

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BOARD OF APPEALS

In Re: ) Docket No. 03-2015-L-0363  
)  
[APPELLANT] ) REVIEW DECISION AND FINAL ORDER  
)  
Appellant ) Children's Administration - CPS Review

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I. NATURE OF ACTION

1. The Department of Social and Health Services (Department) received an allegation of negligent treatment or maltreatment by the Appellant of a minor child. After investigation and review, the Department's Child Protective Services (CPS) division determined the allegation of negligent treatment or maltreatment was founded against the Appellant. The Appellant requested a hearing to contest the founded CPS finding of negligent treatment or maltreatment and a hearing was held by Administrative Law Judge (ALJ) Laurel Gibson on October 29, 2015. The ALJ issued an *Initial Order* on January 19, 2016, setting aside the founded CPS finding of negligent treatment or maltreatment.

2. The Department filed a petition for review of the *Initial Order* on February 9, 2016, with the Department's Board of Appeals (BOA). The Appellant filed a response to the petition for review on February 29, 2016.

3. Based on the following findings and conclusions, the *Initial Order* is **reversed** and the founded CPS finding of negligent treatment or maltreatment is **affirmed**.

II. FINDINGS OF FACT

1. On [DATE 1], 2014, the Department received a referral for child abuse/neglect by a staff person employed by [FACILITY].<sup>1</sup> The referral originated as a complaint against the

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<sup>1</sup> Exhibit 6.

licensed residential service program [FACILITY], but the investigation was narrowed to the actions of the Appellant.<sup>2</sup>

2. On January 16, 2015, the Appellant received a letter from the Department by certified mail which informed her that the investigation resulted in a founded finding of negligent treatment or maltreatment against her.<sup>3</sup> The Appellant requested an internal Department review of the finding by way of a Review Request Form received by the Department on February 2, 2015.<sup>4</sup>

3. On February 20, 2015, the Appellant received a letter from the Department by certified mail which affirmed the finding of negligent treatment or maltreatment.<sup>5</sup>

4. The Appellant requested an administrative hearing on March 2, 2015, to challenge the founded CPS finding of negligent treatment or maltreatment.<sup>6</sup>

5. At the time of the incident relevant to this decision, [DATE 1], 2014, [CHILD] was one month shy of his [AGE] birthday. [CHILD] was born on [DATE 2].<sup>7</sup>

6. In [DATE 1] of 2014, [CHILD] was residing at [FACILITY] which is described as a home for behaviorally challenged youths. It is located in or near [TOWN]. [CHILD] came to reside at the house by way of a Dependency Petition filed in Superior Court.<sup>8</sup> As part of the investigation, Ms. Hayes reviewed records from [FACILITY] from [DATE 3], 2014, which described [CHILD] as “impulsive, physically aggressive, non-compliant/oppositional, sexually deviant behaviors, poor peer relations, and runaway behaviors.” The records stated that

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<sup>2</sup> Testimony of Corrie Hayes, Division of Licensed Resources CPS investigator.

<sup>3</sup> Exhibit 1.

<sup>4</sup> Exhibit 3.

<sup>5</sup> Exhibits 4 and 5.

<sup>6</sup> The Appellant’s request for hearing is a necessary jurisdictional document and is entered into the hearing record as Exhibit [INITIAL]-1.

<sup>7</sup> Exhibit 6. Only the children’s first names are used in this decision for reasons of confidentiality.

<sup>8</sup> Testimony of Ms. Hayes.

[CHILD] has been diagnosed with Asperger Disorder, Post-Traumatic Stress Disorder (PTSD), Mood Disorder, and Oppositional Defiant Disorder.<sup>9</sup>

7. According to [FACILITY] records, [CHILD] was to be supervised in all community activities. His behavioral triggers are identified as being “held responsible ... feeling he has no control.” His behavioral plan for de-escalating behavior was identified as “allow [CHILD] to blow off his adrenaline. Allow him to walk around or do physical activity.”<sup>10</sup>

8. [CHILD] was receiving supervision at the level of one staff to three participants. [FACILITY] uses positive and negative behavioral incentives to encourage behavioral compliance. In the [SEASON] of 2014 there were [NUMBER] residents of [FACILITY], all of whom were males between the ages of [AGE 1] and [AGE 2]. The residents received points for good behavior which they could then use for outings in the community. Each person living at [FACILITY] has household jobs assigned to them. They receive verbal instruction in their activities of daily living. [CHILD] had no functional difficulties with self-care or household chores. He was responsible for doing dishes, mopping floors, and cleaning his room. [CHILD] is responsive and capable of learning through verbal instruction. For fun the boys of [FACILITY] would watch television or play board games.<sup>11</sup>

9. There is no evidence that [CHILD] was enrolled in special education or was receiving any specialized aids at school.

10. [EMPLOYEE] worked at [FACILITY] from April 2006, through July 2011. In his experience, [FACILITY] was a facility for boys involved with juvenile corrections. The structure of the house was designed to manage and mitigate aggressive or deviant behaviors. The boys typically served by [FACILITY] were high functioning in that they could manage their own self-care beyond what might be expected of someone who would qualify for services based on a

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<sup>9</sup> Exhibit 7, p. 14.

<sup>10</sup> *Id.*

<sup>11</sup> Testimony of the Appellant.

developmental disability. The boys were prone to aggression and [EMPLOYEE] testified that he had previously experienced an incident in which a youth resident had taken his car keys and tried to turn off his vehicle.<sup>12</sup>

11. Based on the evidence presented, [FACILITY] serves juveniles with severe behavioral issues who are not otherwise medically or developmentally disabled. There is no available assessment of [CHILD]'s intellectual capacity but the lack of enrollment with the Developmental Disabilities Administration, coupled with the services he receives through the Children's Administration, suggests that [CHILD] is at least of low normal intelligence. Although the [FACILITY] records note a diagnosis of Asperger Syndrome, this is not telling as to his level of cognition. There is no evidence that [CHILD] was enrolled in special education. A finding that [CHILD] is, or is not, cognitively disabled cannot be made based solely on the evidence entered into the hearing record.<sup>13</sup>

12. The Appellant has 15 to 20 years of previous experience working with adults with mental health and developmental delays. She was hired to work at [FACILITY] due to her background with persons with mental health conditions. In [DATE 1] of 2014, she had been employed with [FACILITY] for a little over a month (first day of employment was [DATE 4], 2014).<sup>14</sup> She had not reviewed [CHILD]'s file, but had heard from other staff what might be expected from [CHILD] and the other residents.

