

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

DURRELL SLAYTON,

Respondent,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Appellant.

OPENING BRIEF

ROBERT M. MCKENNA
Attorney General

JONATHON BASHFORD
Assistant Attorney General
WSBA #39299
7141 Cleanwater Drive SW
Olympia, WA 98504-0124
(360) 586-6535

ORIGINAL

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I. INTRODUCTION

The Washington State Department of Social and Health Services, through its Division of Developmental Disabilities (DDD), provides an array of services to individuals who have developmental disabilities—disabilities that arise during the developmental years and limit cognitive development and/or adaptive skills. The term “developmental disability” is defined in RCW 71A.10.020(3) as mental retardation, cerebral palsy, epilepsy, autism, or “*another neurological or other condition*” found by DSHS to be closely related to mental retardation or to require similar treatment.

The Department is expressly mandated by statute to promulgate rules defining which additional “neurological or other conditions” are developmental disabilities. Accordingly, the Department has developed separate criteria to determine (1) whether an individual has a neurological condition that causes intellectual and physical impairments, or (2) whether an individual has another condition “similar to mental retardation” that causes intellectual and adaptive functioning impairments. The agency’s rules, WAC 388-823-0600 through -0710, constitute the Department’s definition of those conditions that are similar to mental retardation, in that they are either closely related to mental retardation, or require similar treatment to mental retardation.

The Department determined that Durrell Slayton is not eligible for DDD services because he has not been diagnosed with a clinical condition that meets the Department's definition of conditions closely related to, or which require treatment similar to mental retardation. Mr. Slayton sought judicial review. The superior court did not upset the Department's determination that Mr. Slayton does not qualify for DDD services under the existing eligibility rules. However, it reversed the denial of eligibility, concluding that the statute provides for eligibility based on an individual's treatment needs, regardless of whether the underlying condition is similar to mental retardation. The superior court noted that this eligibility criterion is not included in the existing eligibility rules, and ordered the Department to determine whether Mr. Slayton's treatment needs are similar to those of an individual with mental retardation. The Department appeals from that order.

The superior court misread both the statute and the rules defining developmental disability. In doing so, the court fundamentally changed the definition of developmental disability in Washington law, contrary to both the text and the legislative history of RCW 71A.10.020(3). This Court should therefore reverse the superior court and affirm the original DSHS ruling.

II. ASSIGNMENT OF ERROR

The trial court erred in entering its Order, paragraphs 1-6.

III. ISSUES

1. Under RCW 71A.10.020(3), the definition of a “developmental disability” includes four specifically named diagnosable conditions (mental retardation, cerebral palsy, epilepsy, and autism), as well as “another neurological or other condition of an individual found by the secretary to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation[.]” Do DSHS’s developmental disability eligibility rules for “another neurological condition” in WAC 388-823-0600 through -0615, and for “other condition similar to mental retardation” in WAC 388-823-0700 and -0710, constitute the Department’s reasonable interpretation and implementation of that entire statutory clause?
2. Are WAC 388-823-0040(2) and WAC 388-823-0120, which state that “another neurological or other condition” is defined as only those conditions that meet the criteria of WAC 388-823-0600 through -0710, consistent with RCW 71A.10.020(3) and therefore valid?
3. Should the Court interpret the statutory definition of “developmental disability” in RCW 71A.10.020(3), the text of which focuses on diagnosable medical or neurological “conditions”, to also

include a separate, purely treatment-based definition, despite the Legislature's clear intent to avoid such a result?

IV. STATEMENT OF THE CASE

Durrell Slayton has resided continuously at Western State Hospital since 1987, when he was involuntarily committed for mental health treatment following a verdict of Not Guilty By Reason Of Insanity on a charge of first degree rape of a 95 year-old nursing home patient. AR 20.¹
² Now 43 years old, Mr. Slayton is currently diagnosed with schizoaffective disorder bipolar type, polysubstance abuse, paraphilia NOS (rape), antisocial personality disorder, and borderline personality trait. AR 21. He has also been diagnosed with mild mental retardation. AR 21. Mr. Slayton has a history of drug use beginning at age 12, AR 20; and mental illness from age 17 or earlier. AR 22, n.9.

In 2006, Mr. Slayton applied for services from the DSHS Division of Developmental Disabilities for the first time. AR 21.³ DSHS granted

¹ References are to the adjudicative record. See CP 58 (notice of transmittal of certified copy of agency record).

² Initially, in his petition, Mr. Slayton alleged that the Final Order was not supported by substantial evidence. CP 8. However, he abandoned that argument in his briefing. CP 69 (request for relief does not include challenge to DSHS findings of fact). Because Mr. Slayton did not assign error to any findings of fact made by DSHS in the Final Order under review, those findings are verities for purposes of this appeal. See RCW 34.05.546(7); *Hilltop Terrace Homeowners' Ass'n v. Island Cy.*, 126 Wn.2d 22, 39, 891 P.2d 29 (1995); *Forsman v. Employment Sec. Dep't*, 59 Wn. App. 76, 79, 795 P.2d 1184 (1990).

³ While a Western State Hospital psychologist assessed Mr. Slayton's IQ at the age of 19 and found that his IQ score would potentially qualify him for DDD eligibility,

his application after determining that Mr. Slayton was eligible for DDD services based on his diagnosis of mental retardation. AR 21. However, following a further review of records DSHS concluded that its original eligibility decision was based “on insufficient and possibly erroneous evidence[.]” AR 22. DSHS ultimately determined that Mr. Slayton did not meet the requirements for eligibility under the category of mental retardation or any other category of eligibility, and in May 2007 notified Mr. Slayton that his DDD eligibility would be terminated. AR 22.

Mr. Slayton requested an administrative hearing. AR 22, 377. He stipulated that he did not meet the requirements for eligibility under the category of mental retardation; or for autism, cerebral palsy, epilepsy, or “another neurological condition.” AR 22-23, 387. The hearing thus focused on whether Mr. Slayton was eligible under the “other condition” category. Mr. Slayton made three main arguments. First, he argued that he is eligible under the eligibility rules for “other condition” based on his diagnosis of Alcohol Related Neurodevelopmental Disorder (ARND). AR 23, 30-31. Second, he argued that he is eligible under the eligibility rules for “other condition” based on his diagnosis of mild mental retardation. AR 34. Finally, and as relevant to this appeal, he argued that he is eligible for DDD services because his treatment needs are similar to those of a

AR at 206-07, Mr. Slayton did not apply for DDD services at that time and was thus not assessed by DDD eligibility experts.

person with mental retardation—notwithstanding that the Department’s rules do not provide for eligibility on that basis. AR 37, 71-72.

Following an evidentiary hearing, the administrative law judge concluded that Mr. Slayton was not eligible for DDD enrollment. AR 79-80. Mr. Slayton appealed the ALJ’s initial decision to the DSHS Board of Appeals. AR 62-78.

In its Final Order, the Board of Appeals affirmed the termination of Mr. Slayton’s DDD eligibility. AR 39. The Board found that ARND “is currently not a medically recognized diagnosis,” AR 29, and does not “by definition” result in cognitive and adaptive skills deficits. AR 33-34. The Board also found that, “even if mild mental retardation is considered an ‘other condition’”, Mr. Slayton did not prove onset of that condition prior to the age of 18, as required under the statute. AR 36. Those findings are not at issue in this appeal.

Finally, the Board of Appeals concluded that the rules for DDD eligibility do not include a separate category of eligibility based exclusively upon the applicant’s treatment needs. AR 37-39. The final agency order terminated Mr. Slayton’s eligibility for DDD services. AR 39.

Mr. Slayton filed a petition for judicial review under the Administrative Procedure Act, Chapter 34.05 RCW. CP 4-57. He

requested that the DSHS Final Order be overturned, and that WAC 388-823-0040(2) and -0120 be invalidated.⁴ CP 69.

