, reply and supplemental pleadings were provided to the trial court. ( CP 3056-3685)

The Trial Court permitted arguments on the motion for summary judgments over the course of two days. On April 25, 2008, the Trial Court issued its ruling. Initially the Trial Court dismissed the claimants' claims of outrage due to factual sufficiency grounds. Focusing in what it viewed to be the "big central issue", the Trial Court analyzed the available precedent, and found that the primary purpose of the underlying legislative scheme regarding the licensing of daycares was to "safeguard the health, safety and well being of children". (RP 28) In addition, the Trial Court found that the terms of WAC 388-155-295(5) were not ambiguous, and that by using the word lake the Department (DSHS) clearly considered lakes to be a water hazard. Also, the Court, on the evidence before it, observed the individual licensors "did not seem to pay attention to their own regulations". Id. The Court clearly found that the "failure to enforce" exception and "implied remedy exception"

to the Public Duty Doctrine, were applicable, because the Defendants in this matter failed to enforce the statute. ( RP 28-29)

The Court found that whether or not there had been a Breach of Duty was a question of fact for the jury. (RP 31) The Trial Court subsequently entered a detailed order on the cross- motions. (CP 3221-3227) From this Order the defendants sought reconsideration which was heard on or about May 16, 2008. Following argument, the defendants' Motion for Reconsideration was denied. At that time, the parties had an extended discussion with the Trial Court regarding the content of its Order regarding the Summary Judgment Cross-motions. (RP 62-76); (CP 3221-3227).

Thereafter the parties prepared for trial. Both parties filed extensive Motions in Limine, and ER 904 Notices with Objections. On or about September 5, 2008, the case was called for trial. Over the course of that date and September 9, 2008, the Trial Court permitted extensive argument regarding the various Motions in Limine and the ER 904 submissions. (RP 76-220). As a result, the Court entered into detailed Orders granting and denying the parties' various motions, and also ruled on the parties' ER 904 submissions. (CP 3720-3727–Order on Plaintiff's ER 904

Notice)(CP 3694-3701–Court Order on Plaintiff’s Motions in Limine)(CP 3715-3719–Court Order on Defendant’s Motions in Limine)

After the case was called on September 15, 2008, over 30 witnesses were called by the Plaintiffs, and none by the defense. It was concluded with jury verdicts in favor of the Plaintiffs on or about October 3, 2008, with damages totalling \$11,791,668.45. (CP 4185-4199).

During trial, both parties submitted proposed Jury Instructions. (CP 3907-3938) Within the defendants’ proposed Jury Instructions, there were no specific instructions relating to the elements of the Public Duty Doctrine or the various exceptions to the Public Duty Doctrine. Rather, defendants’ un-numbered Jury Instructions included what could be characterized as general negligence instructions under WPI 10.01; 10.02; and included an instruction predicated on WPI 60.03 regarding the violation of an administrative rule as simply being “evidence in determining negligence.” (CP 3860-3901)(CP 3995-3998) Plaintiffs’ proposed instructions, also contained instructions based upon WPI 10.01; 10.02; and WPI 60.03. (CP 3995).

On or about October 10, 2008, the court heard exceptions to instructions. (RP 1840-1863) With respect to the Court's negligence instructions, counsel for the State did not except to their form, and vaguely referenced back to the State's liability summary judgment motions and motions in limine. (RP 1846-47) At no time did the State indicate that the instructions were in any way deficient for not addressing the specific elements of the exceptions to the Public Duty Doctrine.

During the course of closing arguments, both parties were able to argue their theories of the case. Counsel for the State's argument commences at page 1936 and heavily emphasized the State's position that the regulation did not require fencing under the circumstances of this case. (CP 1936-1949)

On or about October 3, 2008, the jury rendered a verdict allocating fault to the State and the individual defendants in an amount totaling 81%. Lisa Fish was found 19% responsible for the unfortunate death of Gabriel Tobin. (CP 4080-4085) This appeal followed. (CP 4200-4225)

## VI. ARGUMENT

### A. Standards of Review Applicable to the Issues Raised by the Appellants herein.

It is noted that nowhere within Appellants' opening brief is there the slightest discussion of what standards of review are applicable to the various assignments of error within the four corners of the Appellants' opening brief. In this case, the Court's preliminary rulings were based on cross-motions for summary judgment, where in part, Plaintiff's motion for summary judgment regarding the existence of a duty was granted, but also at the same time, the Defendants were successful in eliminating what could be characterized as collateral or "redundant" claims. The case thereafter proceeded to trial and concluded with Judgment on a the jury's verdict. To the extent that Plaintiff's motion for summary judgment with respect to the existence of duty was granted, it could just as easily be said that the practical effect of the order was the denial of the Defendants' motion for summary judgment, contending that there was absence of duty.

The most rational approach is to treat the Trial Court's interlocutory decisions on summary judgment, as effectively being a denial of the Defendants' motion for

summary judgment, on the absence of duty. As the Court is no doubt aware, generally an Order denying a motion for summary judgment, is not a reviewable Order even after the entry of Judgment, and the losing party must appeal from the sufficiency of the evidence presented at trial. See, *Adcox v. Children's Orthopedic Hospital*, 123 Wn.2d 15, 864 P.2d 921 (1993); *Caufield v. Kitsap County*, 108 Wn.App 242, 29 P.3d 738 (2001). See, RAP 2.2 (a)(1). This is because the purpose of summary judgment is to avoid a useless trial, and once the trial has occurred, an appeal of a summary judgment determination, as opposed to the final judgment, would be purposeless. See, *Johnson v. Rothstein*, 52 Wn.App 303, 306,-07, 759 P.2d 471 (1988).

The appropriate record for purposes of review in this matter, is the full trial transcript, and not that which was before the trial court at the summary judgment stage. Further, it is noted that to the extent that the State is attempting to contend that the trial court's summary judgment decision rests on purely legal issues, the burden is upon the appealing party to demonstrate that the trial court's denial of summary judgment turned on an issue of substantive law, rather than on issues of fact. See,

*Bulman v. Safeway, Inc.*, 96 Wn.App 194, 978 P.2d 568 (1999), reversed on other grounds, 144 Wn.2d 335, 27 P.3d 1172 (2001).

Given the fact that the State in this case has failed to address in any way the applicable standards of review, it has not met the burden articulated in *Bulman*. Further, to the extent that the existence of duty in this case turns on questions of facts (as discussed below), as the Appellants have failed to assign error to the final Judgment, any factual determination should be deemed in favor of Plaintiff/Respondent as a verity on appeal.

Generally, an appellate court cannot overturn a jury verdict if it is supported by substantial evidence. See, *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107-108, 864 P.2d 937 (1994). The court will not substitute its Judgment for that of the jury, so long as there is evidence, if believed, would support the verdict. *Id.* The record must contain a sufficient quantity of evidence to persuade a rational fair-minded person of the premise in question. *Id.* As such, it is respectfully suggested, that at a minimum, any factual issues in this matter must be reviewed under a substantial evidence test, as opposed to the de novo review standard, typically applicable to summary judgment motions. Under the substantial evidence standard,

direct evidence is unnecessary to uphold a verdict and circumstantial evidence is sufficient. See, *State v. O'Neal*, 159 Wn.2d 500, 506, 150 P.3d 1121 (2007). Under such a standard, the appellate court defers to the fact finder on issues of credibility, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn.App 410,415,-16, 824 P.2d 533 (1992).

Further, it is troubling that the State in this case, while seeking to appeal a summary judgment determination, failed to assign error to the final Judgment. As the Court can take note, typically an appeal of a final Judgment brings before the Court all prior interlocutory decisions. See generally, *Fox v. Sunmaster Products, Inc.*, 115 Wn.2d 498, 798 P.2d 808 (1990). In this case, while the State did designate the final Judgment within its notice of appeal, it failed to assign error to the final Judgment or in any way reference it within the body of its argument.

In a similar case, the Court found that the failure to assign error to a portion of a final Judgment constitutes waiver of issues on appeal. See, *Sharbono v. Universal Underwriters*, 139 Wn.App 383, 161 P.3d 405 (2007). In *Sharbono*, although the appellant had assigned error to a final Judgment, it had failed to specifically assign error to a portion of the Judgment awarding in excess of \$3

million to the Plaintiff therein. Although the Court reversed a portion of the Judgment in that case, it affirmed that portion of Judgment to which there had been no assignment of error, on the grounds that such a Judgment absent assignment, was a verity on appeal.

In this case, not only did the State fail to assign error to a portion of the Judgment, but failed to assign error to the Judgment at all. It is suggested that by failing to assign error to the final Judgment, it precludes consideration of the merits on appeal. As it is, when addressing the purely substantive legal issues, and as discussed below, clearly the trial court did not err, and as indicated above, all factual questions on this matter must be reviewed under the substantial evidence test applicable to jury verdicts.

With respect to the remaining issues before the trial court, it is noted that issues regarding jury instructions and the admissibility of evidence are reviewed under the highly deferential abuse of discretion standard. See, *Hoskins v. Reich*, 142 Wn.App 557, 566, 174 P.3d 1250 (2008) (admission of evidence); see also, *State v. Winings*, 126 Wn.App 75, 86, 107 P.3d 141 (2005) (a trial court's decision to reject

proposed jury instructions is reviewed under an abuse of discretion standard).

Alleged legal errors within jury instructions are reviewed de novo. *Id.*

**B. The Doctrine of Sovereign Immunity Is Clearly Inapplicable to the Claims Brought By The Tobins.**

Simply because the Legislature waived the State's sovereign immunity to make it liable in tort, to the same extent as private entities, does not mean that there has to be a private analogy to the alleged tortious conduct of the State. Such a proposition fundamentally misapprehends Washington's waiver of sovereign immunity, which is set forth in RCW 4.92.090. That statute provides:

*The State of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to **the same extent as if it were a private person or corporation.*** (Emphasis added).

When reading this statute, it first must be recognized that it is one of the broadest waivers of sovereign immunity in the country. See, *Savage v. State*, 127 Wn.2d 434, 444, 899 P.2d 1270 (1995). It makes the State presumptively liable for its alleged tortious conduct "**in all instances in which the legislature has not indicated otherwise.**" *Id.* See also, *Oda v. State*, 111 Wn.App 79, 84, 44 P3d 8 (2002). Such a waiver has been deemed so broad that it not only served to waive the

State's sovereign immunity, but also the derivative immunity of all political subdivisions within the State, even before the 1967 enactment of RCW 4.96.010. See, *Kelso v. City of Tacoma*, 63 Wn.2d 913, 390 P.2d 2 (1964). This waiver of immunity was clearly intended to be a broad public policy shift favoring the notion that victims of governmental torts should be fairly compensated. *Id.*

This statute does not limit the State's liability to any particular area of the law, but rather it covers any remedy available for the State's tortious conduct. See, *Maziar v. State*, \_\_\_ Wn.App \_\_\_, \_\_\_ P.3d \_\_\_ (8/25/09).

The most recent case interpreting the relevant language, was the case of *Locke v. City of Seattle*, 162 Wn.2d 474, 172 P.3d 705 (2007).<sup>5</sup> In the *Locke* case, the Supreme Court examined whether or not a municipal entity could be liable in tort for injuries suffered by its employees for damage over and above the amount received under Worker's Compensation, when employees within the private sector would not

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Although the *Locke* case addresses municipal liability under RCW 4.96.010 (1), the language utilized in this statute is identical to that used in RCW 4.92.090 regarding the above-emphasized clause. See generally, *Keller v. City of Spokane*, 146 Wn.2d 237, 243 n.8, 44 P.3d 845 (2002), wherein it is noted that RCW 4.92.090 is a "similar waiver of sovereign immunity for the State..."

have such a right. In that case, the issue was whether or not the “right to sue provision” set forth in RCW 41.26.281, which granted law enforcement and fire fighters the right to sue their employer for damages in excess of Worker’s Compensation, violates the provision of RCW 4.96.010 (1), which could be construed as limiting governmental liability to only those circumstances where a private party or corporation otherwise would be liable.

In rejecting such an argument and affirming the Court of Appeals opinion set forth at 133 Wn.App 696, 702-04, 137 P.3d 52 (2006), the Supreme Court found that such a position was a misinterpretation of that clause. The Court of Appeals opinion is instructive at page 702-04:

*Although the statute generally waives a municipality’s sovereign immunity, the city nonetheless contends that the phrase ‘to the same extent as if they were a private person or corporation,’ operates to provide the city with sovereign immunity for claims under LEOFF because a private person or corporation would not be required to pay into a worker’s compensation fund and still be subject to an employee’s tort suit.*

*The city’s argument is inconsistent with Washington Supreme Court’s decision holding that RCW 4.96.010 permits different rules of liability for the tortious conduct of governmental entities as compared with private persons. See, Bailey v. Town of Forks, 108 Wn.2d 262, 265, 737 P.2d 1257, 753 P.2d 523 (1987); King v. City*

of Seattle, 84 Wn.2d 239, 243, 525 P.2d 228 (1974), overruled on other grounds by Nelson v. Eisenhower Carlton, 100 Wn.App 584, 999 P.2d 42 (2000); Evangelical United Brethren Church v. State, 57 Wn.2d 246, 253, 407 P.2d 40 (1965). *The difference in municipal liability compared to a private party liability set forth in these cases does not preclude the applicability of RCW 4.96.010 to a municipality. As the Supreme Court explained: ‘[i]t is well recognized that RCW 4.96.010 was not intended to create new duty where none existed before. Rather, it was to permit a cause of action in court if a duty could be established, just the same as with a private person’.* J & B Dev. Co. v. King County, 100 Wn.2d 299, 305, 669 P.2d 468 (1983), reversed on other grounds by Meaney v. Dodd, 111 Wn.2d 174, 759 P.2d 455 (1988), and Taylor v. Stevens County, 111 Wn.2d 159, 759 P.2d 447 (1988). See also, Beal v. City of Seattle, 134 Wn.2d 769, 784, 954 P.2d 237 (1998) (explaining public duty doctrine).

*The correct interpretation of RCW 4.96.010 is that if the government is found to have engaged in tortious conduct under applicable substantive law, which may or may not be different than for private parties, the government will be found liable for such tortious conduct ‘to the same extent as if they were a private person or corporation.’ See, Taylor v. City of Redmond, 98 Wn.2d 315, 319, 571 P.2d 1388 (1977). (sovereign immunity waived by RCW 4.96.010 for suits brought by LEOFF Plan I members). (Emphasis added).*

The duties applicable to the government “may or may not be the same duties that would otherwise be applicable to private parties.” (*Id.*) (See also, 162 Wn.2d at 481). In other words, as stated in the Supreme Court opinion, “...the language of RCW 4.96.010 does not state that the parties may sue governmental entities **only to**

**the same extent that a private party may be liable.”** (Emphasis original). There is simply no basis to apply different principles to RCW 4.92.090 when construing the identical language.

The cases relied on by the Appellant, to the extent that they are inconsistent with the *Locke* opinion, simply do not survive the above-referenced Supreme Court decision. Further, it is noted that the case of *Donohoe v. State*, 135 Wn.App 824, 142 P.3d 654 (2006), while it suggests some continuing vitality in the notion that there must be a private sector analogy before governmental liability can be imposed, such language is purely dicta. <sup>6</sup> In addition, the case of *Edgar v. State*, 92 Wn.2d 217, 595 P.2d 534 (1979), is simply a case where the Court found an absence of duty. <sup>7</sup>

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It is curious to note that the *Donohoe* opinion was issued on August 29, 2006, and the *Locke* opinion, which is not mentioned in *Donohoe*, was initially issued on June 19, 2006. It is noted that apparently a petition for review was not filed in the *Donohoe* case. In addition, the State relies on *Linville v. State*, 137 Wn.App 201, 208, 151 P.3d 1073(2007) for the proposition that only when the legislation expressly waives sovereign immunity can there be a possibility of an actual duty owed by the State, citing to *Donohoe*. While that is generally true, it is noted that very clearly RCW 4.92.010 is such legislation, and *Linville* is contrary to the presumptive liability of the State for tortious conduct discussed in the *Savage* opinion.

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It is also noted that apparently in order to further the current Attorney General's radical political agenda, the State has cited as positive authority Mr. McKenna's own

In marked contrast to the State's assertions, there are a number of examples where the Courts have found the applicability of exceptions to the public duty doctrines, where there are no close private sector analogies. See generally, *Chambers-Castanes v. King County*, 100 Wn.2d 275, 669 P.2d 451 (1983) (reliance of false assurances provided by 911 operator); *Mason v. Bitton*, 85 Wn.2d 321, 534 P.2d 1360 (1975) (tort liabilities relating to high-speed police pursuits); *Tyner v. State*, 141 Wn.2d 68, 1 P.3d 1148 (negligent investigation of child abuse allegations), just to name a few cases. <sup>8</sup>

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law review article where he is advocating a radical change in existing State law. See, *Tardiff & McKenna, Washington State's 45 Year in Governmental Liability*, 29 Seattle U. L. Rev. 1 (2005). It is noted that this political article by Attorney General McKenna was debunked by an article written by current Supreme Court Justice Deborah Stephens and Brian P. Harnetiaux, in "**The Value of Government Tort Liability, Washington State's Journey from Immunity to Accountability**", 30 Seattle U. L. Rev. 35 (2006). Further, the basic notion that our waiver of sovereign immunity does not apply to "purely governmental functions" is contrary to the express statutory language of RCW 4.92.090, which indicates that the State will be liable, "whether acting in a governmental or proprietary capacity..." and is contrary to one of the primary purposes of the statutory waiver, which was to do away with such distinctions. See, *Kelso v. City of Tacoma*, supra.

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It is troubling that at page 13 of its brief, the State - apparently in reliance on the *Linville* opinion - uses the case of *Evangelical United Brethren Church v. State*, 57 Wn.2d 246, 253, 407 P.2d 440 (1965) out of context. In the *Evangelical* case, the

In sum, beyond discretionary immunity, which is not implicated in this case, the only small vestiges of sovereign immunity available to the State is simply a determination that there was no duty to the particular member of the public claiming injury. Thus, the true issue in this case is whether or not the Plaintiffs can establish the application of one or more of the exceptions to the public duty doctrine. The trial court clearly found that the Plaintiffs' could do so, and such determination should be affirmed by this Court.

C. **A Number of Exceptions to the Public Duty Doctrine are Applicable to the Plaintiff's Claims.**

1. **Introductory Comments.**

In this case, very few of the Court's instructions were subject to exception, despite that fact, and as discussed below, a number of the exceptions to the public

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court carved out an extremely narrow exception to the broad statutory waiver of immunity for high level discretionary policy decisions made by the officials within the executive branch. Such an exception was recognized, no doubt in large part due to separation of power concerns. See, *Estate of Jones v. State*, 107 Wn.App 510, 523, 15 P.3d 108 (2000). This exception applies to only high level policy decisions, which are not at issue herein. See, *Karr v. State*, 53 Wn.App 1, 765 P.2d 316 (1988) (rev. denied) 112 Wn.2d 1011, 765 P.2d 316 (1989). Discretionary immunity does not apply to "the type of ministerial" or "operational" acts such as are at issue herein. See, *Taggart v. State*, 118 Wn.2d 105, 114-15, 822 P.2d 243 (1992).

duty doctrine have factual elements, the Defendants in this case did not submit specific instructions relative to the applicable exceptions. With very few exceptions, this case was presented to the jury on general negligence instructions under the WPI's. As such, the instructions in this matter should be deemed to constitute the law of the case. See, *Tyner v. State*, 141 Wn.2d 68, 88, 1 P.3d 1148 (2000).

Alternatively, the "invited error doctrine" should preclude the Defendants from asserting that it was error not to instruct the jury with respect to such elements, or that the evidence is insufficient to meet such elements. See generally, *ESDA Corp. v. KPM Peat Marwick*, 86 Wn.App 682, 939 P.2d 1228 (1997). Implicit in the notion that a party must raise proper exceptions to instructions, is that a party should not be allowed to gamble on the outcome of trial and then raise objections later. *McGovern v. Greyhound Corp.*, 53 Wn.2d 773, 777, 337 P.2d 290 (1959). As such, it is respectfully suggested that the existence of such factual elements should be

viewed as verities on appeal, or at a minimum, tested under the above-discussed substantial evidence standard. <sup>9</sup>

A further consideration, is that an issue may not be raised for the first time on appeal. See, *Martin v. Johnson*, 141 Wn.App 611, 617, 170 P.3d 1198 (2007). In addition, issues may not be raised for the first time within a reply brief. See, *Cowich Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

It is suggested that since the defense waived any determination by the jury as to the application of each of the relevant exceptions to the public duty doctrine, should the Court find that any one of the exceptions are applicable to the facts and circumstances of this case, the jury verdict on this matter, which was predicated on general negligence instructions, must be affirmed. See, *Otis Housing Assoc., Inc. v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009) (appellate court may affirm the trial court on any grounds established by the pleadings and supported by the record).

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For example, under the special relationship exception discussed below, it may be an issue of fact whether or not a public official gave express assurances, and whether the Plaintiff justifiably relied upon such assurances. See, *Sundberg v. Evans*, 78 Wn.App 616, 624-25, 897 P.2d 1285 (1995). See also, *King v. Hutson*, 97 Wn.App 590, 987 P.2d 655 (1999) (question of fact as to whether or not a statutory violation occurred which would have triggered a duty to act).

Both the failure to enforce exception and the implied remedy exception to the public duty doctrine require a detailed statutory analysis. As such, prior to addressing the specific exceptions to the public duty doctrine, the following analysis is provided regarding the relevant statutes and regulations at issue.

**D. Application of the Rules of Statutory and Regulatory Construction.**

The existence of a legal duty is a question of law for the Court to decide. See, *Linville v. State, supra*. Recognition of a duty generally involves policy considerations and a balancing of interests. *Whaley v. DSHS*, 90 Wn.App. 658, 672, 956 P.3rd 1100 (1998).

The starting place in examining the regulatory and statutory scheme within the State of Washington relating to family in-home daycares (which are at issue ) is RCW 74.15.010 (1), which provides, concerning statutory purposes, the following:

*The purpose of chapter 74.15 RCW and RCW 74.13.031 is:*

- (1) ***To safeguard the health, safety, and well-being of children, expectant mothers and developmentally disabled persons receiving care away from their own homes, which is paramount over the right of any person to provide care;***
- (2) ***To strengthen and encourage family unity and to sustain parental rights and responsibilities to the end that foster care is provided only when a child's family, through the use of all available resources, is unable to provide necessary care;***

- (3) *To promote the development of a sufficient number and variety of adequate child-care and maternity-care facilities, both public and private, through the cooperative efforts of public and voluntary agencies and related groups;*
- (4) *To provide consultation to agencies caring for children, expectant mothers or developmentally disabled persons in order to help them to improve their methods of and facilities for care;*
- (5) *To license agencies as defined in RCW 74.15.020 and to assure the users of such agencies, their parents, the community at large and the agencies themselves that adequate minimum standards are maintained by all agencies caring for children, expectant mothers and developmentally disabled persons. (Emphasis added).*

The purpose of the 1995 revision to RCW 74.15.010 was to ensure that the protection of the health, safety and well-being of children took priority over the rights of the businesses providing services. *Id.* This statute reflects a hierarchy of protected interests where the safety of children is primary, while at that same time acknowledging the role of parents and their need for assurance that their children will be safe, and the duty of the State to “consult” with daycare providers and provide information to assure any children are safe. The mere fact a number or interests are addressed does not preclude this statute as the being a source of an actionable duty. See, *Tyner v. State*, 141 Wn.2d at 79.

Under RCW 74.15.020 (1) it is very clear that the “agencies” being referenced within RCW 74.15.010 (1) would be inclusive of family in-home daycare providers, such as the one at issue herein, Lisa Fish’s daycare otherwise known as “Little Fish’s,” which was located on So. Island Drive, across the street from Lake Tapps.

Under RCW 74.15.030 (2) (a), the Secretary of DSHS had the duty of setting forth minimum requirements for family home daycare facilities, including making a determination as to their “suitability.” Under RCW 74.15.030, not only was DSHS to set minimum standards, but also had the obligation to police compliance with such minimum standards through among other things, revoking or denying a license to family in-home daycares. RCW 74.15.130 sets forth a procedure for the denial or suspension and/or revocation and/or modification for *inter alia* daycare licenses.

Tellingly, under RCW 74.15.030, “the Secretary shall **have the power** and it shall be the Secretary’s **duty**” to promulgate various minimum standards applicable to facilities such as daycares. Under subsection (2), “the minimum requirements shall be limited to:

- (a) ***the size and suitability of a facility and the plan of operation for carrying out the purpose for which an applicant seeks a license;***
- (j) ***the safety, cleanliness, and the general adequacy of the premises***

- to provide for the comfort, care and wellbeing of children...*
- (k) the provision of necessary care, including food, clothing, supervision and discipline; physical, mental and social wellbeing; and educational, recreational and spiritual opportunities for those served;*
  - (l) the financial ability of an agency to comply with the minimum requirements established pursuant to Chapter 74.15 RCW and RCW 74.13.031.*

Further, under subsection (6) of this statute, it is a requirement that DSHS (through its Secretary) adopt appropriate procedures necessary in order to administer the law. It also, under subsection (9), is obligated to consult with the agencies such as a daycare in order to help them improve their methods and facilities for the care of children.

Further, although the State would contend that the utilization of the word “may” in RCW 74.15.130, which addresses denial of licenses, suspensions and the like, means that the duties imposed by this statute, are somehow non-binding, such a position is unsupportable. The subject statutory scheme does not afford the State the discretion to license and permit the continued operation of regulatory noncompliant and fundamentally unsafe daycares. (See, Appellants Brief, p. 34).

Also, such an argument is barred by the law of the case doctrine because Instruction No. 17 to the jury provided: “A statute provides that the Department of

Social and Health Services shall grant a daycare license if the applicant meets the ‘minimum requirements.’ If an applicant fails to meet ‘minimum requirements,’ **a daycare license must be denied.**” This instruction was not subject to exception and therefore the proposition set forth therein constitutes the law of the case, and the State is therefore barred from arguing a contrary proposition. See, *Tyner v. State*, 141 Wn.2d at 88. Further, such a position would defy all relevant tenants of statutory construction and/or interpretation. RCW 74.15.130 (1) cannot rationally be construed to authorize the licensing of a regulatory non-compliant daycare. It is suggested that the only reason the term “may” is utilized within subsection 130, is because subsection 125, affords the alternative of issuing a probationary license, but only if the daycare is “temporarily unable to comply with the rules...” and only under the very limited conditions set forth within subsections (1)(a) and (b). Under subsection (1) (a), a probationary license can only issued if the non-compliance “does not present an immediate threat to the health and wellbeing of the children...” and under subsection (b), there must be a plan approved by the Department to correct the area of non-compliance within the probationary period. What is clear, under the terms of this regulatory scheme, DSHS simply cannot issue a daycare license to a

regulatory non-compliant daycare, particularly when the minimum standard at issue is a safety regulation. <sup>10</sup>

It is simply inconceivable that this statutory scheme could be construed in a manner which would permit, without any mitigation, the existence of an unsafe and regulatory non-compliant daycare. The statutory scheme is so comprehensive in this area that, save for limited circumstances, it is a misdemeanor to operate a daycare within the State of Washington without an appropriate license. See, RCW 74.15.150.

This statutory scheme is substantially similar to those found in the case of *Tyner and Yonker v. DSHS*, 85 Wn.App 71, 78, 930 P.2d 958 (1997). Like RCW 26.44.010 at issue in *Yonker*, which requires the “safeguard” of children, RCW 74.15.010 has the legislative purpose “to safeguard the health, safety and wellbeing of children...” While RCW 26.44.050 at issue therein imposes a “duty” to “investigate,” RCW 74.15 creates a “duty” to promulgate and enforce minimum safety regulations.

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Plaintiff’s experts, at time of trial, clearly supported and endorsed such a proposition. (See, Katherine Ken RP 883-931; Margo Logan, p. 1012-1134).

On the other hand, the statutory scheme at issue in the *Donohoe* case heavily relied on by the State, is very different. The purpose of that statute, RCW 18.51 et seq, is simply to “promote” (not safeguard) good care. See, RCW 18.51.005 and RCW 18.51.070. As noted in *Donohoe*, under the scheme the duties are imposed onto “the facility” and not the governmental agency. See, *Donohoe v. State*, 135 Wn.App at 844-45. Clearly, *Tyner* and *Yonker* control the analysis in this case.

Pursuant to the authority vested in the Department under RCW 74.15 et seq, at the time in question, Washington Administrative Code (WAC) 388-155 et. seq. was promulgated. Within the coverage of WAC 388-155 are family child daycare homes, the designation applicable to the daycare owned and operated by Lisa Fish, which is at issue herein. See, WAC 388-155-010. Significant in this case, WAC 388-155-295 under the heading of “water safety” provided the following:

- (1) *The licensee must maintain the following water safety precautions when the child uses an **on-premises** swimming pool or wading pool. The licensee must ensure:*
  - (a) *The **on-premises** pool is inaccessible to the child when not in use; and*
  - (b) *An adult with current CPR training supervises the child at all times;*
- (2) *The licensee must ensure a certified lifeguard is present during the*

- child's use of an off-premises swimming pool.*
- (3) *The licensee must empty and clean a portable wading pool daily, when in use.*
  - (4) *An adequate, department-approved cover or barrier, installed at the manufacturer's specification must be in place to prevent the child access at all times to heated tubs, whirlpools, spas, tanks, or similar equipment.*
  - (5) **A five foot high fence with gates, locked when not in use, is required to prevent access to water hazards such as swimming pools, lakes, streams, or natural or artificial pools.**
- (Emphasis added). (Ex. 12)

Subsection 5 was adopted in the year 2000, while the remaining provisions had existed as early as 1991. (Ex. 112; Appendix No. 7). Section 295 specifically deals with water safety issues. Other parts of the WAC's address outdoor and indoor play areas. See, WAC 388-155-320 and 330.

Under WAC 388-155-050, the minimum licensing requirements set forth within this chapter can be subject to waiver only if safety is not compromised and regulating purposes can be met. Properly promulgated, agency regulations have the force and effect of law. *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 445, 932 P.2d 628 (1997). *Wingert v. Yellow Freight Systems*, 146 Wn.2d 841, 50 P.3d 256 (2002); see also, *Joyce v. State*, 155 Wn.2d 306, 325-25, 119 P.3d 825 (2005).

Under WAC 388-155-090 (1), the Department **must deny a daycare license application or suspend or revoke a license if the home daycare facility does not meet the minimum requirements within WAC 388-155 eq seq.** The term “must” appears mandatory.

Generally, the construction of statutes and an agency’s regulations involve matters of statutory construction and questions of law. See, *Linville v. State*, 137 Wn.App. at 209. The primary purpose in engaging in statutory construction is to give effect to the “legislative intent.” The rules of statutory interpretation are equally applicable to the interpretation of a state agency’s regulations. *Id.* The beginning point when interpreting a statute or regulation is its “plain language.” *Id.*, citing to *Lacey Nursing Center, Inc. v. DOR*, 128 Wn.2d 40, 53, 905 P.2d 338 (1995). When a statute or regulation is unambiguous, courts determine legislative intent from the statutory or regulatory language alone. *Id.* See, also, *Waste Management v. WUTC*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994).

Generally, statutes and regulations should be construed to effect their purposes and unlikely, absurd or strained consequences should be avoided. See, *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987). Any interpretation of

a statute which would render it unreasonable or result in an illogical consequence should be avoided. See, *City of Puyallup v. Pac Bell*, 98 Wn.2d 443, 450, 656 P.2d 1035 (1982). All provisions of statutes and regulations should be harmonized whenever possible, and all terms should be given effect whenever possible. *Emwright v. King County*, 96 Wn.2d 538, 543, 637 P.2d 656 (1981). Further, whenever possible, a statute should be construed in a manner which does not nullify, void or render meaningless or superfluous any section or words. *Truly v. Heuft*, 138 Wn.App. 913, 921, 158 P.3d 1276 (2007). When the language of a statute is plain and free from ambiguity there is no room for construction, the plain meaning must be given its effect without resort to the rules of statutory construction. *State v. Theilken*, 102 Wn.2d 271, 273, 684 P. 2d 709 (1984).

Generally, if a statute is ambiguous, it must be interpreted in a manner which is most consistent with legislative intent as derived from the language of the act as a whole. See, *Stewart Carpenter Services v. Contractor Bonding and Insurance*, 105 Wn.2d 353, 358, 715 P.2d 1115 (1986). When there has been an administrative construction applied to a statute, it can be provided deference if, and only if, a statute is ambiguous. *Allen v. ESD*, 83 Wn.2d 145, 151, 516 P.2d 1032 (1973). Further, the

administrative agency's construction of a statute may be given some weight, but is not binding upon the court and an agency cannot amend or change legislation. *Id.* See, *Bennett v. Hardy*, 113 Wn.2d 912, 926, 784 P.2d 1258 (1990). In addition, when a statute provides both general and specific terms, they should be harmonized with specific terms controlling over the more general. 2 A Sutherland Statutory Construction SS 47-17 (7<sup>th</sup> Ed); *Condit v. Lewis Ref. Co.*, 101 Wn.2d 106, 111, 676 P.2d 466 (1984).

In this case, the legislative intent with respect to the statutory regulatory scheme at issue is set forth in RCW 74.15.010 (1), which provides a legislative purpose of safeguarding the "health, safety and well-being of children..." who are "receiving care away from their homes..." In addition, there are secondary purposes set forth within the statute, however, by the wording within the statute it can be easily gleaned that safeguarding the health and safety of children is in fact "paramount." In examining the terms of WAC 388-155 et seq, it must be done with the notion that the safety and well-being of children is the paramount consideration and the overriding justification for the regulations. The named defendants in fact agree with this fundamental proposition.

In this case, the State has contended that we are simply dealing with a difference of interpretation of the subject statute and regulation is in contravention to the above set forth rules of statutory and that the regulatory construction; the trial court nevertheless allowed the defense to present evidence regarding such a “difference in interpretation,” which was contrary to the plain and unambiguous language of the regulation, and is factually unsupportable. On application of such rules, there is simply not a scintilla of doubt that the defendants licensed an unsafe and regulatory non-compliant daycare. If the regulations at issue, specifically subsection 295 (5) had been complied with, the tragic death of Gabriel Tobin would not have occurred. WAC 388-155-295 (5) is an unambiguous regulation that simply requires that there be a five foot high fence to prevent access to water hazards such as lakes. It is a specific statute dealing with water hazards and not play areas generally. WAC 388-155-320, which directly addresses play areas, in and of itself requires fencing to prevent access to roadways and other dangers. Had the promulgating authority intended fencing with respect to water hazards to be limited to play areas, it certainly would have said so. In fact, the jurors even questioned that if the regulation meant something different than what it said, why did it not say so?

(Appendix No. 14). In addition, if one were to apply the interpretation advocated by the defendants in this case, WAC 388-155-295 (5) would be rendered meaningless and superfluous, in violation of the rules of statutory construction. In fact, the fencing height requirements for outdoor play areas is supposed to be a minimum of four feet, while the water safety hazard regulation at issue is set at a minimum of five feet. Quite obviously, there are different regulations for different applications. The State attempted to create confusion where none existed. See, WAC 388-155-310 (1)(d). As discussed below, Defendants' proof in that regard was fanciful, inconsistent, and impeached by extrinsic and expert evidence.

If one actually examines the structure of WAC 388-155-295 sections (1) through (4), it is clear that had the promulgating authority intended that the water hazard at issue be limited to on-premises bodies of water, it certainly knew how to say so, given the fact that subsections (1) and (2) specifically address the on and off-premises issues. In fact, there is simply nothing in subsection (5) that would in any way indicate that the five foot fencing requirement is in any way limited to play areas or water hazards only existing upon the premises as disingenuously suggested by the defendants.

To provide such a construction would be to ignore statutory purposes and to defy any number of rules of statutory construction. Further, even if one could argue that subsection (5) is ambiguous, such ambiguity must be construed with child safety in mind. Under the circumstances of this case, it would be absurd to hold that fencing would not be required between an indoor play area and Lake Tapps, when the only thing separating the two was a door, which had to be kept unlocked from the inside. Such an interpretation truly would be a position advocating for child “unsafety.” Under WAC 388-155-280 (1) daycares must be located in a “safe” environment.

As such, the defendants’ self-serving, strained and absurd assertions that no fence was required “in the front yard” of Little Fish’s daycare, between an unlocked front door and Lake Tapps, was unsupportable, and clearly was rejected by the jury.

<sup>11</sup> It is also factually unsupportable, and it was shown at time of trial, that the State

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Plaintiffs’ experts, Katherine Kent and Margo Logan, indicate that it was absolutely mandatory that a fence be in place between the front door of Little Fish’s daycare and Lake Tapps, and expert Margo Logan goes so far as to say that Ms. Fish’s daycare simply should not have been licensed without the required fencing to prevent access to the water hazard where Gabriel drowned. (RP 883-931; 1012-1134).

had often regulated such water hazards. There were a number of examples admitted into evidence where enforcement of the regulation occurred: (1) five foot fence needed to block access to adjacent river and marsh, resolved with abandonment of a play area: Pond fence not five feet (Ex. 60); (3) waiver provided to allow for wood grating over fish pond in lieu of five foot high fence (Ex. 61); (4) ornamental pond outside of play area needed fencing or grating (; (5) need a five foot high fence to address slough or ditch across the street (prior fence only four feet high); (6) inadequate fence between home and lake (four foot fence needed to be five feet; (7) Cichowski requiring fence between home and roadway (Ex. 7); (8) large water reservoir by property and fence too low (three feet where five feet needed; (9) Berdecia required provider to put alarms on both front and back doors because home five to ten minute walk to Lake Tapps and no fence in the front yard); (10) five foot high fence required for stream near the backyard; (11) home on lake with fenced patio area to block access to lake but inadequate to provide sufficient play area. Waiver given to allow use of a local park for a play area; (12) grate put over front yard fish pond even though front yard not a play area; (13) pond in side yard not

fenced; and (14) the need for a five foot high fence around a pond. (Ex. 60-62; 77-84).