13. The ALJ had the opportunity to observe the Appellant and found she is [PHYSICAL DESCRIPTION] and approximately in her [AGE 5]. She is [PHYSICAL DESCRIPTION].

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<sup>12</sup> Testimony of [EMPLOYEE].

<sup>13</sup> The Department was afforded the opportunity to supplement the hearing record by submitting evidence by November 13, 2015, related to [CHILD]'s intellectual capacity/disability. The undersigned could find no evidence that would indicate the Department availed itself of this opportunity.

<sup>14</sup> Exhibit 7, p. 13.

14. In the late afternoon of [DATE 1], 2014, the Appellant was transporting three youths back to [FACILITY] after seeing a movie with other residents. The Appellant was driving her own vehicle and another, more senior staff, was transporting other boys in her vehicle. [CHILD] and [CHILD 2] were sitting in the rear seat, and [CHILD 3] was in the front passenger seat.<sup>15</sup> All three boys are described as being average sized youth between [AGE 3] and [AGE 4] years of age. [CHILD 3] and [CHILD] had been arguing. By her own admission to the Department investigator and in her admitted statement, the Appellant confirmed traffic was heavy, it was dark, and raining heavily causing poor driving conditions with limited visibility as they drove north on Interstate 5 after leaving the movie theater.<sup>16</sup> [CHILD 3] and [CHILD] continued to argue when [CHILD] began to reach for [CHILD 3] in an effort to strike him. The Appellant tried to calm the boys and de-escalate the argument. When her efforts were not successful she pulled over to the side of the freeway. Her vehicle was approximately ½ mile from the next exit. [CHILD] exited the Appellant's car on the traffic side. He then walked to [CHILD 3]'s window and began to knock on it, challenging [CHILD 3] to get out and fight. [CHILD 2] was asking [CHILD] to return to the vehicle. The Appellant did not exit the car to speak with [CHILD] and did not directly ask [CHILD] to get back in the car, relying on [CHILD 2] to coax him back in the car.<sup>17</sup> When [CHILD 3] did not exit the car, [CHILD] said he would just walk and proceeded northbound on the side of the freeway, in front of the car. Neither the

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<sup>15</sup> Exhibit 7, p. 4.

<sup>16</sup> Exhibit 7, p. 8 and Appellant's Exhibit 1.

<sup>17</sup> Exhibit 7, p. 8. The Appellant's written statement and sworn testimony that she did attempt to talk to [CHILD] through the car window to get him back into the car and that [CHILD] walked away from the car and out of her sight does not comport with the consistent statements made by [CHILD 2], [CHILD 3], and [CHILD] to the Department's investigator when they were individually interviewed. (Exhibit 7, p. 5, Exhibit 7, p. 11, and Exhibit 7, p. 3, respectively.) Nor do these claims made by the Appellant in the statement entered into the hearing record and her testimony at hearing comport with the Appellant's initial statements made when interviewed by the Department investigator on [DATE 1], 2014. (Exhibit 7, p.p. 8-9.) Although the children's statements to the investigator are hearsay, they are substantially corroborated by the Appellant's statements to the investigator which are not hearsay as they are *admissions by Party-Opponent* pursuant to Washington Court Rules of Evidence (ER) 801(d)(2). Additionally, the Appellant's claims made in her written statement regarding why she did not immediately attempt to contact law enforcement after leaving the freeway were not relayed to the Department investigator during the initial interview. (Exhibit 7, p. 9.)

Appellant nor the boys had a cellphone on their person. After a few minutes, the Appellant went back into traffic and drove back to [FACILITY]. The Appellant admitted at hearing that she had not reviewed [CHILD]'s care file prior to leaving him alongside the Interstate 5 after dark and during heavy rain.<sup>18</sup> The Appellant informed the Department investigator that her focus in leaving the scene was to "catch up to" the more senior staff due to her lack of experience and confidence in how to handle the situation. She considered [CHILD] a runaway when he failed to re-enter the car and knew she needed to report him as a runaway.<sup>19</sup> The drive back to [FACILITY] was approximately 18 miles from the freeway exit.<sup>20</sup> There was a gas station and a number of fast food restaurants just off the freeway exit close to the point the Appellant had originally stopped.<sup>21</sup> The Appellant did not stop to use a phone at one of the businesses or otherwise attempt to contact law enforcement. The Appellant testified that she was concerned about [CHILD] walking alone on the freeway, but was also concerned about leaving the other two teenagers in the car while she used a business phone. The Appellant failed to explain why she did not flag down another motorist to use their phone or pull into a parking lot and hail another person to call 911 to report the young teenager left on the freeway.

15. After the Appellant had driven away, [CHILD] continued to walk up the freeway. A Washington State Patrol Officer saw [CHILD] on the side of the freeway and attempted to pull over. In the process of pulling over, the officer's patrol car was struck by another vehicle while in the traffic lane and the officer was injured. Another state patrol officer arrived to investigate and interviewed [CHILD]. The officer stated, *inter alia*, in the resulting police report: "[CHILD] stated that he was almost [AGE 6] years old, but it appeared that he had limited speech or

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<sup>18</sup> Testimony of the Appellant.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* The ALJ's finding that "In all, the drive back to [FACILITY] was approximately 15 minutes" does not comport with the Appellant's concession at hearing that [FACILITY] was 18 miles from the freeway exit. (Audio record of hearing at counter 1:41:58 as replayed on a ThinkCentre cd player.) To make this 18-mile trip in 15 minutes would require traveling continuously at just over 70 miles per hour along secondary roads, after dark, and in the rain.