Much of the argument before the superior court concerned whether the Department was barred by non-mutual collateral estoppel from asserting Mr. Slayton's ineligibility due to a prior superior court order in a different case, involving a different individual. *See* CP 69-72 (discussion in Slayton's brief); CP 81-92 (Department's brief); CP 99-102 (reply brief). The court rejected that argument. RP 5-8.

The superior court ultimately set aside the DSHS Final Order and remanded the case to the Department for further proceedings. CP 120-122; RP 9-25. The basis for the order was the court's construction and interpretation of RCW 71A.10.020(3) as including a separate, "statutorily required basis" for DDD eligibility for those who require treatment similar to that required by individuals with mental retardation. CP 121. The court thus bypassed the DDD eligibility rules, concluding they did not address that basis for eligibility. *See* RP 16. In reaching this conclusion, the court

⁴ WAC 388-823-0040 is titled "What is a developmental disability?" Part (1) restates the first sentence of 71A RCW 71A.10.020(3). Part (2) and then states: "In addition to the requirements listed in (1) above, *you must meet the other requirements contained in this chapter.*" (Emphasis added.)

WAC 388-823-0120 is titled "Will my diagnosis of a developmental disability qualify me for DDD eligibility?" It states in full: "Eligibility for DDD requires more than a diagnosis of a developmental disability. *You must meet all of the elements that define a developmental disability in WAC 388-823-0040 and meet the requirements of a specific eligible condition defined in this chapter.*" (Emphasis added.)

determined that WAC 388-823-0040(2) and -0120 “do not apply” to a determination of eligibility based on treatment needs. CP 122; RP 16-18.

The Department sought and was denied reconsideration, CP 137-138; it timely filed a notice of appeal. CP 139-148.

V. ARGUMENT

The system of services for individuals with developmental disabilities is established in Title 71A RCW. The statute defines the general parameters for participation in the program. It requires DSHS to adopt rules setting forth the criteria for eligibility.

The statutory definition of “developmental disability” reads in full:

“Developmental disability” means a disability attributable to mental retardation, cerebral palsy, epilepsy, autism, or another neurological or other condition of an individual found by the secretary [of DSHS] to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, which disability originates before the individual attains age eighteen, which has continued or can be expected to continue indefinitely, and which constitutes a substantial handicap to the individual. By January 1, 1989, the department shall promulgate rules which define neurological or other conditions in a way that is not limited to intelligence quotient scores as the sole determinant of these conditions, and notify the legislature of this action.

RCW 71A.10.020(3) (emphasis added). Consistent with this statutory directive to “promulgate rules” regarding “another neurological or other condition”, the Department adopted WAC 388-823-0600, -0610, -0615, -

0700, and -0710. Under those rules, other “neurological” conditions are defined as diseases of the central nervous system that cause cognitive and physical disabilities; while “other conditions” are defined as conditions diagnosed by physicians or psychologists that cause cognitive and adaptive functioning⁵ deficits. The Final Order found and concluded that Mr. Slayton did not meet the eligibility requirement in the current rules. AR 39. Mr. Slayton did not challenge the conclusion that he is not eligible under the current rules. CP 69. The Department’s “another neurological condition” and “other condition” rules constitute a reasonable interpretation of RCW 71A.10.020(3) which is entitled to deference by the courts.

Mr. Slayton’s theory, which the trial court adopted, was that RCW 71A.10.020(3) requires DSHS to use a definition of “another neurological or other condition” that includes a separate category of eligibility based on the type and/or amount of the individual’s need for treatment. CP 121. Mr. Slayton also argued that, because DSHS’s current rules do not adopt such a definition, the rules that restrict the definition of “developmental

⁵ The term “adaptive functioning” refers to an individual’s ability to perform basic skills of daily living, including motor skills, social and communication skills, personal living skills, and community living skills. *See* Transcript of Administrative Proceedings at 190 (testimony of Dr. Gene McConnachie); AR 292 (chart from manual for adaptive functioning test); DSHS form 16-182, “Guidelines For Completing The ICAP/SIB-R Adaptive Behavior Scale”, *available online at* http://www.dshs.wa.gov/pdf/ms/forms/16_182.pdf (last accessed Dec. 28, 2009).

disability” to that provided in the DSHS rules (WAC 388-823-0040(2) and -0120) are invalid. CP 72, 102-04. The trial court did not invalidate those rules because it interpreted the rules as incorporating the alleged treatment-based statutory basis for eligibility. CP 122.

The superior court erred because it accepted Mr. Slayton’s argument that RCW 71A.10.020(3) contains a self-executing category of DDD eligibility that is not reflected in the DDD eligibility rules. CP 121. By its clear language, the statute does not require the Department to measure an individual’s treatment needs when determining whether the individual has “another neurological or other condition” that falls within the definition of “developmental disability.” The legislative history supports that conclusion. Accordingly, the DSHS Final Order was correct and the superior court’s remand is based on an error of law.

The superior court also erred in concluding that WAC 388-823-0600 through -0710 do not implement the entire “another neurological or other condition” clause, including the portion identifying conditions requiring treatment similar to that required for mental retardation. DSHS was required by the Legislature to implement “other condition” rules by 1989. Both the text and the history of the rules demonstrate that DSHS did not implement RCW 71A.10.020(3) in a piecemeal and incomplete fashion.

A. Standard Of Review And Burden Of Persuasion

The Administrative Procedure Act governs this court's review of the trial court's ruling vacating the Department's decision. *See generally* RCW 34.05.570; *Utter v. Dep't of Social and Health Servs.*, 140 Wn. App. 293, 402, 165 P.3d 399 (2007). The Court of Appeals applies the APA standards directly to the agency record, sitting in the same position as the trial court, which was sitting in its appellate capacity. *Utter*, 140 Wn. App. at 402. There is no deference given to the superior court's judicial review of the agency action. *Id.* at 403.

The standard of review of agency orders in adjudicative proceedings is set forth in RCW 34.05.570(3). The statute provides nine grounds for determining whether the agency decision should be reversed. Only three appear to be raised here: (1) whether the order exceeds the statutory authority of the agency; (2) whether the agency interpreted or applied the law erroneously; or (3) whether the agency has not decided all issues requiring resolution. Under the APA the challenging party bears the burden of demonstrating the invalidity of the agency decision. RCW 34.05.570(1)(a).

The validity of an agency rule is a question of law that the Court of Appeals reviews de novo. *Littleton v. Whatcom County*, 121 Wn. App. 108, 117, 86 P.3d 1253 (2004). While an agency rule is invalid if it

exceeds the scope of the agency's authority, *see* RCW 34.05.570(2)(c), "rules adopted pursuant to a legislative grant of authority are presumed to be valid and should be upheld on judicial review if they are reasonably consistent with the statute being implemented." *Campbell v. Dep't of Social and Health Servs.*, 150 Wn.2d 881, 892, 83 P.3d 999 (2004) (internal quotation marks omitted).

The burden of overcoming the presumption of validity is on the Respondent in this case. RCW 34.05.570(1)(a); *Washington Independent Telephone Assn. v. Utilities and Transportation Commission*, 148 Wn.2d 887, 903, 64 P.3d 606 (2003). Respondent must also show he has been "substantially prejudiced" by the rule and by the decision. RCW 34.05.570(1)(d); *Assn. of Washington Business v. State Dept. of Revenue*, 121 Wn. App. 766, 90 P.3d 1128 (2004).

B. RCW 71A.10.020(3) Requires DSHS To Define "Another Neurological Or Other Condition" Eligibility Criteria

To the extent that statutory language is clear and unambiguous, the court must give effect to that language. *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). The task of determining the meaning of RCW 71A.10.020(3) thus begins with an examination of the text.