In the instant case, apparently the State concocted a position that it was “not the intent of the regulation to require fencing” under the circumstances of this case that was thoroughly impeached. The defense story has varied that no fencing is required for “off-premises” water hazards, or that it only applies to “play areas,” or that you simply cannot fence “front yards.” (RP 402, 438; 574; 692). As the above examples indicate, none of these assertions proved to be true, and Plaintiffs presented expert testimony to the contrary. Although many of the above-referenced licensing actions were subsequent to the death of Gabriel Tobin, and after amendment of the regulation, given the nature of the defense in this case, it is of no importance. It is clear that such a defense was made of whole cloth, not credible, and properly rejected by the jury.

In any event, it is respectfully submitted that the Court, on application of the rules of statutory construction, easily found that Little Fish’s Daycare was licensed even though it did not comply with an obviously applicable safety regulation. The jury clearly did.

### 3. The Public Duty Doctrine - Generally.

Generally, under the Public Duty Doctrine the State is not liable for its negligent conduct, even where a duty does not exist, unless the duty was owed to the injured person and not merely to the public in general. See, *Sheikh v. Choe*, 156 Wn.2d 441, 448, 128 P.3d 574 (2006).<sup>12</sup> The Washington State Supreme Court has recognized that the exceptions to the Public Duty Doctrine generally embody traditional negligence principals, and it is simply a “focusing tool” to determine whether the public entity had a duty to the injured plaintiff as opposed to the public in general. See, *Caulfield v. Kitsap County*, 108 Wn.App. 242, 251, 29 P.3d 738 (2001). The question of whether an exception to the Public Duty Doctrine applies is simply another way of asking whether or not the State owed a duty to the plaintiff.

*Id.*

There are four recognized exceptions to Public Duty Doctrine: (1) *A legislative intent*; (2) *special relationship*; (3) *volunteer rescue*; and (4) *failure to*

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In *Sheikh*, the Supreme Court touched on RCW 74.15 et seq, but found the plaintiff injury victim therein fell outside statutory protections. ( Third party victim of foster children).

*enforce. See, Babcock v. Mason County Fire District*, 144 Wn.2d 774, 786, 30 P.3d 1261 (2001).

Significantly, it is noted that cases from other states clearly support the imposition of a duty under the circumstances of this case. In the case of *Andrade v. Ellefson*, 391 NW 2d 836 (Minn.1986), the Minnesota Supreme Court found that health and safety licensing regulations directed at daycare providers established that the state had a duty to avoid negligence in the performance of licensing and supervisory functions. In *Andrade*, the state was liable for licensing child care operators where two young children were physically abused. The facility inspection revealed violations of licensing requirements and that insufficient remedial actions were taken.

Similarly, in *Brasel v. Childrens Services Division*, 642 P.2d 696 (Ore. App. 1982), in a case involving the death of an eighteen-month-old child as a result of injuries received in daycare, the Court held that a state agency with statutory authority to establish the health and safety standards for daycare centers and for ensuring compliance with such standards, could be held liable in tort if it breached the duties to members of the statutorily protected class.

In this case, clearly the State owed the Plaintiffs, and their decedent child, a number of duties which clearly fall within the recognized exceptions to the Public Duty Doctrine.

**F. The Legislative Intent Exception is Applicable.**

The legislative intent exception applies when the terms of the legislative enactment indicate a legislative intent to identify and protect a particular and circumspect class of person. See, *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987). The starting point in determining the existence of such a legislative intent is to look at the statute's declaration of purpose. See, *Dorsch v. City of Tacoma*, 92 Wn.App. 131, 134, 960 P.2d 489 (1998). When there is a clear statement of legislative intent to protect individuals, there is a statutory duty imposed upon the governmental entity. See, *Barlein v. State*, 92 Wn.2d 229, 231-32, 595 P.2d 930 (1979). See, also, *Halvorson v. Dahl*, 89 Wn.2d 673, 574 P.2d 1190 (1978); *Smith v. State*, 59 Wn.App. 808, 813 3, 802 P.2d 133 (1990).

The courts in the State of Washington employ a three-part test to determine whether or not a statute or regulation creates an implied cause of action. See, *Sheikh*

v. *Choe*, 156 Wn.2d at 457; see, also, *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990). In order to determine whether or not an implied cause of action will be recognized, the following factors must be shown:

- (1) *Whether the plaintiff is within the class for whose “special” benefit the statute was enacted,*
- (2) *Whether legislative intent, explicitly or implicitly, supports creating or denying a remedy, and*
- (3) *Whether applying a remedy is consistent with the underlying purpose of the legislation.*

Under the *Bennett* test, when determining whether or not the plaintiff is within a class which is subject to special benefit, the issue is whether or not the legislature intended to protect a particular and circumscribed class of person and such an intent must be clearly expressed within the provisions of the statute and will not be implied. See, *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 929, 969 P.2d 75 (1998). The issue is not the size of the potential class protected by the statute, but whether or not the class is “particular and circumscribed.” See, *Yonker v. State*, 85 Wn.App. 71, 78, 930 P.2d 958 (1997). In *Bennett v. Hardy, supra*, the class found to be protected was everyone over the age of 40. In cases where such a legislative intent has been found to identify a specific duty, the applicable statutes

have expressly focused on the protection of a specific class of individuals. See, *Yonker v. DSHS*, 85 Wn.App. at 78-80 and *Donaldson v. Seattle*, 65 Wn.App. 661, 666-68, 83 P.2d 1098 (1992). The State's contention that size matters is simply wrong.

On the other hand, a legislative intent indicating an intent to benefit the public as a whole as opposed to a particular class of individuals does not give rise to the duty of care pursuant to the legislative intent exception. See, *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d at 929; see also, *Burnett v. City of Tacoma City Light*, 124 Wn.App. 550, 563, 104 P.3d 677 (2004) (statute empowering cities to take action necessary to combat local disasters was indicative of intent to protect the people of the state, rather than the a particular group of individuals).

As noted in *Bennett v. Hardy*, it has long been recognized that a legislative enactment may be the foundation for a right of action. See, *Bennett v. Hardy*, at 919-21. Under such circumstances, the Court can assume that the legislature is aware of the doctrine of implied statutory causes of action, and it also can be assumed that the legislature would not enact a remedial statute granting rights to an identifiable class without enabling members of the class to enforce those rights. Without an implicit

creation of a remedy, the statutes can be rendered meaningless. *Id.* As noted in Bennett, the courts have consistently held that when a statute gives a right and no specific remedy, the common law will provide a remedy.

In the instant matter, RCW 74.15.010 (1) clearly indicates that plaintiff's decedent child was amongst a class of individuals who was to be benefitted by the statute's enactment. As noted in the *Sheikh v. Choe* case, 156 Wn.2d at 452, the purpose of such statute is to safeguard the health and welfare of our children and RCW 74.15.010 (5) is an express assurance to the public and parents that DSHS will fulfill its child protection role.<sup>13</sup> In marked contrast, in *Donahoe v. State, supra*, the statutes at issue involved the duties of care imposed on nursing homes and very general statutes authorizing DSHS to regulate nursing homes. These statutes did not set forth any definable class of individuals beyond the public at large.<sup>14</sup>

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The *Sheikh v. Choe* case was a case where the plaintiffs were attempting to argue that DSHS had responsibility for an assault perpetrated by two minors who were in foster care under the auspices of the Department. In *Sheikh*, the Court concluded that statutes such as RCW 74.15.010 did not create a duty to protect the public from the children. Rather, the Court noted that the purposes of such statutes is to protect the children within its coverage from harm.

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Several cases are readily distinguishable. The case of *Braam v. State*, 115 Wn.2d 689,

With respect to the second and third elements of the *Bennett* test, the cases of *Yonker v. DSHS*, *supra*, and *Donaldson v. Seattle*, *supra*, are instructive. In *Yonker*, the Court found an implied cause of action based on the language of RCW 26.44 et seq, which deals with the reporting of child abuse. In that case, it was alleged that DSHS had been negligent in failing to investigate possible child abuse of a two and one-half year-old after the father confessed to molesting the child. It was presumed that the legislature was aware of the doctrine of implied remedy. Passing legislation specifically designed to benefit a particular class of individuals provides indication that the legislature intended to support creation of a remedy. As noted in *Yonkers*, it can be presumed that the legislature has taken the view that tort liability will encourage the State to execute its duties responsibly. As quoted in

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711, 81 P.3d 851 (2003) was a class action suing to preclude DSHS from moving foster children from place to place. In that case, the Court, while recognizing that the statute at issue was for the benefit of foster children, declined to broaden implied remedy because it would interfere with DSHS's discretion with respect to the placement of foster children and other remedies were available to the children in the context of dependency actions. Similarly, in *Stiefel v. City of Kent*, 132 Wn.App. 523, 532, 132 P.3d 1111 (2006), the statute at issue, RCW 19.27.110, simply imposed upon the county a duty to adopt the international fire code. Finally, *Linville v. State*, *supra*, was not a negligent licensing case, but rather it dealt with a strained argument that an Insurance Statute RCW 48.88 et seq compelled the State to ensure liability insurance for intentional torts.

*Yonkers*, at page 81: “[T]he existence of tort liability will encourage DSHS to avoid negligent conduct and leave open the possibility to those injured by DSHS negligence can recover.” Quoting *Babcock v. State*, 116 Wn.2d 596, 622, 809 P.2d 143, (1991). The same is true here.

In *Donaldson*, the Court found that the Domestic Violence Protection Act created a mandatory duty to arrest the perpetrator of domestic violence and his victim has an implied cause of action upon the breach of such a duty. At footnote 1 of the *Donaldson* opinion, it was noted that a failure to impose liability under such circumstances would defeat the stated purpose of the statute as a whole.

Similarly, when examining RCW 74.15.010, it would defeat the statutory purposes of protecting children within daycare facilities if the Court failed to recognize a cause of action. Clearly, without an implied remedy it would undermine the legislative directive that DSHS is to promulgate and enforce minimum safety requirements. If the legislature did not intend to provide a remedy for the violation of this statute, it certainly would have said so, and would not have drafted a statute in a manner which indicated it was designed to protect a particular class of people. See, also, *Wingert v. Yellow Freight Systems, Inc.*, 104 Wn.App. 583, 591-92, 13

P.3d 677 (2000) (utilizing provisions of the WACs for a determination as to whether or not the plaintiffs were within the class intended to be benefitted by the statutory scheme and rejecting the argument that the existence of other potential remedies precluded the creation of a remedy by implication). As noted in *Wingert*, it is unlikely that the legislature intended to pass legislation that could be thwarted with impunity.

With respect to the third *Bennett* element, there is nothing within RCW 74.15 or the applicable WAC's which would indicate that implying a remedy would be inconsistent with the underlying purposes of the legislation. In fact, as noted above, without such a remedy it is likely that the purposes of the legislation would be frustrated; DSHS could avoid its statutory duty with impunity, thus frustrating the purpose of the legislation. It would be grossly inconsistent with the underlying purposes of the legislation to not imply a remedy when it would have the potential of allowing unsafe and regulatory non-compliant daycares to flourish within the State of Washington. See, also, *Tyner v. DSHS, supra*.

3. Defendants Who Were Aware of An Actual Regulatory Violation Are Subject to Liability Under the Failure to Enforce Exception of the Public Duty Doctrine.

As is evident, the defendants' failure to enforce WAC 388-155-295 (5) had disastrous consequences. The failure to enforce exception has the following elements:

- (1) *There is a statutory duty to take corrective action;*
- (2) *Government agents responsible for enforcing the statutory requirements possess actual knowledge of a statutory violation;*
- (3) *The agent failed to take corrective action; and*
- (4) *The plaintiff is within the class the statute intended to protect.*

See, *Halleran v. Nu West, Inc.*, 123 Wn.App. 701, 714, 98 P.3d 52 (2004).

See, also, *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987).

As discussed above, the plaintiff is clearly within the class intended to be protected by RCW 74.15.010. In addition, in the instant matter, DSHS had a mandatory duty pursuant to RCW 74.15.030 (2) to set the "adequate minimum standards" for in-home family daycare facilities, particularly with respect to its size, suitability and safety. In addition, it is the Secretary of DSHS's duty pursuant to RCW 74.15.030 (5) to issue, revoke and deny licenses to in-home family daycares

when necessary. RCW 74.15.030 (5) imposes a “duty” onto the Secretary of DSHS to deny and revoke licenses should requirements not be met, and the term “shall” is a word of command and indicates a mandatory obligation. See, *Singleton v. Frost*, 108 Wn.2d 723, 728, 742 P.2d 1224 (1987). In addition, pursuant to WAC 388-155-090 (1), the Department had the duty to deny a license application or to suspend or revoke a license if the minimum requirements of WAC 388-155 are not met. Of course, one of the requirements of WAC 388-155 is Subsection 295 (5). To the extent that RCW 74.15.130 uses the word “may” as previously noted, the State’s discretion is extremely limited. The agency itself interpreted the obligation to be mandatory by using the word “must” in WAC 388-155-090 (1). It can be readily said that the first element of the failure to enforce exception has been met.

With respect to the second element: “actual knowledge of statutory violation” - it is noted that actual knowledge can be inferred from circumstantial evidence. See, *Sloan v. Thompson*, 128 Wn.App. 776, 787, 115 P.3d 1009 (2005) (actual knowledge can be proved by circumstantial evidence, and actual knowledge of a condition does not necessarily mean actual knowledge that an injury will result); see, also, *Tabak v. State*, 73 Wn.App. 691, 696, 870 P.2d 1014 (1994). (Actual knowledge can be

proved by circumstantial evidence and the plaintiff may come forward with evidentiary facts from which a trier of fact can reasonably infer actual knowledge, even when knowledge is denied). The existence of a statutory violation and knowledge involve questions of fact. See, *King v. Hutson, supra*.

In this case, there is substantial evidence that the defendants had actual knowledge of the regulatory violation at issue. Defendant Cichowski was aware that she was inspecting a daycare located directly across the street from Lake Tapps, and that it was mandatory that the front door remain easily unlocked from the inside. In addition, Ms Cichowski was addressing fencing issues, and naturally would have been focusing on fencing requirements at or around the time she was conducting her inspection. Ms Cichowski, as well as Mr. Berdecia, were well-aware they were licensing a daycare called "Little Fish's" located near "Island Inlet" by a lake, on So. Island Drive, and the presence of Lake Tapps was open and obvious from the front door of the residence.

As such, it strains credulity that they did not have actual knowledge that there was a daycare located close to a water hazard and that 295 (5) required fencing between the daycare and the water hazard. The checklist forms that the licensors

were required to use literally forced them to consider the issue. With respect to the terms of Section 295 (5), it is noted that the legal maxim “every person is presumed to know the law,” should be provided added weight, when all of the individuals at issue were charged with the enforcement of the relevant regulations. See, generally, *City of Pasco v. Shaw*, 127 Wn.App. 417, 426, 110 P.3d 1200 (2005) citing to *Maynard Inv. Co. V. McCann*, 77 Wn.2d 616, 624, 465 P.2d 657 (1970).

In this case, there is a wealth of evidence from which a jury reasonably concluded that defendants Berdecia and Cichowski knowingly allowed a non-compliant daycare to be licensed and remain operating. In addition, defendant Quinlan, who is described as a regulatory expert by her peers, had to know the same. This is particularly so given the fact that Service Episode Records or, “SER’s,” specifically direct one’s attention to fencing issues, as well as the fact that there was an unsecured front door, which children were opening. See, also, *Livingston v. Everett*, 50 Wn.App. 655, 751 P.2d 1199 (1988); *Waite v. Whatcom County*, 54 Wn.App. 682, 775 P.2d 967 (1989) (application of the failure to enforce exception involves a question of fact, as does the issue of whether or not the defendants possessed actual knowledge of the statutory violation). There was and is clearly

substantial evidence supporting application of this exception.

**G. There Was a Special Relationship Between Gabriel Tobin and the Defendant State of Washington and Its Agency and Employees.**

The Public Duty Doctrine's exception, known as "the special relationship exception", applies in this case because Gabriel Tobin was in a licensed daycare under 74.15 et seq, which specifically provides that the paramount goal of the statute is to protect the safety and well-being of children in licensed homes. The home was licensed to provide daycare for children and minimum licensing standards were required for the granting of the license. When an agency takes responsibility for the activity of licensing care providers, they are responsible for caring for children, and a special relationship should be deemed to exist.

As previously discussed, under RCW 74.15, State unlicensed in-home family daycares are illegal within the State of Washington. It is the duty of the State to make the safety of the children the "paramount" consideration, and to impose minimum safety requirements. Under such circumstances, it should not be disputed that the defendants had an obligation to use reasonable care in engaging in their statutory duties. See, *Yonker v. DSHS*, *supra*. Further, as noted in the *Donohoe* opinion,

substantially relied on by defendants, a special relationship can arise under the Restatement 2<sup>nd</sup> of Torts, Section 315 (1965), which provides: there is no duty to control the conduct of third person and to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct; or (b) a special relation exists between the actor and the other which gives rise to the other a right of protection.

In this case, very clearly the State had a special relationship with Lisa Fish through its regulatory powers. It clearly had the ability to control Ms. Fish's operation of a daycare by either denying her license or conditioning her license in such a manner as to render her daycare facility safe. The relationship between Ms. Fish and the State becomes even more remarkable, once one considers that at the time of the re-inspection with Mr. Berdecia, she specifically requested help in addressing the issue of Gabriel trying to exit through the front door, which was directly accessible to Lake Tapps. The situation presented a "huge hazard", and it was part of defendant Berdecia's job duties to lend such advice and assistance.

Berdecia, under RCW 74.15, had a statutory duty to consult with Ms. Fish on safety issues.

Secondly, a special relationship existed between the State and Gabriel Tobin who, as discussed above, fell well within statutory coverages and purposes. By engaging in the licensing function, at a minimum the State had an obligation to ensure that Gabriel was placed in a daycare which was safe. See, generally, *Caulfield v. Kitsap County, supra*.

In addition, there is another form of special relationship that exists when there is (1) direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are express assurances given by a public official which (3) gives rise to justified reliance on the part of the plaintiff. See, generally, *Babcock v. Mason County Fire Dist. #6, supra*; *Cummins v. Lewis County*, 156 Wn.2d 844, 852, 133 P.3d 458 (2006).

In this case, Jennifer Tobin specifically recalled receiving the name of Little Fish's daycare from a State referral agency. The referral agency indicated that in fact Ms. Fish's daycare was State-licensed, and presumptively met the minimum requirements mandated by statute. In addition, upon arrival at Ms. Fish's daycare,

there were express assurances that the daycare was safe and conformed to minimum regulatory requirements based on the fact that Ms. Fish was duly licensed by the State of Washington. Naturally, Mrs. Tobin justifiably relied upon such assurances in her determination to select Ms. Fish as her daycare provider. She so testified at trial.

Here, one of the purposes of the statutory scheme is to provide parents with assurances that the daycare their child is in is safe, and meets minimum safety standards. See, RCW 74.15.010 (5). A single or isolated assurance can be sufficient to establish “privity.” See, *Babcock v. Mason County*, 144 Wn.2d 774, 788, 30 P.3d 1261 (2001). Governmental liability can be predicated on justifiable reliance upon assurance specifically sought and expressly given. *Id.* At 789. Whether reliance is “justified” involves a question of fact and depends on the particular circumstances. See, *Sundberg v. Evans*, 78 Wn.App 616, 897 P.2d 1285 (1995). An important factor is whether the government official who provides the false information has a duty to provide accurate information. See, *Smith v. State*, 125 Wn.App 259, 283-84, 144 P.3d 331 (2006), see generally, *McKinney v. State*, 134 Wn.2d 388, 950 P.2d 461 (1998).

In order to meet its collateral statutory purposes of promoting daycares, and providing parents assurances that their child can be placed in State-licensed and regulatory compliant safe daycares, the State of Washington operates a referral line for State-licensed daycare services. As indicated by Appendix "1" to Appellant's opening brief, at page 4, in the year 2007, in excess of 25,078 families received referral services through the State's referral service line. As such, the utilization of a referral service by DSHS with respect to daycares appears to be a core feature of the regulatory efforts, and as only State-licensed daycares are subject to such referrals, it provides that statutorily required assurances to parents that such facilities are safe and available.

The undisputed testimony provided at time of trial was that Jennifer Tobin very specifically wanted her child in a State-licensed, family home daycare. She not only discussed it with her husband, but also her friends, and indicated that it was extremely important to her that her childcare provider be State licensed. By calling the referral line, she was given specific assurances that the daycare providers within her local area were licensed and by logical extension, that they met minimum safety requirements.

It is suggested that under such circumstances, it was simply up to the jury to make a determination as to whether or not such assurances were “express” and whether or not Ms. Tobin was justified in her reliance on such assurances. It is unrebutted that she did rely on such assurances, and as a result of such reliance, placed her child in Ms. Fish’s regulatory non-compliant and unsafe daycare. Again, given the fact that the Defendants did not request specific instructions on this issue, the existence of such fact should be treated as a verity on appeal. Even if such facts are not treated accordingly, very clearly substantial evidence would support a jury’s determination that in fact the State of Washington was negligent and had such instructions been propounded to the jury, clearly there exists facts to meet the factual element of this exception to the public duty doctrine.

**H. Restatement (2<sup>nd</sup>) Torts, Sec. 323.**

The instant case also in part implicates the “voluntary rescue doctrine,” which is recognized in *Restatement (2<sup>nd</sup>) of Torts*, Sec. 323 (1965) (“There is no essential reason why the breach of a promise which has induced reliance and so caused harm should not be actionable in tort.”).

In the context of the “public duty doctrine,” the “rescue doctrine” was most recently discussed in the case of *Osborn v. Mason County*, 157 Wn.2d 18, 25-26, 134 P.3d 197 (2006). In its simplest formulation, the rescue doctrine provides:

*Under the rescue doctrine, a public entity has a “special” duty to “exercise reasonable care after assuming a duty to warn or come to the aid of a particular plaintiff.”* (Emphasis added).

*Bailey v. Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257, 753 P.2d 523 (1987).

*That “special” duty exists because a public entity’s assurance may induce reliance. “A person who voluntarily promises to perform a service for another in need has a duty to exercise reasonable care when the promise induces reliance and causes the promisee to refrain from seeking help elsewhere.” Folsom, 135 Wn.2d at 676, 958 P.2d 301, see, also, Couch, 113 Wn.App at 752, n. 66, 54 P.3d 197 (finding no duty under rescue doctrine without reliance). And see, Restatement (2<sup>nd</sup>) of Torts, Sec. 323 (1965) (“There is no essential reason why the breach of a promise which had induced reliance and so caused harm should not be actionable in tort.”). See, Board of Regents v. Roth, 408 US 564, 92 S.Ct 2701, 33 L.Ed 2d 548 (1972) (holding due process protects reasonable reliance on assurances of public entity). A person may reasonably rely on explicit or implicit assurances. “Even when an offer to seek to render aid is implicit and unspoken, a duty to make good on a promise has been found by most courts if reasonably relied upon.” Brown v. McPhersons, Inc., 86 Wn.2d 293, 301, 545 P.2d 13 (1975).*

The case of *Brown v. McPhersons, Inc, supra*, provides an example of the application of the principles set forth within *Restatement (2<sup>nd</sup>) of Torts*, Sec. 323. In

that case, parties who were injured by an avalanche sued the State contending that an avalanche expert had told State employees that the cabins located in a development project were in a high avalanche risk area. The State employees led the expert to believe that the state would deal with the matter and warn the residents in the area. As a result, the expert refrained from warning the residents of the danger, in reliance on the State employees' representation. Unfortunately, State employees failed to convey such information and as a result of such a failure to warn injury resulted.

In finding the existence of a duty, the Court noted that "one who undertakes, albeit gratuitously, to render aid or to warn a person in danger is required by our law to exercise reasonable care in his efforts, however commendable." Citing to, *Jay v. Walla Walla College*, 53 Wn.2d 590, 595, 335 P.2d 458 (1959); *French v. Chase*, 48 Wn.2d 825, 830, 297 P.2d 235 (1956).

If a "rescuer" fails to exercise such care and consequently increases the risk of harm to those he is trying to assist, he is liable for any physical damage he causes. (Citations omitted). *Brown v. McPhersons, Inc.*, 86 Wn.2d at 18.

In this case, the rescue doctrine is implicated in two instances. The first instance involves Mrs. Tobin's utilization of a State-sponsored, telephonic referral

source to aid her in placing her child within Little Fish's Daycare or generally, a State-licensed daycare. Implicit in such a referral is that the daycare facilities to which referrals are being made, comply with the minimum safety standards. As discussed in great detail, it is clear that Little Fish's Daycare did not comply with minimum State licensing requirements because it did not have a five foot high fence between its front door and Lake Tapps, in non-compliance with the clear provisions of WAC 388-155-295 (5).

In addition, assurances were also implicit in Lisa Fish's efforts to gather additional information from Victor Berdecia with respect to children trying to exit out of her unlocked front door. Such contact between Ms. Fish and Mr. Berdecia is memorialized in Ex. Nos. 21 and 26. The "SER" (Ex. 21), indicates that Ms. Fish inquired of Mr. Berdecia as to what, if anything, she could do to secure her front door. Ex. 26, which is part of Ms. Fish's rebuttal to the revocation of her license due to Gabriel's death, provides additional information indicating that she was speaking to Mr. Berdecia specifically about Gabriel Tobin when making such an inquiry. Mr. Berdecia's effort to advise her in that regard, no matter how gratuitous (it was statutorily mandated), was unreasonable in that he did not advise her that her

problems would be resolved had she complied with WAC 388-155-295 (5), which required a five foot high fence in her front yard. By failing to provide such advice, Mr. Berdecia unreasonably increased the risk of harm to those he was trying to assist, which naturally would include Gabriel Tobin, who was amongst the children under six years of age, who were in attendance at Little Fish's Daycare.

In sum, this case squarely fell within the number of exceptions to the public duty doctrine. All that is necessary for the Court to affirm the verdict in this case is to find that one of the above exceptions is applicable. By stipulation, this case was tried on what could be characterized as simple negligence instructions. As such, it is the law of this case, that all that was necessary for the Plaintiff to establish their claim was the existence of such negligence. Clearly, the evidence presented at time of trial was sufficient.

Throughout the Appellant's opening brief, there is a veiled, and sometimes direct, suggestion that Lisa Fish's actions were the sole proximate cause of Gabriel Tobin's death. Such an argument flies in the face of the evidence in this case, where it was all but an undisputed point that the entire purpose of fencing around daycares is the underlying assumption that a daycare provider cannot maintain constant

surveillance of the children at all time.<sup>15</sup> See, *Queen City Farm, Inc. v. Central National Insurance Company of Omaha*, 126 Wn.2d 50, 98, 882 P.2d 703 (1994) (instructions given by a trial court to a jury is treated as the proper applicable law if not objected to). See also *Lutheran Daycare v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992). The law of this case is that the defendants in this matter can be held accountable for their ordinary negligence. Even if it is not, as a matter of law it should be found that Plaintiff met the burden of establishing breach of duty and proximate cause, and damages.

**I. The Trial Court Did Not Abuse its Discretion in Permitting Evidence Regarding the Post Death Investigation Conducted by Dshs Following the Death of Gabriel Tobin.**

As correctly pointed out by the appellants, after Gabriel Tobin's death, DSHS

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<sup>15</sup> See *Baughn v. Honda Motor Co.*, LTD 107 Wn.2d 127, 142, 727 P.2d 655 (1986)(Unless the undisputed facts do not permit a reasonable difference of opinion, proximate cause is a question of fact for the jury to decide). In this case there is a direct causal link between the absence of fencing and the death of Gabriel Tobin and clearly a reasonable jury could conclude "but for" the absence of fencing, Gabriel Tobin would still be alive today. In viewing the defendants' proposed jury instructions in this case, it is clear that they do not propose a superceding cause instruction (WPI 15.05). Arguments in passing not fully supported by citation to authority should be disregarded. See, *Smith v. King*, 106 Wn.2d 443, 451-52, 772 P.2d 796 (1989); *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990).

conducted an investigation into Lisa Fish's daycare and the facts and circumstances surrounding Gabriel Tobin's death. Defendant Quinlan and defendant Berdicia played a substantial role in the investigative committees involved, and clearly such an investigation was relevant to any negligence on the part of Lisa Fish and how such negligence could be allocated amongst the named defendants in this case including the State of Washington and its employees.

Naturally, for allocation purposes, the Plaintiffs are entitled to point out the substantial flaws in the investigative process given the fact that the entire focus of the investigation was the action of Lisa Fish and not the substantial negligence of the State employees who were part of the investigative committee. Here, the government never investigated its own misconduct, but nevertheless exonerated DSHS. (Ex. 42).

During the course of the review process (which included state employees outside of DSHS' licensing establishment) the final product was a report which denied the very existence of WAC 388-155-295 (5). (Ex. 42-34). The existence of such a report and the defendants' prior efforts to misinterpret and mischaracterized the terms of this WAC went directly to the credibility of the defendants' case and was

highly relevant on such issue. This is particularly so given the fact that early on in this matter, supervisor Quinlan candidly told Jennifer Tobin that Berdecia was misinterpreting the WAC and it could apply to off premise water hazard. (RP 1746-47). The State's own documentation provided a number of examples where water hazards in front yard areas and off premises were being mitigated. As discussed above, the Defendants' contention on how the WAC should be interpreted was throughout trial and pre-trial proceedings a moving target. At one point they were indicating it only applied to water hazards within or near play areas. When it was established that was not a viable interpretation, it was interpreted to mean only "adjacent" water hazards, and when that was proved false, it has come down to the characterization now set forth within the State's rather disingenuous opening brief as being whether or not one can "require front yards" to be fenced.

Thus, clearly the evidence was relevant as it related to Ms. Fish's fault and how fault should be apportioned amongst all the Defendants. The information is also relevant because it went directly to the credibility of the Defendants' contention. To state it another way, if in an official report relating to this death, the State denied the existence of the existing water safety regulation, how can we now believe any of their

assertions with respect as to how such a regulation should be interpreted? By its verdict, clearly the jury stated its disbelief.

To the extent that the Defendants are contending that this information was improperly utilized during the course of closing argument, in a manner to incite the passion and prejudice of the jury, the defendants at time of trial had the obligation to object to such argument, seek to have it stricken and ask for a curative instruction.<sup>16</sup>

As it is, an attorney in closing is fully entitled to argue reasonable inferences from the evidence. See, *Hanson v. Friend*, 118 Wn.2d 476, 483, 824 P.2d 483 (1992).

Further, to the extent that it constitutes error to allow Jennifer Tobin to testify how she was impacted by the State's failure to investigate its own obvious negligence, given the overwhelming evidence of the damage she suffered as a bi-

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<sup>16</sup> It is long been recognized that unless misconduct of opposing counsel is so flagrant, persistent and ill intentioned, its wrong so obvious and evil, results so certain that an instruction disregard cannot neutralize its effect, any objection to such misconduct is waived by failure to object at the time and request a curative instruction. See, *Nelson v. Martinson*, 52 Wn.2d 684, 689, 328 P.2d 703 (1958). Here the defendant did not object during the course of closing argument to the referenced statements and as such, any arguments in that regard have been waived. It was the State's obligation to request a limiting instruction. See, *State v. Ellard*, 46 Wn.App. 242, 730 P.2d 109 (1986) (the trial court will not be reversed for failing to give a limine instruction sua sponte).

product of the death of her son and other overwhelming evidence of the defendants' negligence in this case, any error in that regard [if it occurred] was simply harmless. See *Hoskins v. Reich, supra*, (improper admission of evidence is harmless error if the evidence is cumulative or only minor in significance, in reference to the evidence of the whole).

In addition it is noted that the evidence was highly relevant to the State's negligent supervision of its employees. In this case, Plaintiff pled a claim of negligent supervision which was ultimately dismissed by the trial court, not based on factual insufficiency, but due to the fact that it would be "redundant" with Plaintiff's general claims of negligence. See, *Gilliam v. DSHS*, 89 Wn.App. 569, 584-85, 950 P.2d 20 (1998) (Claim of negligent supervision can be dismissed as "redundant" when there is no issue regarding scope of employment and when under *respondeat superior* principals the employers would be liable for the negligence of its employees).<sup>17</sup>

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<sup>17</sup>There is no case law indicating that when a claim of negligent supervision is dismissed based on such principles or based on "redundancy" that such a ruling necessarily would preclude introduction of evidence relevant negligent supervision.

In this case, the jury found supervisor Quinlan 20% accountable for the death of Gabriel Tobin. The evidence established supervisor Quinlan was not only herself negligent in failing to recognize the substantial errors within her subordinates work (using outdated forms, not properly filling out the relevant home studies and the like). It is suggested that the evidence regarding the “CFR” process was again relevant with her failure to examine the actions of her employees and serve the bolster of Plaintiff’s contention that supervisor Quinlan and the State in its capacity as an employer was negligent.<sup>18</sup>

It sum, the evidence was relevant for a number of purposes. If the defendants sought to seek limitation on such evidence, it should have requested a limiting instruction, but did not do so. Further, even if it can be found that the evidence

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<sup>18</sup>It was also noted that a Community Death Review was conducted. The results of such a community death review are not subject to discovery under the terms by statute. It is telling that when discussing this issue with members of the community, including a local fire chief and a member of the State Department of Health, it is probable that the involved State employees misled this review panel into believing that there was no existing regulation requiring fencing between daycares and water hazards.

Contrary to the Appellants’ self-serving assertions, a reasonable jury could have concluded that there was “a cover up” given the fact that relevant content of Ex. 42 quoted above is absolutely untrue.

should not have been admitted, the admission of such evidence, given the evidence as a whole in this case, was simply harmless.<sup>19</sup>

**J. It Was Not Error for the Court to Allow Evidence Regarding the Modification of the Water Safety Wac Shortly after the Death of Gabriel Tobin.**

In this case, the State of Washington, following the death of Gabriel Tobin in July 2004, adopted a new water safety WAC in August 2004, which is set forth verbatim at page 48 footnote 26 of Appellants' brief. The new water safety WAC is unclear and ambiguous. Obviously, one cannot place a locked gate around a pool of water, if that pool of water is a large lake. Given the timing between the death of Gabriel Tobin and the re-writing of WAC 388-155-295(5), it was temporally suspect. See, *Wilmont v. Kaiser Aluminum*, 118 Wn.2d 46, 70-72, 821 P.2d 118 (1991) (temporal relationship may provide circumstantial evidence of a cause and effect relationship).

Further, it was important for the jury to know about the change in the WAC to the extent that, even following the change, the evidence established that DSHS continued to regulate daycare premises for water hazards including small water

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features in “front yards” and hazards that were off the premises. (Ex. 60-62; 77-84).

Again, such evidence was relevant and went directly to the core credibility of defendants’ basic contention in this case that they did not violate the subject regulation. As the jury notes in this case indicated, if the State intended regulation to be as interpreted as the defendants contended, why did it not say so? (RP 878-79) (Appendix No. 13). Further, if they do not intend the regulation to mean what it said to begin with, why did they not change the regulation to provide a more clear definition of exactly what they intended, as opposed to making it substantially more ambiguous and superficially absurd?

Again, even if the Court could conclude that the admission of this evidence was erroneous, taken the evidence at the time of trial as a whole, clearly the admission of such evidence did not have an impact upon the outcome of this case, and its admission would be harmless error, if at all. Again to the extent that the defendants’ desire to complain about how such evidence was used by their opposing counsel, they had an obligation to seek a limiting instruction and to the extent that they are contending such evidence resulted in an improper appeal to the passion and

prejudice of the jury, the defendants had an obligation to object to such argument and to seek a curative instruction as necessary.

Finally, counsel for the defense repeatedly disavowed that the amendment to the WAC was in any way causally related to the death of Gabriel Tobin. It was their contention that it was just a part of the normal process of an overall WAC revision. The jury had the option of believing this contention or not. Having taken such position, the defendants are judicially estopped from asserting to the contrary. See, *King v. Clodfelter*, 110 Wn.App. 514, 518, P.2d 206 (1974)(the doctrine of judicial estoppel precludes a party from taking inconsistent factual positions in litigation). In this case the State simply cannot have it both ways. Either there is a causal relationship between the revision of the regulation and the death of Gabriel Tobin (thus admitting that it was remedial), or denying that there is any cause and effect relationship between the two (thus unremedial).

Also, ER 407, by its terms, does not require the exclusion of evidence of remedial measures when offered for another purpose, such as ownership, control, or feasibility of precautionary measures, if controverted or for impeachment. See, *Brown v. Quick Mix Co.*, 75 Wn.2d 833, 839, 454 P.2d 205 (2002). In this case, the

“other purpose” for the admission of such evidence was to establish that both before and after the event DSHS continued to regulate water hazards in or around daycares. In August 2004, for example, a daycare was required to have a 5' high fence around its facility because it had a slough across the street. Front yard features were also being regulated, such as small ornamental ponds. Again such information went directly to the credibility of the defendants constantly changing contentions with regard with how its regulations should be interpreted.

**K. The Trial Court Did Not Abuse its Discretion Rejecting Appellate’s Proposed Jury Instruction Number 19 Which Is Not a Correct Nor A Complete Statement of the Law.**

The jury was properly instructed pursuant to the guidance provided by WPI 60.01, and its note of use and comment, with regard to the specific statutes and regulations which were at issue in this case. In addition, within the Court’s Instruction Number 20, the jury was instructed in accordance with WPI 60.03 that the violation, if any, of a statute or administrative rule is simply evidence in determining negligence. Such instruction was consistent with the dictates of RCW 5.40.050. (See, Appendix No. 15).