<sup>21</sup> The Appellant's Exhibit 1, Exhibits 7 and 8, and testimony of the Appellant and Ms. Hayes.

cognitive capability, and my conversation with him was similar to one that you might have with a younger child.”<sup>22</sup> The Washington State Patrol phoned [FACILITY] and the call came in just after the Appellant had arrived at [FACILITY] with [CHILD 3] and [CHILD 2]. She was in the process of calling the police as that was what she had been instructed to do by a senior staff person.<sup>23</sup>

### III. CONCLUSIONS OF LAW

#### *Jurisdiction, Standard of Review, and Standard of Proof*

1. The petition for review of the *Initial Order* was timely filed and is otherwise proper.<sup>24</sup> Jurisdiction exists to review the *Initial Order* and to enter the final agency decision.<sup>25</sup>
2. In an adjudicative proceeding regarding a founded CPS finding of negligent treatment or maltreatment of a child, the undersigned has the same authority as the ALJ to enter Findings of Fact, Conclusions of Law, and Orders.<sup>26</sup> The Washington Administrative Procedure Act broadly states that the undersigned Review Judge has precisely the same decision-making authority when deciding and entering the *Final Order* as the ALJ had while presiding over the hearing and deciding and entering the *Initial Order*, unless the Review Judge or a provision of law limits the issue subject to review.<sup>27</sup> RCW 34.05.464(4) grants the undersigned Review Judge the same decision-making authority as the ALJ and in the same manner as if the undersigned had presided over the hearing.<sup>28</sup> This includes the authority to make credibility determinations, weigh the evidence, and change or set aside the ALJ’s findings

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<sup>22</sup> Exhibit 9, p. 1.

<sup>23</sup> Testimony of the Appellant.

<sup>24</sup> WAC 388-02-0580.

<sup>25</sup> WAC 388-02-0217(3) and 388-02-0560(1).

<sup>26</sup> WAC 388-02-0600(1) and WAC 388-02-0217(3). See also RCW 34.05.464(4); *Tapper v. Employment Security*, 122 Wn.2d 397 (1993); and *Northwest Steelhead and Salmon Council of Trout Unlimited v. Washington State Dept. of Fisheries*, 78 Wn. App 778 (1995).

<sup>27</sup> RCW 34.05.464(4). See also WAC 388-02-0600(1).

<sup>28</sup> *Kabbae v. Dep’t of Soc. & Health Servs.*, 144 Wn. App. 432, 443 (2008) (citing RCW 34.05.464(4) as the basis for invalidating WAC 388-02-0600(2)(e)—now repealed—which purported to limit the scope of the undersigned’s decision-making authority when reviewing certain types of cases).

of fact.<sup>29</sup> This is because "...administrative review is different from appellate review."<sup>30</sup> The undersigned Review Judge does not have the same relationship to the ALJ as an Appellate Court Judge has to a Trial Court Judge or that a Trial Court Judge has to a Review Judge in terms of the level of deference owed by the Review Judge to the presiding ALJ's findings of fact.<sup>31</sup> The Review Judge's authority to substitute his or her judgment for that of the presiding ALJ on matters of fact as well as law is the difference.<sup>32</sup> However, if the ALJ specifically identifies any findings of fact in the *Initial Order* that are based substantially on the credibility of evidence or demeanor of the witnesses,<sup>33</sup> a Review Judge must give due regard to the ALJ's opportunity to observe the witnesses when reviewing those factual findings by the ALJ and making his or her own determinations.<sup>34</sup> This does not mean a Review Judge must defer to an ALJ's credibility findings, but it does require that they be considered.<sup>35</sup> In conducting this review, the undersigned is required to consider the ALJ's ability to observe the witnesses, when applicable.<sup>36</sup>

3. It may help to explain briefly at the outset the unique characteristics and specific limitations of the administrative hearing process. An administrative hearing is held under the

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<sup>29</sup> See *Hardee v. Dep't of Soc. & Health Servs.*, 152 Wn. App. 48, 59 (2009), *review granted*, 168 Wn.2d 1006 (2010) (referring to the court in *Regan v. Department of Licensing*, which "...held that a reviewing officer has the authority 'to modify or replace an ALJ's findings, including findings of witness credibility' and stated that the statute does not require a reviewing judge to defer to the ALJ's credibility determinations, but rather authorized the reviewing judge to make his or her own independent determinations based on the record"). See also *Regan v. Dep't of Licensing*, 130 Wn. App. 39, 59 (2005).

<sup>30</sup> *Kabbae*, 144 Wn. App. at 441 (explaining that this is because the final decision-making authority rests with the agency head). See also *Messer v. Snohomish County Bd. of Adjustment*, 19 Wn. App. 780, 787 (1978) (stating that "[t]he general legal principles which apply to appeals from lower to higher courts do not apply to administrative review of administrative determinations").

<sup>31</sup> See, e.g., *Tapper v. Employment Sec. Dep't.*, 122 Wn.2d 397, 404-05 (1993), *overruled on other grounds by Markam Group, Inc. v. Employment Sec. Dep't.*, 148 Wn. App. 555, 562 (2009), and Andersen, *The 1988 Washington Administrative Procedure Act – An Introduction*, 64 Wash. L. Rev. 781, 816 (1989).

<sup>32</sup> *Id.*

<sup>33</sup> RCW 34.05.461(3).

<sup>34</sup> RCW 34.05.464(4) and WAC 388-02-0600(1).

<sup>35</sup> *Hardee*, 152 Wn.App. at 59 (stating that RCW 34.05.464(4) permits a Review Judge to make his or her own independent credibility determinations and need not defer to the ALJ's as long as the ALJ's credibility findings are duly contemplated).