The legislature has defined "developmental disability" to include only a disability "which . . . originates before the individual attains age

eighteen, which has continued or can be expected to continue indefinitely, and which constitutes a substantial handicap to the individual.” RCW 71A.10.020(3). However, not all disabilities that meet those criteria are considered “developmental” in character. *Campbell*, 150 Wn.2d at 894-95 (RCW 71A.10.020(3) applies only to conditions that are historically considered developmental disabilities, not to all medical or psychological conditions that cause disabilities). The disability must be “attributable to” one of a number of conditions. RCW 71A.10.020(3). Four conditions that count as “developmental disabilities” are specifically named in the statute (mental retardation, cerebral palsy, epilepsy, and autism). *Id.*

In addition to the four named conditions, a developmental disability includes “another neurological or other condition of an individual *found by the secretary* [of DSHS] to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation[.]” *Id.* (Emphasis added.)

In the next breath, the legislature signaled that it understood this final category of eligibility to be largely or completely undefined; and that the definition would thus depend on rules adopted by the agency:

[T]he department shall promulgate rules which define neurological or other conditions in a way that is not limited to intelligence quotient scores as the sole determinant of these conditions, and notify the legislature of this action.

Id.

The Department adopted rules defining “another neurological or other condition” in 1989; those rules were last amended in 2005. Wash. St. Reg. 05-12-130. “Another neurological . . . condition” is defined as “an impairment of the central nervous system” that causes “both physical disability and intellectual impairment.” WAC 388-823-0600. An “other condition” is defined as “a neurological condition, central nervous system disorder involving the brain or spinal column, or chromosomal disorder” that “by definition results in both intellectual and adaptive skills deficits.” WAC 388-823-0700.

Despite the clear findings of the DSHS secretary articulated in these rules, the superior court concluded that the statutory definition of “another neurological or other condition” required the Department to define that term in a different manner. It determined that before the Department may conclude that an individual is not eligible for DDD enrollment under the category “another neurological or other condition”, the Department must first consider the individual’s treatment needs and determine if those needs are “similar” to the treatment needs of an individual with mental retardation. This conclusion is wrong because the statutory definition of “another neurological or other condition”, while limiting DSHS’s authority to expand DDD eligibility beyond conditions

found by the secretary to be similar to mental retardation or to require similar treatment, does not require the Department to use a particular test or inquiry when assessing an individual's eligibility under the "another neurological or other condition" category.

C. The Superior Court Misconstrued The Clear Language Of RCW 71A.10.020(3)

Under the normal rules of English usage, RCW 71A.10.020(3) requires the Department to define "another neurological or other condition" in a manner involving more than mere intelligence quotient (IQ) scores; but does not require that any specific criterion such as treatment be part of the Department's definition.

The first sentence of RCW 71A.10.020(3) lists five categories of DDD eligibility. The first four are specific medically or psychologically recognized conditions or diseases. The fifth category⁶ is described by the clause, "another neurological or other condition of an individual found by the secretary [of DSHS] to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation[.]"

⁶ The Department's current rules separate this category into two different tests of eligibility—"another neurological condition" and "other condition' similar to mental retardation"—resulting in a total of six categories of DDD eligibility. See discussion, *infra* at 32-35. That the Department has subdivided the clause into separate tests does not change the language of the statute, which treats "another neurological or other condition" as a single category of eligibility. *Infra* at 16-17; see *Mason v. Office of Administrative Hearings*, 89 Cal.App.4th 1119, 1122 (2001) (describing a virtually identical California statute as containing a "fifth category of developmental disability").

The trial court misconstrued the statutory language for “another neurological or other condition” eligibility in three ways. First, the court treated the relevant clause as if it were three separate clauses rather than just one. Second, the court apparently approached the statute as if “individual” rather than “condition” were the subject noun of the clause. Third, the court treated the key verb phrase “found by the secretary” as surplusage and completely read it out of the statute.

1. “Another neurological or other condition” is a single clause, not a three-part test.

The superior court read the statute as if it required the Department to create three separate avenues to DDD eligibility: (1) a “neurological” condition, (2) a condition “closely related to mental retardation”, and (3) a condition “requiring treatment similar to that required by individuals with mental retardation”—each defined differently and measured by different criteria. The court concluded that the Department’s rules do not in any way address the allegedly separate “similar treatment” category of eligibility, and thus that Mr. Slayton’s eligibility should be redetermined based on his treatment needs. This was incorrect. The entire “another neurological or other condition” clause describes a single category of eligibility.

The text itself shows that “another neurological or other condition” creates a single category of eligibility. Grammatically speaking, the part of RCW 71A.10.020(3) dealing with “another neurological or other condition” is a dependent clause. Its major elements are a subject (“condition”), a verb (“found”), and an object phrase (“to be closely related . . . or to require [similar] treatment”). The entire clause is set off by commas from the other parts of the sentence—as are each of the other categories of eligibility.

Aside from the grammar and punctuation of the clause itself, the second sentence of RCW 71A.10.020(3) also suggests that the Legislature meant the clause to be read as a single category. DSHS was asked to “define neurological *or* other conditions” (emphasis added); DSHS was not asked, as one would expect if the superior court’s construction of the statute were correct, to define neurological, closely related, *and* similar treatment conditions.

2. The statute defines conditions, not individuals.

The superior court’s order stated that on remand the Department was “directed to determine whether Mr. Slayton remains eligible [for DDD services] . . . based on *his treatment needs*[.]” CP 121 (emphasis added). The superior court seemingly concluded that the Department must examine Mr. Slayton’s individual treatment needs, and compare those

with treatment required by an individual with mental retardation, to determine his eligibility.⁷

An individual, regardless of his or her treatment needs, only qualifies for DDD services upon demonstrating that he or she has a condition that is a developmental disability. That distinction is crucial, as it allows the Department to first ask whether a person is developmentally disabled before it assesses the type and amount of services that the person requires. Under Washington's statutory scheme, "a determination as to what services are appropriate for the person" is made *after* the eligibility determination. RCW 71A.16.050. "Thus, eligibility is determined before the need for services is considered." *Campbell*, 150 Wn.2d at 890. A reading of RCW 71A.10.020(3) that requires DSHS to determine each applicant's need for services prior to deciding that the person is eligible would be inconsistent with that scheme.

The text of RCW 71A.10.020(3) does not say that an individual has a developmental disability if he or she requires treatment similar to that required for mental retardation. Instead, it says that an individual has

⁷ The wording of the superior court's order is not entirely clear on whether it considered the focus of a "similar treatment" inquiry to be the individual or the condition, as in the very next paragraph the court required DSHS to determine "whether Mr. Slayton has 'a condition that requires treatment . . .'" CP 121 (emphasis added). If the court meant only to require DSHS to consider the treatment needs associated with clinical conditions from which Mr. Slayton suffers—rather than a direct inquiry into Mr. Slayton's personal treatment needs—the proper remedy would have been mandamus to engage in rule-making to define such conditions, or invalidation of the "other condition" rules as an unreasonable interpretation of the statute. The superior court did neither.

a developmental disability if he or she has “a disability attributable to” a *condition* identified by the Department as having certain attributes. The word “condition”, not the word “individual”, is the subject noun of the “another neurological or other condition” clause.⁸

Moreover, the legislative history of RCW 71A.10.020(3), discussed *infra* at 25-29, shows that predicating eligibility on the individual’s treatment needs would run counter to the entire approach to developmental disabilities that has been adopted in Washington. It would be error to require DSHS to make an individual inquiry into each applicant’s treatment needs, rather than an individual inquiry into what conditions (neurological or otherwise) the individual suffers from.

3. The statute requires that an “other condition” must be one found by DSHS within certain limits, but does not specify which criteria DSHS must use to identify conditions within those limits.

