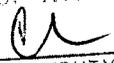


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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

Durrell Slayton,

Respondent,

v.

Department of Social and Health Services,

Appellant.

REPLY BRIEF

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TABLE OF CONTENTS

I. ARGUMENT1

 A. DDD Eligibility Rules Were Clearly Meant To Implement The “Similar Treatment” Language Of The “Other Condition” Category3

 1. The language of chapter 388-823 WAC shows that DSHS meant that chapter to define all “other conditions”, not just conditions closely related to mental retardation.....3

 2. The history of the “other condition” eligibility rules shows that the rules have always defined all “other conditions”, not just conditions closely related to mental retardation.....5

 3. The rule-making file indicates that DSHS meant the “other condition” rules to define all “other conditions”, not just conditions closely related to mental retardation.....7

 B. RCW 71A.10.020(3) Does Not Require DSHS To Examine Mr. Slayton’s Treatment Needs In Order To Determine Whether He Has A Developmental Disability8

 1. Mr. Slayton offers no alternative analysis of the legislative history of RCW 71A.10.020(3) to support his interpretation of the statute.9

 2. The language of RCW 71A.10.020(3) does not require DSHS to create a separate category of DDD eligibility for individuals with certain treatment needs.10

 C. Attorney Fees Are Inappropriate Because DSHS’s Action Was Substantially Justified13

II. CONCLUSION15

TABLE OF AUTHORITIES

Cases

<i>Campbell v. Dep't of Social and Health Servs.</i> , 150 Wn.2d 881, 83 P.3d 999 (2004).....	7, 12, 13
<i>Cerrillo v. Esparza</i> , 158 Wn.2d 194, 142 P.2d 155 (2006).....	11
<i>D.W. Close Co. v. Dep't of Labor & Indus.</i> , 143 Wn. App. 118, 177 P.3d 143 (2008).....	5
<i>Rettkowski v. Dep't of Ecology</i> , 76 Wn. App. 384, 885 P.2d 852 (1994), <i>aff'd in part, rev'd on other grounds in part</i> , 128 Wn.2d 508, 910 P.2d 462 (1996).....	14
<i>Silverstreak, Inc. v. Dep't of Labor and Industries</i> , 159 Wn.2d 868, 154 P.3d 891 (2007).....	14, 15
<i>State v. Costich</i> , 152 Wn.2d 463, 98 P.3d 795 (2004).....	10
<i>Wagner v. Foote</i> , 128 Wn.2d 408, 908 P.2d 884 (1996).....	14

Statutes

RCW 34.05.570	3
RCW 4.84.350(1).....	13, 14
RCW 71A.10.020(3).....	passim

Other Authorities

<i>Webster's Third New International Dictionary</i> 1916 (2002)	4
<i>Webster's Third New International Dictionary</i> 2120 (2002)	4

Rules

Former WAC 388-825-030(6)(b) (2003).....	6
WAC 388-823.....	3, 4, 7, 8
WAC 388-823-0040.....	2
WAC 388-823-0120.....	2, 4
WAC 388-823-0600.....	5
WAC 388-823-0700.....	passim
WAC 388-823-0700(1).....	6
WAC 388-823-0710:.....	2, 5, 8
WAC 388-823-0710(1)(a)	6
WAC 388-823-0710(1)(b).....	6
WAC 388-823-0800.....	4

I. ARGUMENT

This case involves judicial review of DSHS's determination that Durrell Slayton does not meet eligibility requirements for services from the DSHS Division of Developmental Disabilities (DDD). DSHS determined that Mr. Slayton does not have a developmental disability as that term is defined in state law and department regulations. More specifically, the issue in this appeal is the correctness of DSHS's determination that Mr. Slayton did not demonstrate that he had "another neurological or other condition . . . found by the secretary to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation" as required for eligibility under RCW 71A.10.020(3).

In his Response, Mr. Slayton repeatedly mischaracterizes the Department's position in this appeal, stating that the Department's "core claim" is that DSHS has the power to define "another neurological or other condition" through rulemaking "without any consideration of or reference to conditions that 'require treatment similar to that required for individuals with mental retardation.'" Br. of Resp't at 14-15; at 16 (alleging that DSHS claims that the second sentence of RCW 71A.10.020(3) should be read "in a manner that ignores the 'treatment needs' language"). What the Department has actually argued is

that its definition of “other condition” in WAC 388-823-0700 and -0710 *does* reasonably encompass conditions requiring similar treatment to mental retardation; that the Department may reasonably treat “other condition” as a single category of eligibility rather than breaking it into separate “closely related” and “similar treatment” categories with different eligibility criteria; and that the statute does not require (and in fact forbids) that the “other condition” definition involve an examination of each applicant’s individual treatment needs, as opposed to an examination of each applicant’s individual diagnosed conditions.