<sup>36</sup> WAC 388-02-0600(1).

auspices of the *executive branch of government* and neither the ALJ nor the Review Judge enjoy the broad equitable authority of a Superior Court Judge within the *judicial branch of government*. It is well settled that administrative agencies, such as the OAH and the Board of Appeals, are creatures of statute, without inherent or common law powers, and, consequently, they may exercise only those powers expressly granted in enabling statutes or necessarily implied therein.<sup>37</sup> It is also well settled that an ALJ's or a Review Judge's jurisdictional authority to render a decision in an administrative hearing is limited to that which is specifically provided for in the authorizing statute(s) or WAC provision(s).<sup>38</sup> This is because ALJs and Review Judges must first apply the Department rules adopted in the WAC to resolve an issue.<sup>39</sup> If there is no Department WAC governing the issue, the ALJ and the Review Judge must resolve the issue on the basis of the best legal authority and reasoning available, including that found in federal and Washington constitutions, statutes and regulations, and court decisions.<sup>40</sup> The ALJ and the Review Judge may not declare any rule invalid, and challenges to the legal validity of a rule must be brought *de novo* in a court of proper jurisdiction.<sup>41</sup>

4. "The power of an administrative tribunal to fashion a remedy is strictly limited by statute."<sup>42</sup> Again, the only discretionary authority afforded to ALJs and Review Judges is that which is set forth, either explicitly or implicitly, in statute or agency rule.<sup>43</sup> As a result, the ALJ and the undersigned have extremely limited authority to grant equitable relief in this administrative forum.<sup>44</sup> Equity within the administrative hearing process generally comes from

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<sup>37</sup> *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County*, 135 Wn.2d 542, 558 (1998), and *Taylor v. Morris*, 88 Wn.2d 586, 588 (1977). See also WAC 388-02-0216 which provides, "The authority of the ALJ and the review judge is limited to those powers conferred (granted) by statute or rule. The ALJ and the review judge do not have any inherent or common law powers."

<sup>38</sup> *Id.*

<sup>39</sup> WAC 388-02-0220(1).

<sup>40</sup> WAC 388-02-0220(2).

<sup>41</sup> WAC 388-02-0225(1).

<sup>42</sup> *Skagit Surveyors & Eng'rs. L.L.C.*, 135 Wn.2d at 558.

<sup>43</sup> WAC 388-02-0216.

<sup>44</sup> WAC 388-02-0495 (setting forth the only explicit equitable remedy of which the undersigned is aware in administrative hearings applying the Department's WAC provisions).

equal application of the law to the supported facts for all who appear before the tribunal. ALJs and Review Judges do not have the same opportunity as Superior Court Judges to fashion an equitable remedy.

5. The ALJ had jurisdiction to hear and determine whether the founded CPS finding was correct and to issue an initial order.<sup>45</sup> The authority to promulgate rules related to adjudicative hearings to contest CPS findings is granted to the Department in RCW 26.44.125(7). Administrative hearings conducted pursuant to Chapter 388-15 WAC and subsequent administrative review of the ALJs' initial orders are subject to the statutes and regulations found at Chapter 34.05 RCW, Chapter 10-08 WAC, and Chapter 388-02 WAC.

6. The standard of proof refers to the amount of evidence needed to prove a party's position.<sup>46</sup> Unless a WAC provision, RCW provision, or published case law states otherwise, the standard of proof in a Department hearing is a preponderance of the evidence.<sup>47</sup> Regulations relevant to CPS hearings set the standard of proof as a preponderance of the evidence.<sup>48</sup> A preponderance of the evidence means that it is more likely than not that something happened or exists.<sup>49</sup> The burden of proof is borne by the party attempting to persuade the ALJ that his or her position is correct.<sup>50</sup>

7. The undersigned has reviewed the audio record of the hearing, the documents admitted as exhibits, the *Initial Order*, the Department's petition for review, and the Appellant's response to determine the adequacy and appropriateness of the *Findings of Fact* made by the ALJ in the *Initial Order*. After review, the undersigned finds that those *Findings of Fact*, with some amendments and supplements, are supported by substantial evidence based on the

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<sup>45</sup> Chapter 34.12 RCW; RCW 26.44.125(5); Chapter 10-08 WAC; WAC 388-15-105; WAC 388-02-0215; and WAC 388-02-0217(3).

<sup>46</sup> WAC 388-02-0485.

<sup>47</sup> *Id.*

<sup>48</sup> WAC 388-15-129.

<sup>49</sup> WAC 388-02-0485.

<sup>50</sup> WAC 388-02-0480(2).

entire record. For this reason the *Findings of Fact*, with some amendments and supplements, are adopted and are incorporated by reference into this decision as set forth above.<sup>51</sup>

*Applicable Law*

8. Chapter 26.44 of the Revised Code of Washington (RCW) is entitled "Abuse of Children." It establishes a system for reporting instances of non-accidental injury, neglect, death, abuse, and cruelty to children by others. The Legislature's intent in adopting RCW 26.44 is that as a result of these reports, protective services will be made available in an effort to avoid further abuse and to safeguard the general welfare of these children.<sup>52</sup> The Department is directed to investigate allegations of child abuse and neglect, and to notify the alleged perpetrator of its investigative findings. A person so named by the Department as an alleged perpetrator has the right to request an adjudicative hearing governed by the Administrative Procedure Act, chapter 34.05 RCW.<sup>53</sup> The Department has implemented chapter 26.44 RCW by adopting chapter 388-15 of the Washington Administrative Code (WAC) entitled "Child Protective Services."

9. The relevant definitional regulations provide:

**"Abuse or neglect"** means the injury, sexual abuse, sexual exploitation, negligent treatment, or maltreatment of a child as defined in RCW [26.44.020](#) and this chapter.<sup>54</sup>

And:

Child abuse or neglect means the injury, sexual abuse, or sexual exploitation of a child by any person under circumstances which indicate that the child's health, welfare, or safety is harmed, or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child. An abused child is a child who has been subjected to child abuse or neglect as defined in this section.

. . .