Simplified somewhat, the relevant portion of RCW 71A.10.020(3) says: “‘Developmental disability’ means a disability attributable to mental

⁸ With careful placement of ellipses, the “other condition” clause of the statute can be made to look arguably individual-focused rather than condition-focused, as so: “condition of *an individual found . . . to require treatment . . .*” This rendering of the sentence, which appears to make “individual” the noun to which the verb “found” is attached, is misleading. In context, “of an individual” is a prepositional phrase that modifies the noun “condition.” This is clear from considering the nonsensical result when some of the language hidden by ellipsis is restored: “condition of *an individual found . . . to be closely related to mental retardation . . .*” While a neurological or other *condition* can be closely related to the condition of mental retardation, an *individual* cannot be closely related to mental retardation. The correct rendering of the sentence, based on the rules of grammatical English usage, is therefore: a “condition . . . found . . . to require treatment . . .”

retardation, cerebral palsy, epilepsy, autism, or . . . [an] other condition . . . found by the secretary” This clearly shows the difference between the four named eligible conditions and this final category of eligibility. The statute does not say, as it could have, that a developmental disability simply *means* a condition closely related to mental retardation, or a condition requiring similar treatment to mental retardation—in the same manner that it says that a developmental disability *means* mental retardation, cerebral palsy, autism, or epilepsy. The final sentence of the subsection also shows that DSHS rulemaking will define this term. RCW 71A.10.020(3) (DSHS “shall promulgate *rules which define* neurological or other conditions”). The statute therefore predicates eligibility under the final category entirely and exclusively upon the Department’s findings related to this category.

The statute “plainly limits additional qualifying conditions” that the Department may permit to those that are closely related to mental retardation or which require treatment similar to that required for mental retardation. *Campbell*, 150 Wn.2d at 894-95. Additionally, when defining those additional qualifying conditions, the Department must do so “in a way that is not limited to intelligence quotient scores as the sole determinant of these conditions[.]” RCW 71A.10.020(3). While the statute thus eliminates one possible method of defining “another

neurological or other condition”, nothing in the statute specifies what determinants the definition *must* use; that determination is left entirely to the expertise of the Department.

In fact, the Legislature’s instruction that IQ scores not be the *sole* determinant of whether a condition falls under the “another neurological or other condition” category has a necessary corollary: the Legislature has allowed that IQ score may be *one* criterion involved in defining those conditions that are closely related to or require treatment similar to mental retardation. The Department is not constrained to a direct examination into whether a given condition is related to mental retardation or requires treatment similar to mental retardation. Instead, the Department may identify those similar conditions by other attributes—such as cognitive deficits (as measured by IQ and other tests) and functional deficits (as measured by tests of adaptive skills)—attributes that are central markers of mental retardation.

Contrary to the trial court’s reasoning, the statute does not require the Department to define conditions that require similar treatment to that required for mental retardation separately from conditions that are closely related to mental retardation. The Department has reasonably implemented a definition that defines all conditions that are similar to mental retardation in either of those ways; and has promulgated WAC

388-823-0600 through -0710 which implement the language in the statute. Because Mr. Slayton has not been diagnosed with any condition that meets the criteria set out in WAC 388-823-0600 or WAC 388-823-0700, the final order properly concluded that he was not eligible.

D. Washington Has Adopted A Categorical Definition Of Developmental Disability

There are two widely-used approaches to defining a “developmental disability.”⁹ Washington’s approach, and the approach of many other states, is “categorical” or “condition-based”: it makes an individual eligible for services only if he or she has a condition that fits within one of the listed categories.¹⁰ For instance, RCW 71A.10.020(3) sets up five categories of eligibility. For the first four categories, the Legislature has identified a particular diagnosis that it considers a developmental disability: mental retardation, cerebral palsy, epilepsy, and autism. For the fifth category, the Legislature has left the door open for the Department to add “other conditions” to the list, within certain constraints. The categorical definition thus focuses on the *condition*:

⁹ See Paul J. Casteliani, *Administration of Developmental-Disabilities Services in State Government*, in *Handbook of State Government Administration* 441, 442-43 (John J. Gargan, ed., 2000).

¹⁰ RCW 71A.10.020(3) further limits eligibility to those conditions that originate prior to age 18, are expected to continue indefinitely, and constitute a substantial handicap.

whether the person is diagnosed with a disabling condition that is considered developmental in character.

An alternative approach is a “functional” or “treatment-based” definition: it focuses on the specific extent of the individual’s needs rather than whether he or she suffers from a specific condition. The federal government has adopted (but does not require) this approach.¹¹ Under a purely functional definition such as the federal one, the focus of the inquiry is the *individual*: what functional limitations the individual has, and what kinds of services he or she requires. For instance, under 42 U.S.C. 15002(8) an individual has a “developmental disability” if he or she has a disability that “reflects the individual’s need for a combination and sequence of special, interdisciplinary, or generic services, individualized supports, or other forms of assistance that are of lifelong or extended duration and are individually planned and coordinated.”¹²

The key difference between the two approaches is that the functional approach examines an individual’s treatment needs in order to

¹¹ American Bar Association Commission on the Mentally Disabled, *Legislative and Regulatory Developments*, 3 Mental Disability L. Rep. 114, 121 (1979); DHHS Office of Human Development Services, *Special Report on the Impact of the Change in the Definition of Developmental Disabilities (Mandated in P.L. 95-602, Sec. 502(b) (2))* (May 1981), available at <http://www.eric.ed.gov/ERICWebPortal/contentdelivery/servlet/ERICServlet?accno=ED217617> (examining the effect of changing from a categorical to a functional definition of developmental disability in 1978) (last accessed Dec. 14, 2009); see 42 U.S.C. 15002(8) (current federal statutory definition).

¹² Washington law does apply a functional analysis once a condition is established by requiring the condition to constitute a substantial handicap. RCW 71A.10.020(3).

determine whether he or she is eligible; while the categorical or condition-based approach determines an individual's eligibility prior to evaluating his or her need for services. Mr. Slayton in effect asks the courts to convert Washington's categorical definition into a functional definition, and to make findings for "other conditions" that the secretary of DSHS has declined to make. Both the text and the legislative history of RCW 71A.10.020(3) show that the functional approach to defining developmental disabilities has been rejected in Washington. To the extent Mr. Slayton argues that eligibility can be based on his individual treatment needs, rather than the attributes of his diagnosed conditions, that argument should be rejected by this Court.

1. The text of RCW 71A.10.020(3) adopts a diagnosis-focused, categorical definition of developmental disabilities.

The text of the DDD eligibility statute shows that it is categorical rather than functional in its approach. First, RCW 71A.10.020(3) names four particular conditions or diagnoses that constitute categories of eligibility. The final category of eligibility, "another neurological or other condition", is also condition-based. The statute does not say that an individual has a developmental disability if he or she requires treatment similar to that required for mental retardation. Instead, it says that an individual has a developmental disability if his or her disability is

attributable to *a condition* identified by the Department as requiring such treatment.

Second, under the statutory scheme for DDD services “a determination as to what services are appropriate for the person” is made *after* the eligibility determination. RCW 71A.16.050. “Thus, eligibility is determined before the need for services is considered.” *Campbell*, 150 Wn.2d at 890. This is the opposite approach from a functional definition, in which the individual’s need for services—that is, his or her treatment needs—is a key part of the eligibility determination itself.

2. The legislative history of RCW 71A.10.020(3) shows the Legislature has rejected an individual-focused, functional definition of developmental disabilities.

In 1974, the Washington Legislature defined the phrase “developmental disability” for the first time by adopting the federal definition in Public Law 91-517 (42 U.S.C. 2691(1)), “as now or hereinafter amended.” Laws of 1974, 3d Ex. Sess., ch. 71, §2 (Former RCW 71.20.015 (1975)). At the time, 42 U.S.C. 2691(1) read:

The term “developmental disability” means a disability attributable to mental retardation, cerebral palsy, epilepsy, or another neurological condition of an individual found by the Secretary [of Health and Human Services] to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, which disability originates before such individual attains age eighteen, which has continued or can be expected to

continue indefinitely, and which constitutes a substantial handicap to such individual.¹³

The definition was “category-based” because it set out four categories of disability that fell within the definition—three Congressionally-mandated psychological or neurological conditions, plus one additional category that the federal administrative agency could populate with additional “closely related” or “similar treatment” neurological conditions.