Clearly, the Plaintiffs contend throughout that statutes and regulations were violated by the actions of the defendants, and such breaches of statutory duty should be considered by the jury as evidence of negligence. It is well recognized, that instructions which are supported by the evidence, and which merely state the applicable law, are not comments on the evidence. See, *Christensen v. Mussen*, 123 Wn.2d 234, 243, 867 P.2d 626 (1994). A trial court should only submit instructions to the jury when there is substantial evidence to supported a claim. *Id.* See also *Adam v. State*, 71 Wn.2d 414, 427, 429 P.2d 109 (1967).<sup>20</sup>

Generally, jury instructions are sufficient if they allow party to argue their theory of the case, do not mislead the jury, and when taken as a whole properly inform the jury the laws to be applied. See, *Joyce v. State*, 155 Wn.2d 306, 323, 119

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<sup>20</sup>In this case at page 50, the Appellants complain that it was error to highlight a single piece of evidence on the issue of negligence by taking one subsection on the regulation “out of context of the entire regulation related to water hazard on or adjacent to daycare property”. First, it is noted that the regulation does not say on or adjacent to daycare property, the defendants never proposed an instruction with respect to the “entire regulation” nor instructions on the entire regulatory scheme. In addition, such regulations unlikely would have been supported by substantial evidence given the fact that it was only contended that the specific statutes and regulations referenced in the instructions were the predicate for negligence in this action. (Appendix No. 15).

P.3d 825 (2005). In other words, the trial court has considerable discretion regarding the wording of instructions and how many instructions are necessary to present each litigants' theory fairly, and in appellate court review these instructions for abuse of discretion. See, *Joyce v. State*, 116 Wn.App. 569, 75 P.3d 548 (2003) affirmative in part, reversed in part 155 Wn.2d 306, 119 P.3d 825 (2005). It is not error to refuse to give an instruction which contains a mis-statement of the law or instructions which are unnecessary or redundant. See *Haven v. C & D Plastics, Inc.*, 124 Wn.2d 158, 876 P.2d 1235 (1994).

It is error to give an instruction which generates extreme emphasis in favor of one party. See, *Young by Young v. Carter*, 38 Wn.App. 147, 684 P.2 784 (1984). In addition a trial court's rejection of an instruction is harmless error if the appellate court considers the outcome of the case would not have been different if the instruction were given. See, *Peterson 's Fryer Farms, Inc. v. Transamerican Insurance Co.*, 83 Wn.App. 432, 922 P.2d 126 (1996). A trial court's rejection of a proposed instruction is reviewed for abuse of discretion. See, *State v. Hall*, 104 Wn.App. 56, 60, 14 P.3d 884 (2000).

The party proposing the instruction has the obligation to provide the court with an appropriate instruction which correctly states the law. See, *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 135, 606 P.2d 1214 (1980). Instructions must not be “misleading”. See *State v. Mark*, 94 Wn.2d 520, 618 P.2d 73 (1980).

In the instant matter, nowhere in the Appellants’ brief do they cite to any authorities to the proposition that when a jury is instructed pursuant to WPI 60.03 with respect to various statutory and/or regulatory duties which “may be evidence of negligence, that the trial court is also obligated to provide the jury with an instruction on the legal rules applicable to statutory interpretation. It is suggested that the reason why no such authority can be found is because such a proposition is preposterous, because as shown above, there are a substantial number of rules of statutory construction and interpretation that are applicable when a court is considering how to interpret a statute.

Further, the jury instruction proposed by the defendants clearly is incomplete because it failed to inform the jury of the above-referenced rules for statutory interpretation, which are all designed to aid the Court in gleaning the intent of a statute. Clearly, the purpose of the subject statutory scheme is among other things,

child safety and the defendants' proposed jury instruction number 19 makes no reference to the primary statutory purposes.

Further, the defense jury instruction as to what it states, is misleading and extremely argumentative. It clearly over-emphasizes the defendants' theory of the case and would be tantamount to a directed verdict as to how the subject regulation should be interpreted. It also misstates the law in that an agency's interpretation of its regulation is only accorded deference if the statute and/or regulation is ambiguous. Further, ultimately the agency's interpretations is not binding on the court (nor presumably a jury to the extent that instructing the jury on such issues could ever be deemed appropriate) who are free to independently interpret the regulation as it deems appropriate. See generally, *Bostian v. Food Express, Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846 (2007). See also, *Dot Foods, Inc. v. DOR*, 141 Wn.App. 874, 175 P.3d 309 (2007).

In this case, there was no definitive proof presented at time of trial, or at any juncture, which definitely indicated the agency's position regarding the subject water safety regulation. The regulation is unambiguous and speaks for itself, and when the jury examined the method and manner in which it was applied in the field, clearly it

was applied in a manner contrary to the self-serving testimony of the mid-level managers who testified at the time of trial. There is no policy manual nor other authoritative document used by the agency which informs the public or staff how the regulations should be interpreted nor are there any high level directive in that regard. Further, within the DSHS system there is an ability to get any definitive clarification of regulations which was not utilized with respect to the relevant water safety regulation. (See, Ex. 13). Thus, it is suggestive that the beginning of the subject instruction in and of itself was not supported by substantial evidence.

Further, even if the giving of such an instruction ever could be considered appropriate, it is suggested that in this case, the failure to give such an instruction in this case, had no impact on its outcome. As is evident when reviewing defense counsel's closing arguments, he was still capable of arguing as to how the regulation should be interpreted and in fact, dedicated a large portion of argument to such a proposition. (RP 1937-1966). Apparently the jury found such argument (for obvious reasons) to be unpersuasive.

Clearly the trial court did not abuse its discretion in failing to give such an unprecedented, argumentative and self-serving instruction which did not accurately state the law and which was not supported by substantial evidence.

## VII. CONCLUSION

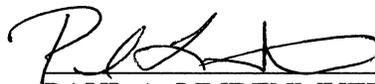
In this case, the State breached its fundamental duty to protect our children. These Defendants violated their statutory and regulatory duties to ensure that daycares within the State of Washington are safe. The Trial Court correctly determined that it was the intent of our Legislature to place an enforceable duty upon DSHS, its supervisors, and employees to ensure that minimum safety standards are complied with.

In this case, the overwhelming evidence established that this solemn duty to protect our children was breached by the negligence of these Defendants. The jury's decision in this case was supported by substantial evidence and should not be disturbed on appeal. The Defendants in this case received a fair trial, and were provided by the Trial Court a full and fair opportunity to state their position. It was the jury's prerogative to reject such a position, which in many instances simply

strained credulity. Given the overwhelming evidence of negligence in this case, if any error occurred, it was clearly harmless.

For the reasons stated above, and by the jury in its verdict, the Judgment in this matter should be affirmed.

RESPECTFULLY SUBMITTED this 7 day of October, 2009.



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PAUL A. LINDENMUTH, WSBA#15817  
Attorney for Respondents

# Appendix 1



# Appendix 2

5 at than just does it look safe, is it clean, you can  
6 have a more active role, and I didn't ever know that  
7 these WACs existed before.

8 Q Have you thought about how you might make that better?

9 A Oh, I mean, there's so many things you can do. You can  
10 set up, you know, a website, you can set up hotlines,  
11 phone numbers, resources for parents to learn more  
12 about what these WACs are so they have more control to  
13 know that there is these study groups or groups that  
14 they can take part in, and from what we've heard, to  
15 help write these WACs or be part of, you know, these  
16 WACs.

17 I don't think parents are told any of this,  
18 for the most part, the resources aren't there and I  
19 think they should be there. I don't think any parent  
20 should have to go through what we've gone through. And  
21 so if I can help a parent not have to live through what  
22 we've lived through, that's what I want to do.

23 Q Do you recall being asked during the course of the  
24 exchange of written discovery, answering a question  
25 called an interrogatory as to how Gabriel's passing has

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1 Jennifer Tobin/By Mr. Barcus (Direct)  
affected you?

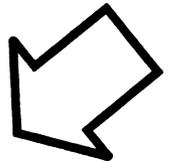
2 A Yes.

3 Q And is this answer to Interrogatory Number 9 what you  
4 wrote?

5 A Yes.

6 Q Can you read that to the jury, please?

7 A The senseless and preventable loss of our son Gabriel  
8 Michael Tobin has caused my husband and me  
9 indescribable emotional distress and heartache. The  
10 grieving process will never end, and the gaping hole in  
Page 115



11 our hearts and lives is irreparable. This empty,  
12 agonizing hole replaces our hopes and dreams of the  
13 person that our son would grow to become. It cheats us  
14 of all the milestones and precious tiny moments we  
15 should have experienced in Gabriel's life. It deprives  
16 us of the innumerable hugs and kisses we should have  
17 received as our precious boy grew into a man. It robs  
18 us of the satisfaction and joy of seeing our son raise  
19 a family of his own.

20 The distress we continue to suffer is an  
21 exhausting strain on our marriage as we each grieve for  
22 our son in different ways. It is unnatural to bury  
23 one's child, and we struggle daily with the reality of  
24 our situation. We continuously grapple with emotions  
25 of could have, would have, and should have, each time

1758

Jennifer Tobin/By Mr. Barcus (Direct)  
1 ending with infuriating frustration at what transpired,  
2 and our complete and utter lack of control of the  
3 outcome.

4 Our other children have been irreparably  
5 harmed too, not only in the sense that they have been  
6 deprived of a brother, but also in the manner of our  
7 interactions with them. We are not the same people  
8 that we have -- that we were even one day before  
9 Gabriel was ripped away from us. We will never again  
10 be those happy, fun-loving parents that we were to  
11 Gabriel. Our every word, action, and event is  
12 tarnished with the sorrow of our little boy who should  
13 have been there to hear, see, or experience it. Fear  
14 of future and further tragedy lurks around us on every  
15 corner like an unwelcomed shadow.

16 we continue living and raising our remaining  
17 children with the heavy hearts of people that know the  
18 ultimate heartache and sorrow of burying their own  
19 child. To be forced to live with the consequences is  
20 irresponsibility beyond our control. It was a cruel  
21 twist of fate that we are now forever burdened with.  
22 We ask ourselves when this will get easier, when it  
23 will stop hurting. The answer is never.

24 Q At Gabriel's service, was there a video put together?

25 A Yes.

1759

1 Q Jennifer Tobin/By Mr. Barcus (Direct)  
And it goes through his life?

2 A Pictures.

3 Q Does that illustrate Gabriel's life from sonogram all  
4 the way up?

5 A Yes, it does.

6 MR. BARCUS: If we could play that, please.

7 (CD being played)

8 (Pause in Proceedings)

9 MR. BARCUS: Can we have five minutes, Your  
10 Honor?

11 THE COURT: Brief recess?

12 MR. BARCUS: Yes.

13 THE COURT: Members of the jury, we're going  
14 to take a brief recess, about five minutes. See you  
15 back in five minutes. Thank you.

16 (Jury leaves the  
17 Courtroom)

18 THE COURT: So, ready for the jury?

19 MR. BARCUS: We are.

20 (Jury enters the  
21 Courtroom)

# Appendix 3

# Minimum Licensing Requirements

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**For Family Child Day Care Homes**

DSHS 22-008(X) (Rev. 5/03)

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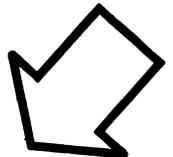
- 8) The licensee must use an appropriate method for drawing clean mop water and disposing waste water.
- 9) Firearms, ammunition, and other weapons must be kept in secure, locked storage, at all times when not in use. They must be accessible only to authorized persons. Secure locked storage means a locked storage container, gun cabinet, gun safe, or other storage area made of strong, unbreakable material. If the cabinet has a glass or other breakable front, then the guns need to be secured with a cable or chain placed through the trigger guards securing the guns in the storage unit.
- 10) The licensee must ensure a person with current first aid and infant-child CPR training is on the premises at all times.
- 11) The licensee must store separate from food products and make inaccessible to children cleaning supplies, toxic substances, paint, poisons, aerosol containers, and items bearing warning labels indicating a product is hazardous, if a person is exposed to, or consumes the product.
- 12) The licensee must label a container filled from a stock supply to identify contents.
- 13) The licensee must ensure that any animal or pet on the premises has not demonstrated aggressive behavior. If a pet or animal has demonstrated aggressive behavior, it must be inaccessible to children in care at all times.
- 14) The use of wheeled baby walkers is prohibited.
- 15) The use of trampolines, including rebounders, is prohibited.

#### **WAC 388-155-290 WATER SUPPLY, SEWAGE, AND LIQUID WASTES**

- 1) The licensee must obtain water from:
  - (a) A public water supply that is regulated by Washington state department of health drinking water operations or the local health authority, as appropriate;
  - (b) An individual water supply operated and maintained in a manner acceptable to the local health authority; or
  - (c) Commercially bottled water in cases where (a) or (b) of this subsection are unsatisfactory.
- 2) The licensee must ensure sewage and liquid wastes are discharged into:
  - (a) A public sewer system; or
  - (b) An independent sewage system maintained so as not to create a public health nuisance as determined by the local health authority.

#### **WAC 388-155-295 WATER SAFETY**

- 1) The licensee must maintain the following water safety precautions when the child uses an on-premises swimming pool or wading pool. The licensee must ensure:
  - (a) The on-premises pool is inaccessible to the child when not in use; and
  - (b) An adult with current CPR training supervises the child at all times.
- 2) The licensee must ensure a certified lifeguard is present during the child's use of an off-premises



swimming pool.

- 3) The licensee must empty and clean a portable wading pool daily, when in use.
- 4) An adequate, department-approved cover or barrier, installed at the manufacturer's specification must be in place to prevent the child access at all times to heated tubs, whirlpools, spas, tanks, or similar equipment.
- 5) A five foot high fence with gates, locked when not in use, is required to prevent access to water hazards, such as swimming pools, lakes, streams, or natural or artificial pools.

#### **WAC 388-155-310 FIRST- AID SUPPLIES**

- 1) The licensee must maintain first-aid supplies on the premises conforming with the home's first-aid policies and procedures.
- 2) The home's first-aid supplies must include unexpired syrup of ipecac which may be administered only on the advice of a poison control center.

#### **WAC 388-155-320 OUTDOOR PLAY AREA**

- 1) The licensee must provide a safe and securely-fenced or department-approved, enclosed outdoor play area:
  - (a) Adjoining directly the indoor premises; or
  - (b) Reachable by a safe route and method; and
  - (c) Promoting the child's active play, physical development, and coordination; and
  - (d) Protecting the child from unsupervised exit with an enclosure at least forty-eight inches high; and
  - (e) Preventing child access to roadways and other dangers.
- 2) The licensee must ensure the home's activity schedule affords the child sufficient daily time to participate actively in outdoor play.
- 3) The licensee must provide a variety of age appropriate play equipment for climbing, pulling, pushing, riding, and balancing activities. The licensee must arrange, design, construct, and maintain equipment and ground cover to prevent the child's injury. The licensee's quantity of outdoor play equipment must offer the child a range of outdoor play options.
- 4) Preschool children and younger must be in visual and auditory range when outside.
- 5) School-age children must be in auditory range when outside.

#### **WAC 388-155-330 INDOOR PLAY AREA**

- 1) The home's indoor premises must contain adequate space for child play and sufficient space to house developmentally appropriate activities for the number and age range of children served. The licensee shall provide a minimum of thirty-five square feet of usable floor space per child, exclusive of a bathroom,

## **Chapter 74.15 RCW**

# **Care of children, expectant mothers, developmentally disabled**

### Chapter Listing

### **RCW Sections**

- 74.15.010 Declaration of purpose.
- 74.15.020 Definitions.
- 74.15.030 Powers and duties of secretary.
- 74.15.035 Negotiated rule making--Family child care licensees--Intent.
- 74.15.040 Licenses for foster-family homes required -- Inspections.
- 74.15.050 Fire protection -- Powers and duties of chief of the Washington state patrol.
- 74.15.060 Health protection -- Powers and duties of secretary of health.
- 74.15.070 Articles of incorporation and amendments -- Copies to be furnished to department.
- 74.15.080 Access to agencies, records.
- 74.15.090 Licenses required for agencies.
- 74.15.100 License application, issuance, duration -- Reclassification.
- 74.15.110 Renewal of licenses.
- 74.15.120 Initial licenses.
- 74.15.125 Probationary licenses.
- 74.15.130 Licenses -- Denial, suspension, revocation, modification -- Procedures -- Adjudicative proceedings -- Penalties.
- 74.15.132 Adjudicative proceedings -- Training for administrative law judges.
- 74.15.134 License or certificate suspension -- Noncompliance with support order -- Reissuance.
- 74.15.140 Action against licensed or unlicensed agencies authorized.
- 74.15.150 Penalty for operating without license.
- 74.15.160 Continuation of existing licensing rules.
- 74.15.170 Agencies, homes conducted by religious organizations -- Application of chapter.
- 74.15.180 Designating home or facility as semi-secure facility.
- 74.15.190 Authority of Indian tribes to license agencies within reservations -- Placement of children.
- 74.15.200 Child abuse and neglect prevention training to parents and day care providers.
- 74.15.210 Community facility -- Service provider must report juvenile infractions or violations -- Violations by service provider -- Secretary's duties -- Rules.
- 74.15.220 HOPE centers -- Establishment -- Requirements.
- 74.15.230 Responsible living skills programs -- Established--Requirements.
- 74.15.240 Responsible living skills program -- Eligibility.
- 74.15.250 HOPE centers -- Responsible living skills programs -- Licensing authority -- Rules.
- 74.15.260 HOPE centers -- Responsible living skills programs -- Grant proposals -- Technical assistance.
- 74.15.270 HOPE centers -- Responsible living skills programs -- Awarding of contracts.
- 74.15.280 Emergency respite centers -- Licensing -- Rules.
- 74.15.300 Enforcement action -- Definition.
- 74.15.900 Short title -- Purpose -- Entitlement not granted -- 1999 c 267 §§ 10-26.
- 74.15.901 Federal waivers -- 1999 c 267 §§ 10-26.

**Notes:**

Adoption: Chapter 26.33 RCW.

Age of majority: Chapter 26.28 RCW.

Birthing centers: Chapter 18.46 RCW.

Child abuse: Chapter 26.44 RCW.

Immunization program, applicability to day care centers: RCW 28A.210.060 through 28A.210.170.

Liability insurance for foster parents: RCW 74.14B.080.

Liability of foster parents: RCW 4.24.590.

Out-of-home placement -- Court action upon filing of child in need of services petition -- Child placement: RCW 13.32A.160.

Uniform Parentage Act: Chapter 26.26 RCW.

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**74.15.010****Declaration of purpose.**

The purpose of chapter 74.15 RCW and RCW 74.13.031 is:

(1) To safeguard the health, safety, and well-being of children, expectant mothers and developmentally disabled persons receiving care away from their own homes, which is paramount over the right of any person to provide care;

(2) To strengthen and encourage family unity and to sustain parental rights and responsibilities to the end that foster care is provided only when a child's family, through the use of all available resources, is unable to provide necessary care;

(3) To promote the development of a sufficient number and variety of adequate child-care and maternity-care facilities, both public and private, through the cooperative efforts of public and voluntary agencies and related groups;

(4) To provide consultation to agencies caring for children, expectant mothers or developmentally disabled persons in order to help them to improve their methods of and facilities for care;

(5) To license agencies as defined in RCW 74.15.020 and to assure the users of such agencies, their parents, the community at large and the agencies themselves that adequate minimum standards are maintained by all agencies caring for children, expectant mothers and developmentally disabled persons.

[1995 c 302 § 2; 1983 c 3 § 192; 1977 ex.s. c 80 § 70; 1967 c 172 § 1.]

**Notes:**

**Intent -- 1995 c 302:** "The legislature declares that the state of Washington has a compelling interest in protecting and promoting the health, welfare, and safety of children, including those who receive care away from their own homes. The legislature further declares that no person or agency has a right to be licensed under this chapter to provide care for children. The health, safety, and well-being of children must be the paramount concern in determining whether to issue a license to an applicant, whether to suspend or revoke a license, and whether to take other licensing action. The legislature intends, through the provisions of this act, to provide the department of social and health services with additional enforcement authority to carry out the purpose and provisions of this act. Furthermore, administrative law judges should receive specialized training so that they have the specialized expertise required to appropriately review licensing decisions of the department.

Children placed in foster care are particularly vulnerable and have a special need for placement in an environment that is stable, safe, and nurturing. For this reason, foster homes should be held to a high standard of care, and department decisions regarding denial, suspension, or revocation of foster care licenses should be upheld on review if there are reasonable grounds for such action." [1995 c 302 § 1.]

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

**Severability -- 1967 c 172:** "If any provision of this 1967 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1967 c 172 § 24.]

#### 74.15.020 Definitions.

#### \*\*\* CHANGE IN 2007 \*\*\* (SEE 1377.SL) \*\*\*

For the purpose of this chapter and RCW 74.13.031, and unless otherwise clearly indicated by the context thereof, the following terms shall mean:

(1) "Agency" means any person, firm, partnership, association, corporation, or facility which receives children, expectant mothers, or persons with developmental disabilities for control, care, or maintenance outside their own homes, or which places, arranges the placement of, or assists in the placement of children, expectant mothers, or persons with developmental disabilities for foster care or placement of children for adoption, and shall include the following irrespective of whether there is compensation to the agency or to the children, expectant mothers or persons with developmental disabilities for services rendered:

(a) "Child-placing agency" means an agency which places a child or children for temporary care, continued care, or for adoption;

(b) "Community facility" means a group care facility operated for the care of juveniles committed to the department under RCW 13.40.185. A county detention facility that houses juveniles committed to the department under RCW 13.40.185 pursuant to a contract with the department is not a community facility;

(c) "Crisis residential center" means an agency which is a temporary protective residential facility operated to perform the duties specified in chapter 13.32A RCW, in the manner provided in RCW 74.13.032 through 74.13.036;

(d) "Emergency respite center" is an agency that may be commonly known as a crisis nursery, that provides emergency and crisis care for up to seventy-two hours to children who have been admitted by their parents or guardians to prevent abuse or neglect. Emergency respite centers may operate for up to twenty-four hours a day, and for up to seven days a week. Emergency respite centers may provide care for children ages birth through seventeen, and for persons eighteen through twenty with developmental disabilities who are admitted with a sibling or siblings through age seventeen. Emergency respite centers may not substitute for crisis residential centers or HOPE centers, or any other services defined under this section, and may not substitute for services which are required under chapter 13.32A or 13.34 RCW;

(e) "Foster-family home" means an agency which regularly provides care on a twenty-four hour basis to one or more children, expectant mothers, or persons with developmental disabilities in the family abode of the person or persons under whose direct care and supervision the child, expectant mother, or person with a developmental disability is placed;

(f) "Group-care facility" means an agency, other than a foster-family home, which is maintained and operated for the

care of a group of children on a twenty-four hour basis;

(g) "HOPE center" means an agency licensed by the secretary to provide temporary residential placement and other services to street youth. A street youth may remain in a HOPE center for thirty days while services are arranged and permanent placement is coordinated. No street youth may stay longer than thirty days unless approved by the department and any additional days approved by the department must be based on the unavailability of a long-term placement option. A street youth whose parent wants him or her returned to home may remain in a HOPE center until his or her parent arranges return of the youth, not longer. All other street youth must have court approval under chapter 13.34 or 13.32A RCW to remain in a HOPE center up to thirty days;

(h) "Maternity service" means an agency which provides or arranges for care or services to expectant mothers, before or during confinement, or which provides care as needed to mothers and their infants after confinement;

(i) "Responsible living skills program" means an agency licensed by the secretary that provides residential and transitional living services to persons ages sixteen to eighteen who are dependent under chapter 13.34 RCW and who have been unable to live in his or her legally authorized residence and, as a result, the minor lived outdoors or in another unsafe location not intended for occupancy by the minor. Dependent minors ages fourteen and fifteen may be eligible if no other placement alternative is available and the department approves the placement;

(j) "Service provider" means the entity that operates a community facility.

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

(a) Persons related to the child, expectant mother, or person with developmental disability in the following ways:

(i) Any blood relative, including those of half-blood, and including first cousins, nephews or nieces, and persons of preceding generations as denoted by prefixes of grand, great, or great-great;

(ii) Stepfather, stepmother, stepbrother, and stepsister;

(iii) A person who legally adopts a child or the child's parent as well as the natural and other legally adopted children of such persons, and other relatives of the adoptive parents in accordance with state law;

(iv) Spouses of any persons named in (i), (ii), or (iii) of this subsection (2)(a), even after the marriage is terminated; or

(v) Extended family members, as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent who provides care in the family abode on a twenty-four-hour basis to an Indian child as defined in 25 U.S.C. Sec. 1903(4);

(b) Persons who are legal guardians of the child, expectant mother, or persons with developmental disabilities;

(c) Persons who care for a neighbor's or friend's child or children, with or without compensation, where the parent and person providing care on a twenty-four-hour basis have agreed to the placement in writing and the state is not providing any payment for the care;

(d) A person, partnership, corporation, or other entity that provides placement or similar services to exchange students or international student exchange visitors or persons who have the care of an exchange student in their home;

(e) A person, partnership, corporation, or other entity that provides placement or similar services to international children who have entered the country by obtaining visas that meet the criteria for medical care as established by the United States immigration and naturalization service, or persons who have the care of such an international child in their home;

(f) Schools, including boarding schools, which are engaged primarily in education, operate on a definite school year schedule, follow a stated academic curriculum, accept only school-age children and do not accept custody of children;

(g) Hospitals licensed pursuant to chapter 70.41 RCW when performing functions defined in chapter 70.41 RCW, nursing homes licensed under chapter 18.51 RCW and boarding homes licensed under chapter 18.20 RCW;

(h) Licensed physicians or lawyers;

(i) Facilities approved and certified under chapter 71A.22 RCW;

(j) Any agency having been in operation in this state ten years prior to June 8, 1967, and not seeking or accepting

moneys or assistance from any state or federal agency, and is supported in part by an endowment or trust fund;

(k) Persons who have a child in their home for purposes of adoption, if the child was placed in such home by a licensed child-placing agency, an authorized public or tribal agency or court or if a replacement report has been filed under chapter 26.33 RCW and the placement has been approved by the court;

(l) An agency operated by any unit of local, state, or federal government or an agency licensed by an Indian tribe pursuant to RCW 74.15.190;

(m) A maximum or medium security program for juvenile offenders operated by or under contract with the department;

(n) An agency located on a federal military reservation, except where the military authorities request that such agency be subject to the licensing requirements of this chapter.

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

(4) "Family child care licensee" means a person who: (a) Provides regularly scheduled care for a child or children in the home of the provider for periods of less than twenty-four hours or, if necessary due to the nature of the parent's work, for periods equal to or greater than twenty-four hours; (b) does not receive child care subsidies; and (c) is licensed by the state under RCW 74.15.030.

(5) "Juvenile" means a person under the age of twenty-one who has been sentenced to a term of confinement under the supervision of the department under RCW 13.40.185.

(6) "Probationary license" means a license issued as a disciplinary measure to an agency that has previously been issued a full license but is out of compliance with licensing standards.

(7) "Requirement" means any rule, regulation, or standard of care to be maintained by an agency.

(8) "Secretary" means the secretary of social and health services.

(9) "Street youth" means a person under the age of eighteen who lives outdoors or in another unsafe location not intended for occupancy by the minor and who is not residing with his or her parent or at his or her legally authorized residence.

(10) "Transitional living services" means at a minimum, to the extent funds are available, the following:

(a) Educational services, including basic literacy and computational skills training, either in local alternative or public high schools or in a high school equivalency program that leads to obtaining a high school equivalency degree;

(b) Assistance and counseling related to obtaining vocational training or higher education, job readiness, job search assistance, and placement programs;

(c) Counseling and instruction in life skills such as money management, home management, consumer skills, parenting, health care, access to community resources, and transportation and housing options;

(d) Individual and group counseling; and

(e) Establishing networks with federal agencies and state and local organizations such as the United States department of labor, employment and training administration programs including the job training partnership act which administers private industry councils and the job corps; vocational rehabilitation; and volunteer programs.

[2006 c 265 § 401; 2006 c 90 § 1; 2006 c 54 § 7. Prior: 2001 c 230 § 1; 2001 c 144 § 1; 2001 c 137 § 3; 1999 c 267 § 11; 1998 c 269 § 3; 1997 c 245 § 7; prior: 1995 c 311 § 18; 1995 c 302 § 3; 1994 c 273 § 21; 1991 c 128 § 14; 1988 c 176 § 912; 1987 c 170 § 12; 1982 c 118 § 5; 1979 c 155 § 83; 1977 ex.s. c 80 § 71; 1967 c 172 § 2.]

#### Notes:

**Reviser's note:** This section was amended by 2006 c 54 § 7, 2006 c 90 § 1, and by 2006 c 265 § 401, each without reference to the other. All amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

**Part headings not law -- Effective date -- Severability -- 2006 c 265:** See RCW 43.215.904 through 43.215.906.

**Part headings not law -- Severability -- Conflict with federal requirements -- Short title -- 2006 c 54:** See RCW 41.56.911 through 41.56.914.

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

**Alphabetization -- 1998 c 269:** See note following RCW 13.50.010.

**Intent -- Finding -- Effective date -- 1998 c 269:** See notes following RCW 72.05.020.

**Intent -- 1995 c 302:** See note following RCW 74.15.010.

**Severability -- Effective date -- 1991 c 128:** See RCW 19.166.900 and 19.166.901.

**Severability -- 1988 c 176:** See RCW 71A.10.900.

**Severability -- 1987 c 170:** See note following RCW 13.04.030.

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

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

#### 74.15.030

##### Powers and duties of secretary.

\*\*\* CHANGE IN 2007 \*\*\* (SEE 5952-S.SL) \*\*\*

\*\*\* CHANGE IN 2007 \*\*\* (SEE 5774-S.SL) \*\*\*

The secretary shall have the power and it shall be the secretary's duty:

(1) In consultation with the children's services advisory committee, and with the advice and assistance of persons representative of the various type agencies to be licensed, to designate categories of facilities for which separate or different requirements shall be developed as may be appropriate whether because of variations in the ages, sex and other characteristics of persons served, variations in the purposes and services offered or size or structure of the agencies to be licensed hereunder, or because of any other factor relevant thereto;

(2) In consultation with the children's services advisory committee, and with the advice and assistance of persons representative of the various type agencies to be licensed, to adopt and publish minimum requirements for licensing applicable to each of the various categories of agencies to be licensed.

The minimum requirements shall be limited to:

(a) The size and suitability of a facility and the plan of operation for carrying out the purpose for which an applicant seeks a license;

(b) The character, suitability and competence of an agency and other persons associated with an agency directly responsible for the care and treatment of children, expectant mothers or developmentally disabled persons. In consultation with law enforcement personnel, the secretary shall investigate the conviction record or pending charges and dependency record information under chapter 43.43 RCW of each agency and its staff seeking licensure or relicensure. No unfounded allegation of child abuse or neglect as defined in RCW 26.44.020 may be disclosed to a child-placing agency, private adoption agency, or any other provider licensed under this chapter. In order to determine the suitability of applicants for an agency license, licensees, their employees, and other persons who have unsupervised access to children in care, and who have not resided in the state of Washington during the three-year period before being authorized to care for children shall be fingerprinted. The fingerprints shall be forwarded to the Washington state patrol and federal bureau of investigation for a criminal history records check. The fingerprint criminal history records checks will be at the expense of the licensee except that in the case of a foster family home, if this expense would work a hardship on the licensee, the department shall pay the expense. The licensee may not pass this cost on to the employee or prospective employee, unless the employee is determined to be unsuitable due to his or her criminal history record. The secretary shall use the information solely for the purpose of determining eligibility for a license and for determining the character, suitability, and competence of those persons or agencies, excluding parents, not required to be licensed who are authorized to care for children, expectant mothers, and developmentally disabled persons. Criminal justice agencies shall provide the secretary such information as they may have and that the secretary may require for

such purpose;

(c) The number of qualified persons required to render the type of care and treatment for which an agency seeks a license;

(d) The safety, cleanliness, and general adequacy of the premises to provide for the comfort, care and well-being of children, expectant mothers or developmentally disabled persons;

(e) The provision of necessary care, including food, clothing, supervision and discipline; physical, mental and social well-being; and educational, recreational and spiritual opportunities for those served;

(f) The financial ability of an agency to comply with minimum requirements established pursuant to chapter 74.15 RCW and RCW 74.13.031; and

(g) The maintenance of records pertaining to the admission, progress, health and discharge of persons served;

(3) To investigate any person, including relatives by blood or marriage except for parents, for character, suitability, and competence in the care and treatment of children, expectant mothers, and developmentally disabled persons prior to authorizing that person to care for children, expectant mothers, and developmentally disabled persons. However, if a child is placed with a relative under RCW 13.34.065 or 13.34.130, and if such relative appears otherwise suitable and competent to provide care and treatment the criminal history background check required by this section need not be completed before placement, but shall be completed as soon as possible after placement;

(4) On reports of alleged child abuse and neglect, to investigate agencies in accordance with chapter 26.44 RCW, including child day-care centers and family day-care homes, to determine whether the alleged abuse or neglect has occurred, and whether child protective services or referral to a law enforcement agency is appropriate;

(5) To issue, revoke, or deny licenses to agencies pursuant to chapter 74.15 RCW and RCW 74.13.031. Licenses shall specify the category of care which an agency is authorized to render and the ages, sex and number of persons to be served;

(6) To prescribe the procedures and the form and contents of reports necessary for the administration of chapter 74.15 RCW and RCW 74.13.031 and to require regular reports from each licensee;

(7) To inspect agencies periodically to determine whether or not there is compliance with chapter 74.15 RCW and RCW 74.13.031 and the requirements adopted hereunder;

(8) To review requirements adopted hereunder at least every two years and to adopt appropriate changes after consultation with the children's services advisory committee for requirements for other agencies;

(9) To engage in negotiated rule making pursuant to RCW 34.05.310(2)(a) with the exclusive representative of the family child care licensees selected in accordance with RCW 74.15.035 and with other affected interests before adopting requirements that affect family child care licensees; and

(10) To consult with public and private agencies in order to help them improve their methods and facilities for the care of children, expectant mothers and developmentally disabled persons.

[2006 c 265 § 402; 2006 c 54 § 8; 2005 c 490 § 11. Prior: 2000 c 162 § 20; 2000 c 122 § 40; 1997 c 386 § 33; 1995 c 302 § 4; 1988 c 189 § 3; prior: 1987 c 524 § 13; 1987 c 486 § 14; 1984 c 188 § 5; 1982 c 118 § 6; 1980 c 125 § 1; 1979 c 141 § 355; 1977 ex.s. c 80 § 72; 1967 c 172 § 3.]

**Notes:**

**Reviser's note:** This section was amended by 2006 c 54 § 8 and by 2006 c 265 § 402, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

**Part headings not law -- Effective date -- Severability -- 2006 c 265:** See RCW 43.215.904 through 43.215.906.

**Part headings not law -- Severability -- Conflict with federal requirements -- Short title -- 2006 c 54:** See RCW 41.56.911 through 41.56.914.

**Effective date -- 2005 c 490:** See note following RCW 43.215.540.

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

**Intent -- 1995 c 302:** See note following RCW 74.15.010.

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

#### 74.15.035

**Negotiated rule making — Family child care licensees — Intent.**

**\*\*\* CHANGE IN 2007 \*\*\* (SEE 5952-S.SL) \*\*\***

(1) Solely for the purposes of negotiated rule making pursuant to RCW 34.05.310(2)(a) and 74.15.030, a statewide unit of all family child care licensees is appropriate. As of June 7, 2006, the exclusive representative of family child care licensees in the statewide unit shall be the representative selected as the majority representative in the election held under the directive of the governor to the secretary of the department of social and health services, dated September 16, 2005. If family child care licensees seek to select a different representative thereafter, the family child care licensees may request that the American arbitration association conduct an election and certify the results of the election.

(2) In enacting this section, the legislature intends to provide state action immunity under federal and state antitrust laws for the joint activities of family child care licensees and their exclusive representative to the extent such activities are authorized by this chapter.

[2006 c 54 § 6.]

#### **Notes:**

**Part headings not law -- Severability -- Conflict with federal requirements -- Short title -- 2006 c 54:** See RCW 41.56.911 through 41.56.914.

#### 74.15.040

**Licenses for foster-family homes required — Inspections.**

An agency seeking to accept and serve children, developmentally disabled persons, or expectant mothers as a foster-family home shall make application for license in such form and substance as required by the department. The department shall maintain a list of applicants through which placement may be undertaken. However, agencies and the department shall not place a child, developmentally disabled person, or expectant mother in a home until the home is licensed. Foster-family homes shall be inspected prior to licensure, except that inspection by the department is not required if the foster-family home is under the supervision of a licensed agency upon certification to the department by the licensed agency that such homes meet the requirements for foster homes as adopted pursuant to chapter 74.15 RCW and RCW 74.13.031.

[1982 c 118 § 7; 1979 c 141 § 356; 1967 c 172 § 4.]

#### 74.15.050

**Fire protection — Powers and duties of chief of the Washington state patrol.**

The chief of the Washington state patrol, through the director of fire protection, shall have the power and it shall be his or her duty:

(1) In consultation with the children's services advisory committee and with the advice and assistance of persons representative of the various type agencies to be licensed, to adopt recognized minimum standard requirements pertaining to each category of agency established pursuant to chapter 74.15 RCW and RCW 74.13.031, except foster-family homes and child-placing agencies, necessary to protect all persons residing therein from fire hazards;

(2) To make or cause to be made such inspections and investigations of agencies, other than foster-family homes or child-placing agencies, as he or she deems necessary;

(3) To make a periodic review of requirements under RCW 74.15.030(7) and to adopt necessary changes after

consultation as required in subsection (1) of this section;

(4) To issue to applicants for licenses hereunder, other than foster-family homes or child-placing agencies, who comply with the requirements, a certificate of compliance, a copy of which shall be presented to the department of social and health services before a license shall be issued, except that a \*provisional license may be issued as provided in RCW 74.15.120.