(5) Negligent treatment or maltreatment means an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, on the part of a child's

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<sup>51</sup> RCW 34.05.464(8).

<sup>52</sup> RCW 26.44.010.

<sup>53</sup> RCW 26.44.125(5).

<sup>54</sup> WAC 388-15-005 "**Abuse or neglect.**"

parent, legal custodian, guardian, or caregiver that shows a serious disregard of the consequences to the child of such magnitude that it creates a clear and present danger to the child's health, welfare, or safety. A child does not have to suffer actual damage or physical or emotional harm to be in circumstances which create a clear and present danger to the child's health, welfare, or safety. Negligent treatment or maltreatment includes, but is not limited, to:

(a) Failure to provide adequate food, shelter, clothing, supervision, or health care necessary for a child's health, welfare, or safety. Poverty and/or homelessness do not constitute negligent treatment or maltreatment in and of themselves;

(b) Actions, failures to act, or omissions that result in injury to or which create a substantial risk of injury to the physical, emotional, and/or cognitive development of a child; or

(c) The cumulative effects of a pattern of conduct, behavior or inaction by a parent or guardian in providing for the physical, emotional and developmental needs of a child's, or the effects of chronic failure on the part of a parent or guardian to perform basic parental functions, obligations, and duties, when the result is to cause injury or create a substantial risk of injury to the physical, emotional, and/or cognitive development of a child.<sup>55</sup>

10. The relevant definitional statute provides:

"Abuse or neglect" means sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child's health, welfare, or safety, excluding conduct permitted under RCW [9A.16.100](#); or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child. An abused child is a child who has been subjected to child abuse or neglect as defined in this section.<sup>56</sup>

"Negligent treatment or maltreatment" means an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare, or safety, including but not limited to conduct prohibited under RCW [9A.42.100](#). When considering whether a clear and present danger exists, evidence of a parent's substance abuse as a contributing factor to negligent treatment or maltreatment shall be given great weight. The fact that siblings share a bedroom is not, in and of itself, negligent treatment or maltreatment. Poverty, homelessness, or exposure to domestic violence as defined in RCW [26.50.010](#) that is perpetrated against someone other than the child does not constitute negligent treatment or maltreatment in and of itself.<sup>57</sup>

11. The Department's regulatory definition of "negligent treatment or maltreatment"

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<sup>55</sup> WAC 388-15-009.

<sup>56</sup> RCW 26.44.020(1).

<sup>57</sup> RCW 26.44.020(16).

cannot be interpreted nor applied so as to run contrary to the authorizing statute.<sup>58</sup> The regulation's statement that a child does not have to suffer actual harm to prove negligence is not an expansion of the statute, but rather recognition, under law, that the *risk of potential harm* is enough to prove negligence under both the statute and the rule.<sup>59</sup> The statute's separation of the term "negligent treatment or maltreatment" from the terms "sexual abuse, sexual exploitation, or injury" by the disjunctive word "or" in RCW 26.44.020(1) is evidence that "harm to the child's health, welfare, or safety" need not be shown to establish negligent treatment or maltreatment. Nothing in either RCW 26.44.020(1) or (16) requires that actual harm needs to have occurred for negligent treatment to be found. To conclude otherwise undermines the entire purpose of RCW 26.44 and WAC 388-15 in *preventing* harm to children rather than just *reacting* when such harm has occurred.<sup>60</sup>

12. The regulation's listing of certain actions (or failures to act) in providing adequate necessities for a child's care does not and should not be applied so as to create *per se* negligent treatment. The regulatory listings in the subparagraph simply provide clarifying examples of what could be negligent treatment if not adequately provided and do not relieve the Department of having to show that a particular action or failure to act constituted a serious disregard of the consequences to a child of such magnitude as to create a clear and present danger to that child's health, welfare, or safety as required in the statute and mimicked in the

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<sup>58</sup> See, Washington State Court of Appeals Division II decision in *Marcum v. Department of Social and Health Services*, No. 42283-2-II, p. 12 (2012). Although the Court of Appeals vacated the finding of neglect the Department entered against the appellant in *Marcum*, the case was remanded to the BOA to determine if the founded CPS finding of negligent treatment or maltreatment should stand based on the facts without application of a *strict liability* standard. On remand from the Court of Appeals, the BOA re-affirmed the founded CPS finding of negligent treatment or maltreatment against that appellant based on her mistakenly leaving a child unattended. The case was decided on remand not on a *per se* finding of neglect based on lack of supervision, but on a determination that the lack of *adequate* supervision constituted a serious disregard of the consequences to the child of such a magnitude that it created a clear and present danger to the child's health, welfare, and safety.

<sup>59</sup> See, *Bond v. DSHS*, 111 Wash. App. 566, 572-574, 45 P.3d 1087 (2002)(stating that "...the 'no harm' argument fails"). See also, *Interest of J.F.*, 109 Wn. App. 718, 731, 2001 Wash. App. LEXIS 2810 (Wash. Ct. App., December 31, 2001, Filed).

<sup>60</sup> See, RCW 26.44.010 and WAC 388-15-001.

regulation.

13. In *Conclusions of Law 5.4* of the *Initial Order*, the ALJ cites to the Washington State Court of Appeals, Division Three, analysis in *Ashley Brown v. Department of Social and Health Services*, 190 Wn. App. 572, 360 P.3d 875 (2015). The *Brown* decision addressed what constitutes negligent treatment or maltreatment of a child under RCW 26.44.020(16) when a parent does not immediately obtain medical treatment for an injured child. The *Brown* case involved a young mother who was informed by telephone at work that her young son had been scalded in the bathtub at home while under the supervision of her boyfriend. The mother rushed home and, based on her observations of the child's skin as slightly red and after consulting with both her mother and her boyfriend's mother (who worked in a hospital), as well as seeking advice from a pharmacist and the internet, decided not to seek professional medical treatment for the child and to apply burn ointment to the child herself as she had often done with work related burns while working in a sandwich shop. After initial improvement, the child developed blisters and exhibited increased pain. When the burned area began to bleed, the child's mother took him to the hospital. The ALJ in the *Brown* case affirmed the Department's founded CPS finding of negligent treatment or maltreatment for failure to seek timely medical attention for the child, the BOA affirmed the ALJ, and the Superior Court also upheld the Department's decision. Division Three of the Washington State Court of Appeals concluded that the specific definition of negligent treatment or maltreatment required more than a showing of mere negligence.<sup>61</sup> The Court of Appeals appeared to be focused on what would have been the results if the mother had immediately sought medical attention for her son and would that medical treatment be any different than what the mother had done to treat the child's burns.<sup>62</sup> The Department representative's inability to adequately answer these questions posed by the Court of Appeals,<sup>63</sup> appeared to have considerable sway in the

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<sup>61</sup> *Brown*, 190 Wn. App. at 590.