In 1978 Congress amended the definition of developmental disability by repealing 42 U.S.C. 2691(1). Public Law 95-602 (42 U.S.C. 6001(7) (1978)).¹⁴ The new federal definition was no longer category-based; rather, it was based on functional limitations of the individual. *Id.*

In 1982, DSHS warned the Legislature that tens of thousands of additional individuals who had not been eligible under the old definition could become eligible for DDD services under the new federal definition;¹⁵ and that since no additional appropriations were expected,

¹³ Autism was added to the list of categories in 1975, for a total of four specifically listed conditions. Public Law 94-103. Dyslexia caused by one of the listed conditions was also added to the definition. *Id.*

¹⁴ The 1982 legislative history of H.B. 851 consistently and mistakenly cites to Public Law 94-103 as the repealing legislation. *E.g.*, House Comm. on Human Servs., H.B. Rep. on H.B. 851, at 3, 47th Leg. (Wash. 1982); Senate Comm. on Social and Health Servs., S.B. Rep. on H.B. 851, at 2, 47th Leg. (Wash. 1982). While the 1975 legislation made changes to the federal definition, including by adding autism to the list of conditions, it was the 1978 legislation that repealed 42 U.S.C. 2691(1) and abolished the category-based definition in favor of a function-based definition.

¹⁵ This warning came after a 1981 superior court case in which a DDD applicant with quadriplegia (but no cognitive impairment) was found eligible for DDD services under the new federal definition, as incorporated under Washington law. *Morgan v. DSHS*, Thurston Co. No. 80-2-01398-7 (1981); see House Comm. on Human Servs., H.B.

services to existing clients would have to be reduced to extend services to this new pool of applicants. House Comm. on Human Servs., H.B. Rep. on H.B. 851, at 3, 47th Leg. (Wash. 1982); Senate Comm. on Social and Health Servs., S.B. Rep. on H.B. 851, at 3, 47th Leg. (Wash. 1982). The Legislature repealed Former RCW 71.20.015 (1975) and adopted statutory language that was identical in its treatment of “another neurological condition” as the previous federal definition had been. Laws of 1982, ch. 176, §102. In doing so, the Legislature firmly rejected the functional approach to defining developmental disabilities.

In 1983 the first sentence of the statute took its current form. Laws of 1983, 1st Ex. Sess., ch. 41, §19. The only substantive changes from the previous year were to add “autism” as a mandated category of eligibility; and to amend the phrase “another neurological condition” to “another neurological or other condition.” *Id.* The fiscal note for the legislation shows that these changes were meant to reflect the fact that DDD was already serving individuals with autism, and “allow [DDD] to continue to serve individuals currently included in developmentally disabled programs whose disability is related to other than a neurological condition. No fiscal impact would result from this change.” Fiscal Note to H.B. 346/S.B. 3660, 48th Leg. (Wash. 1983).

Rep. on H.B. 851, at 3, 47th Leg. (Wash. 1982); Senate Comm. on Social and Health Servs., S.B. Rep. on H.B. 851, at 3, 47th Leg. (Wash. 1982).

The statute was recodified to its current location in 1988. Laws of 1988, ch. 176, §102.¹⁶ While the statutory definition of “another neurological or other condition” remained identical, DSHS was required to “promulgate rules which define neurological or other conditions in a way that is not limited to intelligence quotient scores as the sole determinant¹⁷ of these conditions[.]” Laws of 1988, ch. 176, §102; RCW 71A.10.020(3).

All of the legislative history of RCW 71A.10.020(3) from 1982 to present shows that the Legislature intended DDD to continue using a definition of developmental disability similar to the one adopted in 1974 under the federal definition. The history specifically shows that Washington has rejected the federal approach of defining “developmental disability” on the basis of each individual’s treatment needs. Washington has instead opted for a definition that requires each individual to show that he or she has some medical, neurological, or other clinical condition that fits the definition of a developmental disability.

¹⁶ That recodification was “not intended to affect existing programs, policies, and services, nor to establish any new program, policies, or services not otherwise authorized[.]” RCW 71A.10.010.

¹⁷ Due to apparent scrivener’s error this originally read “determinate”; it was later corrected. Laws of 1998, ch. 216, §2.

3. Because Washington uses a categorical definition of developmental disabilities, it was error for the superior court to order DSHS to make a determination based on Mr. Slayton's individual treatment needs.

RCW 71A.10.020(3) does not require the Department to utilize a definition of "another neurological or other condition" that includes as one of its criteria the treatment needs associated with such condition. Nor does the statute require the Department to make a free-standing inquiry into each individual applicant's treatment needs. Under the superior court's order the Department would have to make a determination of Mr. Slayton's treatment needs prior to determining his eligibility—contrary to RCW 71A.16.050. To do so would convert Washington's categorical definition into a *de facto* functional one.

The categorical definition of "developmental disability" has been the law in this state since 1974, other than during the interlude from 1978 until 1982 when the new federal functional definition was rejected and the old language reinstated. DSHS has never during that time used treatment needs as one of the criteria—much less the sole criterion—for a category of DDD eligibility. The Legislature has never authorized or required the Department to promulgate rules allowing DDD eligibility solely on the basis of treatment needs—even as it required the Department to make other changes to its eligibility rules in the 1988 amendment.

By accepting Mr. Slayton's argument the superior court essentially concluded that DSHS and the Legislature have been mistaken for over three decades about the meaning of the statute; and that the effort to change the statutory language in 1982 was futile, because the language regarding "treatment similar to" eligibility has all along been a separate, functional category of eligibility, free from the category-based restrictions that the Legislature favored. This position should be rejected.

E. Chapter 388-823 WAC Implements The Entire "Another Neurological and Other Condition" Statutory Clause

The superior court bypassed the Department's rules by concluding that WAC 388-823-0040(2) and -0120 "do not apply" to a determination of eligibility under this separate treatment-based eligibility category. CP 122. The court also concluded, erroneously, that the restatement of RCW 71A.10.020(3) in WAC 388-823-0040(1) was the Department's implementation of a separate, mandated, treatment-based eligibility category. *Id.*; RP 14, 16.

"An agency acting within the ambit of its administrative functions normally is best qualified to interpret its own rules, and its interpretation is entitled to considerable deference by the courts." *D.W. Close Co. v. Dep't of Labor & Indus.*, 143 Wn. App. 118, 129, 177 P.3d 143 (2008) (quotations omitted); *Ballinger v. Dep't of Social and Health Servs.*, 104

Wn.2d 323, 336, 705 P.2d 249 (1985). DSHS is the agency charged with developing and applying eligibility criteria for developmental disability services. RCW 71A.16.020(2). The determination of what constitutes a qualifying condition is within the particular expertise of DSHS and its Division of Developmental Disabilities. DSHS was given an express statutory command to define “another neurological or other condition” through rule-making. RCW 71A.10.020(3). The Department’s interpretation of its own eligibility criteria for developmental disabilities services should thus be given substantial weight.

The best interpretation of Chapter 388-823 WAC when the chapter is read as a whole is that the Department meant the definitions in WAC 388-823-0600 through -0710 to constitute the regulatory implementation, i.e., the findings of the secretary, of the entire clause “another neurological or other condition of an individual found by [DSHS] to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation[.]” Those rules have remained in large part the same since 1989, and are thus entitled to deference as the agency’s contemporaneous construction of a statute.¹⁸

¹⁸ *But see Campbell*, 150 Wn.2d at 894, n.4. The Court in *Campbell* declined to defer to DSHS’s interpretation of RCW 71A.10.020(3) to the extent that the statute determines the scope of the agency’s own authority. Unlike in *Campbell*, this case does not deal with the scope of DSHS’s authority under the statute. Instead, this case involves

Mr. Slayton has not shown that those rules are unlawful under the criteria of RCW 34.05.570(2). The rules are consistent with RCW 71A.10.020(3), and the statute does not include the additional treatment requirement category argued by Mr. Slayton.