[1995 c 369 § 62; 1986 c 266 § 123; 1982 c 118 § 8; 1979 c 141 § 357; 1967 c 172 § 5.]

**Notes:**

**\*Reviser's note:** "Provisional license" redesignated "initial license" by 1995 c 311 § 22.

**Effective date -- 1995 c 369:** See note following RCW 43.43.930.

**Severability -- 1986 c 266:** See note following RCW 38.52.005.

**74.15.060**

**Health protection — Powers and duties of secretary of health.**

The secretary of health shall have the power and it shall be his or her duty:

In consultation with the children's services advisory committee and with the advice and assistance of persons representative of the various type agencies to be licensed, to develop minimum requirements pertaining to each category of agency established pursuant to chapter 74.15 RCW and RCW 74.13.031, necessary to promote the health of all persons residing therein.

The secretary of health or the city, county, or district health department designated by the secretary shall have the power and the duty:

(1) To make or cause to be made such inspections and investigations of agencies as may be deemed necessary; and

(2) To issue to applicants for licenses hereunder who comply with the requirements adopted hereunder, a certificate of compliance, a copy of which shall be presented to the department of social and health services before a license shall be issued, except that a \*provisional license may be issued as provided in RCW 74.15.120.

[1991 c 3 § 376; 1989 1st ex.s. c 9 § 265; 1987 c 524 § 14; 1982 c 118 § 9; 1970 ex.s. c 18 § 14; 1967 c 172 § 6.]

**Notes:**

**\*Reviser's note:** "Provisional license" redesignated "initial license" by 1995 c 311 § 22.

**Effective date -- Severability -- 1989 1st ex.s. c 9:** See RCW 43.70.910 and 43.70.920.

**Effective date -- Severability -- 1970 ex.s. c 18:** See notes following RCW 43.20A.010.

**74.15.070**

**Articles of incorporation and amendments — Copies to be furnished to department.**

A copy of the articles of incorporation of any agency or amendments to the articles of existing corporation agencies shall be sent by the secretary of state to the department of social and health services at the time such articles or amendments are filed.

[1979 c 141 § 358; 1967 c 172 § 7.]

**74.15.080****Access to agencies, records.**

All agencies subject to chapter 74.15 RCW and RCW 74.13.031 shall accord the department of social and health services, the secretary of health, the chief of the Washington state patrol, and the director of fire protection, or their designees, the right of entrance and the privilege of access to and inspection of records for the purpose of determining whether or not there is compliance with the provisions of chapter 74.15 RCW and RCW 74.13.031 and the requirements adopted thereunder.

[1995 c 369 § 63; 1989 1st ex.s. c 9 § 266; 1986 c 266 § 124; 1979 c 141 § 359; 1967 c 172 § 8.]

**Notes:**

**Effective date -- 1995 c 369:** See note following RCW 43.43.930.

**Effective date -- Severability -- 1989 1st ex.s. c 9:** See RCW 43.70.910 and 43.70.920.

**Severability -- 1986 c 266:** See note following RCW 38.52.005.

**74.15.090****Licenses required for agencies.**

Except as provided in RCW 74.15.190, it shall hereafter be unlawful for any agency to receive children, expectant mothers or developmentally disabled persons for supervision or care, or arrange for the placement of such persons, unless such agency is licensed as provided in chapter 74.15 RCW.

[1987 c 170 § 14; 1982 c 118 § 10; 1977 ex.s. c 80 § 73; 1967 c 172 § 9.]

**Notes:**

**Severability -- 1987 c 170:** See note following RCW 13.04.030.

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

**74.15.100****License application, issuance, duration — Reclassification.**

Each agency shall make application for a license or renewal of license to the department of social and health services on forms prescribed by the department. A licensed agency having foster-family homes under its supervision may make application for a license on behalf of any such foster-family home. Such a foster home license shall cease to be valid when the home is no longer under the supervision of that agency. Upon receipt of such application, the department shall either grant or deny a license within ninety days unless the application is for licensure as a foster-family home, in which case RCW 74.15.040 shall govern. A license shall be granted if the agency meets the minimum requirements set forth in chapter 74.15 RCW and RCW 74.13.031 and the departmental requirements consistent herewith, except that an initial license may be issued as provided in RCW 74.15.120. Licenses provided for in chapter 74.15 RCW and RCW 74.13.031 shall be issued for a period of three years. The licensee, however, shall advise the secretary of any material change in circumstances which might constitute grounds for reclassification of license as to category. The license issued under this chapter is not transferable and applies only to the licensee and the location stated in the application. For licensed foster-family homes having an acceptable history of child care, the license may remain in effect for two weeks after a move, except that this will apply only if the family remains intact.

[2006 c 265 § 403; 1995 c 302 § 8; 1982 c 118 § 11; 1979 c 141 § 360; 1967 c 172 § 10.]

**Notes:**

**Part headings not law -- Effective date -- Severability -- 2006 c 265:** See RCW 43.215.904 through 43.215.906.

**Intent -- 1995 c 302:** See note following RCW 74.15.010.

**74.15.110****Renewal of licenses.**

If a licensee desires to apply for a renewal of its license, a request for a renewal shall be filed ninety days prior to the expiration date of the license except that a request for renewal of a foster family home license shall be filed prior to the expiration of the license. If the department has failed to act at the time of the expiration date of the license, the license shall continue in effect until such time as the department shall act.

[1991 c 14 § 1; 1967 c 172 § 11.]

**74.15.120****Initial licenses.**

The secretary of social and health services may, at his or her discretion, issue an initial license instead of a full license, to an agency or facility for a period not to exceed six months, renewable for a period not to exceed two years, to allow such agency or facility reasonable time to become eligible for full license. An initial license shall not be granted to any foster-family home except as specified in this section. An initial license may be granted to a foster-family home only if the following three conditions are met: (1) The license is limited so that the licensee is authorized to provide care only to a specific child or specific children; (2) the department has determined that the licensee has a relationship with the child, and the child is comfortable with the licensee, or that it would otherwise be in the child's best interest to remain or be placed in the licensee's home; and (3) the initial license is issued for a period not to exceed ninety days.

[1995 c 311 § 22; 1979 c 141 § 361; 1967 c 172 § 12.]

**74.15.125****Probationary licenses.**

(1) The department may issue a probationary license to a licensee who has had a license but is temporarily unable to comply with a rule or has been the subject of multiple complaints or concerns about noncompliance if:

(a) The noncompliance does not present an immediate threat to the health and well-being of the children but would be likely to do so if allowed to continue; and

(b) The licensee has a plan approved by the department to correct the area of noncompliance within the probationary period.

(2) A probationary license may be issued for up to six months, and at the discretion of the department it may be extended for an additional six months. The department shall immediately terminate the probationary license, if at any time the noncompliance for which the probationary license was issued presents an immediate threat to the health or well-being of the children.

(3) The department may, at any time, issue a probationary license for due cause that states the conditions of probation.

(4) An existing license is invalidated when a probationary license is issued.

(5) At the expiration of the probationary license, the department shall reinstate the original license for the remainder of its term, issue a new license, or revoke the original license.

(6) A right to an adjudicative proceeding shall not accrue to the licensee whose license has been placed on probationary status unless the licensee does not agree with the placement on probationary status and the department then suspends, revokes, or modifies the license.

[1995 c 302 § 7.]

**Notes:**

**Intent -- 1995 c 302:** See note following RCW [74.15.010](#).

**74.15.130**

**Licenses — Denial, suspension, revocation, modification — Procedures — Adjudicative proceedings — Penalties.**

**\*\*\* CHANGE IN 2007 \*\*\* (SEE 5321-S.SL) \*\*\***

(1) An agency may be denied a license, or any license issued pursuant to chapter 74.15 RCW and RCW 74.13.031 may be suspended, revoked, modified, or not renewed by the secretary upon proof (a) that the agency has failed or refused to comply with the provisions of chapter 74.15 RCW and RCW 74.13.031 or the requirements promulgated pursuant to the provisions of chapter 74.15 RCW and RCW 74.13.031; or (b) that the conditions required for the issuance of a license under chapter 74.15 RCW and RCW 74.13.031 have ceased to exist with respect to such licenses. RCW 43.20A.205 governs notice of a license denial, revocation, suspension, or modification and provides the right to an adjudicative proceeding.

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

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

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

(c) The conditions required for issuance of a license under chapter 74.15 RCW and RCW 74.13.031 have ceased to exist with respect to such licenses.

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

(4) The department may assess civil monetary penalties upon proof that an agency has failed or refused to comply with the rules adopted under the provisions of this chapter and RCW 74.13.031 or that an agency subject to licensing under this chapter and RCW 74.13.031 is operating without a license except that civil monetary penalties shall not be levied against a licensed foster home. Monetary penalties levied against unlicensed agencies that submit an application for licensure within thirty days of notification and subsequently become licensed will be forgiven. These penalties may be assessed in addition to or in lieu of other disciplinary actions. Civil monetary penalties, if imposed, may be assessed and collected, with interest, for each day an agency is or was out of compliance. Civil monetary penalties shall not exceed two hundred fifty dollars per violation for group homes and child-placing agencies. Each day upon which the same or substantially similar action occurs is a separate violation subject to the assessment of a separate penalty. The department shall provide a notification period before a monetary penalty is effective and may forgive the penalty levied if the agency comes into compliance during this period. The department may suspend, revoke, or not renew a license for failure to pay a civil monetary penalty it has assessed pursuant to this chapter within ten days after such assessment becomes final. Chapter 43.20A RCW governs notice of a civil monetary penalty and provides the right of an adjudicative proceeding. The preponderance of evidence standard shall apply in adjudicative proceedings related to assessment of civil monetary penalties.

[2006 c 265 § 404; 2005 c 473 § 6; 1998 c 314 § 6; 1995 c 302 § 5; 1989 c 175 § 149; 1982 c 118 § 12; 1979 c 141 § 362; 1967 c 172 § 13.]

**Notes:**

**Part headings not law -- Effective date -- Severability -- 2006 c 265:** See RCW 43.215.904 through 43.215.906.

**Purpose -- 2005 c 473:** See note following RCW 74.15.300.

**Intent -- 1995 c 302:** See note following RCW 74.15.010.

**Effective date -- 1989 c 175:** See note following RCW 34.05.010.

**74.15.132**

**Adjudicative proceedings — Training for administrative law judges.**

(1) The office of administrative hearings shall not assign nor allow an administrative law judge to preside over an

adjudicative hearing regarding denial, modification, suspension, or revocation of any license to provide child care, including foster care, under this chapter, unless such judge has received training related to state and federal laws and department policies and procedures regarding:

- (a) Child abuse, neglect, and maltreatment;
- (b) Child protective services investigations and standards;
- (c) Licensing activities and standards;
- (d) Child development; and
- (e) Parenting skills.

(2) The office of administrative hearings shall develop and implement a training program that carries out the requirements of this section. The office of administrative hearings shall consult and coordinate with the department in developing the training program. The department may assist the office of administrative hearings in developing and providing training to administrative law judges.

[1995 c 302 § 6.]

**Notes:**

**Intent -- 1995 c 302:** See note following RCW [74.15.010](#).

**74.15.134**

**License or certificate suspension — Noncompliance with support order — Reissuance.**

The secretary shall immediately suspend the license or certificate of a person who has been certified pursuant to RCW 74.20A.320 by the department of social and health services as a person who is not in compliance with a support order or a residential or visitation order. If the person has continued to meet all other requirements for reinstatement during the suspension, reissuance of the license or certificate shall be automatic upon the secretary's receipt of a release issued by the department of social and health services stating that the licensee is in compliance with the order.

[1997 c 58 § 858.]

**Notes:**

**\*Reviser's note:** 1997 c 58 § 887 requiring a court to order certification of noncompliance with residential provisions of a court-ordered parenting plan was vetoed. Provisions ordering the department of social and health services to certify a responsible parent based on a court order to certify for noncompliance with residential provisions of a parenting plan were vetoed. See RCW 74.20A.320.

**Short title -- Part headings, captions, table of contents not law -- Exemptions and waivers from federal law -- Conflict with federal requirements -- Severability -- 1997 c 58:** See RCW 74.08A.900 through 74.08A.904.

**Effective dates -- Intent -- 1997 c 58:** See notes following RCW 74.20A.320.

**74.15.140**

**Action against licensed or unlicensed agencies authorized.**

Notwithstanding the existence or pursuit of any other remedy, the secretary may, in the manner provided by law, upon the advice of the attorney general, who shall represent the department in the proceeding, maintain an action in the name of the state for injunction or such other relief as he may deem advisable against any agency subject to licensing under the provisions of chapter 74.15 RCW and RCW 74.13.031 or against any such agency not having a license as heretofore provided in chapter 74.15 RCW and RCW 74.13.031.

[1979 c 141 § 363; 1967 c 172 § 14.]

**74.15.150****Penalty for operating without license.**

Any agency operating without a license shall be guilty of a misdemeanor. This section shall not be enforceable against an agency until sixty days after the effective date of new rules, applicable to such agency, have been adopted under chapter 74.15 RCW and RCW 74.13.031.

[1982 c 118 § 13; 1967 c 172 § 15.]

**74.15.160****Continuation of existing licensing rules.**

Existing rules for licensing adopted pursuant to \*chapter 74.14 RCW, sections 74.14.010 through 74.14.150, chapter 26, Laws of 1959, shall remain in force and effect until new rules are adopted under chapter 74.15 RCW and RCW 74.13.031, but not thereafter.

[1982 c 118 § 14; 1967 c 172 § 16.]

**Notes:**

**\*Reviser's note:** Chapter 74.14 RCW was repealed by 1967 c 172 § 23.

**74.15.170****Agencies, homes conducted by religious organizations — Application of chapter.**

Nothing in this chapter or the rules and regulations adopted pursuant thereto shall be construed as authorizing the supervision, regulation, or control of the remedial care or treatment of residents of any agency, children's institution, child placing agency, maternity home, day or hourly nursery, foster home or other related institution conducted for or by members of a recognized religious sect, denomination or organization which in accordance with its creed, tenets, or principles depends for healing upon prayer in the practice of religion, nor shall the existence of any of the above conditions militate against the licensing of such a home or institution.

[1967 c 172 § 21.]

**74.15.180****Designating home or facility as semi-secure facility.**

The department, pursuant to rules, may enable any licensed foster family home or group care facility to be designated as a semi-secure facility, as defined by RCW 13.32A.030.

[1979 c 155 § 84.]

**Notes:**

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

**74.15.190****Authority of Indian tribes to license agencies within reservations — Placement of children.**

(1)(a) The state of Washington recognizes the authority of Indian tribes within the state to license agencies, located within the boundaries of a federally recognized Indian reservation, to receive children for control, care, and maintenance outside their own homes, or to place, receive, arrange the placement of, or assist in the placement of children for foster care or adoption.

(b) The state of Washington recognizes the ability of the Indian tribes within the state to enter into agreements with the state to license agencies located on or near the federally recognized Indian reservation or, for those federally recognized tribes that do not have a reservation, then on or near the federally designated service delivery area, to

receive children for control, care, and maintenance outside their own homes, or to place, receive, arrange the placement of, or assist in the placement of children for foster care.

(c) The department and state licensed child-placing agencies may place children in tribally licensed facilities if the requirements of RCW 74.15.030 (2)(b) and (3) and supporting rules are satisfied before placing the children in such facilities by the department or any state licensed child-placing agency.

(2) The department may enter into written agreements with Indian tribes within the state to define the terms under which the tribe may license agencies pursuant to subsection (1) of this section. The agreements shall include a definition of what are the geographic boundaries of the tribe for the purposes of licensing and may include locations on or near the federally recognized Indian reservation or, for those federally recognized tribes that do not have a reservation, then on or near the federally designated service delivery area.

(3) The department and its employees are immune from civil liability for damages arising from the conduct of agencies licensed by a tribe.

[2006 c 90 § 2; 1987 c 170 § 13.]

**Notes:**

**Severability -- 1987 c 170:** See note following RCW 13.04.030.

**74.15.200**

**Child abuse and neglect prevention training to parents and day care providers.**

The department of social and health services shall have primary responsibility for providing child abuse and neglect prevention training to parents and licensed child day care providers of preschool age children participating in day care programs meeting the requirements of chapter 74.15 RCW. The department may limit training under this section to trainers' workshops and curriculum development using existing resources.

[1987 c 489 § 5.]

**Notes:**

**Intent -- 1987 c 489:** See note following RCW 28A.300.150.

**74.15.210**

**Community facility — Service provider must report juvenile infractions or violations — Violations by service provider — Secretary's duties — Rules.**

(1) Whenever the secretary contracts with a service provider to operate a community facility, the contract shall include a requirement that each service provider must report to the department any known infraction or violation of conditions committed by any juvenile under its supervision. The report must be made immediately upon learning of serious infractions or violations and within twenty-four hours for other infractions or violations.

(2) The secretary shall adopt rules to implement and enforce the provisions of this section. The rules shall contain a schedule of monetary penalties not to exceed the total compensation set forth in the contract, and include provisions that allow the secretary to terminate all contracts with a service provider that has violations of this section and the rules adopted under this section.

(3) The secretary shall document in writing all violations of this section and the rules adopted under this section, penalties, actions by the department to remove juveniles from a community facility, and contract terminations. The department shall give great weight to a service provider's record of violations, penalties, actions by the department to remove juveniles from a community facility, and contract terminations in determining to execute, renew, or renegotiate a contract with a service provider.

[1998 c 269 § 7.]

**Notes:**

**Intent -- Finding -- Effective date -- 1998 c 269:** See notes following RCW 72.05.020.

**74.15.220****HOPE centers — Establishment — Requirements.**

The secretary shall establish HOPE centers that provide no more than seventy-five beds across the state and may establish HOPE centers by contract, within funds appropriated by the legislature specifically for this purpose. HOPE centers shall be operated in a manner to reasonably assure that street youth placed there will not run away. Street youth may leave a HOPE center during the course of the day to attend school or other necessary appointments, but the street youth must be accompanied by an administrator or an administrator's designee. The street youth must provide the administration with specific information regarding his or her destination and expected time of return to the HOPE center. Any street youth who runs away from a HOPE center shall not be readmitted unless specifically authorized by the street youth's placement and liaison specialist, and the placement and liaison specialist shall document with specific factual findings an appropriate basis for readmitting any street youth to a HOPE center. HOPE centers are required to have the following:

- (1) A license issued by the secretary;
- (2) A professional with a master's degree in counseling, social work, or related field and at least one year of experience working with street youth or a bachelor of arts degree in social work or a related field and five years of experience working with street youth. This professional staff person may be contractual or a part-time employee, but must be available to work with street youth in a HOPE center at a ratio of one to every fifteen youth staying in a HOPE center. This professional shall be known as a placement and liaison specialist. Preference shall be given to those professionals cross-credentialed in mental health and chemical dependency. The placement and liaison specialist shall:
  - (a) Conduct an assessment of the street youth that includes a determination of the street youth's legal status regarding residential placement;
  - (b) Facilitate the street youth's return to his or her legally authorized residence at the earliest possible date or initiate processes to arrange legally authorized appropriate placement. Any street youth who may meet the definition of dependent child under RCW 13.34.030 must be referred to the department. The department shall determine whether a dependency petition should be filed under chapter 13.34 RCW. A shelter care hearing must be held within seventy-two hours to authorize out-of-home placement for any youth the department determines is appropriate for out-of-home placement under chapter 13.34 RCW. All of the provisions of chapter 13.32A RCW must be followed for children in need of services or at-risk youth;
  - (c) Interface with other relevant resources and system representatives to secure long-term residential placement and other needed services for the street youth;
  - (d) Be assigned immediately to each youth and meet with the youth within eight hours of the youth receiving HOPE center services;
  - (e) Facilitate a physical examination of any street youth who has not seen a physician within one year prior to residence at a HOPE center and facilitate evaluation by a county-designated mental health professional, a chemical dependency specialist, or both if appropriate; and
  - (f) Arrange an educational assessment to measure the street youth's competency level in reading, writing, and basic mathematics, and that will measure learning disabilities or special needs;
- (3) Staff trained in development needs of street youth as determined by the secretary, including an administrator who is a professional with a master's degree in counseling, social work, or a related field and at least one year of experience working with street youth, or a bachelor of arts degree in social work or a related field and five years of experience working with street youth, who must work with the placement and liaison specialist to provide appropriate services on site;
- (4) A data collection system that measures outcomes for the population served, and enables research and evaluation that can be used for future program development and service delivery. Data collection systems must have confidentiality rules and protocols developed by the secretary;
- (5) Notification requirements that meet the notification requirements of chapter 13.32A RCW. The youth's arrival date and time must be logged at intake by HOPE center staff. The staff must immediately notify law enforcement and dependency caseworkers if a street youth runs away from a HOPE center. A child may be transferred to a secure facility as defined in RCW 13.32A.030 whenever the staff reasonably believes that a street youth is likely to leave the HOPE center and not return after full consideration of the factors set forth in RCW 13.32A.130(2)(a) (i) and (ii). The street youth's temporary placement in the HOPE center must be authorized by the court or the secretary if the youth is a dependent of the state under chapter 13.34 RCW or the department is responsible for the youth under chapter 13.32A

RCW, or by the youth's parent or legal custodian, until such time as the parent can retrieve the youth who is returning to home;

(6) HOPE centers must identify to the department any street youth it serves who is not returning promptly to home. The department then must contact the missing children's clearinghouse identified in chapter 13.60 RCW and either report the youth's location or report that the youth is the subject of a dependency action and the parent should receive notice from the department;

(7) Services that provide counseling and education to the street youth; and

(8) The department shall only award contracts for the operation of HOPE center beds and responsible living skills programs in departmental regions: (a) With operating secure crisis residential centers; or (b) in which the secretary finds significant progress is made toward opening a secure crisis residential center.

[1999 c 267 § 12.]

**Notes:**

**Phase in of beds -- 1999 c 267 §§ 12 and 13:** "Within funds specifically appropriated by the legislature, HOPE center beds referenced in section 12 of this act and responsible living skills program beds referenced in section 13 of this act shall be phased in at the rate of twenty-five percent each year beginning January 1, 2000, until the maximum is attained." [1999 c 267 § 26.]

**Effective date -- 1999 c 267 §§ 12 and 13:** "Sections 12 and 13 of this act take effect January 1, 2000." [1999 c 267 § 27.]

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

**74.15.230**

**Responsible living skills programs — Established — Requirements.**

The secretary shall establish responsible living skills programs that provide no more than seventy-five beds across the state and may establish responsible living skills programs by contract, within funds appropriated by the legislature specifically for this purpose. Responsible living skills programs shall have the following:

(1) A license issued by the secretary;

(2) A professional with a master's degree in counseling, social work, or related field and at least one year of experience working with street youth available to serve residents or a bachelor of arts degree in social work or a related field and five years of experience working with street youth. The professional shall provide counseling services and interface with other relevant resources and systems to prepare the minor for adult living. Preference shall be given to those professionals cross-credentialed in mental health and chemical dependency;

(3) Staff trained in development needs of older adolescents eligible to participate in responsible living skills programs as determined by the secretary;

(4) Transitional living services and a therapeutic model of service delivery that provides necessary program supervision of residents and at the same time includes a philosophy, program structure, and treatment planning that emphasizes achievement of competency in independent living skills. Independent living skills include achieving basic educational requirements such as a GED, enrollment in vocational and technical training programs offered at the community and vocational colleges, obtaining and maintaining employment; accomplishing basic life skills such as money management, nutrition, preparing meals, and cleaning house. A baseline skill level in ability to function productively and independently shall be determined at entry. Performance shall be measured and must demonstrate improvement from involvement in the program. Each resident shall have a plan for achieving independent living skills by the time the resident leaves the placement. The plan shall be written within the first thirty days of placement and reviewed every ninety days. A resident who fails to consistently adhere to the elements of the plan shall be subject to reassessment by the professional staff of the program and may be placed outside the program; and

(5) A data collection system that measures outcomes for the population served, and enables research and evaluation that can be used for future program development and service delivery. Data collection systems must have confidentiality rules and protocols developed by the secretary.

(6) The department shall not award contracts for the operation of responsible living skills programs until HOPE center

beds are operational.

[1999 c 267 § 13.]

**Notes:**

**Phase in of beds -- Effective date -- 1999 c 267 §§ 12 and 13:** See notes following RCW [74.15.220](#).

**Findings -- Intent -- Severability -- 1999 c 267:** See notes following RCW [43.20A.790](#).

**74.15.240**

**Responsible living skills program — Eligibility.**

To be eligible for placement in a responsible living skills program, the minor must be dependent under chapter 13.34 RCW and must have lived in a HOPE center or in a secure crisis residential center. Responsible living skills centers are intended as a placement alternative for dependent youth that the department chooses for the youth because no other services or alternative placements have been successful. Responsible living skills centers are not for dependent youth whose permanency plan includes return to home or family reunification.

[1999 c 267 § 14.]

**Notes:**

**Findings -- Intent -- Severability -- 1999 c 267:** See notes following RCW [43.20A.790](#).

**74.15.250**

**HOPE centers — Responsible living skills programs — Licensing authority — Rules.**

The secretary is authorized to license HOPE centers and responsible living skills programs that meet statutory and rule requirements created by the secretary. The secretary is authorized to develop rules necessary to carry out the provisions of sections 10 through 26, chapter 267, Laws of 1999. The secretary may rely upon existing licensing provisions in development of licensing requirements for HOPE centers and responsible living skills programs, as are appropriate to carry out the intent of sections 10 through 26, chapter 267, Laws of 1999. HOPE centers and responsible living skills programs shall be required to adhere to departmental regulations prohibiting the use of alcohol, tobacco, controlled substances, violence, and sexual activity between residents.

[1999 c 267 § 15.]

**Notes:**

**Findings -- Intent -- Severability -- 1999 c 267:** See notes following RCW [43.20A.790](#).

**74.15.260**

**HOPE centers — Responsible living skills programs — Grant proposals — Technical assistance.**

The department shall provide technical assistance in preparation of grant proposals for HOPE centers and responsible living skills programs to nonprofit organizations unfamiliar with and inexperienced in submission of requests for proposals to the department.

[1999 c 267 § 21.]

**Notes:**

**Findings -- Intent -- Severability -- 1999 c 267:** See notes following RCW [43.20A.790](#).

**74.15.270**

**HOPE centers — Responsible living skills programs — Awarding of contracts.**

The department shall consider prioritizing, on an ongoing basis, the awarding of contracts for HOPE centers and

responsible living skills programs to providers who have not traditionally been awarded contracts with the department.

[1999 c 267 § 22.]

**Notes:**

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

**74.15.280**

**Emergency respite centers — Licensing — Rules.**

The secretary is authorized to license emergency respite centers. The department may adopt rules to specify licensing requirements for emergency respite centers.

[2001 c 230 § 2.]

**74.15.300**

**Enforcement action — Definition.**

For the purposes of chapter 473, Laws of 2005, "enforcement action" means denial, suspension, revocation, modification, or nonrenewal of a license pursuant to RCW 74.15.130(1) or assessment of civil monetary penalties pursuant to RCW 74.15.130(4).

[2005 c 473 § 2.]

**Notes:**

**Purpose -- 2005 c 473:** "The legislature recognizes that child care providers provide valuable services for the families of Washington state and are an important part of ensuring the healthy growth and development of young children. It also recognizes the importance of ensuring that operators of child day-care centers and family day-care providers are providing safe and quality care and operating in compliance with minimal standards.

The legislature further recognizes that parents, as consumers, have an interest in obtaining access to information that is relevant to making informed decisions about the persons with whom they entrust the care of their children. The purpose of this act is to establish a system, consistent throughout the state, through which parents, guardians, and other persons acting in loco parentis can obtain certain information about child care providers." [2005 c 473 § 1.]

**74.15.900**

**Short title — Purpose — Entitlement not granted — 1999 c 267 §§ 10-26.**

Sections 10 through 26, chapter 267, Laws of 1999 may be referred to as the homeless youth prevention, protection, and education act, or the HOPE act. Every day many youth in this state seek shelter out on the street. A nurturing nuclear family does not exist for them, and state-sponsored alternatives such as foster homes do not meet the demand and isolate youth, who feel like outsiders in families not their own. The legislature recognizes the need to develop placement alternatives for dependent youth ages sixteen to eighteen, who are living on the street. The HOPE act is an effort to engage youth and provide them access to services through development of life skills in a setting that supports them. Nothing in sections 10 through 26, chapter 267, Laws of 1999 shall constitute an entitlement.

[1999 c 267 § 10.]

**Notes:**

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

**74.15.901**

**Federal waivers — 1999 c 267 §§ 10-26.**

The department of social and health services shall seek any necessary federal waivers for federal funding of the

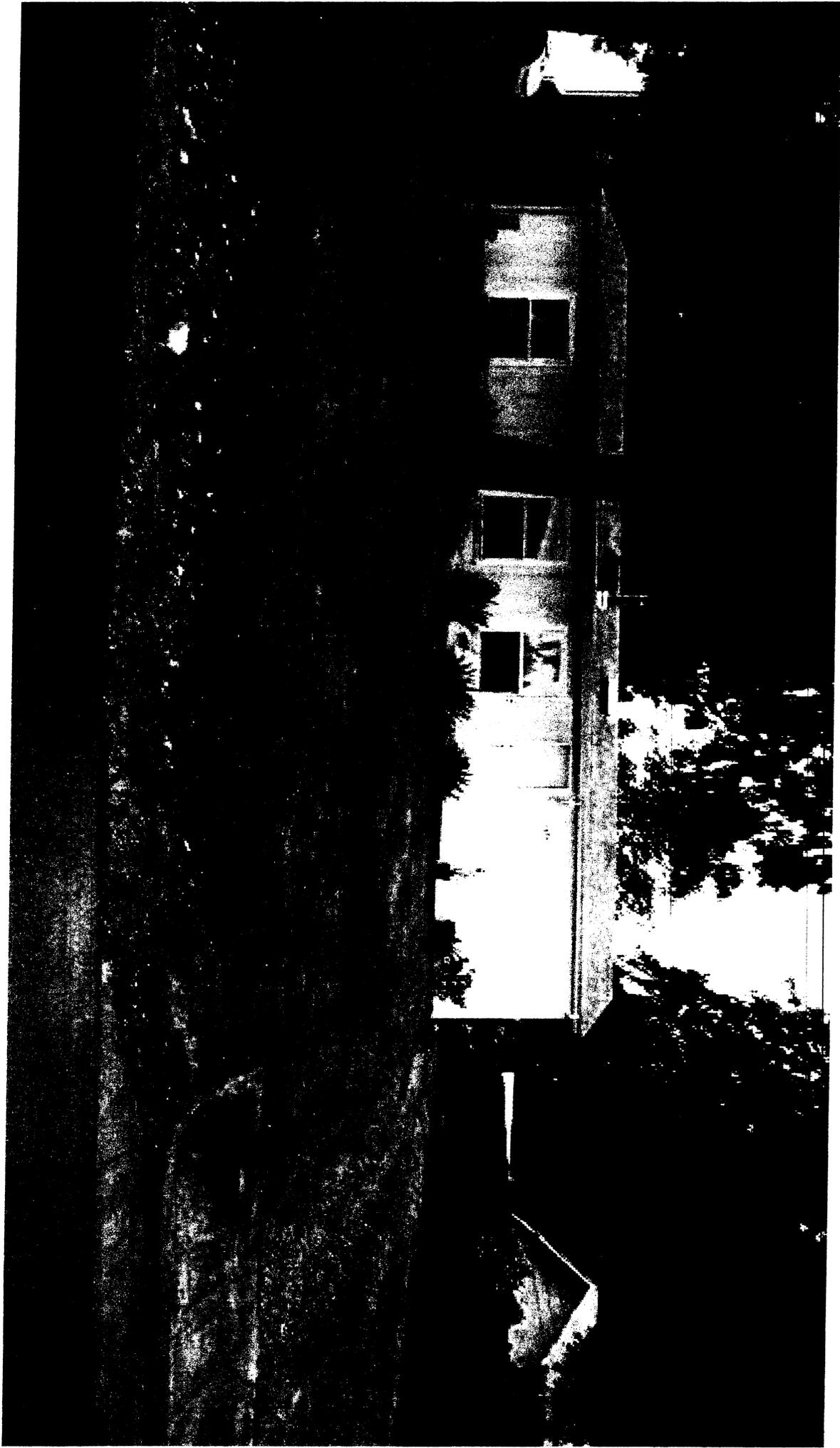
programs created under sections 10 through 26, chapter 267, Laws of 1999. The department shall pursue federal funding sources for the programs created under sections 10 through 26, chapter 267, Laws of 1999, and report to the legislature any statutory barriers to federal funding.

[1999 c 267 § 23.]

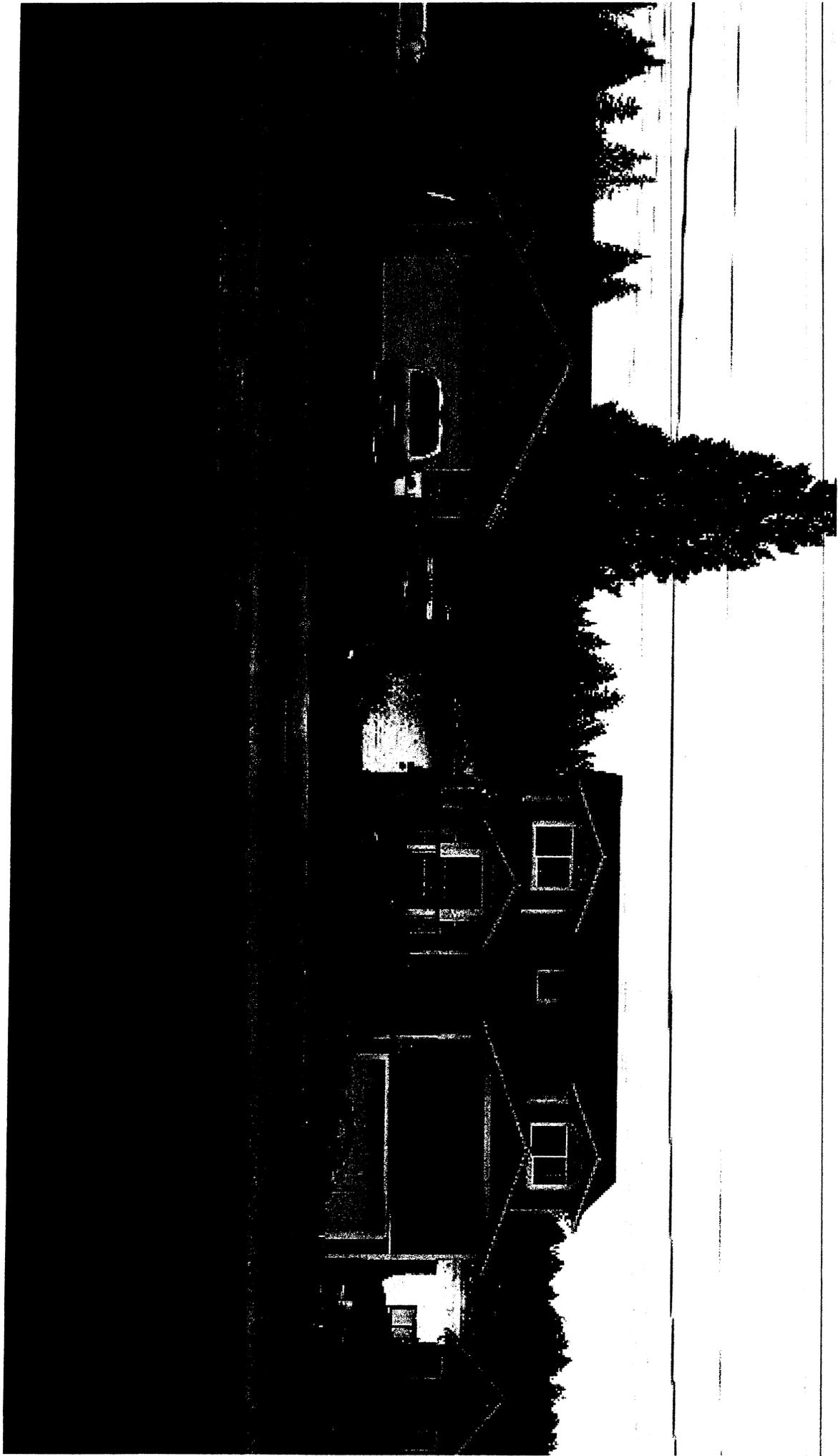
**Notes:**

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

# Appendix 4



# Appendix 5



# Appendix 6



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# Appendix 7

# SIGNIFICANT RULE ANALYSIS

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1. What are the goals and objectives of the statute that the rule is implementing?

The goals and objectives of the statute (RCW 75.15) is to safeguard the health, safety, and well-being of children receiving care away from their own homes, which is paramount over the right of any person to provide care. Additionally, to license agencies and to assure users and the community at large that adequate minimum standards are maintained; and to provide consultation to such agencies in order to help them improve their methods and facilities.

2. Why is the rule needed to achieve the agency goal?

Rules are needed for providers of family child care to ensure that the health, safety, and well-being of children in alternate care is safeguarded. The maintenance of minimum standards through these rules offers assurance to the general public that children are safe in these licensed facilities.

3. Are there any alternatives other than adopting a rule?

We offer guidance in the form of a guidebook, which interprets the rules, and ongoing training for providers of child care. The rules are all to ensure the health, safety, and well-being of children in alternate care.