<sup>62</sup> *Brown*, 190 Wn. App. at 595.

<sup>63</sup> *Brown*, 190 Wn. App. at 584-85.

court's decision that the mother's decision not to immediately seek medical attention and to treat the child herself, under the specific facts in that case, did not rise to the level of an act that evidenced a serious disregard of consequences of such magnitude as to constitute a clear and present danger to the child's health, welfare, or safety.

14. The facts in this case can be readily distinguished from the facts existing in the *Brown* case. Here, the Appellant made the conscious decision not to directly confront [CHILD] in an attempt to get him back into the car; left a troubled young teenager alongside a major freeway after dark and in inclement weather that affected visibility as well as drivability by other motorists; and opted to drive 18 miles to [FACILITY] before any attempt to contact emergency personnel. Any question by this tribunal or the Court of Appeals as to what difference did the Appellant's conscious decisions to leave the child along the freeway and drive to [FACILITY] make can readily be answered by responding, "The troubled teenager would not have been placed in harm's way and put in the dangerous position of being hit by an automobile, struck by debris, or picked up by a stranger with nefarious intent."

15. The applicable definition of negligent treatment or maltreatment requires that there be a "clear and present danger" created by the Appellant's actions in leaving [CHILD] alone on the freeway. What appeared to concern the ALJ in this case was whether or not [CHILD] had the cognitive ability to reasonably protect himself when left alone and to his own devices on the freeway that evening. Whether he was fully able to do this has some relevancy in determining if the requisite "clear and present danger" exists, but is not completely dispositive of the issue. A fully mature and healthy adult is at some risk walking along a major highway, not intended for pedestrian traffic use, after dark, and in the rain. This is why it is illegal to use most, if not all, of the I-5 corridor as a pedestrian byway except for emergency purposes. The law recognizes an inherent danger of walking along a shoulder of a freeway where cars are traveling at speeds often in excess of 60 miles per hour. It should not be ignored, that the State

Patrol Officer who first saw [CHILD] walking alongside I-5 recognized the serious danger in this behavior by anyone, let alone, a troubled teenager, and placed herself in danger when she braked abruptly to intervene causing her patrol car to be rear-ended by another driver within the lane of traffic. Under the conditions present at the time of the relevant incident, there is an argument that a clear and present danger existed as to anyone walking alongside the freeway at that location.

16. Evidence in the hearing file indicates [CHILD] does attend public school unsupervised, functions “typically on the highest level and given ‘quite a few freedoms’” at [FACILITY], and was eligible for, but had not yet earned, unsupervised time in the community. Recognizing these attributes that would indicate that [CHILD] could and would take reasonable measures to protect himself when left alone on the freeway, it cannot be ignored that he was in a program requiring “line of sight supervision” (as were all residents of [FACILITY]), exhibited impulsive, physically aggressive, non-compliant/oppositional, runaway, and sexually deviant behaviors, as well as poor peer relations. His existing supervision plan specifically required that “all community activities will be supervised by staff or approved adults.” [CHILD] is diagnosed with Asperger Disorder, Post-Traumatic Stress Disorder, Mood Disorder, and Oppositional Defiant Disorder. These conditions certainly do not mitigate, and possibly heighten, the risk of danger incurred by any young teenager left alongside a major high-speed freeway.

17. Our nation’s highest court has recently addressed the differences in the developing cognitive abilities between minor children and adults in a case involving mandatory life sentences for minor children who have committed criminal acts. In the case of *Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the United States Supreme Court recognized the “significant gaps between juveniles and adults. . . . children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity,

and heedless risk-taking.”<sup>64</sup> The Supreme Court went on to state, “Our decisions rested not only on common sense--on what ‘any parent knows’--but on science and social science as well.”<sup>65</sup> The Supreme Court noted that “‘developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds’--for example, in ‘parts of the brain involved in behavior control.’”<sup>66</sup> We reasoned that those findings--of transient rashness, proclivity for risk, and inability to assess consequences--both lessened a child’s “moral culpability” and enhanced the prospect that, as the years go by and neurological development occurs, his ‘deficiencies will be reformed.’”<sup>67</sup> And finally, the U.S. Supreme Court provided in footnote: “The evidence presented to us in these cases indicates that the science and social science supporting *Roper’s* and *Graham’s* conclusions have become even stronger. See, e.g., Brief for American Psychological Association et al. as *Amici Curiae* 3 (‘[A]n ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court’s conclusions’); *id.*, at 4 (‘It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance’); Brief for J. Lawrence Aber et al. as *Amici Curiae* 12-28 (discussing post-*Graham* studies).”<sup>68</sup>

18. In any case involving a finding of negligent treatment or maltreatment where no actual physical harm to a child has occurred requires making certain assumptions and identifying *possible* or *potential* hazards or negative outcomes. This necessary exercise requires a certain level of what some may consider *impermissible speculation*, but is actually positing *reasonable inferences*. Setting forth the potential for harm to unsupervised children,

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<sup>64</sup> *Miller*, 132 S. Ct. at 2464, citing [Roper v. Simmons, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#) (2005).