1. DSHS was required to further define additional conditions that fall within the definition of developmental disability in 1989.

The Department has the specific authority to “adopt rules further defining and implementing the criteria in the definition of ‘developmental disability’[.]” RCW 71A.16.020(2). This authority is permissive with respect to the four conditions specifically named in the statutory definition. With regard to the final category of eligibility, “another neurological or other condition,” the Department was *required* by the Legislature to “promulgate rules which define neurological or other conditions” by January 1, 1989. RCW 71A.10.020(3). The presumption of the validity of agency action, *see Campbell*, 150 Wn.2d at 892, supports the conclusion that the Department has fully done so; and Mr. Slayton has not shown otherwise.

2. Chapter 388-823 WAC implements the entire “neurological or other condition” statutory clause,

the reasonableness of DSHS’s implementation of the statute under the express statutory directive to define “another neurological or other condition” through rulemaking.

However, even if this court were not to give deference to DSHS’s interpretation of RCW 71A.10.020(3), the clear meaning of the statute itself is at odds with the conclusions of the trial court, as discussed *supra*.

including the portion involving treatment similar to that required for mental retardation.

A DDD applicant “must . . . meet the requirements of a specific eligible condition defined in [chapter 388-823 WAC].” WAC 388-823-0120. Exactly six “specific eligible conditions” are “defined” in that chapter—the four specifically named in statute, plus “another neurological condition” and “‘other condition’ similar to mental retardation.” Each is marked by rules titled in a similar manner. *E.g.* WAC 388-823-0500 (“What evidence do I need to substantiate ‘autism’ as an eligible condition?”), -0600 (“What evidence do I need to substantiate ‘another neurological condition’ as an eligible condition?”), -0700 (“How do I meet the definition for an ‘other condition’ similar to mental retardation?”); WAC 388-823-0515 (“What evidence do I need to substantiate adaptive functioning limitations for the condition of autism?”), -0615 (“What evidence do I need to substantiate adaptive functioning limitations for another neurological condition?”), -0710 (“What evidence do I need to meet the definition of substantial limitations for an ‘other condition’ similar to mental retardation?”). Each of the six is also marked by its own heading within the sub-chapter designated “Determination Of A Developmental Disability.”¹⁹

¹⁹ Section headings are “an integral part of the law” when they are placed in the original act by the Legislature without a contrary instruction. *State v. Lundell*, 7 Wn.

Children ages ten and older “must meet the requirements in WAC 388-823-0200 through 388-823-0710”, which provide the Department’s definitions and criteria for each of the six eligible conditions, in order to prove eligibility. WAC 388-823-0800. The DDD eligibility rules also contain a chart that “summarizes the applicable eligibility conditions by age”, which names six “eligible conditions” applicable to adults: “Mental Retardation (MR)”, “Cerebral Palsy”, “Epilepsy”, “Autism”, “Another Neurological”, and “Other condition similar to MR.” WAC 388-823-0800.

WAC 388-823-0600 through -0710 constitute DSHS’s interpretation of the entire statutory clause “another neurological or other condition . . . closely related to mental retardation or . . . requir[ing] treatment similar to that required for individuals with mental retardation[.]” The superior court was incorrect to interpret the restatement of RCW 71A.10.020(3) in WAC 388-823-0040(1) as creating a free-standing category of eligibility unconstrained by WAC 388-823-0120 or the rest of the chapter.

The rules indicate that DSHS has concluded that there is no separate statutory mandate that the Department include a specific

App. 779, 782 n.1, 503 P.2d 774 (1972). The section headings in Chapter 388-823 WAC were placed there by DSHS, not the Code Reviser, Wash. St. Reg. 05-13-130; and are therefore an integral part of the regulations themselves.

examination of treatment needs as one of the criteria for defining “another neurological or other condition”. The superior court erred when it interpreted the statute in that manner contrary to the Department’s rules where these rules are consistent with and reflect its expert interpretation of the statutory language.

F. Chapter 388-823 WAC Reasonably Implements The “Other Condition” Statutory Clause

While the exact evidentiary standards have changed over time, the Department’s basic definition of neurological and other conditions has remained largely the same since 1989. “Neurological” conditions—conditions diagnosed by a physician and impacting the central nervous system—must result in intellectual impairment and physical disability. “Other” conditions—which can be diagnosed by either a physician or a psychologist—must result in intellectual impairment and functional impairment.

1. The basic form of the “other condition” eligibility rules has remained unchanged since 1989.

Prior to 1989, the Department’s definition of “another neurological or other condition” was simply the statutory language, plus the conditions of “auditory impairment” and “visual impairment.” Former WAC 275-27-030(1)(b) (1986). In 1988, the Legislature required the Department to promulgate rules further defining the additional qualifying conditions; and

to do so without relying on IQ scores as the sole determinant of whether a condition is a developmental disability. Laws of 1988, ch. 176, §102.

The Department implemented a rule that was in substance very similar to the current rules. Wash. St. Reg. 89-06-049 (promulgating former WAC 275-27-026 (1989)). In particular, that rule divided the additional eligible conditions into those that involve medical conditions involving the central nervous system, former WAC 275-27-026(6)(a) (1989)—now controlled by the “Another Neurological Condition” rules in WAC 388-823-0600 through -0615; and those involving both cognitive and adaptive functioning deficits, former WAC 275-27-026(6)(b) (1989)—now controlled by the “‘Other Condition’ similar to mental retardation” rules in WAC 388-823-0700 and -0710. The eligibility rule implemented in 1989 remained virtually unchanged²⁰ until 2005, when the current rules were implemented. Wash. St. Reg. 05-12-130.

The Department’s interpretation of “another neurological and other condition” in 1989, following the Legislature’s 1988 directive that the definition be based on more than a simple IQ test, clearly shows that conditions requiring similar treatment to mental retardation were meant to be captured by the rule. Former WAC 275-27-026(6)(1989) specifically

²⁰ Some technical changes were made to the DDD eligibility rule in 1992, but the basic structure and terms of the rule remained the same. Wash. St. Reg. 92-04-004. The rule was recodified as WAC 388-823-030 in 1999. Wash. St. Reg. 99-19-104. Outdated WAC citations were amended in 2002. Wash. St. Reg. 02-16-014.

stated that it provided the definition for conditions “closely related to mental retardation, or requiring treatment similar to that required for individuals with mental retardation[.]” The separation of the sub-sections former WAC 275-27-026(6)(a)(1989) into the “Another Neurological Condition” rules, and former WAC 275-27-026(6)(b)(1989) into the “‘Other Condition’ similar to mental retardation” rules, did nothing to change the fact that those rules continue to constitute the Department’s interpretation of the entire “another neurological or other condition” clause.

Nor did the Department’s decision with regard to naming the eligibility category in WAC 388-823-0700 and -0710—to call it “‘other condition’ similar to mental retardation” in the sub-chapter heading and in the rule titles—reflect a narrowing of the definition to exclude the “similar treatment” portion of the statute. The full language of the clause is unwieldy and (as in this brief) often easiest to reference without full quotation. The description of both “closely related” and “similar treatment” conditions as “similar to mental retardation” is an intuitive and easy way to reference the clause. *See Mason v. Office of Administrative Hearings*, 89 Cal.App.4th at 1129 (2001) (simplifying California’s nearly identical statutory language as involving “a determination as to whether an individual’s condition is substantially similar to that of mental

retardation”). The basic contour of the “other condition” rule remained the same between the pre-2005 rule and the current rules: “other condition” eligibility was and is premised on a condition that causes cognitive and adaptive deficits.

2. DSHS’s definition of “other condition” eligibility has not been disturbed by the Legislature and is thus entitled to deference.