Mr. Slayton asks this Court to affirm the superior court’s decision, arguing that RCW 71A.10.020(3) includes a “separate and distinct” category of DDD eligibility for individuals who have certain treatment needs, which is not implemented in the Department’s current rules. *E.g.*, Br. of Resp’t at 3.¹ He insists that his interpretation of the statute is clear and obvious. *E.g.*, Br. of Resp’t at 17. As the party challenging a final agency order, Respondent Mr. Slayton has the burden under

¹ In his statement of facts, Mr. Slayton incorrectly implies that the Department’s Board of Appeals agreed that “similar treatment” is a separate category of DDD eligibility under RCW 71A.10.020(3) and WAC 388-823-0040. Br. of Resp’t at 7-8. In fact, the Board of Appeals concluded that the alleged “similar treatment” category of eligibility “is not a separate category that can lead to eligibility.” AR 38. The Board specifically declined “to consult any other legal authority because WAC 388-823-0120 determines the outcome of this case.” AR 38. Any statements made by the Board regarding a “category” of “similar treatment” eligibility were clearly describing the *alleged* category referenced by Mr. Slayton, and were not the Board’s own conclusions of law that such a separate category exists under either the statute or the Department’s rules. *See* AR 37-38 (describing and analyzing, but not adopting, Mr. Slayton’s argument).

RCW 34.05.570 to show that the Department's order was unlawful. He has failed to meet that burden.

A. DDD Eligibility Rules Were Clearly Meant To Implement The "Similar Treatment" Language Of The "Other Condition" Category

Mr. Slayton insists that the Department's current rules "in no way can be claimed to encompass or determine eligibility for 'conditions that require treatment similar to that required for mental retardation' as required by" RCW 71A.10.020(3). Br. of Resp't at 23. In fact, the clear language and history of chapter 388-823 WAC show that DSHS intended that chapter to provide the Department's definition of *all* conditions found by the secretary to be similar to mental retardation—both those closely related and those requiring similar treatment.

- 1. The language of chapter 388-823 WAC shows that DSHS meant that chapter to define all "other conditions", not just conditions closely related to mental retardation.**

Mr. Slayton argues that the Department used the phrase "condition *similar to* mental retardation" in WAC 388-823-0700 and elsewhere to refer only to conditions "closely related to mental retardation" but not to those "requiring similar treatment to mental retardation." Without analysis, he equates the phrase "closely related" in the statute with the word "similar" in the rules. Br. of Resp't at 15 (alleging that DSHS has

promulgated a definition only for “conditions closely related [i.e. similar] to mental retardation” (brackets in original)). This sleight of hand must be rejected under the ordinary meaning of the words, and in the context of the rule chapter read as a whole.

The words “similar” and “related” can both be used to describe two things which have something in common. However, they are not synonyms. “Similar” is used to describe things that are comparable or alike, *Webster’s Third New International Dictionary* 2120 (2002); whereas “related” is used to describe things that are connected or akin. *Id.* at 1916. The argument that DSHS casually substituted one word for the other, without any change in the meaning of the phrase, ignores that difference in normal usage. More significantly, it is contrary to how the words are used in the context of the Department’s rules.

As explained in DSHS’s Opening Brief at 33-34, the language of chapter 388-823 WAC shows the Department’s intent to implement the entire “other condition” eligibility category under its rules for “other condition similar to mental retardation.” In context of these rules, the word “similar” is clearly meant to refer to both “closely related” and “similar treatment” conditions in the aggregate. *E.g.*, WAC 388-823-0120 (DDD applicants must meet the requirements of one of the DSHS-defined eligible conditions); WAC 388-823-0800 (naming six eligible conditions,

including “Other condition similar to MR [Mental Retardation]”). Mr. Slayton has failed to explain why he believes that the *similar* conditions described in WAC 388-823-0700 and -0710 do not include those that require *similar* treatment to mental retardation, but do include those that are closely related to mental retardation. The word “similar”, after all, does appear in the rules, while the word “related” does not.