4. What are the consequences of not adopting the rule?

The standards would be lower—children could be harmed by providers who either were not aware of a minimally acceptable standard for health, safety, and well-being, or who did not choose to provide that minimum standard. Children could be injured emotionally or physically if the caregiver did not have to live up to a minimum standard.

5. Determine whether the probable benefits of the rule are greater than its probable costs.

A cost-benefit analysis was completed and the cost of the new rules was found to be minimal. A 15% statewide random sample was done to assess the impact of the new rules.

6. Determine the least burdensome alternatives.

A work-group used the regulatory reform guidelines to weigh each change and judged each proposed change by these guidelines. Several of the former rules were rescinded in light of the regulatory reform, and the new ones were carefully assessed before being recommended.

7. Determine whether the rule requires a person to take action that violates state or federal law.

None of the rules requires a person to take action that violates a state or federal law.

8. Determine whether the rule imposes more stringent performance requirements on private entities than on public entities?

The rules do not impose more stringent performance requirements on private entities than on public entities.

8a. If so, are there requirements justified by state or federal law?

N/A

9. Determine whether the rule differs from the objectives of federal rules relating to the same subject matter.

There are no federal rules regulating family child care homes.

9a. If so, are the differences justified by a state law or by specific objectives of the law?

N/A

10. Did you coordinate your rule adoption activity relating to the same subject matter with the federal/state/local regulatory agencies? Explain.

Federal, state and local agency representatives were on the workgroup to revise the family child care home minimum licensing requirements. OSPI, Department of Health and local health, fire marshal, Family Child Care Association representatives, providers and licensors were all represented and gave input as well as commenting on the draft proposal.

Rule-Making Criteria applies (please check appropriate boxes):

the proposed rule is considered significant

a majority of JARRC requests application of the criteria in association with the rule

the agency voluntarily applies criteria to the proposed rule

Signature

*Leslie Edwards Hill*

Date

*11-12-99*

# Rule Implementation Plan

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1. How will the rule be implemented and enforced?

The rules will continue to be implemented and enforced by the licensing field staff. Methods continue to be information through the quarterly publication of the Link, through licensing orientations and re-orientations, and through on-site visits by individual licensors. Enforcement is up to the licensors. The rules give them enforcement authority and they also have the power to impose civil penalties for non-compliance as well as issue probationary licenses in lieu of revocation.

2. What resources will be used to implement and enforce the plan?

Existing resources (licensors in the field) will be used, as before.

3. How will the department inform and educate the persons affected by the rule?

Through newsletters, orientation, individual conversations and field visits.

4. How will the department promote and assist voluntary compliance?

Individual providers of child care have had active involvement in developing the rules; the Family Child Care Association of Washington State has also had input. Stakeholder involvement will be stressed and the licensors will promote the rules by discussing the changes at orientation. A licensor can also issue a waiver for a limited time period if a provider needs time to come into compliance.

5. How will the department evaluate the rule to determine whether it achieves its purpose?

The department will evaluate the rule by listening to feedback from providers and licensors. Many of the changes proposed are for health and safety reasons, as well as some changes in wording to promote higher quality of interactions between providers and children. Any new rule that is not achieving its purpose will be commented on by those affected. The department will then re-consider the rule if it is not working as intended.

Note: The Rule Implementation Plan must be included in the permanent rule-making file.

Signature Leslie Edwards-Hill Date 11-12-99

**MEMORANDUM**

**DATE:** August 1, 1999

**TO:** Marie Myerchin-Redifer, Manager  
Rules and Policies Assistance Unit  
MS 45850

**FROM:** Leslie Edwards-Hill, Program Manager  
Office of Child Care Policy  
Division of Licensed Resources  
Children's Administration  
MS 45

**SUBJECT:** Economic Impact of Proposed Amendments to Chapter 388-155 WAC,  
Minimum Licensing Requirements for Family Child Day Care Homes

**SUMMARY OF PROPOSED RULES:**

The Department of Social and Health Services' Children's Administration (CA) is proposing amendments to Chapter 388-155 WAC, Minimum Licensing Requirements for Family Child Day Care Homes. The primary purpose of the proposed rule amendments is to increase child safety in family child day care homes. Specifically, the proposed amendments:

- Comply with Executive Order 97-02, which charges Children's Administration to review its rules and improve them by clarifying and simplifying where possible;
- Reorganize sections, clarify language, add important definitions, eliminate redundancies and repeal regulations that have proven to be unworkable;
- Incorporate department child care policies into rule;
- Adopt the anti-discrimination provisions of federal and state laws that apply to employment practices and client services;
- Clarify a providers responsibilities when providing services to an American Indian child;
- Implement state laws requiring family child day care home license applicants to submit fingerprint cards;
- Adopt Department of Health requirements regarding Haemophilus Influenza Type B (HIB) immunizations, the administration of certain nonprescription medications and the storage of all class II narcotics;

- Require providers to report all individuals moving in or out of their household;
- Require that service providers develop a department approved plan to ensure the physical safety and emotional well-being of children during sleeping hours;
- Require service providers caring for young children to monitor infant sleep position and bedding to prevent Sudden Infant Death Syndrome (SIDS);
- Require services providers to use the least toxic methods available when keeping their premises free from rodents, fleas, cockroaches, etc. and require them to give advance notice to parents regarding the methods they use and when they use them;
- Require that all laundry supplies and soiled items be inaccessible to children in care;
- Require that all firearms or other weapons located in a family child day care home be kept in locked storage accessible only to an authorized person;
- Require that any animal or pet at a family child day care home that has demonstrated aggressive behavior be kept from children in care at all times;
- Prohibit the use of trampolines while children in care are present;
- Require the use of department-approved heated tubs, whirlpools, spas covers or barriers, installed to manufacturer's specifications, when children in care are present; and
- Require at least a five-foot high fence, with locked gates, to protect children in care from water hazards such as swimming pools, lakes or streams.

While developing their proposed rules, Children's Administration recognized that the amendments regulating firearms, animals, trampolines and water hazards could potentially impose an economic impact on family child day care homes. To help determine this potential economic impact, CA administered a survey to 15% of the family child day care home providers licensed by the department. The survey was administered to a random sample of providers, stratified by county. CA concluded that a survey would provide more detailed and relevant information than available at the four-digit Standard Industrial Classification (SIC) Code level. The survey results have been used for the following industry analysis and the cost of compliance conclusions.

#### **INDUSTRY ANALYSIS:**

Currently the Division of Licensed Resources licenses approximately 7,300 family child day care homes. It was decided that a 15% sample would provide CA with information regarding the potential economic impact of the proposed rules that would be representative of all potentially regulated industry members. Therefore 1,113 survey instruments were mailed to family child day care homes licensed by DSHS. Three of the surveys were returned unanswered because the licensee had either retired or was deceased. Of the remaining 1,110 surveys mailed, 569 (51.3%) were completed and returned.

Based upon survey results, family child day care homes licensed by DSHS can be characterized as small, family owned businesses caring for a rather small number of children per week and employing very few people. The following tables statistically describes the industry:

<b>Employees Information Provided by Survey</b>	<b>Number</b>	<b>Children in Care During One Week</b>	<b>Number</b>
Range in number of employees employed	0-6	Range in number of children in care during a week	0-85
Average number of employees employed (mean)	.4	Average number of children in care during a week (mean)	11.2
Middle number of employees (median) shown on the survey	0	Middle number of children in care during a week (median) shown on the survey	7
Most frequent number of employees (mode) shown on the survey	0	Most frequent number of children in care during a week (mode) shown on the survey	6
Total number of employees employed by homes surveyed	242	Total number of children in care during a week	6364

				<b>Totals</b>
Number of employees reported by respondents	0	1	2 or more employees	N/A
Number of respondents reporting	400	120	49	569
Percent of total respondents reporting	70.3%	21.1%	8.6%	100.0%

**COST OF COMPLIANCE TABULAR SUMMARY:**

The survey gathered compliance and cost information on five topics:

- Locking up firearms and/or weapons;
- Controlling aggressive animals or pets;
- Covering heated tubs, whirlpools, spas, tanks and similar equipment;
- Fencing out swimming pools, lakes and streams; and
- Prohibiting the use of trampolines.

The following is a summary of the survey results.

***FIREARMS and/or WEAPONS***

Proposed Rule Language: *"The licensee must ensure a firearm or another weapon is kept in locked storage accessible only to an authorized person."*

Do you keep firearms or other weapons on your child-care premises?	No	438
If you keep firearms or other weapons on your child-care premises, are they kept in "locked storage accessible only to an authorized person"?	Yes	121
<b>Total</b>		<b>559</b>
<b>Conclusion</b>		98.2% of the respondents are either not affected by the proposed rule or are already complying with it

Total Cost to Comply as Reported on the Survey	Cost Per Employee	Cost Per Child in Care	Cost Per Survey Respondent
\$3,450.00	\$14.26	\$0.54	\$6.06

***AGGRESSIVE PETS or ANIMALS:***

Proposed Rule Language: *"The licensee must ensure that any animal or pet on the premises which has demonstrated aggressive behavior is inaccessible to children in care at all times."*

Do you keep animals or pets on your child-care premises that demonstrate aggressive behavior?	No	547
If you keep animals or pets on your child-care premises that demonstrate aggressive behavior, are they "inaccessible to children in care at all times"?	Yes	16
<b>Total</b>		<b>563</b>
<b>Conclusion</b>		98.9% of the respondents are either not affected by the proposed rule or are already complying with it

Total Cost to Comply as Reported on the Survey	Cost Per Employee	Cost Per Child in Care	Cost Per Survey Respondent
\$1,550.00	\$6.40	\$0.24	\$2.72

**WATER SAFETY:**

Proposed Rule Language: "An adequate, department-approved cover or barrier, installed at the manufacturer's specification must be in place to prevent the child access at all times to heated tubs, whirlpools, spas, tanks, or similar equipment."

Do you have a heated tub, whirlpool, spa, tank or similar equipment on your child care premises?	No	512
If you have a heated tub, whirlpool, spa, tank or similar equipment on your child care premises, is it kept inaccessible from children at all times by a "department approved cover or barrier installed according to the manufacturer's specifications"?	Yes	53
<b>Total</b>		<b>565</b>
<b>Conclusion</b>		99.3% of the respondents are either not affected by the proposed rule or are already complying with it

Total Cost to Comply as Reported on the Survey	Cost Per Employee	Cost Per Child in Care	Cost Per Survey Respondent
\$1,329.00	\$5.49	\$0.21	\$2.34

Proposed Rule Language: "A five foot high fence with gates, locked when not in use, is required to prevent access to water hazards, such as swimming pools, lakes, or streams."

Is your child-care home located on or near property that contains a water hazard such as a swimming pool, lake or stream?	No	496
If your child-care home is located on or near property containing a water hazard, are children in care denied access to the hazard by a five-foot high fence with locked gates?	Yes	59
<b>Total</b>		<b>555</b>
<b>Conclusion</b>		97.5% of the respondents are either not affected by the proposed rule or are already complying with it

Total Cost to Comply as Reported on the Survey	Cost Per Employee	Cost Per Child in Care	Cost Per Survey Respondent
\$13,300.00	\$54.96	\$2.09	\$23.37

**TRAMPOLINES:**

Proposed Rule Language: *"The use of trampolines is prohibited."*

Is there a trampoline on your child-care premises?	No	536
If there is a trampoline on your child-care premises, is it kept inaccessible from children at all times?	Yes	23
<b>Total</b>		<b>559</b>
<b>Conclusion</b>		98.2% of the respondents are either not affected by the proposed rule or are already complying with it

<b>Total Cost to Comply as Reported on the Survey</b>	<b>Cost Per Employee</b>	<b>Cost Per Child in Care</b>	<b>Cost Per Survey Respondent</b>
\$1,690.00	\$6.98	\$.27	\$2.97

**COST OF COMPLIANCE CONCLUSION:**

Proposed Rule	Total Cost to Comply as Reported on the Survey	Cost Per Employee	Cost Per Child in Care	Cost Per Survey Respondent
Locking up firearms and/or weapons	\$3,450.00	\$14.26	\$0.54	\$6.06
Controlling aggressive animals or pets	\$1,550.00	\$6.40	\$0.24	\$2.72
Covering heated tubs, whirlpools, spas, tanks and similar equipment	\$1,329.00	\$5.49	\$0.21	\$2.34
Fencing out swimming pools, lakes and streams	\$13,300.00	\$54.96	\$2.09	\$23.37
Prohibiting the use of trampolines	\$1,690.00	\$6.98	\$.27	\$2.97
<b>Totals</b>	<b>\$21,319.00</b>	<b>\$88.09</b>	<b>\$3.35</b>	<b>\$37.46</b>

Although RCW 19.85.040 lists "cost per employee" as a recommended method for evaluating the cost impact of a proposed rule, Children's Administration does not believe it is appropriate in this case because over 70% of the respondents reported "zero" employees. Further, over 91% of the respondents reported one employee or less. CA has concluded that "cost per respondent" is a more representative indicator of the cost of compliance for these proposed rules.

CA has concluded that an average cost of \$37.46 per respondent is minor. Based on this conclusion and the high percentage of family child day care homes either unaffected by the proposed rules or already in compliance with them, CA has determined that the proposed rules would not place a more than minor economic impact on business.

#### **SMALL BUSINESS ECONOMIC IMPACT STATEMENT:**

Chapter 19.85 RCW, The Regulatory Fairness Act, requires that the economic impact of proposed regulations be analyzed in relation to small businesses and outlines the information that must be included in a Small Business Economic Impact Statement (SBEIS). Preparation of an SBEIS is required when a proposed rule has the potential of placing a more than minor economic impact on business.

The Children's Administration has analyzed the proposed rule amendments and concludes that the new costs associated with them do not constitute "a more than minor economic impact" on businesses. In addition, at least 97.5% of those surveyed are either unaffected by the proposed rules or already complying with them. Therefore, CA has concluded that the preparation of a comprehensive SBEIS is not required.

#### **EVALUATION OF PROBABLE COSTS AND PROBABLE BENEFITS:**

Since the proposed amendments "make significant amendments to a policy or regulatory program" [see RCW 34.05.328(5)(c)(iii)], Children's Administration has determined the proposed rules to be "significant" as defined by the legislature.

As required by RCW 34.05.328(1)(c), the administration has analyzed the probable costs and probable benefits of the proposed amendments, taking into account both the qualitative and quantitative benefits and costs. The Children's Administration analysis did reveal that the proposed new rules would impose additional costs on a small percentage of family child day care homes. However, those additional costs are insignificant when compared to the increased safety that will be enjoyed by employees and children in care if the proposed rules are adopted. In addition to increased employee and child safety, several other benefits will result. Those additional benefits include:

- Increasing Children's Administration compliance with Executive Order 97-02;
- Improving the quality of DSHS services to family child day care home clients by adopting a rule that is, because of its clarity, easier to administer;
- Increasing the voluntary compliance of family child day care home providers by adopting a rule that is clear and easy to understand;
- Reducing parent anxiety by adopting a variety of safety requirements ranging from ensuring the physical safety and emotional well-being of children during sleeping hours to requiring that providers keep a first aid kit, health history and emergency medical consent form in any vehicle used to transport children;
- Increasing department and service provider compliance with Department of Health requirements; and
- Increasing compliance with federal and state anti-discrimination laws and the federal Americans with Disabilities Act.

Children's Administration concludes that the probable benefits of the proposed amendments exceed the probable costs. The administration has complied with the appropriate sections of the Administrative Procedure Act and is prepared to proceed with the rule filing.

Please contact me by e-mail at [EDLE300@DSHS.WA.GOV](mailto:EDLE300@DSHS.WA.GOV) or by telephone at (360) 902-8041 if you have any questions.

# Appendix 8



Department of Social and Health Services  
OFFICE OF CHILD CARE POLICY

FAMILY CHILD CARE HOME LICENSING STUDY

RENEWAL	OTHER (SPECIFY)	CASE NUMBER: 75989
NAME Lisa CRESPIN-FISH		HOME VISIT DATE 2/9/01 2/24/01
ADDRESS STREET 6408 S. ISLAND DR.	CITY BONNEY LAKE	STATE WA ZIP CODE 98008

NAME OF EVALUATOR Ciehauski, A.	OFFICE Yacoma, Reg. US, OCCP
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Mark appropriately: **NA** = Not applicable    **C** = Compliance    **D** = Discussed    **N** = Noncompliance  
**P** = Presumed Compliance (no evidence to the contrary)    **W** = Waiver or exception granted per WAC 388-155-050.

**APP** = To be completed by the applicant .    **OCCP** = To be completed by the OCCP licensor.  
**WAC** = Washington Administrative Code, licensing requirements.

**GB** = Guidebook page numbers, the applicant can use the Guidebook to find information on how to meet requirements and on best practices.

**SECTION I ABOUT YOU AND YOUR HOME**

A. APPLICANT WAC 388-155-			SHOW US YOUR DOCUMENTS		
APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	Date(s) attended Orientation: 11-28-00 (WAC 388-155-070) (GB p. 118)	C	C	HIV/AIDS Training Date(s) 1-27-01 (WAC 388-155-200)
P	C	TB Test results for all applicable persons Date(s): 1-23-01 1-30-01 (WAC 388-155-220)	NA	NA	Water test results Date City (WAC 388-155-290) - If required:
C	C	Basic, Standard First Aid Training. Expiration Date(S) 1-27-01 (WAC 388-155-200)	NA	NA	Sewage system Date City (WAC 388-155-290) If required
C	C	Infant / Child CPR Training (WAC 388-155-200) Expiration Date(s) 1-27-01	C	C	Employment / Education resume (WAC 388-155-070)

Licensor Comments:

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**B. CHARACTERISTICS OF APPLICANT AND HOUSEHOLD MEMBERS WAC 388-155- (GB P. 188-189)**

APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	Over 18 years of age (WAC 388-155-070)	C	C	Applicant/licensee/volunteers/assistants/visitors are qualified to care for or be in contact with children (WAC 388-155-090(3) (c))
C	D	Physical health sufficient to provide care (WAC 388-155-180)			
P	D	No alcohol consumption during hours of operation by anyone on the premises (WAC 388-155-430)	C	P	Good character (WAC 388-155-180) 01010068
C	D	No illegal drug use (WAC 388-155-090 & 430)	C	P	Emotional stability (WAC 388-155-180)
C	D	No known family problems to prevent doing care (WAC 388-155-090)	C	D	No alcohol abuse history (WAC 388-155-090)

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Please describe the reasons you have chosen to do child care:

*I love to work with small children. I think that I can make a good impression for small children and help them get started on their way to learning for school. I hope to instill in them a loving, confident and positive attitude. I also have a small child of my own that I would love to work with.*

**C. PARENT COMMUNICATION**

(WAC 388-155-170)

**GB PAGES 75-91**

The following WRITTEN policies and procedures are GIVEN and EXPLAINED to parents:

APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	Enrollment/admission requirements	C	C	Religious activities
C	C	Fee and payments plan	C	C	Transportation/trips
	C	Typical activity schedule	C	C	Medical emergencies
	C	Meals and snacks served (give example)	C	C	Practices concerning ill child
C	C	Permission for free access	C	C	Medication management
C	C	Child abuse and neglect reporting	C	C	Diapering
C	C	Behavior management and discipline (must state no corporal punishment allowed)	C	C	Toilet training
C	C	Non-discrimination statement	C	C	Feeding

Licenser Comments:

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The following WRITTEN policies and procedures are GIVEN and EXPLAINED to parents:

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**SECTION II TELL US ABOUT YOUR SPACE**

**INDOOR PLAY AREA AND HOME ATMOSPHERE (WAC 388-155-330, 388-155-370, 388-155-380) GB pages 169-179**

APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	At least 35 square feet of usable space per child for developmentally appropriate play. (WAC 388-155-330)	C	C	Any use of space for more than one purpose (examples: napping area or kitchen used as play space) is safe and appropriate (WAC 388-155-330)

Describe below the indoor play area(s) children use (attach picture if you wish):

*Indoor play areas that the children will be able to use will be: living room, dining room, kitchen and baby room.*

APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	Temperature maintained no lower than 68 F while child awake and 60 F while child naps	C	C	Lights provide good visibility and comfort
C	C	Cheerful learning environment provided	C	C	Accessible and individual storage for each child: Describe <u>SEPARATE BINS FOR EACH CHILD</u>

Please describe below some examples of decorations or pictures in your child care area at heights appropriate for children.

*I have posters and ABC, 123, Colors & Shapes taped level from kitchen table.*

Licenser Comments:

*else one bedroom, living area & dining area. Bedroom avail. if needed. Kitchen has flat surface w/ some space for play.*

**3. LEARNING AND PLAY MATERIALS (WAC 388-155-110) What do you have? GB pages 33-45**

APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	Appropriate to the ages and development of the children	C	C	Sufficient quantity and variety
C	C	Culturally relevant	C	C	Easily accessible

How have you stored your play materials so that children can get to them on their own?

*I have stored play materials in tupperware boxes on living room floor so children have easy access to them along with book case in baby room that holds toys & books.*

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**EARNING AND PLAY MATERIALS (continued)** (WAC 388-155-110) What do you have? GB pages 33-45

Please list below some of your inventory of play materials that promote the following:

Social development:

stuffed animals and dolls, felt board

Intellectual ability:

Books & Blocks, rattles, mobile, puzzles

Language or communication:

preschool material, alphabet, word & letter association

Self-help skills:

fitting shapes into required toy

Sensory stimulation:

books, sensory boxes, water activities, bubbles, playdough

Large and small muscle development:

net & take, balls, legos, blocks, crayons, outside toys, climbing toys

Creative expression:

Crayons, playdough, arts & crafts, gluing, cutting & pasting, paints

Licenser comments:

Provider has enough equipment & supplies to begin child care. Has equipment for a variety of ages & developmental stages. Provider has worked for an experienced in-home family child care provider & has followed examples & organization from this experience.

**C. OUTDOOR PLAY AREA** (WAC 388-155-320) Is it safe and fun? GB pages 165-169

APP	OCCP	Requirement	APP	OCCP	Requirement
C	N	Safe, securely-fenced or department approved enclosed play area that directly adjoins the indoor premises or is reached by a safe route and method	C	N	Child unable to get out of play area without adult
			C	N	Child unable to access roadways or dangers

Describe what encloses your outdoor play area and what methods (type of lock, etc.) you use to protect children from going out:

We have a fence that locks at top on one side of house. House. House area to be completely fenced so children will require help.

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**OUTDOOR PLAY AREA (continued)** (WAC 388-155-320) Is it safe and fun? GB pages 165-169

Please describe how you meet this requirement:

APP	OCCP	Requirement
C	C	Equipment and ground cover arranged, designed, and constructed to prevent child injury

Soft grassy area to play on along with sand box. sand filled under big toys.

List outdoor equipment and toys for:

APP	OCCP	Requirement
C	C	Variety and quantity of age appropriate play equipment that promotes active play, development, and coordination

Climbing:

toddler/preschool climbing toy w/ slide, small climber toy w/ slide

Riding:

Rocking horses

Pulling and pushing:

Shopping carts, rocking horses

Balancing:

climbing toys, cherny timbers around sand pit.

Licenser Comments:

**SECTION III TELL US WHAT YOU DO WITH CHILDREN**

**A. ACTIVITIES AND ROUTINES** (WAC 388-155-100) GB pages 17-33 & 43-45

APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	Child initiated activities: <u>BLOCKS, LEGGOS</u> <u>COLOR BOOKS</u>	C	C	Small and large muscle activities: <u>Climbing</u> <u>Toys outdoors - LEGGOS -</u> <u>Puzzles</u>
C	C	Free play: <u>All indoor play toys</u> <u>outdoor toys during summer</u> <u>weather</u>	P	C	Variety of special events: <u>Birthday's</u> <u>Holiday celebrations</u>
C	C	Individual activities: <u>ARTS &amp; CRAFTS</u> <u>COMPUTER TIME</u>	C	C	Adult-initiated activities: <u>ARTS &amp; CRAFTS</u> <u>STORYTIME</u>
C	C	Quiet experience: <u>STORYTIME, PUZZLES.</u> <u>COLOR BOOKS</u>	C	C	Organized events: <u>field trips</u> <u>same local park w/</u> <u>walking distance</u>

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**SECTION III**

**TELL US WHAT YOU DO WITH CHILDREN**

**A. ACTIVITIES AND ROUTINES (continued)**

(WAC 388-155-100)

GB pages 17-33 & 43-45

APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	Group activities: <u>Arts &amp; Crafts</u> <u>outdoor/indoor playtime</u>		C	Outdoor play: <u>free play, lots of</u> <u>space for organized games</u> <u>+ for children to run.</u>
	C	Active experiences: <u>outside play,</u> <u>cycling, exercise</u>	P	D	For American Indian children in care appropriate resources and programs developed (WAC 388-155-410)

Please describe how your activities and routines include and share aspects of your culture, and the cultures of the children in your care and in the broader community:

*Our daily activities and routines include stories about different people and places. I make like to look around for different artwork that the children can make thus creating a diverse cultural background for them to experience.*

Licenser Comments:

**B. APPLICANT-CHILD INTERACTIONS**

(WAC 388-155-120)

GB pages 45-51

APP	OCCP	Requirement	APP	OCCP	Requirement
		<u>observed interaction:</u> Through frequent interactions with the child in care, the applicant:	C	P	Respects the child's religious faith (WAC 388-155-400)
C	C	Is nurturing	C	CP	Treats child equally regardless of race, religion or handicapping condition (WAC 3788-155-120(1)(e))
C	C	Is supportive	C	C	Is responsive
C	C	Is respectful	C	P	Makes meal time pleasant and educational

Please describe below what it is about you, your philosophy of child care and your experience with children that helps you meet the above requirements:

*Raising 2 children of my own that are very sensitive as helped me to understand the needs of children along with a parenting class I took. Before I left Calif I believe that all children deserve the above responses.*

(Continue on next page)

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**APPLICANT-CHILD INTERACTIONS (CONTINUED)**

(WAC 388-155-120)

GB pages 45-51

*See previous page*

Licensur Comments:

**C. BEHAVIOR MANAGEMENT AND DISCIPLINE**

(WAC 388-155-130)

GB pages 52-68

APP	OCCP	Requirement	APP	OCCP	Requirement
		Applicant's behavior management practices promote:	C	P	Respect for the rights of others
C	P	Developmentally appropriate social behavior	C	C	No one on the premises uses corporal punishment (no "hitting, biting, jerking, shaking, spanking, slapping, striking, kicking" no "cruel, unusual, hazardous, frightening, or humiliating discipline" no "withholding of food, no physical restraint injurious to the child")
C	P	Self-control			
		Please describe below your goals for children's behavior. What methods do you use to reach these goals? How do you change your methods for children of different ages? How do your methods change for different individual children?	C	C	Behavior management plan submitted

*Time out 1 min. for ea. yr. talk to them about behavior offer suggestions - Redirection. NO physical discipline. there something ~~new~~ new or new way.*

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**BEHAVIOR MANAGEMENT AND DISCIPLINE (continued)**

(WAC 388-155-130)

GB pages 52-68

Licenser Comments:

**D. NON DISCRIMINATION AND REASONABLE ACCOMODATION**

(WAC 388-155-390 )

GB pages 181-185

APP	OCCP	Requirement	APP	OCCP	Requirement
		Complies with state and federal nondiscrimination laws including the Americans with Disabilities Act	C	Plc	Discrimination in employment is prohibited. Applicants and employees receive notice that program does not discriminate. Job applicants are not required to answer questions about their race, color, national origin, marital status, age, sex, disability, or Vietnam era veteran status
C	Plc	Discrimination in child care services on the basis of race, color, national origin, disability and marital or veteran status of child or family members is prohibited			
C	C	Policy that criteria for enrollment will not discriminate or tend to discriminate against children with disabilities	P	C	Policy to make reasonable accommodation to physical or mental limitations of any otherwise qualified disabled job applicant or employee
C	C	Policy to make reasonable accommodation to physical or mental limitations of disabled children in care or seeking care			
			N/A	P	If program has employees, it has a policy prohibiting sexual harassment and providing a means for making and resolving sexual harassment complaints

Licenser Comments:

**SECTION IV**

**TELL US WHAT YOU DO WITH CHILDREN**

**A. SUPERVISION OF CHILDREN IN YOUR CARE**

APP	OCCP	Requirement	APP	OCCP	Requirement
C	C/D	Children are within sight or hearing range at all times (WAC 388-155-120(3)) GB P. 51-52	C	D	Only parent, licensee or family member, employee, volunteer or government representative have regular or unsupervised access to the child (WAC 388-155-440) GB P. 189-190
C	D	No child is left unattended while in motor vehicle (WAC 388-155-165(6)) GB P. 70-75			
N/A	N/A	Young child supervised while bathing (WAC 388-155-340(8)(a)) GB P. 172	C	NA	Assistant providing sole supervision is 18 years of age or over (WAC 388-155-190(5)) GB P. 93

**B. PROTECTION OF CHILDREN IN YOUR CARE**

APP	OCCP	Requirement	APP	OCCP	Requirement
C	C/D	Child in care is protected from child abuse, neglect, or exploitation (WAC 388-155-420) GB P. 185-188	C	C/D	The licensee reports promptly to the licenser major changes in the premises, activities and routines, the assistant, or members of the household affecting the home's capacity classifications, delivery of safe, developmentally appropriate services (WAC 388-155-490) GB P. 206

**C. SAFETY AND ENVIRONMENT**

(WAC 388-155-280)

GB Pages 149-158

APP	OCCP	Requirement	APP	OCCP	Requirement
	C	Home, yard and equipment safe, sanitary and free of hazards, in good repair	C	C	Flashlight available. Location: kitchen (2)
NA	NA	Hand railings on stairs at child height	C	C	Working telephone available

01010075

Mark appropriately: **NA** = Not applicable      **C** = Compliance      **D** = Discussed      **N** = Noncompliance  
**P** = Presumed Compliance (no evidence to the contrary)      **W** = Waiver or exception granted per WAC 388-155-050.

**C SAFETY AND ENVIRONMENT (continued)** (WAC 388-155-280) GB Pages 149-158

APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	No flaking, lead-based paint on home or equipment	C	C	Poisonous plants inaccessible
C	C	Child accessible electrical outlets have non-removable safety devices or covers	C	C	All toxins inaccessible (including cosmetics)
If you own firearms and ammunition, please describe where and how they are locked and stored: <i>N/A</i>			N/A	NA	Firearms and ammunition in locked storage

**D. KITCHEN AND EATING EQUIPMENT** (WAC 388-155-250 AND 388-155-260) GB Pages 130-132

APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	Adequate facilities for preparing, storing, serving food	C	C	Each child has their own cup or glass or disposable single-use cups are used
C	C	Eating equipment properly cleaned	C	C	Appropriate size eating utensils
Please describe where hazardous items are kept. How do you make sure the children cannot get into them? <i>Hazardous items are kept in utility room which is locked.</i>			C	C	Hazardous appliances and sharp knives and utensils are inaccessible to child

**E. LAUNDRY** (WAC 388-155-350) GB Pages 172-173

APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	Access to washing and drying equipment	C	P	Contaminated laundry sanitized
C	C	Laundry equipment inaccessible to children	C	CP	Soiled and cleaned laundry stored separately
How do you keep children from being able to get into washer and dryer or other laundry equipment? <i>SAFETY LATCHES ON DRYER, FR., Baby gate</i>					

**F. TOILET** (WAC 388-155-340) GB Pages 171-172

APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	At least one indoor flush-type toilet with one adjacent hand washing sink	C	C	Water for handwashing is between 85-120° F. Temperature is: _____
C	C	Toilets and hand washing sinks at appropriate height or reached safely by easily cleanable platform	N/A	NA	If bath tub is used, it has nonskid pad or other safety device
C	C	Room used for toileting is ventilated	C	C	Toileting privacy provided for child six years or older or showing need for privacy
			C	C	Soap and individual cloth towel or <u>paper towels</u> used (Circle one)

**G. WATER SAFETY** (WAC 388-155-295) GB Pages 163

APP	OCCP	Requirement	APP	OCCP	Requirement
C	NA	Child NOT permitted to use or access heated tub, spa, whirlpool, tank or similar equipment.	N/A	NA	On-premises pool inaccessible when not in use
C	NA	Portable wading pool emptied, cleaned daily	N/A	NA	Certified life guard present when child uses pool off-premises
			N/A	NA	Adult with current CPR and First Aid supervises CONTINUOUSLY child's use of wading or other type of pool

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**G WATER SAFETY (continued)**

(WAC 388-155-295)

GB Pages 163

If you have a pool, hot tub or similar equipment, please describe how you keep children from getting into it:

N/A

Licenser Comments:

**H. FIRE AND SAFETY RULES**

(WAC 388-155-600, 605, 610, 620, 640, 650, 660, 670, 680)

**EQUIPMENT:** (WAC 388-155-610, 620, and 630)

APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	2A, 10BC fire extinguisher checked each year	C	C	Smoke detector installed in nap/sleeping areas
C	C	Fire extinguisher kept on shelf or mounted, top not more than 5 feet above floor, within 75 feet of exit	C	C	Smoke detector audible in all areas of buildings
C	C	Alternative method of sounding fire alarm: What is it? <u>Whistle</u>	N/A	C	Smoke detector installed on each story and basement <u>One level</u>
		Where is it kept? <u>With ESCAPE plan</u>	C	C	Proper type and size of extra batteries for smoke detectors
C	C	Smoke detectors tested monthly			Where are they kept: <u>STORAGE/utility ROOM</u>

**CONSTRUCTION:** (WAC 388-155-605 and 610)

APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	Hard wired smoke detectors shall be permanent, without a disconnecting switch <u>Hardwired</u>	N/A	NA	Commercial or biohazardous areas shall be separated from the child care with a fire wall

**EXITS:** (WAC 388-155-600)

APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	Two exits on each floor used for child care (one may be sliding glass door), usually at opposite ends of building	C	C	No night latches, dead bolts, security chains, manually operated edge or surface mounted bolts
			C	C	Maximum distance between exit door and any point in the home is not more than 150 feet
C	C	Each exit door opens easily, to full open position, from inside, without using a key	C	C	Each room used for napping/sleeping (and basements used for child care) has one approved emergency escape or rescue door or window

**BASEMENTS** more than FOUR FEET BELOW GRADE LEVEL used for child care must have one of the following:

APP	OCCP	Requirement	APP	OCCP	Requirement
NA		TWO EXIT stairways opening directly to exterior of building without entering the first floor, OR	C		ONE of the TWO EXITS is an operable window or door, approved for emergency escape or rescue, and opens directly to public street, public alley, yard or exit court, OR
		ONE of the TWO EXITS discharges directly to the exterior from the basement level AND a self-closing door is installed at the top or bottom of the interior stair leading to the floor ABOVE, OR	NA		RESIDENTIAL SPRINKLER SYSTEM installed for entire home meet National Fire Protection Association standard

Mark appropriately: **NA** = Not applicable      **C** = Compliance      **D** = Discussed      **N** = Noncompliance  
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SECONDSTORY, more than four feet above grade level, must have ONE of the following or shall not be used for child care, except for child to use the toilet facilities under supervision:

APP	OCCP	Requirement	APP	OCCP	Requirement
NA		TWO EXIT STAIRWAYS from second story open directly to exterior without entering the first floor, OR	NA		ONE of TWO EXITS discharges directly to exterior from second story level, and a self-closing door is installed at the top and bottom of interior stair leading to the floor below
NA		RESIDENTIAL SPRINKLER SYSTEM installed for entire home meet National Fire Protection Association standards, or			

SPLIT LEVEL HOMES shall have the following:

APP	OCCP	Requirement	APP	OCCP	Requirement
NA		If nap/sleeping areas are on the lower level, smoke detectors shall be used in all levels	NA		If nap/sleep rooms are on the upper level, detectors shall be installed near stairway and each nap room

ESCAPE OR RESCUE WINDOW has 5.7 square feet of net clear operable area:

APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	24" minimum net clear operable height	C	C	44" maximum sill height above floor or stationary platform under window to meet 44" requirement
C	C	20" minimum net clear operable width			

EMERGENCY PROCEDURES:

WRITTEN FIRE EVACUATION PLAN developed, including: (WAC 388-155-660 and 670)

APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	Monthly fire drills completed and record posted <i>already begun charting</i>	C	C	Method to sound alarm on the premises
C	C	FLOOR PLAN identifies exit doors, windows	C	C	Action plan to evacuate and account for children
C	C	Action plan of person discovering a fire	C	C	Action plan pending arrival of Fire Dept

LICENSEE, ASSISTANT AND VOLUNTEERS ARE FAMILIAR WITH AND ABLE TO ACCOMPLISH: (WAC 388-155-680)

APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	Fire evacuation plan	C	C	Test smoke detectors
C	P	Operate fire extinguishers	P	P	Conduct fire hazard home inspections and correct any hazards found

PREVENTION: (WAC 388-155-640) *\*compliant at time of inspection*

APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	Bathroom door lock opens from outside in an emergency, opening device readily available for staff use	C	P/C	Combustible rubbish not allowed to accumulate; removed from home or stored in closed, metal containers
NA	NA	Closet door latches open easily from the inside			
C	C	No obstructions in corridors, aisles, doorways, doors, stairways or ramps	C	P/C	Waste removed daily, disposal containers made of noncombustible material, with tops
C	C	No space that is accessible only by ladder, folding stairs or trap doors is used for child care	C	P	Electrical motors kept dust free
C	P	Furnace room kept free of lint, grease, rubbish accumulation, and suitably isolated, enclosed or protected	C	P	Electrical circuits, devices, appliances properly maintained
			C	C	Permanent wiring and receptacles used
C	P/C	Flammable or combustible materials stored away from exits, in areas not accessible to children	C	C	Circuits not overloaded (no multi-plug adapters)