An administrative agency’s interpretation of a statute “which is nearly contemporaneous with passage of legislation is particularly entitled to great weight where the Legislature fails to repudiate the contemporaneous construction.” *State ex rel. Evergreen Freedom Found. v. Washington Educ. Assn.*, 140 Wn.2d 615, 635-36, 999 P.2d 602 (2000). One of the assumptions underlying that canon—that the Legislature monitors how an agency implements its recently-passed laws—is particularly justified in this case related to the “other condition” eligibility rules promulgated in 1989. Under RCW 71A.10.020, DSHS was required to “notify the legislature” in 1989 that it had promulgated rules defining that category of eligibility. The Legislature had already instructed the Department in one of the particulars of how “other condition” eligibility should be defined. Had it meant for the definition to involve, in particular, a direct assessment of treatment needs, the Legislature could have said so either in the 1988 legislation, or at any subsequent time after the

promulgation of the “other condition” rules in 1989. It has not done so; and it is a fair conclusion that the Legislature had no objection to the Department’s implementation of the statute.

G. Cases interpreting the DDD “other condition” eligibility rules support the conclusion that the Department’s rules reasonably implement the statutory language.

In *Campbell v. Dep’t of Social and Health Servs.*, 150 Wn.2d 881, 892, 83 P.3d 999 (2003), the Supreme Court considered a challenge to the Department’s “another neurological or other condition” rule, brought by children who had physical but not cognitive disabilities. The court ruled that RCW 71A.10.020(3) “clearly does not apply to medical conditions . . . that do not involve cognitive or intellectual impairment like that of mental retardation.” *Campbell* at 895. The court thus rejected the claim that “the Legislature intended a departure from traditional limits in defining developmental disabilities” when it required the Department to promulgate rules defining “other condition” in a manner not solely reliant on IQ scores. *Id.* at 894. The court recognized that the “other condition” rules adopted by the Department restrict eligibility “as mandated by the statute”, *id.* at 893; and concluded that former WAC 388-825-030 (2003) (the predecessor to the DDD eligibility rules in WAC 388-823-0010 through -0710) was “clearly within the Department’s delegated authority.” *Id.* at 895.

The only other published decision involving the DDD “another neurological or other condition” definition, *Pitts v. Dep’t of Social and Health Servs.*, 129 Wn. App. 513, 119 P.3d 896 (2005), also involved the predecessor to the current rule, former WAC 388-825-030(6)(2003). In that case the court considered whether an applicant had established a “substantial handicap” for the purpose of demonstrating eligibility under Epilepsy by showing that he had the limitations in the “other condition” rule. *Id.* at 529. The court described WAC 388-825-030(6)(b) as “describ[ing] eligibility for persons with another condition closely related to mental retardation or requiring treatment similar to that required for individuals with mental retardation.” *Id.*

Campbell and *Pitts* directly support the validity of the Department’s rules. Importantly, both courts analyzed the Department’s rules as a reasonable implementation of the entire statutory clause.

H. The Department’s Definition Of “Another Neurological Or Other Condition” Is Consistent With RCW 71A.10.020(3).

The superior court concluded that the final administrative order was inconsistent with the statute itself. Mr. Slayton has made that same argument. However, he does not appear to have argued that the existing regulatory definition of “another neurological or other condition” is inconsistent with RCW 71A.10.020(3) except insofar as it fails to

implement an entirely separate category of eligibility based upon the individual applicant's treatment needs. To the extent that he does so, the Department's rules regarding "another neurological or other condition" are "reasonably consistent with" RCW 71A.10.020(3) and therefore valid. *Campbell*, 150 Wn.2d at 892.

RCW 71A.10.020(3) does not specify how the Department ought to go about identifying those conditions that are related to or require similar treatment to mental retardation, other than by forbidding a definition based solely on IQ scores. Instead the Legislature deferred to "conditions found by the secretary". In developing the "other condition" rules, the Department determined that developmental disabilities not explicitly named by the Legislature could best be identified as those conditions which cause and are characterized by certain types and degrees of deficits. Nothing in the record shows that the current definition does not result in identifying conditions in a manner reasonably consistent with the statutory language.

Mr. Slayton has not produced any clinical literature which defines neurological or psychological conditions in terms of the closeness of their relationship to mental retardation. Nor has he produced any clinical literature which identifies what specific treatments are required for mental

retardation as opposed to other disorders that are clearly outside the scope of the definition, such as mental illness.²¹

Mr. Slayton has the burden of proving that WAC 388-823-0600 through -0710 are not reasonably consistent with the “other condition” clause of RCW 71A.10.020(3). He has not shown that the rules are in any way over-inclusive or under-inclusive—much less that the rules are not reasonably consistent with the statute.

VI. CONCLUSION

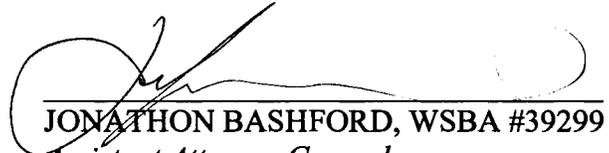
For thirty-five years Washington, like many other states, has firmly adhered to a categorical definition of developmental disabilities. To read the statute as the superior court did—requiring DSHS to make an individualized inquiry into Mr. Slayton’s treatment needs rather than an inquiry into his diagnosed conditions—is contrary to the rules implementing the statute, the text of the statute, and the legislative history. As the Legislature determined in 1982, such a definitional change would result in a surge of eligibility that would imperil the levels of care now relied upon by clients currently and traditionally served by the Division of Developmental Disabilities.

²¹ It is the Department’s position that there is no such literature; that there is no principled and scientific method of separating treatment needs resulting from developmental disabilities from treatment needs that result from other types of disabilities; and that, as a result, a treatment-based category of eligibility would be impossible to administer in a non-arbitrary fashion without radically expanding eligibility for DDD services beyond the traditional eligibility limits. The Supreme Court has rejected the argument that the Legislature has “intended a departure from traditional limits in defining developmental disabilities[.]” *Campbell*, 150 Wn.2d at 894.

The Department asks that the superior court's order be reversed,
and the DSHS Final Order affirmed.

RESPECTFULLY SUBMITTED this 30th day of December,
2009.

ROBERT M. MCKENNA
Attorney General



JONATHON BASHFORD, WSBA #39299
Assistant Attorney General
7141 Cleanwater Drive SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6535

APPENDIX

RCW 71A.10.020

Definitions.

As used in this title, the following terms have the meanings indicated unless the context clearly requires otherwise.

- (1) "Community residential support services," or "community support services," and "in-home services" means one or more of the services listed in RCW 71A.12.040.
- (2) "Department" means the department of social and health services.
- (3) "Developmental disability" means a disability attributable to mental retardation, cerebral palsy, epilepsy, autism, or another neurological or other condition of an individual found by the secretary to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, which disability originates before the individual attains age eighteen, which has continued or can be expected to continue indefinitely, and which constitutes a substantial handicap to the individual. By January 1, 1989, the department shall promulgate rules which define neurological or other conditions in a way that is not limited to intelligence quotient scores as the sole determinant of these conditions, and notify the legislature of this action.
- (4) "Eligible person" means a person who has been found by the secretary under RCW 71A.16.040 to be eligible for services.
- (5) "Habilitative services" means those services provided by program personnel to assist persons in acquiring and maintaining life skills and to raise their levels of physical, mental, social, and vocational functioning. Habilitative services include education, training for employment, and therapy.
- (6) "Legal representative" means a parent of a person who is under eighteen years of age, a person's legal guardian, a person's limited guardian when the subject matter is within the scope of the limited guardianship, a person's attorney-at-law, a person's attorney-in-fact, or any other person who is authorized by law to act for another person.
- (7) "Notice" or "notification" of an action of the secretary means notice in compliance with RCW 71A.10.060.
- (8) "Residential habilitation center" means a state-operated facility for persons with developmental disabilities governed by chapter 71A.20 RCW.
- (9) "Secretary" means the secretary of social and health services or the secretary's designee.
- (10) "Service" or "services" means services provided by state or local government to carry out this title.

(11) "Vacancy" means an opening at a residential habilitation center, which when filled, would not require the center to exceed its biannually [biennially] budgeted capacity.