The Department’s interpretation of WAC 388-823-0600 through -0710 as implementing the entire “another neurological or other condition” clause is grounded in the text itself. Mr. Slayton’s contrary analysis makes an unwarranted assumption that the Department picked its words carelessly. Even if his interpretation were plausible, the Department’s reasonable interpretation should be adopted in light of the considerable deference owed to an agency’s interpretation of its own rules. *D.W. Close Co. v. Dep’t of Labor & Indus.*, 143 Wn. App. 118, 129, 177 P.3d 143 (2008).

2. **The history of the “other condition” eligibility rules shows that the rules have always defined all “other conditions”, not just conditions closely related to mental retardation.**

The Department maintains that its rules clearly implemented the entire “other condition” statutory phrase in 1989, and that the current rules are substantially similar to those rules. Opening Br. at 35-37. Mr. Slayton

counters that the current DDD eligibility rules for “other condition,” promulgated in 2005, “significantly modify” the previous rules. Slayton Br. at 23. He sees a “contrast” between the prior rules which involved “low IQ or participation in special education” plus “adaptive function testing”; and the current rules which involve “intellectual and adaptive skills deficits.” *Id.* If there is any significant difference between the two in their basic approach to defining “other condition” eligibility, it is far from self-evident. Under the current rules, intellectual deficits are still measured by either low scores on an Intelligence Quotient test, or by school records showing significant academic delays. WAC 388-823-0710(1)(a). Likewise, adaptive skills deficits are still measured by adaptive functioning testing. WAC 388-823-0710(1)(b). There is only one real difference: the current rules require a “diagnosis of a condition or disorder” that causes significant intellectual and adaptive deficits, WAC 388-823-0700(1); whereas the old rules required only a “condition evidenced by” significant intellectual and adaptive deficits, former WAC 388-825-030(6)(b) (2003).

The diagnosis requirement is irrelevant to Mr. Slayton’s theory, and he has not challenged its validity. Neither the old rules nor the new rules include any reference to the individual applicant’s treatment needs, as Mr. Slayton insists they must. There is no reason to believe that the

2005 rules removed a previous category of eligibility resembling the one that Mr. Slayton insists has always existed.

3. **The rule-making file indicates that DSHS meant the “other condition” rules to define all “other conditions”, not just conditions closely related to mental retardation.**

Citing without specificity to all 363 pages of the rule-making file for chapter 388-823 WAC, Mr. Slayton claims that “nothing” in it supports the Department’s position that WAC 388-823-0700 applies to “similar treatment” conditions. Br. of Resp’t at 18. His argument misallocates the burden of proof: because agency rules are presumed to be valid, it is Mr. Slayton who must affirmatively prove that the Department neglected to implement the statute properly. *Campbell v. Dep’t of Social and Health Servs.*, 150 Wn.2d 881, 892, 83 P.3d 999 (2004). The Department is required by law to “promulgate rules which define neurological or other conditions[.]” RCW 71A.10.020(3). There was no indication from the rule-making process that the Department or any other person believed that the new rules failed to implement any legally-mandated categories of eligibility in their entirety. By failing to support his statement that the “similar treatment” portion of the statute is “ignored”, Br. of Resp’t at 18, Mr. Slayton fails to even address (much less meet) his burden.

Moreover, the rule-making file actually provides evidence that the Department and its stakeholders understood WAC 388-823-0700 and -0710 to implement the entire “other condition” basis for eligibility. The Department received only one public comment on the proposed “other condition” rules: a joint letter from advocacy organizations Columbia Legal Services and TeamChild. RMF 78-84. That letter describes WAC 388-823-0710 as applying to individuals “who have conditions closely related to or requiring similar treatment to mental retardation.” RMF 82. In its Concise Explanatory Statement, the Department responded to that comment by making a small change to the rule; there is no sign that the Department disagreed with the comment’s description of the rule. RMF 321. The rule-making file thus contradicts Mr. Slayton’s interpretation of chapter 388-823 WAC.

B. RCW 71A.10.020(3) Does Not Require DSHS To Examine Mr. Slayton’s Treatment Needs In Order To Determine Whether He Has A Developmental Disability

Mr. Slayton rejects the Department’s interpretation of its governing statute as based on “dubious”, “irrelevant” and “inaccurate” arguments. Br. of Resp’t at 3. However, he largely fails to respond to the Department’s arguments at all, instead using unsupportable logical leaps and conclusory statements to avoid the central question of how RCW 71A.10.020(3) is to be interpreted. The statute’s language and

history both clearly support the Department's position that Washington has not adopted a separate category DDD eligibility based on individual treatment needs.²

1. Mr. Slayton offers no alternative analysis of the legislative history of RCW 71A.10.020(3) to support his interpretation of the statute.