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**PREVENTION continued:**

OCCP	Requirement	APP	OCCP	Requirement
<i>0 D</i>	Use of space heaters prohibited	<i>C</i>	<i>NA</i>	Fireplaces, wood stoves, similar devices and connections approved by local building authority; if used during child care hours, they are cleaned, maintained and inspected on annual basis by licensed specialist:

Please describe fireplaces, wood stoves, etc. you use during child care hours and attach documentation of applicable maintenance and inspections:

*N/A NO fireplace in house*

Please describe the type of barrier used to prevent children coming in contact with open flames or hot surface:

*N/A*

APP	OCCP	Requirement	APP	OCCP	Requirement
<i>C</i>	<i>D</i>	Open flame devices not left on, unattended, or used improperly	<i>C</i>	<i>C</i>	Local fire department requested to visit facility; Please document their response: <i>they came out</i>
<i>C</i>	<i>D</i>	Candles not used			<i>2/21/01 - did inspection</i>
<i>C</i>	<i>C</i>	House numbers plainly visible and legible from street fronting property; numbers contrast with background	<i>N/A</i>	<i>NA</i>	Sprinkler system, if installed, TESTED ANNUALLY by licensed specialist, with documentation maintained on site

for Comments:

**I. TRANSPORTATION (WAC 388-155-165) (WAC 388-155-450) GB PAGES 70 - 75**

APP	OCCP	Requirement	APP	OCCP	Requirement
<i>C</i>	<i>C</i>	Vehicle safe <i>van</i>	<i>C</i>	<i>C</i>	Driver(s) licensed <i>WA</i>
<i>C</i>	<i>C</i>	Vehicle liability and medical insurance Name of insurer <i>STATE FARM</i>	<i>C</i>	<i>C</i>	Seat belts and approved car seat for each child <i>6 belts tested</i>
<i>C</i>	<i>C</i>	Current first aid and CPR for adult in vehicle	<i>C</i>	<i>Pk</i>	Records on children available in case of emergency <i>1 car seat extra; 1 for our child</i>

**SECTION V TELL US HOW YOU KEEP CHILDREN HEALTHY**

**A. HEALTH (WAC 388-155-210, 388-155-220) GB pages 107-119 and page 189**

APP	OCCP	Requirement	APP	OCCP	Requirement
<i>C</i>	<i>C</i>	Health Care Plan, including HIV/AIDS policies, written and implemented	<i>C</i>	<i>P</i>	Child observed daily for signs of illness
<i>C</i>	<i>P</i>	Children properly immunized, immunization in progress or written exception to requirement	<i>C</i>	<i>C</i>	Smoke free child care environment (WAC 388-155-430 (2))

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**SECTION V**

**TELL US HOW YOU KEEP CHILDREN HEALTHY**

**A. HEALTH (continued)**

(WAC 388-155-210, 388-155-220)

GB pages 107-119 and page 189

APP	OCCP	Requirement	APP	OCCP	Requirement
C	P	Child and staff wash hands	C	C	Adequate space available for supervision of ill child
C	P	Toys, equipment, furnishings and facility cleaned and disinfected <i>bleach H<sub>2</sub>O. Rinse w/ dish soap + dishwasher</i>			

**B. MEDICATIONS**

(WAC 388-155-230)

GB pages 120 - 123

APP	OCCP	Requirement	APP	OCCP	Requirement
C	P	Written parental permission given <i>How medicines given</i>	C	P	Record kept of medicine given
C	P	Written physician permission to give, if needed	C	P	Medicines in properly labeled, original containers
C	C	External and internal medicines stored separately	C	P	Unused medicine returned to parent
		Please note where you keep your medicines:	C	C	Medicines are inaccessible to the children

*In locked box in refrigerator*

**C. FIRST AID SUPPLIES**

(WAC 388-155-270)

GB pages 133 - 147

Please list the contents of your first aid supplies container:

<i>22 Back of First Aid Box</i>	<i>—</i>	<i>caten ball, A bandage</i>
<i>sterile strips, non stick tape</i>	<i>fever relief, cold compress</i>	
<i>bandaids, gauze, tape</i>	<i>thermometer, tweezers,</i>	
<i>wound supplies, antiseptic, sunscreen, scissors, gloves</i>		Expiration date of syrup of Ipecac: <i>1/05 / 9/105</i>

**D. CARE OF THE YOUNG CHILD**

(WAC 388-155-270)

GB pages 133-147

**FEEDING:**

APP	OCCP	Requirement	APP	OCCP	Requirement
C	P	Parents agree with feeding schedule	C	P	Child held while bottle feeding (no propped bottles)
C	P	Prepare, label, refrigerated bottle properly	C	P	Semisolid food provided with parental consultation

**DIAPER CHANGING AREA IS:**

APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	Separate from food preparation	C	C	Impervious to moisture and washable
C	C	Easily accessible to handwashing sink	C	P	Proper disposal of diapers
C	P	Sanitized between use by different children or use a disposable covering, discarding after each use	C	P	Proper diaper changing procedure
		Please describe the area where you do diaper changing and how it is:	C	P	Hands washed after diapering each child

*in room. Will change them on changing pad on floor or changing table. Imperv. to moisture & pad covered w/ presistent cotton & child's blanket.*

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TOILET TRAINING: (WAC 388-155-270 (1))			EQUIPMENT: (WAC 388-155-270 (5)(6)(7))		
APP	OCCP	Requirement	APP	OCCP	Requirement
C	P	Begun after consulting with parent(s)	C	C	Have: <u>1</u> crib(s), <u>   </u> infant bed(s), <u>1</u> bassinet(s), and <u>1</u> play pen(s)
C	C	Equipment properly located and developmentally appropriate	C	P	Equipment safe for use
C	C	Equipment sanitized after each use	C	C	Crib slats <u>2 3/8"</u> or less apart if used by child under six months

ACTIVITIES AND ROUTINES (WAC 388-155-270(8))					
APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	Safe and suitable toys and equipment	C	C	Sensory stimulation
		Daily opportunity for activities and routines to promote: (please describe briefly)	C	C	Social interaction
C	C	Large and small muscle development	C	C	Development of communication
C	C	Crawling and exploring	C	C	Self-help skills

E. NUTRITION (WAC 388-155-240)			GB pages 123-130		
APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	Meals follow USDA Food Program Guidelines with added Vitamin C and A	C	P	Food brought from home monitored to meet nutritional requirements
		If applicable, which food program will you be on: <u>Rainbow Valley</u>	C	P	Only WHOLE MILK GIVEN to child twenty-three months or younger, except with parental permission
		Observed snack: cantaloupe, oranges, Bananas, Apple juice	C	P	Food provided meets needs of the child, taking into consideration child's cultural background (WAC 388-155-240(1)(c))

F. REST PERIODS (WAC 388-155-140)			GB pages 69 - 70		
APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	Supervised rest periods offered	C	C	Quiet activities planned for child not resting
C	C	Individual sleep schedule followed for children under 29 months of age			Please describe: <u>Books, Puzzles, Movies</u>

G. NAP AND SLEEP EQUIPMENT (WAC 388-155-360)			GB pages 173 - 175		
APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	Clean, separate, firm mat, cot, bed, playpen, crib provided for each child five years or younger and for other child who naps. Please note how many you have: <u>5</u> firm mats <u>   </u> cots <u>1</u> beds ( <u>crunch mat</u> <u>and</u> <u>rails</u> ) <u>1</u> playpens <u>1</u> cribs	C	C	Clean sheet or blanket for each child <u>Sleeping Bags</u>
			C	C	Nap equipment cleaned as needed, and between use by different children
			C	C	Mat or cot is long, wide, thick enough to give com and is easily cleanable
			C	D	May use sleeping bag for toilet trained child
C	C	Bedding laundered weekly or more often as needed	C	C	Each bedding stored separately
C	C	Nap equipment separated when in use	NA	NA	Upper bunk not used for preschool age or younger child

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EVENING AND NIGHT - TIME CARE (WAC 388-155-150)			GB pages 69 - 70 and 125		
APP	OCCP	Requirement	APP	OCCP	Requirement
NA		Activities, routines and equipment adapted to meet child's physical and emotional needs	NA		Child is always in sight or hearing range
			NA		Sleeping child is able to remain asleep during arrival and departure of another child

Please describe where child / children sleep for night - time care:

N/A

Licensor Comments:

no evening care provided.

**SECTION VI: KEEPING TRACK OF YOUR BUSINESS**

**A. RECORDS, REPORTING AND POSTING** *has forms needed.*

CHILD'S RECORD CONTAINS CURRENT: (WAC 388-155-450) GB pages 191 - 201

APP	OCCP	Requirement	APP	OCCP	Requirement
C	P	Registration information			Parent's consent for:
C	P	Authorization to pick up	C	P	Travel
C	P	Health history	C	P	Medical Care
C	P	Immunization history	C	P	Medication

PROVIDER RECORDS CONTAINS: (WAC 388-155-460)

APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	Attendance records <i>from Rainbow Valley school page.</i>	C	P	Injury, illness, dispensed medication reports <i>see 1</i>

PERSONNEL RECORDS CONTAIN: (WAC 388-155-470) GB PAGES 93 - 105

APP	OCCP	Requirement	APP	OCCP	Requirement
NA	C	Employment application/resume <i>own - provider</i>	NA	C	First Aid and CPR training, if applicable
NA	C	Copy of criminal history form submitted	NA	C	HIV/AIDS training 01010082
NA	C	TB test results	NA	C	Additional trainings if applicable <i>signed up on march 3, 17, 24th</i>

PROVIDER REPORTS IMMEDIATELY: GB PAGES 205 - 206

APP	OCCP	Requirement	APP	OCCP	Requirement
C	D	Death, serious injury or illness requiring hospitalization to: Parent, Emergency Medical (ie 911), Office of Child Care Policy and, if applicable, child's social worker	C	D	Suspicion of child abuse, neglect or sexual abuse to: Children's Administration intake (Child Protective Services), at this phone number:
C	D	Food poisoning or communicable disease to local public health department			or local law enforcement 253-863-2218 <i>9/1/08</i>

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**THESE ITEMS ARE VISIBLY POSTED:**

**GB page 207**

APP	OCCP	Requirement	APP	OCCP	Requirement
C	P	Child care license	C	C	Emergency phone numbers
C	C	Evacuation plan and procedures including floor plan	C	C	Fire drill, smoke alarm test record

**B. CAPACITY**

**(WAC 388-155-190)**

**GB pages 93 - 96**

Applicant/provider licensable for the following categories (multiple options allowed) as approved by DSHS:

APP	OCCP	Requirement	APP	OCCP	Requirement
C	✓	6 children, ages birth - 11 years old (2 under 2 years of age allowed)	N/A		9 children, ages birth - 11 years old (4 under 2 years of age), with an assistant and 1 year experience
N/A		8 children, ages 2 - 11 years old (zero under 2 years of age allowed)	N/A		10 children, ages 3 - 11 years old (zero under age 3), with 2 years experience and 1 ECE class / equivalent
N/A		10 children, ages 5 - 11 years old (zero under 2 years of age allowed)	N/A		12 children, ages birth - 11 years old (four under 2 years of age), with assistant and 2 years experience and 1 ECE class / equivalent

Licensor Comments:

*Infant to five only.*

**C. ASSISTANT(S) Will use CD needed only (WAC 388-155-180, 200 AND 220)**

**GB pages 93 - 105**

Licensee is the primary caregiver. Any other person performing care giving interactions with child in care must be qualified by the department per WAC requirements in this section.

Name of Assistant: Phillip Fish Age: 32

Name of Assistant: \_\_\_\_\_ Age: \_\_\_\_\_

Name of Assistant: \_\_\_\_\_ Age: \_\_\_\_\_

APP	OCCP	Requirement	APP	OCCP	Requirement
C	C	Assistant age 14 to 18 years old never provides unsupervised care to child	C	C	TB test result submitted: Date: <u>Jan 2001, 23</u>
C	D	Assistant 18 years of age or older has sole caregiver responsibility only on limited time basis and only if required qualifications are met	C	C	HIV/AIDS training Date: <u>1/27/01</u>
			C	P	Good character 01010083
C	P	Physical health sufficient to provide care	C	C	Orientation provided to assistant (covering areas listed in WAC 388-155-200) <u>by provider</u>
C	P	Competent to make judgments	C	C	Basic, standard first aid training: Expiration Date: <u>1/27/03</u>
C	C	Criminal history form submitted to DSHS	C	C	Standard and infant / child CPR training, if applicable Expiration Date: <u>1/27/03</u>

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Assistants meet the following requirements: Attach additional sheet(s) if more than one assistant is employed (continued)

Please describe the duties of any assistant(s) in your program:

*Phil Fish would be able to help with child care in Morn. hours till 12:30.*

Licensur Comments:

**D. ADMINISTRATIVE HEARING**

(WAC 388-155-090)

APP	OCCP	Requirement	
<i>C</i>	<i>D</i>	Applicant is aware of administrative hearings procedure	<i>Mary K. Dunlan, supervisor 983-6413 Jan Knight, assistant 983-6400</i>

**OFFICE OF CHILD CARE POLICY (FILLED OUT BY LICENSOR ONLY)**

OCCP	Requirement	OCCP	Requirement
<i>C</i>	References checked	<i>C</i>	CAMIS checked
<i>N</i>	Criminal history cleared	<i>C</i>	Referral service information given
<i>C</i>	Subsidized care and provider number explained to applicant	<i>C</i>	Fee paid

**WAC REQUIREMENTS STILL NEEDING TO BE MET:**

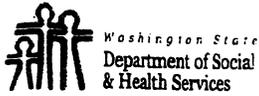
Deadline to Complete:

I hereby certify that I agree to maintain compliance with the provisions of Chapter 74.15 of the Revised Code of Washington (child care agency licensing statute), and with the provisions of Chapter 388-155 of the Washington Administrative Code (WAC) (minimum licensing requirements). I hereby further certify that the above information and required attachments are true and complete to the best of my knowledge.

Applicant's signature: *H. Crispin Fish* Date: *2/26/01*  
 Licensor's signature: *H. Crispin Fish* Date: *2/26/01*  
 Regional Manager's review signature: \_\_\_\_\_ Date: \_\_\_\_\_

01010084

# Appendix 9



DIVISION OF CHILD CARE AND EARLY LEARNING

FAMILY CHILD CARE HOME LICENSING STUDY

DEPOSITION EXHIBIT # 49  
Quinlan

PENICAD 800-631-6596

NAME: LISA M FISH LICENSE NUMBER: 75959 TELEPHONE NUMBER: (include area code) (253) 826-7988

STREET ADDRESS: 6408 S. ISLAND Dr CITY: BENNEY LAKE STATE: WA ZIP CODE: 98390

NAME OF LICENSOR: Victor OFFICE: TACOMA PHONE: 983-6418 HOME VISIT DATE: 3/23/04

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APP = To be completed by the applicant DCCEL = To be completed by the DCCEL licensor

WAC = Washington Administrative Code, licensing requirements  
 GB = Guidebook page numbers. The applicant can use the Guidebook to find information regarding meeting requirements and about best practices.

A. SHOW US YOUR DOCUMENTS			WAC 388-155-070, 180, 200, 220, 290 (GB 11)		
APP	DCCEL	REQUIREMENT	APP	DCCEL	REQUIREMENT
C	C	Attended orientation Date(s) <u>11-28-00</u>	C	C	HIV / AIDS Training Date(s): <u>11-15-2003</u>
C	C	Basic, Standard First Aid Training Expiration Date(s): <u>11-15-2005</u>	N/A	/	Water quality approval if required Date: <u>City</u>
C	C	Infant / Child CPR Training Expiration Date(s): <u>11-15-2005</u>	N/A	/	Sewage system approval if required Date: <u>City</u>
	C	TB Test results Date: <u>1-23-01</u>			Employment / Education resume
C	C	20 Hours Basic STARS Training completed	C	C	

B. CHARACTERISTICS OF APPLICANT AND HOUSEHOLD MEMBERS			WAC 388-155-090, 180, 430 (GB 188-189)		
APP	DCCEL	REQUIREMENT	APP	DCCEL	REQUIREMENT
C	C	Over 18 years of age	C	C	No illegal drug use
C	C	Physical health sufficient to provide care	C	C	Good character
C	C	Emotional stability	C	C	No alcohol abuse history
C	C	No known family problems to prevent doing care	C	C	No alcohol consumption during hours of operation by anyone on the premises
C	C	Applicant/licensee/volunteers/assistants/visitors are qualified to care for or be in contact with children	C	C	Applicant primary child care provider during the majority of child care business hours

Please describe the reasons you have chosen to do child care:

*I Love working with Children and helping them to get a good start before School. I have to small Children of my own and this job ensures that they are in a safe, loving and learning environment.*

*CRESPINK@AOL.COM*

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**C. PARENT COMMUNICATION**

WAC 388-155-170

(GB 75-91)

The following WRITTEN policies and procedures are given and explained to parents:

APP	DCCEL	REQUIREMENT	APP	DCCEL	REQUIREMENT
C	C	Enrollment/admission requirements	C	C	Religious activities
C	C	Fee and payment plan	C	C	Transportation/trips
C	C	Typical activity schedule	C	C	Medical emergencies
C	C	Meals and snacks served (give example)	C	C	Practices concerning ill child
C		Permission for free access	C	C	Medication management
C	C	Child abuse and neglect reporting		C	Disaster response plan
C		Nondiscrimination statement	C	C	Health Care Practices
N/A		Practices regarding night time care if applicable			Care of the young child: <input checked="" type="checkbox"/> SIDS Guidelines <input checked="" type="checkbox"/> Diapering <input checked="" type="checkbox"/> Toilet Training <input checked="" type="checkbox"/> Feeding
C	C	Behavior management and discipline (must state no corporal punishment allowed)	C	C	
C		Typical staffing plan when provider is absent			

**A. INDOOR PLAY AREA AND HOME ATMOSPHERE**

WAC 388-155-330, 370, 380

(GB 169-170, 175-179)

APP	DCCEL	REQUIREMENT	APP	DCCEL	REQUIREMENT
C	C	At least 35 square feet of usable space per child for developmentally appropriate play	C	C	Temperature maintained no lower than 68 F while child awake and 60 F while child naps
C	C	Any use of space for more than one purpose (examples: Napping area or kitchen used as play space) is safe and appropriate	C	C	Accessible and individual storage for each child: Describe below
			C	C	Lights provide good visibility and comfort
			C	C	Cheerful learning environment provided

Describe below the indoor play area(s) children use. Include storage space (attach picture if you wish):

*INDOOR PLAY AREA THAT THE CHILDREN ARE ABLE TO USE ARE: Living Room, Dining Room, Kitchen, Hallway AND CHILDRENS ROOM. MORE THAN I USE WOULD BE THE NAPPING/CHILDRENS ROOM AND THE KITCHEN AREA.*

*EACH CHILD IS ABLE TO USE A TUB FOR PERSONAL STORAGE, HOWEVER IF PARENTS PREFER TO BRING BABY BAG WITH BABYS NEEDED THINGS THIS IS ACCEPTABLE ALSO.*

01010045

**B. LEARNING AND PLAY MATERIALS - What do you have?**

WAC 388-155-110

(GB 33-45)

DCCEL	REQUIREMENT	APP	DCCEL	REQUIREMENT
C	Appropriate to the ages and development of the children	C	C	Sufficient quantity and variety
C	Culturally relevant	C	C	Easily accessible

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**B. LEARNING AND PLAY MATERIALS - What do you have? (cont) WAC 388-155-110 (GB 33-45)**

		For 1 through 7, please check the play materials in your inventory which promote the following:	
APP	DCCEL	REQUIREMENT	
C	C	1. <b>Social development</b> - Toys and/or equipment that encourage play with other children. For example: <input type="checkbox"/> housekeeping props <input checked="" type="checkbox"/> puppets <input checked="" type="checkbox"/> games <input checked="" type="checkbox"/> dolls <input type="checkbox"/> wagons <input checked="" type="checkbox"/> balls <input type="checkbox"/> Other: _____	
C	C	2. <b>Intellectual ability</b> - Toys and/or equipment that encourage thinking, problem solving, and choices. For example: <input checked="" type="checkbox"/> puzzles <input checked="" type="checkbox"/> Legos <input type="checkbox"/> Tinkertoys <input checked="" type="checkbox"/> books <input type="checkbox"/> beads <input checked="" type="checkbox"/> blocks <input type="checkbox"/> Other: <u>DINO BINGO, LEAP PAD, MATH, COMPREHENSION BOOK ect.</u>	
C	C	3. <b>Language development and communication</b> - Toys and/or equipment that encourage talking, listening, and understanding. For example: <input checked="" type="checkbox"/> puppets <input checked="" type="checkbox"/> books <input type="checkbox"/> pictures <input checked="" type="checkbox"/> play telephone <input checked="" type="checkbox"/> recordings of simple songs <input checked="" type="checkbox"/> dolls <input type="checkbox"/> paper dolls <input type="checkbox"/> Other: <u>MUSIC,</u>	
C	C	4. <b>Self-help skills</b> - Toys and/or equipment that encourage and teach day-to-day living skills and independence. For example: <input checked="" type="checkbox"/> Child sized furnishings <input checked="" type="checkbox"/> dishes, eating utensils <input checked="" type="checkbox"/> things to button, zip, and snap <input type="checkbox"/> clean-up <u>tools</u> <input type="checkbox"/> small vacuum <input type="checkbox"/> Other: _____	
C	C	5. <b>Sensory stimulation</b> - Toys and/or equipment that encourage children to use their senses (seeing, hearing, tasting, touching, and smelling). For example: <input checked="" type="checkbox"/> books <input type="checkbox"/> pictures <input checked="" type="checkbox"/> musical toys <input type="checkbox"/> noise makers <input checked="" type="checkbox"/> various play area textures (carpet, flooring, sand, gravel, grass, cement) or textures toys (plastic, wood, cloth, fur) <input checked="" type="checkbox"/> Other: <u>FELT BOARD</u>	
C	C	6. <b>Large muscle development</b> - Toys and/or equipment that encourage the use of large body muscles (arm and legs for running, skipping, hopping, pedaling, jumping, throwing, rolling). <input checked="" type="checkbox"/> balls <input checked="" type="checkbox"/> bikes <input type="checkbox"/> scooters <input checked="" type="checkbox"/> climbing toys <input type="checkbox"/> balance beam <input type="checkbox"/> tires <input type="checkbox"/> boxes <input type="checkbox"/> crawling tubes <input type="checkbox"/> Other: <u>CAR, JUMP ROPE</u>  <b>Small muscle development</b> - Toys and/or equipment that encourage the use of small body muscles (fingers and toes). For example: <input checked="" type="checkbox"/> pencils <input checked="" type="checkbox"/> paper <input checked="" type="checkbox"/> crayons <input checked="" type="checkbox"/> markers <input checked="" type="checkbox"/> scissors <input checked="" type="checkbox"/> glue or paste <input checked="" type="checkbox"/> paint <input checked="" type="checkbox"/> brushes <input checked="" type="checkbox"/> Lego's <input type="checkbox"/> Tinkertoys <input checked="" type="checkbox"/> spoon and fork <input type="checkbox"/> Other: _____	
C	C	7. <b>Creative expression</b> - Toys and/or equipment that encourage activities stimulated from within the child (the child is allowed to use the toys and/or equipment expressing his own ideas or feelings with no specific end results in mind). For example: <input checked="" type="checkbox"/> paper <input checked="" type="checkbox"/> crayons <input checked="" type="checkbox"/> scissors <input checked="" type="checkbox"/> glue or paste <input checked="" type="checkbox"/> paints <input checked="" type="checkbox"/> brushes <input type="checkbox"/> sand <input type="checkbox"/> blocks <input type="checkbox"/> Tinkertoys <input type="checkbox"/> play dough <input type="checkbox"/> music and scarves for movement <input checked="" type="checkbox"/> blankets and sheets for tent making <input type="checkbox"/> Other: _____	

How have you stored your play materials so that children can get to them on their own? Yes, I HAVE STORED TOYS IN TUPPERWARE BOXS ON THE FLOOR FOR EASY ACCESS. TOYS IN TOY BOX IN CHILDREN'S ROOM AND AROUND THE HOUSE.

**C. OUTDOOR PLAY AREA - Is it safe and fun? WAC 388-155-320 (GB 165-169)**

APP	DCCEL	REQUIREMENT	APP	DCCEL	REQUIREMENT
C	C	Safe, securely-fenced (minimum 48" high) or department approved enclosed play area that directly adjoins the indoor premises or is reached by a safe route and method	C	C	Child unable to access roadways or dangers
C	C	Child unable to get out of play area without adult	C	C	Preschool child and younger must be in visual and auditory range.

P e describe what encloses your outdoor play area and what methods (type of lock, etc.) you use to protect children getting out: My HOME IS FENCED AND ATTACHED TO BOTH SIDES OF MY HOUSE AND FENCED IN BACK BEFORE THE LAST FENCE IN BACK.

Mark appropriately: C = Compliance D = Discussed N = Noncompliance NA = Not applicable  
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**C. OUTDOOR PLAY AREA - Is it safe and fun? (cont)**

WAC 388-155-320 (GB 165-169)

APP	DCCCEL	REQUIREMENT	APP	DCCCEL	REQUIREMENT
C	C	Variety and quantity of age appropriate play equipment that promotes active play, development, and coordination	C	C	Equipment and ground cover arranged, designed, and constructed to prevent child injury

Please indicate which of the following you have in your outdoor play area:

- |   |  |  |
|---|--|--|
| <input checked="" type="checkbox"/> balancing (for example: tires, balance beam, etc.)<br><input checked="" type="checkbox"/> climbing (for example: swing sets, climbers, boxes, etc.)<br><input checked="" type="checkbox"/> pushing (for example: push toys, strollers, etc.)<br><input type="checkbox"/> pulling (for example: wagons, carts, etc.) | <input checked="" type="checkbox"/> riding (for example: younger/older children)<br><input checked="" type="checkbox"/> low slide<br><input checked="" type="checkbox"/> small climbing equipment<br><input checked="" type="checkbox"/> jump ropes<br><input checked="" type="checkbox"/> balls (big and small)<br><input checked="" type="checkbox"/> sporting equipment<br><input type="checkbox"/> book of organized cooperative group games | <input checked="" type="checkbox"/> sandbox<br><input checked="" type="checkbox"/> wading pool<br><input checked="" type="checkbox"/> sidewalk chalk<br><input type="checkbox"/> large boxes<br><input type="checkbox"/> storage (for example: large boxes, netting, large buckets)<br><input type="checkbox"/> Other: |
|---|--|--|

**A. ACTIVITIES AND ROUTINES**

WAC 388-155-100 (GB 17-33 & 43-45)

APP	DCCCEL	REQUIREMENT	APP	DCCCEL	REQUIREMENT
C	C	Child-initiated activities/free play: <i>Blocks, Leggos, color books, toys from bins, toy box</i>	C	C	Small muscle activities: <i>Climbing toys, toys outdoor, Leggos, puzzles, arts &amp; crafts, coloring</i>
C	C	Provider-initiated activities: <i>Preschool arts &amp; crafts, story time</i>	C	C	Large muscle activities: <i>Bikes, jump rope, red rover, tag, hide &amp; seek, ball games, basketball, ect. toys outdoors, beams</i>
C	C	Quiet experiences: <i>Books, story time, puzzles, color books</i>	C	C	Organized events: <i>Birthdays, holidays, preschool: academic, music, arts &amp; crafts, walks, park</i>
C	C	Interactive experiences: <i>Hide &amp; seek, Ring Around the Rosie, what am I, cooking, preschool reading, writing.</i>	C	C	

**B. APPLICANT-CHILD INTERACTIONS**

WAC 388-155-120 (GB 45-51)

Through frequent interactions with the child in care, the applicant:

APP	DCCCEL	REQUIREMENT	APP	DCCCEL	REQUIREMENT
C	C	Is nurturing	C	C	Is responsive
C	C	Is supportive	C	C	Makes meal time pleasant and educational
C	C	Is respectful	C	C	

**C. BEHAVIOR MANAGEMENT AND DISCIPLINE**

WAC 388-155-130 (GB 52-68)

Applicant's behavior management practices promote:

APP	DCCCEL	REQUIREMENT	APP	DCCCEL	REQUIREMENT
N	C	Developmentally appropriate social behavior	C	C	Self-control and respect for the rights of others
C	C	No one on the premises uses corporal punishment (no "hitting, biting, jerking, shaking, spanking, slapping, striking, kicking"; no "cruel, unusual, hazardous, frightening, or humiliating discipline"; no "withholding of food, no physical restraint injurious to the child") including disciplinary use of highchair, car seat, or infant seat			

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**D. NON DISCRIMINATION AND REASONABLE ACCOMMODATION** WAC 388-155-390, 410, 400, 120 (GB 181-185)

APP	DCCCEL	REQUIREMENT	APP	DCCCEL	REQUIREMENT
C	C	Complies with state and federal nondiscrimination laws including the Americans with Disabilities Act	C	C	Policy to make reasonable accommodation to physical or mental limitations of disabled children in care or seeking care
C	C	Discrimination in employment is prohibited. If program has employees, it has information about reasonable accommodation for a disabled employee.	C	C	Policy to make reasonable accommodation to physical or mental limitations of any otherwise qualified disabled job applicant or employee
C	C	Discrimination in child care services on the basis of race, creed, color, national origin, sex, marital status, age, or the presence of any sensory, mental, or physical disability or use of a trained guide dog or services animal of child or family members is prohibited	C	C	For American Indian children in care appropriate resources and programs developed in consultation with the parent
			C	C	Treat child equally regardless of race, religion, abilities, and family structure
			C	C	Respects the child's religious faith

**A. SUPERVISION OF CHILDREN IN YOUR CARE** WAC 388-155-120, 165, 440 (GB 51-52, 70-75, 189-190)

APP	DCCCEL	REQUIREMENT	APP	DCCCEL	REQUIREMENT
C	C	Children are within sight or hearing range at all times	C	C	Only parent, licensee or family member, employee, volunteer or government representative have regular or unsupervised access to the child
C	C	No child is left unattended while in motor vehicle			

**B. SAFETY AND ENVIRONMENT** WAC 388-155-280 (GB 149-158)

APP	DCCCEL	REQUIREMENT	APP	DCCCEL	REQUIREMENT
C	C	Home, yard and equipment safe, sanitary and free of hazards, in good repair	C	C	No flaking, lead-based paint on home or equipment
C	C	Child accessible electrical outlets have non-removable safety devices or covers	C	C	Working telephone available
C	C	Poisonous plants inaccessible	C	C	All toxins inaccessible (including cosmetics)
C	C	Firearms and ammunition in locked storage	C	C	Hand railings on stairs at child height
			C	C	Flashlight available Location: in lower

If you own firearms and ammunition, please describe where and how they are locked and stored: *Kitchen Cupboard*

*NA*

**C. KITCHEN AND EATING EQUIPMENT** WAC 388-155-250 (GB 130-132)

APP	DCCCEL	REQUIREMENT	APP	DCCCEL	REQUIREMENT
C	C	Adequate facilities for preparing, storing, serving food	C	C	Eating equipment properly cleaned using an approved sanitizer
C	C	Each child has their own cup or glass or disposable single-use cups are used	C	C	Appropriate size eating utensils
	C	Hazardous appliances and sharp knives and utensils are inaccessible to child			

Please describe where hazardous items are kept. How do you make sure the children cannot get into them?  
*HAZARDOUS ITEMS ARE KEPT IN UTILITY ROOM. THERE IS A LOCK ON DOOR KNOB AND CHILD PROOF DOOR LOCK ON DOOR KNOB.*

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**D. LAUNDRY**

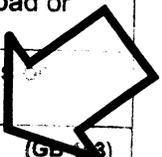
WAC 388-155-350 (GB 172-173)

APP	DCCEL	REQUIREMENT	APP	DCCEL	REQUIREMENT
C	C	Soiled and cleaned laundry stored separately	C	C	Soiled laundry and hazardous laundry supplies inaccessible to children
C	C	Contaminated laundry sanitized			

**E. TOILET**

WAC 388-155-340 (GB 171-172)

APP	DCCEL	REQUIREMENT	APP	DCCEL	REQUIREMENT
C	C	Toilets and hand washing sinks at appropriate height or reached safely by easily cleanable platform	C	C	At least one indoor flush-type toilet with one adjacent hand washing sink
C	C	Water for handwashing is between 85-120° F. Temperature is:	C	C	Room used for toileting is ventilated
C	C	Toileting privacy provided for child six years or older or showing need for privacy	N/A	/	If bath tub is used, it has nonskid pad or other safety device
			C	C	Soap and <input type="checkbox"/> individual cloth towels <input checked="" type="checkbox"/> paper towels used



**F. WATER SAFETY**

WAC 388-155-295 (GB 173)

APP	DCCEL	REQUIREMENT	APP	DCCEL	REQUIREMENT
N/A	/	Child not permitted to use or access heated tub, spa, whirlpool, tank or similar equipment	C	/	Adult with current CPR and First Aid supervises continuously child's use of wading or other type of pool
C	C	On-premises pool inaccessible when not in use	N/A	/	Certified life guard present when child uses pool off- premises
/	/	5 Foot high fence with gates to prevent access to water	C	C	Portable wading pool emptied after use and cleaned daily

if you have a pool, hot tub or similar equipment, please describe how you keep children from getting into it:

WADING POOL, USED IN SUMMERTIME, EMPTIED DAILY & CLEANED OUT, PUT AWAY IN GARAGE WHEN NOT IN USE.  
 SMALL PLASTIC POOL FOR SUMMER TIME - DON'T HAVE ONE YET

**G. FIRE AND SAFETY RULES**

WAC 388-155-600, 605, 610, 620, 630, 640, 650, 660, 670, 680

**EQUIPMENT:**

WAC 388-155-610, 620, and 630

APP	DCCEL	REQUIREMENT	APP	DCCEL	REQUIREMENT
C	C	Smoke detectors tested monthly			Alternative method of sounding fire alarm: What is it? Whistle Where is it kept? hung up with Fire ESCAPE EXIT PLAN.
C	C	Smoke detector installed in nap/sleeping areas			
C	C	Smoke detector audible in all areas of buildings	C	C	
C	C	Smoke detector installed on each story and basement	C	C	2A, 10BC fire extinguisher checked each year
C	C	Proper type and size of extra batteries for smoke detectors and where are they kept: in utility room.	C	C	Fire extinguisher kept on shelf or mounted, top not more than 5 feet above floor, within 75 feet of exit

**CONSTRUCTION:**

WAC 388-155-605 and 610

DCCEL	REQUIREMENT	APP	DCCEL	REQUIREMENT
C	C		N/A	Commercial or biohazardous areas must be separated from the child care with a fire wall

DETACHED GARAGE

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**G. FIRE AND SAFETY RULES (cont)**

WAC 388-155-600, 605, 610, 620, 630, 640, 650, 660, 670, 680

**EXITS:**

WAC 388-155-600

APP	DCCEL	REQUIREMENT	APP	DCCEL	REQUIREMENT
C	C	Two exits on each floor used for child care (one may be sliding glass door), usually at opposite ends of building	C	C	No night latches, dead bolts, security chains, manually operated edge or surface mounted bolts used during child care hours
C	C	Maximum distance between exit door and any point in the home is not more than 150 feet	C	C	Each room used for child care has one approved emergency escape or rescue door or window
C	C	Each exit door opens easily, to full open position, from inside, without using a key			

**BASEMENTS more than FOUR FEET BELOW GRADE LEVEL used for child care must have one of the following:**

APP	DCCEL	REQUIREMENT	APP	DCCEL	REQUIREMENT
N/A	/	One of the two exits discharges directly to the exterior from the basement level AND a self-closing door is installed at the top or bottom of the interior stair leading to the floor above, OR	N/A	/	One of the two exits is an operable window or door, approved for emergency escape or rescue, and opens directly to public street, public alley, yard or exit court, OR
N/A	/	Two exit stairways opening directly to exterior of building without entering the first floor, OR	N/A	/	Residential Sprinkler System installed for entire home meet National Fire Protection Association standard

**SECOND STORY, more than four feet above grade level, must have ONE of the following or must not be used for child care, except for child to use the toilet facilities under supervision:**

APP	DCCEL	REQUIREMENT	APP	DCCEL	REQUIREMENT
N/A	/	Two exit stairways from second story open directly to exterior without entering the first floor, OR	N/A	/	Residential Sprinkler System installed for entire home meet National Fire Protection Association standards, OR
N/A	/	One of two exits discharges directly to exterior from second story level, and a self-closing door is installed at the top and bottom of interior stair leading to the floor below			

**SPLIT LEVEL HOMES must have the following:**

APP	DCCEL	REQUIREMENT	APP	DCCEL	REQUIREMENT
N/A	/	If nap/sleeping areas are on the lower level, smoke detectors shall be used in all levels	N/A	/	If nap/sleep rooms are on the upper level, detectors shall be installed near stairway and each nap room

**ESCAPE OR RESCUE WINDOWS must have:**

APP	DCCEL	REQUIREMENT	APP	DCCEL	REQUIREMENT
C	C	24" minimum net clear operable height	C	C	44" maximum sill height above floor or stationary platform under window to meet 44" requirement
C	C	20" minimum net clear operable width			
C	C	5.7 square feet of net clear openable area			

**H. EMERGENCY PROCEDURES**

WAC 388-155-660, 670, 680, 640

**WRITTEN FIRE EVACUATION PLAN developed, including:**

WAC 388-155-660 and 670

APP	DCCEL	REQUIREMENT	APP	DCCEL	REQUIREMENT
C	C	Monthly fire drills completed and record posted	C	C	Action plan to evacuate and account for children
C	C	Floor plan identifies exit doors, windows	C	C	Action plan of person discovering a fire
	C	Method to sound alarm on the premises	C	C	Action plan pending arrival of fire department