<sup>65</sup> *Id.*

<sup>66</sup> *Miller*, 132 S. Ct. at 2464, citing [Graham v. Florida, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825](#) (2010).

<sup>67</sup> *Miller*, 132 S. Ct. at 2465, citing *Graham*, 560 U.S. at 68 (quoting [Roper, 543 U.S., at 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1](#)).

<sup>68</sup> *Miller*, 132 S. Ct. at 2465, n.5.

due to the possible occurrence of any one of many negative outcomes is not impermissible speculation. The “laws of logic” and the “experience of logical probability”<sup>69</sup> allows the undersigned to make the reasonable and permissible inference that a young teenager, dealing with the behavioral issues and functioning under the anger [CHILD] exhibited at the time of the relevant incident, would not have the same full faculties as a healthy adult would have to ensure his safety while walking along the side of a major freeway, after dark, and in the pouring rain. Concluding that a young teenager with [CHILD]’s emotional and behavioral issues would not have the ability to fully avoid or protect himself from any number of dangerous occurrences in such a precarious situation is a permissible and reasonable inference in explaining why a young teenager with the emotional and behavioral issues held by [CHILD] cannot and should not be left alone, unattended, and unsupervised alongside a major freeway after dark and in inclement late [SEASON] weather.

19. The ALJ concludes that the risk inherent to walking along the freeway at night and in the rain is created by a poorly driven vehicle, not by the specific actions of the Appellant. This is not completely accurate. Anyone who has had the misfortune of being stranded alongside a major freeway, quickly becomes aware of the force created by automobiles traveling at freeway speeds in close proximity to a pedestrian and the blow-by of wind, water, and intermittent debris caused by freeway traffic. When a car is pulled over onto the shoulder of a freeway, it creates a natural alert to passing vehicles that a pedestrian may be in the vicinity or walking up ahead to obtain some form of road-side assistance. When no such vehicle is observed on the shoulder, as was the case caused by the Appellant leaving the scene, the chances of timely noticing a walking pedestrian in the dark and in the rain is reduced if an emergency pull-over becomes necessary.

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<sup>69</sup> See, *Poppell v. City of San Diego*, 149 F.3d 951, 954 (9<sup>th</sup> Cir. 1998).

20. The *Brown* court reasoned that “a ‘serious disregard of the consequences’ . . . is more analogous to the ‘utter disregard’ for another’s safety.” While recognizing that “utter disregard” may be more serious than “serious disregard,” the court concluded the state must still show something more “than want of reasonable care or negligence.”<sup>70</sup> If the Appellant’s disregard of the consequences was not “serious” when she chose to drive away from [CHILD] leaving him on the freeway, it quickly became “a serious disregard,” and possibly an “utter disregard,” when she decided to drive 18 miles further back to [FACILITY] without any attempt to contact authorities to report the troubled child being left on the freeway. The Appellant had a minimal responsibility to exercise at least one of a number of options to alert proper authorities. She did not attempt to flag down another motorist along the freeway and plea that they call 911 immediately to send help due to [CHILD]’s aberrant behavior. Barring this, she failed to pull into a parking lot immediately upon exiting the freeway and hail another person to call 911 to report the young teenager left on the freeway. Either option would not have necessitated leaving the other two boys unobserved as long as she remained in close proximity to the car. In this age of common cell phone usage and peoples’ willingness to call for aid, especially if that is all they are required to do to render assistance, the Appellant would have most likely been able to contact authorities as to [CHILD]’s precarious position in short order.

21. The Appellant was not faced with an *Hobson’s Choice* in this matter.<sup>71</sup> Even accepting as fact that she was apprehensive about the safety of the other two teenagers in the car while on the shoulder of the freeway, the Appellant should have initially attempted personally to get [CHILD] back into the car and, failing that, should have kept [CHILD] in sight by immediately turning on the cars emergency flashers, all running lights, and proceeding slowly

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<sup>70</sup> *Brown*, 190 Wn. App. at 590.

<sup>71</sup> The term “*Hobson’s choice*” has been used historically to mean lack of a real choice or alternative; having to choose between one of two or more equally objectionable options. The origin of the term meant something slightly different as Thomas Hobson, an English liveryman, would require every customer to take the horse which stood nearest the stable door. *Webster’s Third New International Dictionary* 1076 (3d ed. 1981).

and cautiously along the shoulder of the freeway while trailing [CHILD] to maintain line-sight supervision and to protect him from the hazards of oncoming traffic.<sup>72</sup> Such actions could have more readily drawn the attention of the State Patrol and would have provided some protection for [CHILD], at least, until they all reached the exit ramp. By staying as far off the freeway as possible, implementing all emergency and running lights, and proceeding slow enough to keep pace with [CHILD], the Appellant could have minimized any possible danger to the two teenagers in her car while at the same time keeping [CHILD] under observation until they could get off the freeway or until he decided to come in out of the rain.<sup>73</sup> What was not an option, is simply leaving [CHILD] on the highway and failing to alert authorities at the absolute first possible opportunity.

22. Neither the Department nor the Appellant challenged the ALJ's material findings of fact on review. Nor has the Appellant denied during the investigation, or this administrative hearing process, the basic material facts underlying the Department's founded CPS finding of negligent treatment or maltreatment. Even accepting the Appellant's rendition of the incident and why it had occurred, her actions in leaving a young troubled teenager out on the State's highest use freeway and failing to call for help at the earliest opportunity did not constitute adequate supervision and did amount to negligent treatment as that term is defined in the applicable regulation. The fact that a State Patrol Officer was struck and injured along the freeway in the vicinity of where [CHILD] was left, only bolsters the position that the Appellant's decision to drive away created a clear and present danger to [CHILD]'s health, welfare, and safety.

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<sup>72</sup> In questioning the Department's representative, the ALJ seemed to infer that if the State Patrol car was in danger of, and actually was hit, then so could the Appellant's car be hit if she had slowly moved along the shoulder to keep [CHILD] in sight. Such an inference fails to recognize that the patrol officer slammed on her brakes in the lane of traffic and was rear ended by the car behind her, also in the lane of traffic, and not on the shoulder of the freeway.