In support of its interpretation of RCW 71A.10.020(3), the Department offered a detailed history showing that the legislature did not intend the result urged by Mr. Slayton. Opening Br. at 25-28. Mr. Slayton introduces his Response by describing that legislative history as "inaccurate[.]" Br. of Resp't at 3. However, he provides no further

² Before the superior court, Mr. Slayton argued that the Department's "other condition" rules are deficient because they do not involve an examination of the individual applicant's treatment needs. See CP 70 (arguing that DSHS is required to promulgate rules allowing "individuals who 'require treatment similar to that required for mental retardation' receive DDD services."); CP 73 (arguing that "Mr. Slayton's treatment staff at Western State Hospital provide him the specialized treatment and habilitation services that they provide to other developmentally disabled patients because they have determined that *he requires* this specialized treatment." (Emphasis added)). 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). In his Response, Mr. Slayton now suggests that the superior court may have set forth a fundamentally categorical, condition-based test for "similar treatment" eligibility. Br. of Resp't at 20-21.

If Mr. Slayton now agrees that all the Department need do to implement "similar treatment" eligibility is to identify *conditions* that are associated with such treatment, it is unclear what deficiencies he is alleging with the current rules. He does not explain what is present or lacking in the current "other condition" definition which makes it unsuitable for identifying, by the intellectual and functional deficits they cause, those conditions that are similar to mental retardation in terms of the treatment required. Mr. Slayton has not alleged there is a particular condition which should have been, but was not, "found by the secretary" to be a developmental disability within the meaning of RCW 71A.10.020(3). If he is arguing that the existing rules do an adequate job of correctly identifying those conditions that are closely related to mental retardation, but an unlawfully poor job of identifying conditions that require similar treatment, he has not clearly articulated this argument and there is no proof in the record to support it.

argument as to why or how it is inaccurate. *See* Br. of Resp't at 19-21. It appears that Mr. Slayton concedes that Washington's legislature intended to adopt a categorical approach, and affirmatively reject a treatment-based approach to defining developmental disabilities. *See* Opening Br. at 22-30. His argument thus boils down to a claim that the bare language of RCW 71A.10.020(3) so clearly illustrates the legislature's intent to create a treatment-based category of eligibility as to require DSHS and the courts to ignore the overwhelming legislative history to the contrary. As discussed below, Mr. Slayton has failed to prove that claim.

2. The language of RCW 71A.10.020(3) does not require DSHS to create a separate category of DDD eligibility for individuals with certain treatment needs.

Where a statute's language is clear, there is no need to look behind the language itself to determine the legislature's intent. *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). The Department maintains that the clear language of RCW 71A.10.020(3) cannot sustain Mr. Slayton's interpretation. Opening Br. at 15-22. Even if the statutory language on its face is sufficiently unclear to permit a treatment-based definition of "other condition", it is also susceptible to other interpretations—in which case DSHS and this court are bound by the clear indication of legislative intent supplied by the legislative history.

Mr. Slayton claims that the statute “clearly lists two alternative types of ‘other conditions’” and that it is thus “obvious” that the Department cannot reasonably use a single “other condition” category, as it has for over twenty years. Br. of Resp’t at 17. He presents two arguments to support his interpretation of RCW 71A.10.020(3). Neither has merit.

First, Mr. Slayton’s sole textual argument is that the “or” in the phrase “condition . . . found by the secretary to be closely related to mental retardation *or* to require treatment similar to that required for individuals with mental retardation” shows that the “Department must determine client eligibility on both bases.” Br. of Resp’t at 14. The legislature’s use of the disjunctive is far from a clear or obvious sign that RCW 71A.10.020(3) dictates Mr. Slayton’s desired result. Mr. Slayton is correct that the word “or” should be given its normal disjunctive meaning in this context. *E.g.*, *Cerrillo v. Esparza*, 158 Wn.2d 194, 204, 142 P.2d 155 (2006). However, his conclusion that DSHS must divide the “another neurological or other condition” clause into three separate categories (“another neurological condition,” “closely related condition,” and “similar treatment condition”) simply does not follow. In focusing on that one word, Mr. Slayton ignores the structure of the sentence, as well as the language in the following sentence, both of which indicate that “another

neurological or other condition” is (or at least reasonably can be interpreted as) a single grammatical clause and a single eligibility category. Opening Br. at 16-17. For instance, the word “or” also separates “another neurological or other condition” from the four named conditions. That list (“a disability attributable to mental retardation, cerebral palsy, epilepsy, autism, or another . . . condition”) uses the disjunctive to set out five qualifying categories. In contrast, the dependent (“closely related” and “similar treatment”) clauses that follow the phrase “another neurological or other condition” serve to “plainly limit[]” DSHS’s otherwise broad grant of authority to find additional DDD-qualifying conditions under the “other condition” category. *Campbell*, 150 Wn.2d at 894-895. They are not categories unto themselves.