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**H. EMERGENCY PROCEDURES (cont)**

WAC 388-155-660, 670, 680, 640

LICENSEE, ASSISTANT AND VOLUNTEERS ARE FAMILIAR WITH AND ABLE TO ACCOMPLISH:  
 WAC 388-155-680

APP	DCCCEL	REQUIREMENT	APP	DCCCEL	REQUIREMENT
C	C	Fire evacuation plan	C/P	/	Conduct fire hazard home inspections and correct any hazards found
C	C	Test smoke detectors			
C	C	Operate fire extinguishers			

**PREVENTION:**

WAC 388-155-640, 650, 600

APP	DCCCEL	REQUIREMENT	APP	DCCCEL	REQUIREMENT
C	C	Bathroom door lock opens from outside in an emergency, opening device readily available for staff use	C	C	Combustible rubbish not allowed to accumulate; removed from home or stored in closed, metal containers
N/A	/	Closet door latches open easily from the inside	C	C	Waste removed daily, disposal containers made of noncombustible material with lids
C	C	No obstructions in corridors, aisles, doorways, doors, stairways or ramps	C	C	Electrical circuits, devices, appliances properly maintained
C	C	Use of space heaters prohibited	C	C	Electrical motors kept dust free
C	C	Furnace room kept free of lint, grease, rubbish accumulation, and suitably isolated, enclosed or protected	C	C	Circuits not overloaded (no multi-plug adapters)
			C	C	Permanent wiring and receptacles used
C	C	No space that is accessible only by ladder, folding stairs or trap doors is used for child care	C	C	Flammable or combustible materials stored away from exits, in areas not accessible to children
	/	Fireplaces, wood stoves, similar devices and connections approved by local building authority; if used during child care hours, they are cleaned, maintained and inspected on annual basis by licensed specialist:			

Please describe fireplaces, wood stoves, etc. you use during child care hours and attach documentation of applicable maintenance and inspections:

Please describe the type of barrier used to prevent children coming in contact with open flames or hot surface:

Hard wire fence around wood stove used specifically designed for the prevention of touch or to close to stove

APP	DCCCEL	REQUIREMENT	APP	DCCCEL	REQUIREMENT
C	C	Open flame devices not left on, unattended, or used improperly	C	C	Local fire department requested to visit facility; please document their response: <i>CAME OUT - did routine inspect.</i>
C	C	Candles not used			
C	C	House numbers plainly visible and legible from street fronting property; numbers contrast with background	N/A	/	Sprinkler system, if installed, tested annually by licensed specialist, with documentation maintained on site

**I. TRANSPORTATION**

WAC 388-155-165, 450

(GB 70 - 75)

APP	DCCCEL	REQUIREMENT	APP	DCCCEL	REQUIREMENT
C	C	Vehicle safe	C	/	Seat belts and approved car seat for each child according to Washington State Patrol recommendations
	C	Vehicle liability and medical insurance Name of insurer: <u>State Farm</u>			
C	C	Current first aid and CPR for adult in vehicle	N/A	/	I don't transport children Records on children and first aid kit in vehicle I don't transport children
C	C	Driver(s) licensed			

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**A. HEALTH**

WAC 388-155-170, 220, 430

(GB 107-119, 189)

APP	DCCCEL	REQUIREMENT	APP	DCCCEL	REQUIREMENT
✓	Ⓢ	Children properly immunized, immunization in progress or written exception to requirement	✓	Ⓢ	Child and staff wash hands
			✓	Ⓢ	Child observed daily for signs of illness
			✓	Ⓢ	Smoke free child care environment
✓	Ⓢ	Toys, equipment, furnishings and facility cleaned and disinfected	✓	Ⓢ	Adequate space available for supervision of ill child

**B. MEDICATIONS**

WAC 388-155-230

(GB 120-123)

APP	DCCCEL	REQUIREMENT	APP	DCCCEL	REQUIREMENT
✓	Ⓢ	Written parental permission given including a start date and ending date, not to exceed one month	✓	Ⓢ	Medicines are inaccessible to the children; class II narcotics in locked storage.
✓	Ⓢ	Written physician instructions to give, if needed	✓	Ⓢ	Medicines in properly labeled, original containers
✓	Ⓢ	External and internal medicines stored separately	✓	Ⓢ	Unused medicine returned to parent

Please note where you keep your medicines: *IN A LOCK BOX ON TOP OF REFRIG.*

**C. FIRST AID SUPPLIES**

WAC 388-155-310

(GB133-147)

Please list the contents of your First Aid supplies container:

APP	DCCCEL	REQUIREMENT
✓	Ⓢ	<input checked="" type="checkbox"/> Syrup of Ipecac (required)-expiration date: <i>9-05</i> <input checked="" type="checkbox"/> Band-Aids <input checked="" type="checkbox"/> Cotton balls <input checked="" type="checkbox"/> Gauze <input checked="" type="checkbox"/> Protective gloves <input checked="" type="checkbox"/> Ice pack <input checked="" type="checkbox"/> Thermometer <input checked="" type="checkbox"/> Scissors <input checked="" type="checkbox"/> Tweezers <input checked="" type="checkbox"/> Tape <input checked="" type="checkbox"/> Triangular bandage

**D. CARE OF THE YOUNG CHILD**

WAC 388-155-270

(GB 133 - 147)

**FEEDING:**

APP	DCCCEL	REQUIREMENT	APP	DCCCEL	REQUIREMENT
✓	Ⓢ	Parents agree with feeding schedule	✓	Ⓢ	Child held while bottle feeding (no propped bottles)
✓	Ⓢ	Prepare formula following manufactures directions, label, refrigerate bottle properly	✓	Ⓢ	Semi-solid food provided with parental consultation

**DIAPER CHANGING AREA IS:**

APP	DCCCEL	REQUIREMENT	APP	DCCCEL	REQUIREMENT
✓	Ⓢ	Separate from food preparation	✓	Ⓢ	Proper diaper changing procedure
✓	Ⓢ	Easily accessible to handwashing sink other than sink used for food preparation	✓	Ⓢ	Proper disposal of diapers
			✓	Ⓢ	Hands washed after diapering each child
✓	Ⓢ	Sanitized between use by different children or use a disposable covering, discarding it after each use	✓	Ⓢ	Impervious to moisture, washable, adequate size for child

Please describe the area where you do diaper changing and how it is set up:

*I change child in bathroom on changing mat that is impervious to moisture and washable and correct size for child. I wash child's hands, my own & dispose of diaper outside. Wash mat between uses.*

Mark appropriately: C = Compliance D = Discussed N = Noncompliance NA = Not applicable  
 P = Presumed Compliance (no evidence to the contrary) W = Waiver or exception granted per WAC 388-155-050.

**D. CARE OF THE YOUNG CHILD (cont)**

WAC 388-155-270

(GB 133 - 147)

**TOILET TRAINING:**

C	C	Begun after consulting with parent(s)			Equipment properly located on non - absorbent surface and developmentally appropriate
C	C	Equipment sanitized after each use	C	C	

**INFANT ACTIVITIES AND ROUTINES**

APP	DCCCEL	REQUIREMENT	APP	DCCCEL	REQUIREMENT
C	C	Safe and suitable toys and equipment	C	C	Crawling and exploring
C	C	Daily opportunity for activities and routines to promote: (Please describe briefly) <i>Moving a non stimulated baby to a new Challenging Activity. Moving Forward.</i>	C	C	Large and small muscle development
			C	C	Sensory stimulation
			C	C	Social interaction
C	C	Development of communication	C	C	Self-help skills - <i>books, objects, names of things</i>

**E. NUTRITION**

WAC 388-155-240

(GB 123-130)

APP	DCCCEL	REQUIREMENT	APP	DCCCEL	REQUIREMENT
N/A	/	Food brought from home monitored to meet nutritional requirements	C	C	Food provided meets needs of the child, taking into consideration child's cultural
C	C	Meals follow USDA Food Program Guidelines with added Vitamin C and A	C	C	Only whole milk given to child twenty-three months or younger, except with parental permission
C	C	If applicable, which food program will you be on: <i>NWCCN</i>	/	/	

**F. REST PERIODS**

WAC 388-155-140

(GB 69 - 70)

APP	DCCCEL	REQUIREMENT	APP	DCCCEL	REQUIREMENT
C	C	Supervised rest periods offered	C	C	Quiet activities planned for child not resting Please describe: <i>Color, puzzles, leap pad, movies.</i>
C	C	Individual sleep schedule followed for children under 24 months of age	/	/	

**G. NAP AND SLEEP EQUIPMENT**

WAC 388-155-360

(GB 173-175)

APP	DCCCEL	REQUIREMENT	APP	DCCCEL	REQUIREMENT
C	C	Bedding laundered weekly or more often as needed	C	C	Nap equipment cleaned as needed, and between use by different children
C	C	Nap equipment separated when in use	C	C	Clean sheet or blanket for each child
C	C	May use sleeping bag for toilet-trained child	C	C	Each child's bedding stored separately
C	C	Mat or cot is long, wide, thick enough to give comfort and is easily cleanable	C	C	Upper bunk not used for preschool age or younger child
C	C	Crib slats 2 3/8" or less apart if used by child under six months	C	C	Equipment safe for use: no bumper pads
C	C	Clean, separate, firm mat, cot, bed, playpen, crib provided for each child five years or younger and for other children who nap. Please note how many you have: <i>3 firm mats ___ cots 1 beds 1 playpens 1 cribs 1 bassinet(s)</i>			
P	C	Guidelines established by the American Academy of Pediatrics must be followed			

**H. EVENING AND NIGHT - TIME CARE**

WAC 388-155-150

(GB 69 - 70, 125)

APP	DCCCEL	REQUIREMENT	APP	DCCCEL	REQUIREMENT
N/A	/	Activities, routines and equipment adapted to meet child's physical and emotional needs	N/A	/	Separate dressing and sleeping areas for boys and girls ages 6 years and older and demonstrating a need for privacy
N/A	/	Arrangements made for bathing	N/A	/	Individual bedding appropriate for overnight sleeping
N/A	/	Sleeping child is able to remain asleep during arrival and departure of another child	N/A	/	Appropriate night wear and individual toiletry items for each child

Mark appropriately: C = Compliance D = Discussed N = Noncompliance NA = Not applicable  
 P = Presumed Compliance (no evidence to the contrary) W = Waiver or exception granted per WAC 388-155-050.

**H. EVENING AND NIGHT - TIME CARE (cont)**

WAC 388-155-150

(GB 69 - 70, 125)

Describe plan to ensure safety and emotional well being of children while they are sleeping.

N/A

**A. RECORDS, REPORTING AND POSTING**

WAC 388-155-450, 460, 470, 480, 490, 500 (GB 191-200)

**CHILD'S RECORD CONTAINS CURRENT:**

WAC 388-155-450

APP	DCCEL	REQUIREMENT	APP	DCCEL	REQUIREMENT
C	C	Registration form	C	C	Medication permission form (as needed)
C	C	Immunization history	C	C	Injury/accident form (as needed)
C	C	Permission / Authorization form	C	C	Record of Medication given
C	C	Health history			

**PROVIDER RECORDS CONTAINS:**

WAC 388-155-460

APP	DCCEL	REQUIREMENT	APP	DCCEL	REQUIREMENT
C	C	Attendance records	C	C	Injury, illness, dispensed medication reports

**PERSONNEL RECORDS CONTAIN:**

WAC 388-155-470

(GB 93-105)

APP	DCCEL	REQUIREMENT	APP	DCCEL	REQUIREMENT
N/A	C	Employment application/resume	C	C	First Aid and CPR training, if applicable
C	C	Copy of criminal history form submitted	C	C	HIV/AIDS training
C	C	TB test results	C	C	Additional training if applicable Food Program

**PROVIDER REPORTS IMMEDIATELY:**

WAC 388-155-480, 490

STARS

(GB 205-206)

APP	DCCEL	REQUIREMENT	APP	DCCEL	REQUIREMENT
C	C	Death, serious injury or illness requiring medical treatment or hospitalization to: Parent, Emergency Medical (i.e. 911), Office of Child Care Policy and, if applicable, child's social worker	C	C	The licensee reports promptly to the licenser major changes in the premises, activities and routines, the assistant, or members of the household affecting the home's capacity classifications or delivery of safe, developmentally appropriate services
C	C	Food poisoning or communicable disease to local public health department	C	C	Suspicion of child abuse, neglect or sexual abuse to: Children's Administration intake (Child Protective Services), at this phone number: 1800-562-5624 Or local law enforcement: Police # 253-863-2218

**THESE ITEMS ARE VISIBLY POSTED:**

WAC 388-155-500

(GB 207)

DCCEL	REQUIREMENT	APP	DCCEL	REQUIREMENT
C	Child care license	C	C	Fire drill, smoke alarm test record
C	Emergency phone numbers	C	C	Evacuation plan and procedures including floor plan

Mark appropriately: C = Compliance D = Discussed N = Noncompliance NA = Not applicable  
 P = Presumed Compliance (no evidence to the contrary) W = Waiver or exception granted per WAC 388-155-050.

**B. CAPACITY**

WAC 388-155-190

(GB 93-96)

Applicant/provider licensable for the following categories (multiple options allowed) as approved by DSHS:

APP	DCCEL	REQUIREMENT	APP	DCCEL	REQUIREMENT
C	C	6 children, ages birth - 11 years old (2 under 2 years of age allowed)	N/A	/	10 children, ages 3 - 11 years old (none under age 3), with 2 years experience and 1 ECE class / equivalent
N/A	/	8 children, ages 2 - 11 years old (none under 2 years of age allowed) with 1 year experience	N/A	/	
N/A	/	10 children, ages 5 - 11 years old (none under 2 years of age allowed) with 1 year experience	N/A	/	12 children, ages birth - 11 years old (four under 2 years of age), with assistant and 2 years experience and 1 ECE class / equivalent
N/A	/	9 children, ages birth - 11 years old (4 under 2 years of age), with an assistant and 1 year experience	N/A	/	

**C. ASSISTANT(S)**

WAC 388-155-180, 200 AND 220

(GB 93-105)

Licensee is the primary caregiver. Any other person performing care giving interactions with child in care must be qualified by the department per WAC requirements in this section. If more than two, complete information on separate page.

Name of Assistant (1): N/A

Age:

Name of Assistant (2):

Age:

APP	DCCEL		REQUIREMENT	APP	DCCEL		REQUIREMENT		
	2	1	2	1	2	1	2		
N/A				N/A				Assistant age 14 to 18 years old never provides unsupervised care to child	Assistant 18 years of age or older has sole caregiver responsibility only on limited time basis and only if required qualifications are met
N/A				N/A				Orientation provided to assistant (covering areas listed in WAC 388-	
N/A				N/A				Competent to make judgments	Criminal history form submitted to
N/A				N/A				Physical health sufficient to provide	Good character
N/A				N/A				TB test result submitted: Date:	Basic, standard first aid training: Expiration Date:
N/A				N/A				HIV/AIDS training Date:	Standard and infant/child CPR training, if applicable. Expiration Date:

Please describe the duties of any assistant(s) in your program:

N/A

**D. ADMINISTRATIVE HEARING**

WAC 388-155-090

APP	DCCEL	REQUIREMENT
C	C	Applicant is aware of administrative hearings procedure

DCQEL	REQUIREMENT
<input checked="" type="checkbox"/>	References checked
<input checked="" type="checkbox"/>	Criminal history background check cleared
<input checked="" type="checkbox"/>	Subsidized care and provider number explained to applicant
<input checked="" type="checkbox"/>	CAMIS checked
<input checked="" type="checkbox"/>	Referral service information given
<input checked="" type="checkbox"/>	Fee paid

I hereby certify that I agree to maintain compliance with the provisions of Chapter 74.15 of the Revised Code of Washington (RCW) (child care agency licensing statute), and with the provisions of Chapter 388-155 of the Washington Administrative Code (WAC) (minimum licensing requirements). I hereby further certify that the above information and required attachments are true and complete to the best of my knowledge.

*L. A. Fish*  
 Applicant's Signature:

3/23/04  
 Date:

*[Signature]*  
 Licensor's Signature:

3/23/04  
 Date:

\_\_\_\_\_  
 Supervisor/Regional Manager's Signature:

\_\_\_\_\_  
 Date:

# Appendix 10



License Control ID:	75989	License ID:	27H
Facility Type:	Family Child Care Home	Facility Name:	FISH LISA M
Issue Date:	04/26/2001	Expires Date:	04/26/2007
Status:	Renewal (Fully Licensed)	Dual?	
Complaints Pending?	N	Complaints on Other Licenses?	N

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**Selection Criteria**

- Limited to activity dates between 03/23/2004 and 03/30/2004

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SER ID: 7440199 Activity Date/Time: 03/23/2004 - 00:00  
User Name: BERDICIA, VICTOR (BERV300) Create Date/Time: 03/29/2004 - 13:34

Activity Type: Inspection - Facility Inspections, Site Visit, Technical Assistance

License Control ID: 75989 - FISH LISA M

**SER Text**

This licensor visited the home of Ms. Lisa Fish to conduct a license renewal visit. At the time of the visit Ms. Lisa had three children in care and this licensor had an opportunity to observed Ms. Lisa interact with the children while she was getting paper ready and walking this licensor around the premises of the day care. She is license for six children and has a large back yard, a large home that the living room/playroom, kitchen, the bathroom, and a hallway which is for the use for day care. She has sufficient quantity and variety of leaning and play materials that are age appropriate that helps develop the learning skills of the children. Ms. Lisa was missing the copies of the 1st Aid and CPR and she was going to make copies for this licensor to complete the licensing process. This licensor and Ms. Lisa review the parent's handbook and provided technical assistance in some areas that she had question as well as the open door policy. She ask this licensor if her door has to be close but unsecured and this licensor said that what the minimum license required said is that the door must be lock from the outside but easily open from the inside in case of a emergency. This licensor recommends Ms. Lisa Fish to be re-license for the next three years and as long as she complies with the minimum license requirements.

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SER ID: 7445895 Activity Date/Time: 03/30/2004 - 00:00  
User Name: QUINLAN, MARY KAY (QUIM300) Create Date/Time: 03/30/2004 - 16:17

Activity Type: Supervisory/Administrative Review

License Control ID: 75989 - FISH LISA M

**SER Text**

Review file for renewal of FCC license. Licensor completed inspection and home study. Deficiencies are corrected. Licensor determines that MLRs are met for renewal of license. Sign license.

# Appendix 11

Lisa Fish  
6408 S. Island Dr.  
Bonney Lake WA 98390

Eavanne O'donoghue  
1949 S. State St.  
Tacoma, WA 98405

Atten: Ms. O'donoghue:

RE: Letter dated 10-4-04 (not revd. on this date) RE NO:1534408  
RE: Letter dated 10-15-04 not recvd. till 10-19-04

I recieved these letters to inform me of violations against me. In Aug. 2004 I spoke with Victor Berdecia and Ruben Reeves about the inaccurate report made against me and signed by Mary Kay Quinlan. I want to have these corrected and as accurate as possible. Please have the facts corrected and please see police statement.

1. Letter dated 10-15-04:

Statement: Paragraph 1, implies that I left children in the living room and outside unsupervised.

Correction: I had my back windows open and my back door so that I could see and hear both children inside and outside. I was aware of the dispute because I could see the children and hear them. (I was never asked about my back door or windows)

2. Letter dated 10-15-04:

Statement: Paragraph 1 implies that I went into the garden after resolving the dispute between the children outside.

Correction: I told Ruben Reeves that I viewed my garden by looking at it. I NEVER said that I went into it. I told Ruben Reeves I pulled two weeds under foot, Not in the garden. I am able to see through my living room window and hear the children inside. I did not hear Gabe unlock the dead bolt or the security screen door (these were approved on Victor Berdecia's visit to renew my license. I was concerned about Gabe and the door and asked if I could do anything further to ensure the safety of the children in my care. He said to changed my policy to reflect that the doors would remain locked during daycare hours to ensure the safety of the children, but that I, or the children with my permission, could answer the door.)

3. Letter dated 10-15-04

Statement: Paragraph 2 implies that I said that I have a double door knob and a deadbolt on my front door and security screen door.

Correction: I have a single door knob that opens when turned from inside or outside, and I have a deadbolt the the children can turn from the inside; ( I was told this was acceptable and necessary for the children, incase of fire).

It should be known that I passed my relicense with Victor Berdecia in april 2004 WITHOUT any faults.  
It should be known that I tried to have the information taken about me corrected with Victor Berdecia and Ruben Reeves.

Please make these corrections as they are currently not correct.

Sincerely



Lisa Fish  
cc: file, Mary K Quinlan, Victor Berdecia, Ruben Reeves, Bill Robinson Esq.

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# Appendix 12

**D. Other Concerns Raised By Witnesses I Interviewed**

**1. Poor Inspection Techniques**

Several licensees told me that Mr. Berdecia conducted very skimpy inspections. For example, Ms. Hamre told me that Mr. Berdecia did a very cursory inspection. She was surprised that he did not look more thoroughly at items on the inspection list. She said that when her new licensor came, "it was like night and day difference – she did a *great* inspection." This sentiment was echoed by other providers who had experience with different licensors. Even providers who have only worked with Mr. Berdecia expressed surprise that he did not conduct more thorough inspections.

I want to be clear that I did not ask providers about Mr. Berdecia's inspection techniques. In fact, I found it striking that so many of them would volunteer to me that they felt he conducted poor and even shoddy inspections. Some providers felt that he was more concerned with getting the paperwork done than actually looking into the physical spaces. Many felt that he did not pay attention to detail. Overall, the providers welcomed the opportunity to voice their ongoing concerns about Mr. Berdecia's efficacy as a licensor.

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<sup>7</sup> When I asked why they decided to come forward, they generally expressed that they wanted the behavior to stop, and they did not want other women to have to encounter the same problems in the future.

# Appendix 13

# CDR CASE REVIEW NOTES (CPS)

## # 04-018 Pierce County

Child : Gabriel Tobin (DOB:3/29/02 DOD:07/13/04 2.2 years @ death)  
Parents: Jennifer Tobin (DOB: 1/18/77)  
Christopher Tobin (DOB: 4/2/74)

Siblings: none known

### PREVIOUS CPS HISTORY: None

Total # of CPS Referrals (pre-fatality) = 0

Total # of CPS Investigations = 0

### Licensing History for Lisa Fish:

03/02/01: Inspection visit for initial license. Areas of non-compliance noted and applicant given time to correct before licensing.

03/29/01: Corrections completed.

05/01/01: Supervisory review of file for initial license. Documentation requirements acquired, deficiencies corrected, and recommendation from licensor for initial license while provider completes 20 hour guidehood training.

09/27/01: Unannounced monitoring inspection attempted - no answer at the residence.

11/05/01: Inspection conducted to issue full license. Observations made in the home, including infant care, activities, and interactions with the children. Full license recommended.

12/10/01: Supervisory review for full licensing. Provider meets Minimum Licensing Requirements (MLRs). Licensing file sent back to licensor for corrections to license which would be signed upon completion of the corrections.

03/23/04: Home visit to conduct licensing renewal visit. Home licensed for 6 children.

03/30/04: Supervisory review of file for Family Child Care (FCC) license. Inspections and home study completed, deficiencies corrected, and MLRs appear to be met. License renewal signed.

07/13/04: Facility Critical Incident notification - child fatality.

### Licensing Complaints:

02/04/02 (Licensing/Non-CPS): Former day care client complaining that Day Care Provider L. Fish would not provide the Tax I.D. number.

Complaint/allegation determined not to a WAC violation.

### POST FATALITY REFERRAL:

07/13/04: Child care provider called to report the accidental drowning of one of the children at her day care (Lake Tapps/Bonney Lake). Assigned to DLR/CPS for investigation, and the Division of Child Care and Early Learning (DCCEL) also involved.

Tobin v. State  
03040513

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Chronology of Licensing Complaints  
Provider (name)

Date of Receipt	Referral Number	Allegation	DOCS	Investigation	Investigation Result
4/02	1286048	Parent called stating that Ms. Fish would not provide her with a tax ID number for income tax reporting purposes.	Licensor Cichowald contacted provider about the complaint. Licensor encouraged provider to cooperate with parent. Licensor also advised parent to check with IRS to determine what other documentation they would accept to verify child care expenses.	No WAC violation. Screened out.	Complaint closed. No action taken.
7/13/04	1534408	Provider called to report drowning of 2 year old boy that was in her care.	Licensor Berdecia investigated for licensing. Facility Investigator Ruben Reeves investigated for DLRCPS. Joint site visit 7/13/04.	Valid for Licensing: Supervision; Facility Environment; and Nurture/Care.  DLRCPS finding: Founded for Negligent Treatment/Mal-treatment.	Ms. Fish voluntarily closed effective 7/13/04 during the investigation. Summary suspension letter delivered by licensor 7/29/04. Revocation letter sent certified mail 10/15/04 and signed as received 10/19/04.

SUMMARY:

- 1) Provider was licensed by the Department from 4/26/01 - closed on 7/13/04 with a total of 2 complaints. One complaint was screened out and the 2<sup>nd</sup> complaint is valid for licensing and DLRCPS finding is founded for neglect.
- 2) License was suspended during investigation and was revoked when investigation findings were complete.

DEFINITIONS:

*Inconclusive* - Insufficient information exists to conclude whether or not the provider did or did not violate the WAC or RCW.  
*Valid* - Sufficient information exists to conclude that the WAC or RCW was violated.  
*Compliance Agreement* - this is a form that lists the regulations and describes non-compliance; provider submits a plan of correction (includes time frames to reach compliance) with technical assistance from the licensor.

Children's Administration - DSHS  
CHILD FATALITY REVIEW  
Gabriel Tobin

Report Date / System ID / Status	12/2/2004 - 916 - Active
Referral Number	1534408
Region Reporting	5
Office Name	R5 Fac Investigate
Division	DCCEL
Type Of Licensed Facility	DCCEL Child Care Facility
Date Of Death	7/13/2004
Deceased Child's Name	Tobin, Gabriel
Gender	Male
Date Of Birth	3/29/2002
Ethnicity/Race	White
Has The Child Ever Been Placed In Out Of Home Care?	No
Legal Status At Time Of Death	Parental Custody
Official Type Of Death	Accidental
Determined By	Medical Examiner
Case Status At Time Of Death	No Prior History
Cause Of Death	Drowning

**Summary Of How Death Occurred**

Gabriel Tobin, age 2, was attending the licensed child care home of Linda Fish. While attending to the needs of some of the children outside in the fenced back yard, Ms. Fish left several children inside the day care including the now deceased child. The day care provider remained outside and at some point admittedly began pulling weeds. The DLR/CPS investigator believes Ms. Fish had gone to a garden area that was between 150 and 200 feet away from the residence. The licensee has subsequently stated that she had been pulling weeds in an area closer to the house.

Ms. Fish went into the residence and noticed that the front door was open and Gabriel was missing. Ms. Fish reportedly went to the door and began calling for Gabriel. She scanned the shoreline of Lake Tapps, which is across the street from the day care. Ms. Fish then went to the homes of neighbors to see if they had seen Gabriel, but they had not. Ms. Fish called Gabriel's mother to let her know that the boy was missing. At some point after Gabriel's mother arrived at the day care, 911 was called. Bonney Lake Police responded and eventually the child was found under a dock at the lake and was transported

to a local hospital where he was pronounced dead.

More specific details regarding the incident can be found in the DLR/CPS Investigative Risk Assessment.

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<b>Residence At Time Of Death</b>	Family home
<b>County Where Child Resided</b>	Pierce
<b>Location Where Death Occurred</b>	DCCEL Child Care
<b>County Where Death Occurred</b>	Pierce
<b>Incident IS Related To A Facility</b>	

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#### Facility Narrative

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The child was attending licensed family child care at the home of Lisa Fish. The initial license was signed in May 2001, with the full license being attained in December 2001. The family child care home license was renewed in March 2004. The licensing history is as follows:

3/2/01: Inspection visit for initial license. Areas of non-compliance noted and applicant given time to correct before licensing.

3/29/01: Corrections completed.

5/1/01: Supervisory review of file for initial license. Documentation requirements acquired, deficiencies corrected, and recommendation from licensor for initial license while provider completes 20 hour guidebook training.

9/27/01: Unannounced monitoring inspection attempted-no answer at the residence.

11/05/01: Inspection conducted to issue full license. Observations made in the home, including infant care, activities, and interactions with the children. Full license recommended.

12/10/01: Supervisory review for full licensing. Provider meets Minimum Licensing Requirements (MLRs). Licensing file sent back to licensor for corrections to license which would be signed upon completion of the corrections.

02/04/02: Non-CPS licensing complaint that the provider was not providing the Tax ID number of her business. The complaint was found not to be a WAC violation.

03/23/04: Home visit to conduct licensing renewal visit. Home licensed for 6 children.

03/30/04: Supervisory review of file for Family Child Care (FCC) license. Inspections and home study completed, deficiencies corrected, and MLRs appear to be met. License renewal signed.

07/13/04: Facility Critical Incident notification - child fatality.

#### Other Information relating to the Facility:

The provider's home is in a residential neighborhood on Inlet Island of Lake Tapps, and is a rambler on approximately 1/3 of an acre with most of the property in the backyard. The DLR/CPS investigator noticed the perimeter of the backyard was fully-fenced with two locked gates on both sides of the house. There was a two car unattached garage in the backyard. Behind the garage, was a well

maintained garden that was full, fenced with a gate. The Investigator noticed that the garden area is not visible from the house and is approximately 150-200 feet from the back of the house. The front yard does not have a fence and has a deck, measuring approximately 10 x 10 foot, off the front door. The residential homes across the street from the front of the house are on Lake Tapps. The distance between the front door and the paved road is approximately 75-100 feet. It appeared that the road has little traffic. The distance between the front door of the provider's home and the shoreline of Lake Tapps appeared to be approximately 200 yards. As one walks inside the provider's home, one enters the living room, and there is a big screen television on the east side of this living room. The kitchen area is off the living room and it leads to the back door. There are two bedrooms to the right of the living room and the master bedroom is on the left side of the living room. The inside of the home is fairly open.

On the day of the incident, there were 6 children under the age of six at the home. Two of these were the day care provider's biological children. The 17-year old biological son of the day care provider was also at the home at the time of the incident.

The DLR/CPS and DCCEL investigations began the day of the incident (07/13/04). The licensee agreed to close her day care that same day. The licensee was served with a Summary Suspension on 07/29/04. The DLR/CPS investigation was closed out on 10/04/04 with the licensee having received the DLR/CPS Findings Notification Letter and the DCCEL License Revocation Letter on or about 10/17/04.

<b>Facility Name</b>	Lisa Fish
<b>CAMIS/Business ID</b>	75989
<b>Type Of Facility</b>	DCCEL Child Care Facility
<b>Does Facility Have A Dual License?</b>	No
<b>Facility Address</b>	6408 S. Island Dr.
<b>City, State Zip</b>	Bonney Lake, Washington 98390
<b>Phone Number</b>	753-826-7988
<b>Contact Person</b>	Lisa Fish

**BIRTH / ADOPTIVE PARENTS**

<b>Adult Name (Last,First)</b>	<b>Role</b>	<b>Sex</b>	<b>DOB -- Age</b>
Tobin, Jennifer	Birth Parent		
Tobin, Chris	Birth Parent		

**STAFF AUTHORIZED TO ACCESS INCIDENT**

<b>Staff Name (Last, First)</b>	<b>Role</b>	<b>Phone</b>	<b>300 ID</b>
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Bentz Paula	DLR Section Manager	360-966-7939	BENP300
Close Karen	Administrative Assistant		CLOK300
Tosti-Lane Linda	DLR Licensing Supervisor	253 983-6445	TOLI300
Schwartz Diane	DLR Licensing Supervisor	(253) 983-6431	SCDI300

**NEGLECT AND/OR ABUSE ALLEGATIONS**

**Was There An Allegation Of Neglect By A Caretaker Regarding This Fatality In The Referral?** Yes

**Was An Official Finding Of Neglect By A Caretaker Determined A Factor In This Death?** Yes

**If Yes, Was It Physical Or Medical?** Physical

**Neglect Issues Described**

The assigned DLR/CPS Investigator determined a finding of "Founded" for the day care provider for negligent treatment/maltreatment, based on a failure to provide adequate supervision (WAC 388-15-009).

The day care provider told the DLR/CPS Investigator that she had a total of six children (under the age of six) in care the day of the incident, including four daycare children and two of her own bio-children. It appears that around 8:45 am the provider had three children in the living room watching television/video. They were Gabriel (age 2), [redacted] (age [redacted]), and [redacted] (age [redacted]). The other three children were playing outside in the backyard area - [redacted] (age [redacted]), [redacted] (age [redacted]), and [redacted] (age [redacted]). The provider has stated that she overheard [redacted] and [redacted] arguing outside and she went out into the backyard to intervene.

The licensee told the DLR/CPS Investigator that she went outside and separated the two children and then looked inside the garden area. She then self-reportedly went inside the garden area and pulled some weeds. The day care provider told the DLR/CPS investigator that she was outside for approximately 5-10 minutes before she came back inside and noticed that the front door was open - that only [redacted] and [redacted] were in the living room playing and watching television. When she asked the children where Gabriel was, [redacted] told her that Gabriel had gone outside.

The day care provider has stated that she then went to the front door and did not see Gabriel on the deck area so she began calling his name. She noticed her neighbors's side gate was open and went to see if Gabriel was there. Eventually many neighbors joined in to help search for Gabriel. The licensee told DLR/CPS that she had searched for Gabriel for approximately 10 minutes and then went back inside the house and told her 17-year old son to get out of the shower and help look for Gabriel. She then reportedly called Gabriel's mother and 9-1-1. However, there is evidence that the 9-1-1 call occurred only after Gabriel's mother had arrived to the day care. The police arrived around 10:00 am and began searching for Gabriel. The boy was found across the street in the water underneath her neighbor's dock at approximately 10:45 am. Mrs. Fish said Gabriel was transported to Mary Bridge Children's Hospital and he was pronounced dead at the hospital.

Was There An Allegation Of Abuse By A Caretaker Regarding This Fatality In The Referral? No

Was An Official Finding Of Abuse By A Caretaker Determined A Factor In This Death? N/A

**SURVIVING SIBLINGS UNDER AGE 18**

Child Name (Last,First)	Role	Sex	DOB -- Age	Ethnicity/Race	Legal Status
Tobin, Isabelle	Sibling :		4/18/2004 -- 0yr-		
	Sibling		3mo		

No Other Non-Sibling Children Residing In the Home at Time of Death

**CHILD PROTECTION / SAFETY PLANS / LICENSING ACTIONS**

What Action Was Taken To Protect Other Children In Home/Facility? Removed From Home/Facility

If The Child Remained In The Home/Facility, Was A Safety Plan Put Into Place? N/A

**Describe Safety Plan**

After the drowning incident the non-biological children at the day care were turned over to their parents. The biological children of the day care operator remained in the care and custody of the mother and father and were not viewed to be at any significant risk. The licensee voluntarily closed the day care following the incident, and the license has subsequently been revoked.

What Licensing Actions Have Occurred As A Result Of This Death? Revocation

No Prior Child Deaths in Family and/or Facility

No Adults Living in the Home/Facility Where Death Occurred Identified

**CARETAKER CHARACTERISTICS**

Adult Name (Last,First)	Role	Sex	DOB -- Age
Fish, Lisa	Caretaker, Provider, Subject of CA/N Allegations, No Relation	Female	<span style="background-color: black; color: black;">[REDACTED]</span>
Address: 6408 S Island DR : City/State: Bonney Lake, WA : Zip: 98390 : Phone: 253-826-7988 :			

**DECEASED CHILD CHARACTERISTICS**

Child Name (Last,First)	Role	Sex	DOB -- Age	Ethnicity/Race	Legal Status
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Bentz Paula	DLR Section Manager	360-904-7939	BENP300
Close Karen	Administrative Assistant		CLOK300
Tosti-Lane Linda	DLR Licensing Supervisor	253 983-6445	TOLI300
Schwartz Diane	DLR Licensing Supervisor	(253) 983-6431	SCDI300

**NEGLECT AND/OR ABUSE ALLEGATIONS**

**Was There An Allegation Of Neglect By A Caretaker Regarding This Fatality In The Referral?** Yes \_\_\_\_\_

**Was An Official Finding Of Neglect By A Caretaker Determined A Factor In This Death?** Yes \_\_\_\_\_

**If Yes, Was It Physical Or Medical?** Physical \_\_\_\_\_

**Neglect Issues Described**

The assigned DLR/CPS investigator determined a finding of "Founded" for the day care provider for negligent treatment/maltreatment, based on a failure to provide adequate supervision (WAC 388-15-009).

The day care provider told the DLR/CPS Investigator that she had a total of six children (under the age of six) in care the day of the incident, including four daycare children and two of her own bio-children. It appears that around 8:45 am the provider had three children in the living room watching television/video. They were Gabriel (age 2), [redacted] (age [redacted]), and [redacted] (age [redacted]). The other three children were playing outside in the backyard area - [redacted] (age [redacted]), [redacted] (age [redacted]), and [redacted] (age [redacted]). The provider has stated that she overheard [redacted] and [redacted] arguing outside and she went out into the backyard to intervene.

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maintained garden that was fully-fenced with a gate. The investigator noticed that the garden area is not visible from the house and is approximately 150-200 feet from the back of the house. The front yard does not have a fence and has a deck, measuring approximately 10 x 10 foot, off the front door. The residential homes across the street from the front of the house are on Lake Tapps. The distance between the front door and the paved road is approximately 75-100 feet. It appeared that the road has little traffic. The distance between the front door of the provider's home and the shoreline of Lake Tapps appeared to be approximately 200 yards. As one walks inside the provider's home, one enters the living room, and there is a big screen television on the east side of this living room. The kitchen area is off the living room and it leads to the back door. There are two bedrooms to the right of the living room and the master bedroom is on the left side of the living room. The inside of the home is fairly open.