<sup>73</sup> The Appellant's latter assertion that [CHILD] ran away from the car and out of her sight does not comport with her initial statement to the Department investigator when asked if [CHILD] had left the roadside and went over the guard rail and she responded no, he started to walk north in front of the car. Nor does this latter assertion comport with what all three of the teenagers consistently reported to the Department's investigator – that [CHILD] walked a short distance in front of the car and stayed between the fog line (traffic lane edge) and the guard rail marking the other side of the freeway shoulder.

23. [CHILD] was under the care of the Appellant at the time of the relevant incident. Her primary and most crucial responsibility was providing a safe environment for [CHILD] through *continuing supervision* of him. The Appellant abandoned this essential responsibility when she drove away from [CHILD] at [MILE POST] on the I-5 corridor. The Appellant's failure to provide adequate supervision of [CHILD] so as to allow him to walk alone in the dark in pouring rain along a high-speed freeway, and then failing to immediately call authorities at the earliest possible opportunity, showed a serious disregard of the potentially hazardous consequences. The Appellant's actions showed a serious disregard of the consequences to the child of such magnitude that it created a clear and present danger to the child's health, welfare, or safety. This conclusion is reached accepting the common language usage for the terms "serious disregard"<sup>74</sup> and "clear and present danger."<sup>75</sup>

24. The Appellant's specific failure to perform the most fundamental and critical function of a supervising adult, allowed [CHILD] to be left alone and unsupervised alongside a major highway in the dark and during heavy rain. The Appellant's specific failure to provide adequate supervision of her charge created a clear and present danger to [CHILD]'s health, welfare, and safety, as the term "clear and present danger" is defined by common usage. The Appellant's specific omission in providing the required supervision created a substantial risk of injury to the physical development of [CHILD]. Whether the omission was caused by fear, "not knowing what to do," or a last minute risky decision based on a belief of no other options, does not change the seriousness of the omission or the fact that such a decision constituted a serious disregard for [CHILD]'s safety. The reasons asserted by the Appellant for the actions she took, both on the freeway and during the drive back to [FACILITY], do not mitigate in any way the risk of

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<sup>74</sup> The term "serious" is defined as: "Grave in disposition, appearance, or manner." Webster's Third New International Dictionary 2073 (1981). The term "disregard" is defined as: "To treat without fitting respect or attention." Webster's Third New International Dictionary 655 (1981).

<sup>75</sup> The term "clear" is defined as: "Without confusion or obscurity." Webster's Third New International Dictionary 419 (1981). The term "present" is defined as: "Now existing or in progress." Webster's Third New International Dictionary 1793 (1981).

endangerment [CHILD] was exposed to. It was only by the grace of providence (fate) [CHILD]'s emergency room records, or worse, were not part of the hearing record. A young teenager's health, welfare, and safety should not be solely dependent on fate. The entered material facts support a finding of negligent treatment in this case under the statutory and regulatory definitions.

25. In her response to the petition for review, the Appellant asserts what impact a founded CPS finding will have on her personal career and economic well-being. What impact a founded CPS finding of negligent treatment or maltreatment may have on the Appellant's ability to obtain employment, or otherwise be involved, in a given career cannot be considered in determining if negligent treatment or maltreatment has occurred. Such consideration would be equitable in nature. As set forth in *Conclusions of Law 3* and *4*, above, the Appellant's request for such equitable consideration is beyond the authority of either the ALJ or the undersigned.

25. After review of the entire hearing record, the undersigned is convinced that the Appellant was somewhat overwhelmed by what had occurred on the evening of [DATE 1], 2014. She was relatively new to the [FACILITY] and her prior work experience involved caring for vulnerable adults who did not necessarily present the same care needs and problems that existed with the three physically healthy male teenagers under the Appellant's supervision that evening. When the altercation escalated within the car and [CHILD] exited and forcefully slammed his fist against the passenger side window, it is understandable that the Appellant would be fearful, or at least apprehensive, and hesitant about what course of action to take next. However, none of these mitigating conditions justify leaving this young troubled teenager on the side of the freeway, and certainly do not justify failing to make attempts to call for assistance at the earliest opportunity possible once she had made the decision to leave [CHILD] on the freeway.<sup>76</sup>

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<sup>76</sup> The Appellant's actions are evidence of the fundamental fact that we are all human and destined to fail at times. Atonement, repentance, rehabilitation, and meaningful second chances have been an integral part of our system of jurisprudence since the inception of the nation. It is possibly for this reason that

#### IV. DECISION AND ORDER

For the reasons set forth above, the *Initial Order* entered on January 19, 2016, is **reversed**. The Department's founded CPS finding of negligent treatment or maltreatment against the Appellant is **affirmed**.

*Mailed this 15th day of March, 2016.*

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JAMES CONANT  
Review Judge

Attached: Reconsideration/Judicial Review Information

Copies have been sent to: [APPELLANT], Appellant  
Yvette War Bonnet, Appellant's Representative  
Mareen Bartlett, Department Representative  
Connie Lambert-Eckel, Program Administrator, MS: 45710  
Laurel Gibson, ALJ, [City] OAH

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under both federal and state regulations, a single finding of negligent treatment or maltreatment found to have occurred by an employee in a skilled nursing facility can be subject to expungement under certain conditions pursuant to WAC 388-97-0780(3)(c) referencing 42 U.S.C. 1396r(g)(1)(D). Such equitable consideration is also available, at the Department's discretion, regarding employee eligibility in group care facilities, child placement agencies, and foster homes pursuant to WAC 388-145-1330(3), 388-147-1330(3), and 388-148-1320(3)(c)(ii), respectively. However, the undersigned is unaware of any such equitable relief under the specific CPS regulations found at WAC 388-15. Even if such relief does exist, it is beyond the jurisdictional authority of either the ALJ or the undersigned to grant.