[1998 c 216 § 2; 1988 c 176 § 102.]

Notes:

Effective date -- 1998 c 216: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 30, 1998]." [1998 c 216 § 10.]

WAC 388-823-0040

What is a developmental disability?

(1) A developmental disability is defined in RCW 71A.10.020(3) and must meet all of the following requirements. The developmental disability must currently:

(a) Be attributable to mental retardation, cerebral palsy, epilepsy, autism, or another neurological or other condition found by DDD to be closely related to mental retardation or requiring treatment similar to that required for individuals with mental retardation;

(b) Originate prior to age eighteen;

(c) Be expected to continue indefinitely; and

(d) Result in substantial limitations to an individual's adaptive functioning.

(2) In addition to the requirements listed in (1) above, you must meet the other requirements contained in this chapter.

[Statutory Authority: RCW 71A.10.020, 71A.12.030, 71A.12.050, 71A.12.070, 71A.16.020, 71A.16.030, 71A.16.040, 71A.16.050, and chapters 71A.10, 71A.12, and 71A.16 RCW. 05-12-130, § 388-823-0040, filed 6/1/05, effective 7/2/05.]

WAC 388-823-0120

Will my diagnosis of a developmental disability qualify me for DDD eligibility?

Eligibility for DDD requires more than a diagnosis of a developmental disability. You must meet all of the elements that define a developmental disability in WAC 388-823-0040 and meet the requirements of a specific eligible condition defined in this chapter.

[Statutory Authority: RCW 71A.10.020, 71A.12.030, 71A.12.050, 71A.12.070, 71A.16.020, 71A.16.030, 71A.16.040, 71A.16.050, and chapters 71A.10, 71A.12, and 71A.16 RCW. 05-12-130, § 388-823-0120, filed 6/1/05, effective 7/2/05.]

388-823-0600

What evidence do I need to substantiate "another neurological condition" as an eligible condition?

Evidence of an eligible condition under "another neurological condition" requires a diagnosis by a licensed physician of an impairment of the central nervous system involving the brain and/or spinal cord that meets all of the following:

- (1) Originated before age eighteen;
- (2) Results in both physical disability and intellectual impairment;
- (3) Is expected to continue indefinitely; and
- (4) Is not attributable to a mental illness or psychiatric disorder.

[Statutory Authority: RCW 71A.10.020, 71A.12.030, 71A.12.050, 71A.12.070, 71A.16.020, 71A.16.030, 71A.16.040, 71A.16.050, and chapters 71A.10, 71A.12, and 71A.16 RCW. 05-12-130, § 388-823-0600, filed 6/1/05, effective 7/2/05.]

388-823-0610

If I have another neurological condition, how do I meet the definition of substantial limitations to adaptive functioning?

Substantial limitations to adaptive functioning for the condition of another neurological condition require both intellectual impairment and the need for direct physical assistance with activities of daily living per WAC 388-823-0615 (1) and (2) below.

[Statutory Authority: RCW 71A.10.020, 71A.12.030, 71A.12.050, 71A.12.070, 71A.16.020, 71A.16.030, 71A.16.040, 71A.16.050, and chapters 71A.10, 71A.12, and 71A.16 RCW. 05-12-130, § 388-823-0610, filed 6/1/05, effective 7/2/05.]

388-823-0615

What evidence do I need to substantiate adaptive functioning limitations for another neurological condition?

Evidence of substantial limitations to intellectual functioning for another neurological condition is all of the following:

(1) You must have an FSIQ score of 1.5 or more standard deviations below the mean on one of the following acceptable assessments in addition to the other criteria in this section. The acceptable assessments, the standard deviation and the qualifying scores are contained in the following table:

ASSESSMENT	STANDARD DEVIATION	QUALIFYING SCORE
Stanford-Binet 4th edition	16	76 or less
Stanford-Binet 5th edition	15	78 or less
Wechsler	15	78 or less
Differential Abilities Scale (DAS)	15	78 or less
Kaufman Assessment Battery for Children (K-ABC)	15	78 or less
Leiter-R [for persons with significant hearing impairments or when English is not primary language]	15	78 or less

(2) You must have evidence of need for direct physical assistance on a daily basis with two or more of the following activities: Toileting, bathing, eating, dressing, mobility, or communication as a result of your condition as defined in WAC 388-823-0320 and 388-823-0330.

(3) The intellectual impairment and physical assistance needs must be the result of the central nervous system impairment and not due to another condition or diagnosis.

[Statutory Authority: RCW 71A.10.020, 71A.12.030, 71A.12.050, 71A.12.070, 71A.16.020, 71A.16.030, 71A.16.040, 71A.16.050, and chapters 71A.10, 71A.12, and 71A.16 RCW. 05-12-130, § 388-823-0615, filed 6/1/05, effective 7/2/05.]

Reviser's note: RCW 34.05.395 requires the use of underlining and deletion marks to indicate amendments to existing rules, and deems ineffectual changes not filed by the agency in this manner. The bracketed material in the above section does not appear to conform to the statutory requirement.

388-823-0700

How do I meet the definition for an "other condition" similar to mental retardation?

You will need evidence in (1) or (2) below to substantiate that you have an "other condition" similar to mental retardation.

(1) You have a diagnosis of a condition or disorder that by definition results in both intellectual and adaptive skills deficits; and

(a) The diagnosis must be made by a licensed physician or licensed psychologist;

(b) The diagnosis must be due to a neurological condition, central nervous system disorder involving the brain or spinal column, or chromosomal disorder;

(c) The diagnosis or condition is not attributable to or is itself a mental illness, or emotional, social or behavior disorder;

(d) The condition must have originated before age eighteen; and

(e) The condition must be expected to continue indefinitely.

(2) You are under the age of eighteen and are eligible for DSHS-paid in-home nursing through the medically intensive program, defined in WAC 388-551-3000.

[Statutory Authority: RCW 71A.10.020, 71A.12.030, 71A.12.050, 71A.12.070, 71A.16.020, 71A.16.030, 71A.16.040, 71A.16.050, and chapters 71A.10, 71A.12, and 71A.16 RCW. 05-12-130, § 388-823-0700, filed 6/1/05, effective 7/2/05.]

388-823-0710

What evidence do I need to meet the definition of substantial limitations for an "other condition" similar to mental retardation?

(1) Evidence of substantial limitation in both (a) and (b) below is required for an "other condition" similar to mental retardation.

(a) Evidence of intellectual impairment requires documentation of either (i) or (ii) or (iii) below:

(i) An FSIQ of 1.5 or more standard deviations below the mean as described in WAC 388-823-0615(1) for another neurological condition; or

(ii) Significant academic delays resulting in delay of at least twenty-five percent below the chronological age or age equivalent academic functioning in at least two academic areas or grade placement; or

(iii) In the absence of school records to substantiate (ii) above, DDD may review other information about your academic progress sufficient to validate your cognitive deficits.

(b) Unless there is evidence of other conditions or impairments unrelated to the eligible condition currently affecting adaptive functioning, the following evidence will determine if the eligible condition or disorder results in a substantial limitation in adaptive functioning:

(i) A score of more than two standard deviations below the mean on a VABS or SIB-R current within the past three years, or in the absence of a VABS or SIB-R, an ICAP administered by DDD within the past twenty-four months.

(ii) The qualifying scores for these tests are listed in WAC 388-823-0420 (1)(d).

(2) You do not need the additional evidence of your substantial limitations to adaptive functioning in (1)(a) and (b) above if your eligible condition is solely due to your eligibility and participation in the medically intensive program offered through DDD, defined in WAC 388-551-3000.

[Statutory Authority: RCW 71A.10.020, 71A.12.030, 71A.12.050, 71A.12.070, 71A.16.020, 71A.16.030, 71A.16.040, 71A.16.050, and chapters 71A.10, 71A.12, and 71A.16 RCW. 05-12-130, § 388-823-0710, filed 6/1/05, effective 7/2/05.]