On the day of the incident, there were 6 children under the age of six at the home. Two of these were the day care provider's biological children. The 17-year old biological son of the day care provider was also at the home at the time of the incident.

The DLR/CPS and DCCEL investigations began the day of the incident (07/13/04). The licensee agreed to close her day care that same day. The licensee was served with a Summary Suspension on 07/29/04. The DLR/CPS investigation was closed out on 10/04/04 with the licensee having received the DLR/CPS Findings Notification Letter and the DCCEL License Revocation Letter on or about 10/17/04.

<b>Facility Name</b>	Lisa Fish
<b>CAMIS/Business ID</b>	75989
<b>Type Of Facility</b>	DCCEL Child Care Facility
<b>Does Facility Have A Dual License?</b>	No
<b>Facility Address</b>	6408 S. Island Dr.
<b>City, State Zip</b>	Bonney Lake, Washington 98390
<b>Phone Number</b>	253-826-7988
<b>Contact Person</b>	Lisa Fish

**BIRTH / ADOPTIVE PARENTS**

<b>Adult Name (Last,First)</b>	<b>Role</b>	<b>Sex</b>	<b>DOB - Age</b>
Tobin, Jennifer	Birth Parent		
Tobin, Chris	Birth Parent		

**STAFF AUTHORIZED TO ACCESS INCIDENT**

<b>Staff Name (Last, First)</b>	<b>Role</b>	<b>Phone</b>	<b>300 ID</b>
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Date	ID	Subject	Program	CA/N Code	Finding	Decision	Taken
2/4/2002	1286049		Licensing	Licensing	Not Validated	Screened out - Licensing	No Actions Taken

**TRAINING HISTORY OF PROVIDER/FACILITY STAFF**

<b>Has Licensor Reviewed The Licensing Record?</b>	<u>Yes</u>
<b>Has Provider Completed Training Necessary To Meet The Needs Of The Child?</b>	<u>Yes</u>

**Provider / Facility Staff Training Notes**

Documented training of provider/staff includes the following:

- WAC 388-296-1410
- First Aid/CPR 11/15/03
- HIV/Aid Training/Blood borne pathogen training 11/15/03

After six month of having been licensed, the licensee is require to have STARS Training (20 hrs) as well as on-going STARS training (10 hours) every year. It was not clear at the time of this review as to the status of these trainings.

**FACTUAL SUMMARY OF THE CHILD/FAMILY CASE**

The family has had no involvement with Children's Administration.

**FACTUAL SUMMARY OF FACILITY LICENSING HISTORY**

The child was attending licensed family child care at the home of Lisa Fish. The initial license was signed in May 2001, with the full license being attained in December 2001. The family child care home license was renewed in March 2004. The licensing history is as follows:

3/2/01: Inspection visit for initial license. Areas of non-compliance noted and applicant given time to correct before licensing.

3/29/01: Corrections completed.

5/1/01: Supervisory review of file for initial license. Documentation requirements acquired, deficiencies corrected, and recommendation from licensor for initial license while provider completes 20 hour guidebook training.

9/27/01: Unannounced monitoring inspection attempted-no answer at the residence.

11/05/01: Inspection conducted to issue full license. Observations made in the home, including infant care, activities, and interactions with the children. Full license recommended.

12/10/01: Supervisory review for full licensing. Provider meets Minimum Licensing Requirements (MLRs). Licensing file sent back to licensor for corrections to license which would be signed upon completion of the corrections.

02/04/02: Non-CPS licensing complaint that the provider was not providing the Tax ID number of her

business. The complaint was found not to be a WAC violation.

03/23/04: Home visit to conduct licensing renewal visit. Home licensed for 6 children.

03/30/04: Supervisory review of file for Family Child Care (FCC) license. Inspections and home study completed, deficiencies corrected, and MLRs appear to be met. License renewal signed.

07/13/04: Facility Critical Incident notification - child fatality.

**Other Information relating to the Facility:**

The provider's home is in a residential neighborhood on Inlet Island of Lake Tapps, and is a rambler on approximately 1/3 of an acre with most of the property in the backyard. The DLR/CPS investigator noticed the perimeter of the backyard was fully-fenced with two locked gates on both sides of the house. There was a two car unattached garage in the backyard. Behind the garage, was a well maintained garden that was fully-fenced with a gate. The investigator noticed that the garden area is not visible from the house and is approximately 150-200 feet from the back of the house. The front yard does not have a fence and has a deck, measuring approximately 10 x 10 foot, off the front door. The residential homes across the street from the front of the house are on Lake Tapps. The distance between the front door and the paved road is approximately 75-100 feet. It appeared that the road has little traffic. The distance between the front door of the provider's home and the shoreline of Lake Tapps appeared to be approximately 200 yards. As one walks inside the provider's home, one enters the living room, and there is a big screen television on the east side of this living room. The kitchen area is off the living room and it leads to the back door. There are two bedrooms to the right of the living room and the master bedroom is on the left side of the living room. The inside of the home is fairly open.

On the day of the incident, there were 6 children under the age of six at the home. Two of these were the day care provider's biological children. The 17-year old biological son of the day care provider was also at the home at the time of the incident.

The DLR/CPS and DCCEL investigations began the day of the incident (07/13/04). The licensee agreed to close her day care that same day. The licensee was served with a Summary Suspension on 07/29/04. The DLR/CPS investigation was closed out on 10/04/04 with the licensee having received the DLR/CPS Findings Notification Letter and the DCCEL License Revocation Letter on or about 10/17/04.

**PARTICIPANTS IN REVIEW PROCESS**

<b>Reviewer Name (Last,First)</b>	<b>Title</b>	<b>City</b>	<b>Phone</b>
Palmer, Bob	R5 CPS Coordinator		
Reeves, Ruben	DLR facility investigator		
O'Donoghue, Eavanne	DLR/CPS - Supervisor		
Dallison, Laura	Field Mgr - DCCEL		
Quinlan, MaryKay	Licensing Supervisor-DCCEL		
Kalinowski, Linda	OFCL - Regional Mgr		

**INFORMATION USED IN REVIEW PROCESS**

<b>DCFS Case File / Summary Of File</b>	Not Applicable
<b>Licensing File / Summary Of File</b>	Used in Review
<b>DLR/CPS File / Summary Of File</b>	Used in Review
<b>Autopsy Report</b>	Not Available
<b>Law Enforcement Reports</b>	Used in Review
<b>Prosecutor's Office Reports</b>	Not Applicable
<b>Coroner's Office Reports</b>	Not Available
<b>Medical Records</b>	Used in Review
<b>Records Of Contracted Provider</b>	Not Applicable
<b>Death Certificate</b>	Not Available
<b>Criminal History</b>	Not Applicable
<b>CPS Record Check</b>	Used in Review

**Comments About Information Used In Review Process**

The day care licensur, who had participated in a pre-internal review staffing as well as the Community Death Review (CDR) at the local health department, was not able to attend the Child Fatality Review (CFR) due to illness. However, his immediate supervisor was present and the case file was made available both before and during the CFR.

Additional information gathered by the CPS Coordinator prior to the CFR derived from verbal reports rather than written reports from outside agencies involved.

The following areas should be considered when answering the above questions. Intake policies and procedures; required time frames; required contacts; staffing and shared decision making requirements; supervisory reviews; legal authorities and requirements; risk assessment policies and procedures; documentation; other policies, practice, and systems issues appropriate to the case. Any specific personnel actions related to this case as a result of this review are not documented in this report.

**IDENTIFIED ISSUES AND RECOMMENDATIONS**

<b>Category</b>	<b>Issue</b>	<b>Recommendation</b>
Practice	The CFR panel concluded after review and	Recommendations: None.

discussion of the licensing file, that the department had no knowledge of any incidents or pattern of incidents relating to lack of supervision at the licensed child care home - neither specific to the deceased child nor for any children attending the day care. Statements collected post-fatality, however, did indicate that the deceased child was known to open the front door, locked or unlocked.

Comment: Practice standards for licensing activities appear to have been followed.

During the most recent home visit by the licensor in March 2004 (prior to fatality), clarification was given to the day care provider regarding the fire code regulations which require the ability for persons to be able to exit the residence. This was documented in SER by the licensor.

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Policy	Laws, Licensing Requirements, departmental policies, etc., sufficient to protect the safety of children in licensed child care, already exist in the State of Washington.	Recommendations: None
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The responsibility for the death of Gabriel Tobin was determined by the CFR panel to fall solely with the licensee who did not follow current requirements in place which were sufficient to protect the child. That is to say, the day care provider failed to provide sufficient supervision as described in licensing requirements.

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Exceptional Social Work	Post-Fatality response by DLR/CPS and DCCEL: The teaming between the DCCEL licensor and the DLR/CPS investigator was immediate and responsive to the situation. The DLR/CPS investigation was substantive and more than reasonably complete, and the documentation appears to be exceptional. The finding of "Founded for Negligent Treatment/ Maltreatment" appears reasonable given the documentation.	Recommendation: None  Comment: The DLR/CPS investigator and his supervisor were present during the CFR. The DCCEL licensor and his supervisor were also present during the CFR.
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Policy	Post-Fatality response by DCCEL: Suspension and Revocation notifications to DCCEL licensees are most often presented at the same time ("in combination"). In this case the suspension notification preceded the revocation by about 3 weeks due to the sensitivity of the	Recommendations: None
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circumstances. L... discussion of this issue by the CFR panel, it was determined that the decision was within policy and was appropriate under the circumstances.

Policy

Post-Fatality issue not related to the fatality itself:

Recommendations: None

There appears to be no "Traumatic Incident Policy" within DCCEL that addresses issues relating to critical incidents such as child deaths occurring in licensed day care homes.

Comment: Consideration could be made by DCCEL to develop a "Traumatic Incident Response" policy that gives specific guidelines for responding to employees and providers who may become part of such incidents as child fatalities. This policy could allow for supportive intervention to be offered to providers and their staff (either by specified program staff or contracted from without the agency) following such events.

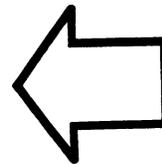
Such policy can offer guidelines for departmental de-briefing, supervisory and administrative support for licensors, and for attaining services through Employee Advisory Services (EAS) which is in policy. Discussion also occurred at to having such a policy to include providing the licensees/providers with support following a traumatic event in their licensed day care home or day care center. The CFR panel members were in agreement that it was not the role of the licensor to work with providers on grief and loss or post-traumatic responses, and taking on that responsibility can actually become traumatic for the licensor.

System

Post-Fatality discussion on increased preventability through changes in WAC:

Recommendations: None

The CFR panel spent time discussing possible additional requirements in the licensing WACs which could reduce the probability of similar incidents occurring. This included requiring 5 foot fences around some yet determined yardage for any day care near a water source (lake, river, pond) or high vehicle traffic area. The problem would be that some areas have residential covenants that do not allow fencing of front yards. Another idea was to suggest requiring laser alarms or other types of door alarms that go off whenever someone enters or exits a day care home or center.



While these discussions were well-intentioned,

the CFR panel concluded that fences and alarms still cannot take place of adequate supervision. In the case under review, the issue is clearly "supervision" which is already sufficiently outlined in WAC and MLR.

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**SUMMARY OF REVIEW AND RECOMMENDATIONS**

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In reviewing the available DCCEL and DLR/CPS case file documentation and post-fatality information gathered from other sources, no violations of policy, procedure, or practices surfaced that would suggest recent or previous actions taken or not taken by the Division of Child Care and Early Learning contributed in any way to the child fatality incident.

The actions/omissions taken by the licensed day care provider have been determined to have directly resulted in the death of Gabriel Tobin. Had the day care provider followed the state requirements which were in effect at the time of the incident and which, if followed, were sufficient to protect children, the drowning would not have occurred.

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**Approved By** \_\_\_\_\_

**Title** \_\_\_\_\_

Child mortality review.

(1)(a) The legislature finds that the mortality rate in Washington state among infants and children less than eighteen years of age is unacceptably high, and that such mortality may be preventable. The legislature further finds that, through the performance of child mortality reviews, preventable causes of child mortality can be identified and addressed, thereby reducing the infant and child mortality in Washington state.

(b) It is the intent of the legislature to encourage the performance of child death reviews by local health departments by providing necessary legal protections to the families of children whose deaths are studied, local health department officials and employees, and health care professionals participating in child mortality review committee activities.

(2) As used in this section, "child mortality review" means a process authorized by a local health department as such department is defined in RCW 70.05.010 for examining factors that contribute to deaths of children less than eighteen years of age. The process may include a systematic review of medical, clinical, and hospital records; home interviews of parents and caretakers of children who have died; analysis of individual case information; and review of this information by a team of professionals in order to identify modifiable medical, socioeconomic, public health, behavioral, administrative, educational, and environmental factors associated with each death.

(3) Local health departments are authorized to conduct child mortality reviews. In conducting such reviews, the following provisions shall apply:

(a) All medical records, reports, and statements procured by, furnished to, or maintained by a local health department pursuant to chapter 70.02 RCW for purposes of a child mortality review are confidential insofar as the identity of an individual child and his or her adoptive or natural parents is concerned. Such records may be used solely by local health departments for the purposes of the review. This section does not prevent a local health department from publishing statistical compilations and reports related to the child mortality review, if such compilations and reports do not identify individual cases and sources of information.

(b) Any records or documents supplied or maintained for the purposes of a child mortality review are not subject to discovery or subpoena in any administrative, civil, or criminal proceeding related to the death of a child reviewed. This provision shall not restrict or limit the discovery or subpoena from a health care provider of records or documents maintained by such health care provider in the ordinary course of business, whether or not such records or documents may have been supplied to a local health department pursuant to this section.

(c) Any summaries or analyses of records, documents, or records of interviews prepared exclusively for purposes of a child mortality review are not subject to discovery, subpoena, or introduction into evidence in any administrative, civil, or criminal proceeding related to the death of a child reviewed.

(d) No local health department official or employee, and no members of technical committees established to perform case reviews of selected child deaths may be examined in any administrative, civil, or criminal proceeding as to the existence or contents of documents assembled, prepared, or maintained for purposes of a child mortality review.

(e) This section shall not be construed to prohibit or restrict any person from reporting suspected child abuse or neglect under chapter 26.44 RCW nor to limit access to or use of any records, documents, information, or testimony in any civil or criminal action arising out of any report made pursuant to chapter 26.44 RCW.

[1993 c 41 § 1; 1992 c 179 § 1.]

# Appendix 14



06-2-12148-7 30606317 JYN 09-29-08

FILED  
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 IN OPEN COURT

SEP 24 2008

Pierce County Clerk  
 By GRH  
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IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

JENNIFER L TOBIN,  
Plaintiff(s)

Cause No: 06-2-12148-7

vs.

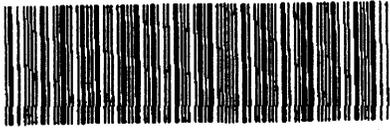
QUESTIONS FOR WITNESS  
FROM THE JURY

STATE OF WASHINGTON,  
Defendant(s)

Juror No. 3

*if the meaning of 295(s) was for  
 adjoining of adjacent property, why  
 would it not say so in the text of the WAC*

*GRH*  
*9/24/08*  
*PMH*



06-2-12148-7 30606348 JYN 09-29-08

FILED  
 DEPT. 8  
 IN OPEN COURT

SEP 24 2008

Pierce County Clerk  
 By Bm  
 DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

JENNIFER L TOBIN,  
Plaintiff(s)

Cause No: 06-2-12148-7

vs.

QUESTIONS FOR WITNESS  
FROM THE JURY

STATE OF WASHINGTON,  
Defendant(s)

Juror No. 11

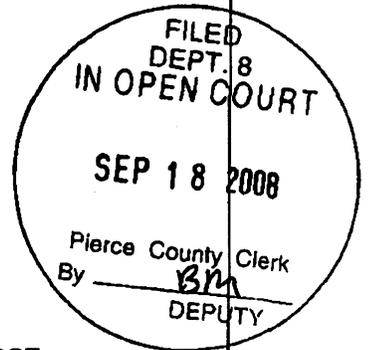
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06-2-12148-7 30571474 JYN 09-23-08



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

JENNIFER L TOBIN,  
Plaintiff(s)

Cause No: 06-2-12148-7

vs.

QUESTIONS FOR WITNESS  
FROM THE JURY

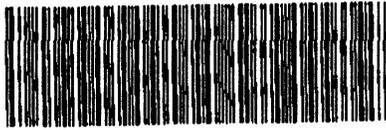
STATE OF WASHINGTON,  
Defendant(s)

Juror No. 6

Having young children yourself at that time,  
you did not feel that a fence was needed in your  
front yard due to the proximity of your house  
to the road or the lake.

*APPE  
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06-2-12148-7 30571456 JYN 09-23-08

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IN OPEN COURT

SEP 18 2008

Pierce County Clerk  
By BM  
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

JENNIFER L TOBIN,  
Plaintiff(s) ,

Cause No: 06-2-12148-7

vs.

QUESTIONS FOR WITNESS  
FROM THE JURY

STATE OF WASHINGTON,  
Defendant(s) .

Juror No. 3

Why would sub section 5 be written  
out in the way it is but have a meaning  
different ~~that~~ than is written.

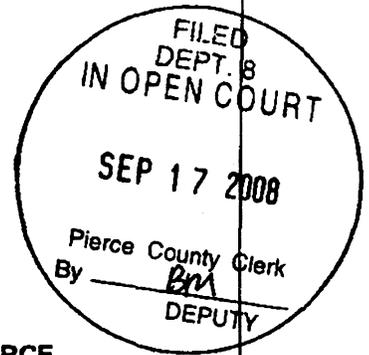
Are certain words interchangeable with  
different meanings, if so, how would any  
one know what the leniency of the terms?

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06-2-12148-7 30546299 JYN 09-18-08



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

JENNIFER L TOBIN,  
Plaintiff(s)

Cause No: 06-2-12148-7

vs.

QUESTIONS FOR WITNESS  
FROM THE JURY

STATE OF WASHINGTON,  
Defendant(s)

Juror No. 1316261

Why "taken into consideration" did you not  
at the least express to your ~~im~~ supervisor  
that in your best judgement, Mrs Fish may  
require a 5 foot fence in the front yard to prevent  
the children from the road or lake taps, "if the  
thought at least crossed your mind"

OK w/ quotes  
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[Signature]

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06-2-12148-7 30546280 JYN 09-18-08

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Pierce County Clerk  
By Bm  
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

JENNIFER L TOBIN,  
Plaintiff(s)

Cause No: 06-2-12148-7

vs.

QUESTIONS FOR WITNESS  
FROM THE JURY

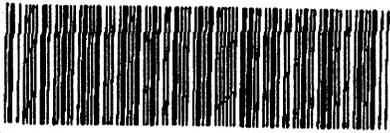
STATE OF WASHINGTON,  
Defendant(s)

Juror No. 9

Seeing no 5' fence how  
could you find her in compliance w/  
the WAC?

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06-2-12148-7 30546257 JYN 09-18-08

FILED  
DEPT. 8  
IN OPEN COURT  
  
SEP 16 2008  
  
Pierce County Clerk  
By BM  
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

JENNIFER L TOBIN,  
Plaintiff(s)

Cause No: 06-2-12148-7

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FROM THE JURY

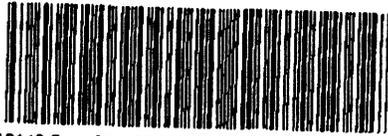
STATE OF WASHINGTON,  
Defendant(s)

Juror No. ~~2~~ 3

If the fire plan had the children  
in the front yard, wouldn't the Day  
Care realize that area in front of the  
House?

*[Handwritten notes and signatures]*

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06-2-12148-7 30546242 JYN 09-18-08

FILED  
DEPT. 8  
IN OPEN COURT  
  
SEP 16 2008  
  
Pierce County Clerk  
By BM  
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

JENNIFER L TOBIN,  
Plaintiff(s)

Cause No: 06-2-12148-7

vs.

QUESTIONS FOR WITNESS  
FROM THE JURY

STATE OF WASHINGTON,  
Defendant(s)

Juror No. 9

Knowing that the children were  
to use the front yard as a "meeting  
place in case of fire, i.e. emergency,  
why wouldn't you mention to Lisa Fish  
that she would need a five foot fence  
for the front yard.

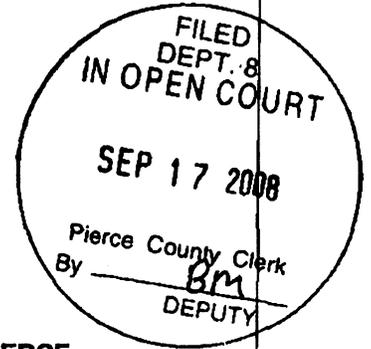
*Answered  
9/18/08*

*Agreed  
9/18*

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06-2-12148-7 30571416 JYN 09-23-08



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

JENNIFER L TOBIN,  
Plaintiff(s)

Cause No: 06-2-12148-7

vs.

QUESTIONS FOR WITNESS  
FROM THE JURY

STATE OF WASHINGTON,  
Defendant(s)

Juror No. 10

~~Have you ever had occasion due to  
cast workload to approve a license or  
renewal without having fully reviewed  
the ~~license~~ workpapers/checklists/comments?  
license~~

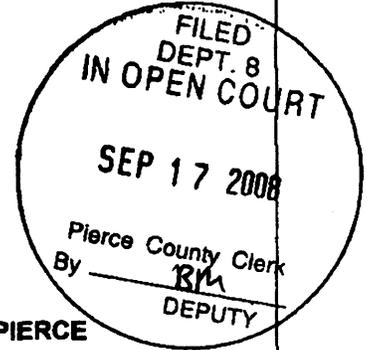
~~If you were the licensee for Little Fishes  
daycare do you believe you would have  
noted the lake as a potential water  
hazard?~~

~~you indicated in your deposition that the  
lake posed a hazard. you also indicated  
you did not feel a fence in the front yard  
was required. How do you think the  
hazard should/could have been mitigated?~~

Answer  
JTB  
PH



06-2-12148-7 30571418 JYN 09-23-08



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

JENNIFER L TOBIN,  
Plaintiff(s)

Cause No: 06-2-12148-7

vs.

QUESTIONS FOR WITNESS  
FROM THE JURY

STATE OF WASHINGTON,  
Defendant(s)

Juror No. 13

an employee, needing to be a critical thinker and think of hypothetically as well; having knowledge of the fire code regulation, the whereabouts of the children in the instance of the fire code regulation, and knowing that hypothetically the daycare provider may not be able to be with the children during the time the fire code regulation is in play, why would a five foot fence not be within standards to prevent the children access to the roadway? No one can predict when their is going to be a hazard so why not prevent the hazard at all times?

*Handwritten notes:* JAMES, 11/13, PM

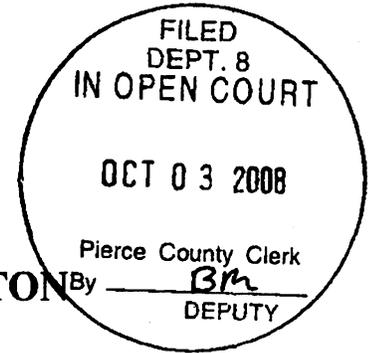
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# Appendix 15



06-2-12148-7 30671270 CTINJY 10-08-08

THE HONORABLE BRIAN TOLLEFSON



**SUPERIOR COURT OF WASHINGTON  
FOR PIERCE COUNTY**

JENNIFER L. TOBIN, as Administratrix of the Estate of GABRIEL M. TOBIN, deceased; JENNIFER L. TOBIN and CHRISTOPHER M. TOBIN, individually and the marital community composed thereof,

Plaintiffs,

v.

THE STATE OF WASHINGTON; VICTOR BERDECIA, in his individual capacity, and as an employee of The State of Washington; AMY CICHOWSKI, in her individual capacity, and as an employee of The State of Washington; MARY KAY QUINLAN, in her individual capacity, and as an employee of The State of Washington; ,

Defendants.

*(Caption continued on next page)*

NO. 06-2-12148-7  
NO. 05-2-04837-4 {Consolidated}

JURY INSTRUCTIONS

**ORIGINAL**

JENNIFER TOBIN, as Administratrix of the Estate of GABRIEL M. TOBIN, deceased; JENNIFER L. TOBIN and CHRISTOPHER M. TOBIN, individually and the marital community composed thereof,

NO. 06-2-12148-7

NO. 05-2-04837-4 {Consolidated}

Plaintiffs,

v.

LISA M. FISH and "JOHN DOE" FISH, individually and the marital community comprised thereof; d/b/a LITTLE FISH'S DAYCARE, a Washington Licensed Daycare Provider;

Defendants.

DATED this 1<sup>st</sup> day of October ~~September~~, 2008.

  
\_\_\_\_\_  
THE HONORABLE BRIAN TOLLEFSON

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses[, and the exhibits that I have admitted,] during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of

the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In

the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

INSTRUCTION NO. 2

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

## INSTRUCTION NO. 3

During this trial, testimony was presented to you by means of a deposition. A deposition is testimony of a witness taken under oath outside of the courtroom. The oath is administered by an authorized person who records the testimony word-for-word. Depositions are taken in the presence of lawyers for both parties.

Insofar as possible, you must consider this form of testimony in the same way that you consider the testimony of witnesses who are present in the courtroom. You must decide how believable the testimony is and what value to give to it.

INSTRUCTION NO. 4

The law treats all parties equally whether they are government entities or individuals. This means that government entities and individuals are to be treated in the same fair and unprejudiced manner.

INSTRUCTION NO. 5

The fact that a witness has talked with a party, lawyer, or party's representative does not, of itself, reflect adversely on the testimony of the witness. A party, lawyer, or representative of a party has a right to interview a witness to learn what testimony the witness will give.

INSTRUCTION NO. 6

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION NO. 7

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

INSTRUCTION NO. 8

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

There may be more than one proximate cause of the same injury. If you find that the defendants were negligent and that such negligence was a proximate cause of injury or damage to the plaintiffs, it is not a defense that some other cause may also have been a proximate cause.

INSTRUCTION NO. 9

The plaintiffs have the burden of proving each of the following propositions:

First, that one or more of the defendants acted, or failed to act, in one of the ways claimed by the plaintiffs and that in so acting, or failing to act, one or more of the defendants was negligent;

Second, that the plaintiffs were injured;

Third, that the negligence of one or more of the defendants was a proximate cause of the injury to the plaintiffs.

If you find from your consideration of all the evidence that each of these propositions has been proved against one or more of the defendants, your verdict should be for the plaintiffs and against the defendant or those defendants. On the other hand, if any of these propositions has not been proved against one or more of the defendants, your verdict should be for that defendant or those defendants.

INSTRUCTION NO. 11

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

INSTRUCTION NO. 12

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

**INSTRUCTION NO. 13**

In determining whether or not a person or entity was negligent, you are instructed that this issue is to be determined by what a reasonable person or entity knew or should have known at the time of the person's or entity's acts or omissions.

INSTRUCTION NO. 14

A child under the age of six years is incapable of contributory negligence. Therefore, there is no issue of contributory negligence on the part of Gabriel M. Tobin, deceased.

INSTRUCTION NO. 15

The Defendant State of Washington (DSHS) acts through its agencies, agents, employees, administrators and supervisory personnel. Any acts or failures to act of an agent within the scope of their employment is the act or omission of the employer. In this case, any acts or omissions of Amy Cichowski, Victor Berdecia, and Mary Kay Quinlan are to be considered the acts or omissions of the State of Washington and DSHS.

The employees of the Department of Social and Health Services (DSHS) are agents of the Defendant State of Washington, and therefore any acts or failures to act of these agents in the course of their employment were the acts or omissions of the Defendant State of Washington and DSHS.

The Department of Early Learning is the successor in interest to the Department of Social and Health Services in this matter.

INSTRUCTION NO. 16

A statute provides that the purposes of regulating and licensing family in-home daycares in the State of Washington are follows:

1. To safeguard the health, safety and well being of children, receiving care away from their own homes which is paramount over the right of any person to provide care;
2. To provide consultation to family in-home daycare providers who are caring for children, in order to help them to improve their methods of and facilities for care;
3. To promote the development of a sufficient number and variety of adequate child-care and maternity-care facilities, both public and private, through the cooperative efforts of public and voluntary agencies and related groups;
4. To license in-home daycares and to ensure that the users of such in-home daycares, their parents, the community at large and the daycares themselves that adequate minimum standards are maintained by all in-home daycares caring for children.

INSTRUCTION NO. 17

A Washington statute provides that the Department of Social and Health Services shall grant a daycare license if the applicant meets "minimum requirements." If an applicant fails to meet "minimum requirements" a daycare license must be denied.

INSTRUCTION NO. 18

A statute provides that the State of Washington, DSHS, and its employees have the duty to establish and enforce minimum standards relating to in-home daycares which must address the size and suitability of the daycare and its plan of operation for conducting in-home daycare services; to conduct background checks to determine whether or not persons seeking an in-home daycare license, or persons within the proposed daycare who have unsupervised access to children, have suitable character and competency to care for children outside of the home within the State of Washington; and to ensure that licensed in-home daycares are safe, clean and are within generally adequate premises which provide for the comfort, care and well being of children, who are being cared for away from home.

INSTRUCTION NO. 19

An administrative rule relating to licensed in-home daycares within the State of Washington, under the heading of "Water Safety" provides:

- (5) A five foot high fence with gates, locked when not in use, is required to prevent access to water hazards such as swimming pools, lakes, streams, or natural or artificial pools.

INSTRUCTION NO. 20

The violation, if any, of a statute and/or administrative rule is not necessarily negligence, but may be considered by you as evidence in determining negligence.

**INSTRUCTION NO. 21**

Evidence on the subject of what Jennifer and Christopher Tobin were or were not told, or knew about Lisa Fish's daycare has been admitted during the course of this trial. You may consider this evidence to determine if the defendants were or were not negligent. This means that you are not to consider this evidence for any other purpose. You are not to discuss this evidence when you deliberate in the jury room except to determine the negligence, if any, of the defendants.

INSTRUCTION NO. 22

You must not discuss or speculate about whether any party has insurance or other coverage available. Whether a party does or does not have insurance has no bearing on any issue that you must decide. You are not to make, decline to make, increase, or decrease any award because you believe that a party does or does not have medical insurance, workers' compensation, liability insurance, or some other form of coverage.

INSTRUCTION NO. 23

Plaintiff Jennifer Tobin, as personal representative of the Estate of Gabriel M. Tobin, brings two separate legal claims on behalf of the estate:

1. In one claim she represents the Estate for the personal losses suffered by Gabriel M. Tobin;  
and
2. In the other claim she represents the Estate for the losses suffered by the beneficiaries of the Estate.

INSTRUCTION NO. 24

You should decide the case of each plaintiff separately as if it were a separate lawsuit.

The instructions apply to all Plaintiffs unless a specific instruction states that it applies only to a specific Plaintiff.

INSTRUCTION NO. 25

If you find for the Plaintiffs you should determine the damages of each Plaintiff separately.

INSTRUCTION NO. 26

You should decide the case of each defendant separately as if it were a separate lawsuit. The instructions apply to all defendants unless a specific instruction states that it applies only to a specific defendant.

INSTRUCTION NO. 27

It is the duty of the court to instruct you as to the measure of damages on the Plaintiffs' claim for personal losses suffered by Gabriel M. Tobin. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the Plaintiffs, then you must determine the amount of money that will reasonably and fairly compensate Gabriel M. Tobin's Estate for such damages as you find were proximately caused by the negligence of the defendants.

If your verdict is for the Plaintiffs, your verdict must include the following undisputed items:

- |    |                          |                                       |
|----|--------------------------|---------------------------------------|
| 1. | Funeral Expenses:        | <u>\$ 5,490.45</u>                    |
| 2. | Past Medical Billings:   | <u>\$ 10,013.00</u>                   |
| 3. | Future Economic Damages: | <u>\$279,894.00 to \$1,546,722.00</u> |

In considering the range of future economic damages you should consider:

1. The net accumulations lost to Gabriel Tobin's estate.
  - (a) In determining the net accumulations, you should take into account Gabriel M. Tobin's age, health, life expectancy, occupation, and habits of industry, responsibility, and thrift.
  - (b) You should also take into account Gabriel M. Tobin's earning capacity, including his actual earnings prior to death and the earnings that reasonably would have been expected to be earned by him in the future, including any pension benefits.
  - (c) Further, you should take into account the amount you find that Gabriel M. Tobin reasonably would have consumed as personal expenses during his lifetime and deduct this from his expected future earnings to determine the net accumulations.

In addition, your verdict should consider the following economic damages:

1. Loss of Services of Gabriel Tobin to his Estate.

In addition, your verdict should consider the following Non-Economic Damages:

1. The pain, suffering, anxiety, emotional distress, humiliation, and fear experienced by him prior to his death as a result of his drowning; and
2. The loss of his enjoyment of life due to his shortened life expectancy.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure non-economic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

INSTRUCTION NO. 28

It is the duty of the court to instruct you as to the measure of damages on plaintiffs' claim for personal losses suffered by Jennifer and Christopher Tobin. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the Plaintiffs, then you must determine the amount of money that will reasonably and fairly compensate Jennifer and Christopher Tobin for such damages as you find were proximately caused by the negligence of the defendants.

If your verdict is for the Plaintiffs, your verdict must include the following undisputed items:

Past Medical Billings:

- |    |  |                   |
|----|--|-------------------|
| 1. | Jennifer Tobin Counseling Expenses:    | <u>\$3,800.00</u> |
| 2. | Christopher Tobin Counseling Expenses: | <u>\$2,760.00</u> |
| 3. | Family Counseling Expenses:            | <u>\$ 700.00</u>  |

In addition, your verdict should consider the additional following Economic Damages:

1. The reasonable value of necessary medical care, treatment, and services received by Jennifer Tobin and Christopher Tobin *and with* reasonable probability to be required in the future;
2. The economic value of services and support Gabriel M. Tobin reasonably would have been expected to contribute to Jennifer and Christopher Tobin from the date of July 13, 2004 until he would have attained the age of majority, less the cost to Jennifer and Christopher Tobin of Gabriel M. Tobin's support and maintenance during that interval.

In addition, your verdict should consider the following Non-Economic Damages:

1. The loss of love and the destruction of the parent-child relationship between Jennifer and Christopher Tobin and Gabriel M. Tobin, including the grief, mental anguish, and suffering of Jennifer and Christopher Tobin as a result of Gabriel Tobin's death experienced and with reasonable probability to be experienced in the future; and

2. The loss of care, companionship, including mutual society and protection, the mutual affection, learning and moral support given and received of Gabriel M. Tobin to Jennifer and Christopher Tobin, experienced and with reasonable probability to be experienced in the future.

In making your determinations, you should take into account Gabriel M. Tobin's age, health, life expectancy, character, and habits, as well as his station in life.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

INSTRUCTION NO. 29

According to mortality tables, the average expectancy of life of Christopher Tobin, aged 34 years is 40.48 years. This one factor is not controlling, but should be considered in connection with all of the other evidence bearing on the same question, such as that pertaining to the health, habits and activity of the person whose life expectancy is in question.

The average expectancy of life of Jennifer Tobin, aged 32 years is 48.21 years. This one factor is not controlling, but should be considered in connection with all of the other evidence bearing on the same question, such as that pertaining to the health, habits and activity of the person whose life expectancy is in question.

According to mortality tables, the average expectancy of life of Gabriel Tobin, 2 years is 70.64 years. This one factor is not controlling, but should be considered in connection with all of the other evidence bearing on the same question, such as that pertaining to the health, habits and activity of the person whose life expectancy is in question.

INSTRUCTION NO. 30

If you find that more than one entity was negligent, you must determine what percentage of the total negligence is attributable to each entity that proximately caused the injury to the plaintiffs. The court will provide you with a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

Entities may include only the named defendants in this action. You are not to consider in apportioning fault to any actions by Gabriel M. Tobin, who as the Court previously instructed as a matter of law cannot be comparatively or contributorily negligent. In addition, you are not to consider any actions or inactions on the part of the parents, Jennifer and Christopher Tobin. It has already been determined as a matter of law that no actions or inactions on the part of Jennifer and Christopher Tobin caused or contributed, in any way, to the death of Gabriel M. Tobin, and/or their own injuries or damages.

**INSTRUCTION NO. 31**

Upon retiring to the jury room for your deliberations, first select a presiding juror. The presiding juror shall see that your discussion is sensible and orderly, that you fully and fairly discuss the issues submitted to you, and that each of you has an opportunity to be heard and to participate in the deliberations on each question before the jury.

You will be given the exhibits admitted in evidence and these instructions. You will also be given a special verdict form that consists of several questions for you to answer. You must answer the questions in the order in which they are written, and according to the directions on the form. It is important that you read all the questions before you begin answering, and that you follow the directions exactly. Your answer to some questions will determine whether you are to answer all, some, or none of the remaining questions.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. However, do not assume that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If you need to ask the court a question that you have been unable to answer among yourselves after reviewing the evidence and instructions, write the question simply and clearly. The presiding juror should sign and date the question and give it to the bailiff. The court will confer with counsel to determine what answer, if any, can be given.

In your question to the court, do not indicate how your deliberations are proceeding. Do not state how the jurors have voted on any particular question, issue, or claim, or in any other way express your opinions about the case.

In order to answer any question on the special verdict form, ten jurors must agree upon the answer. It is not necessary that the jurors who agree on the answer be the same jurors who agreed on the answer to any other question, so long as ten jurors agree to each answer.

When you have finished answering the questions according to the directions on the special verdict form, the presiding juror must sign the form, whether or not the presiding juror agrees with the verdict. The presiding juror will then tell the bailiff that the jury has reached a verdict, and the bailiff will bring you back into court where your verdict will be announced.