Second, Mr. Slayton argues that unless the “other condition” clause creates a separate treatment-based category of DDD eligibility, the statutory language regarding “similar treatment” would be rendered superfluous. Br. of Resp’t at 15. This is circular reasoning; if “similar treatment” is properly interpreted as part of the description of the “other condition” category, rather than a category unto itself, then there is no problem with treating “other condition” as a single, inclusive category. The statutory directive that DSHS serve all individuals with developmental disabilities is “necessarily dependent on the individual

having a developmental disability in the first place.” *Campbell*, 150 Wn.2d at 895. “By the language used in RCW 71A.10.020(3), the legislature has narrowed the category of persons for whom Department services are to be provided.” *Id.* The statutory text does not support Mr. Slayton’s argument that “similar treatment” conditions cannot be defined concurrently with other conditions similar to mental retardation.

C. Attorney Fees Are Inappropriate Because DSHS’s Action Was Substantially Justified

In his Response, Mr. Slayton has requested an award of attorney fees under Washington’s Equal Access to Justice Act (EAJA). Even if Mr. Slayton were to prevail in this appeal, that request should be denied because the Department was substantially justified in terminating his eligibility.

RCW 4.84.350(1) provides, in pertinent part, that:

Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys’ fees, **unless the court finds that the agency action was substantially justified or that circumstances make an award unjust.** A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

(Emphasis added.) Washington follows the American rule concerning attorneys’ fees under which such fees are not recoverable absent specific

statutory authority, contractual provision, or recognized grounds in equity. *Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996). A statute awarding attorneys' fees against the state must be strictly construed because it constitutes both a waiver of sovereign immunity and an abrogation of the American Rule on attorneys' fees. *Rettkowski v. Dep't of Ecology*, 76 Wn. App. 384, 389, 885 P.2d 852 (1994), *aff'd in part, rev'd on other grounds in part*, 128 Wn.2d 508, 910 P.2d 462 (1996).

Under the EAJA, if the court finds that "the agency action was substantially justified" it shall not award expenses, including attorneys' fees, to a prevailing party. RCW 4.84.350(1). "Substantially justified means justified to a degree that would satisfy a reasonable person. . . . It requires the State to show that its position has a reasonable basis in law and fact. . . . The relevant factors in determining whether the Department was substantially justified are, therefore, the strength of the factual and legal basis for the action" *Silverstreak, Inc. v. Dep't of Labor and Industries*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007) (internal quotation marks and citations omitted).

In *Silverstreak*, the Court overturned the agency action at issue on the basis of equitable estoppel. 159 Wn.2d at 886-891. Nonetheless, the prevailing party was denied attorney fees under RCW 4.84.350(1). *Id.* at 891-893. The court reasoned that the agency action, while unlawful, was

substantially justified given the agency's statutory mandates and the strong legal precedents which supported the agency's position. *Id.* at 892-893.

In this case, the statutory definition of "developmental disability" has remained virtually unchanged for decades. At least since 1989, the Department has administered the "other condition" portion of the statute in substantially the same manner, by defining such conditions in terms of the intellectual and functional deficits they cause, and without direct reference to the individual applicant's treatment needs. As discussed in detail above and in the Department's Opening Brief, the caselaw and legislative history around RCW 71A.10.020(3), as well as the language of the statute itself, provide substantial support for the Department's interpretation. Even if this Court finds that the Department's interpretation is incorrect, it should find that the Department was substantially justified in terminating Mr. Slayton's eligibility under its long-standing interpretation of the statute. Attorney fees should be denied.

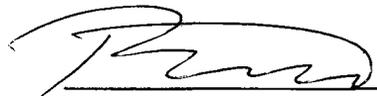
II. CONCLUSION

The statutory definition of "developmental disability" requires DSHS to promulgate rules to define what additional conditions should be included within that definition. The Department's contemporaneous and decades-old interpretation of RCW 71A.10.020(3) as including a single

“other condition” category of eligibility, based on intellectual and adaptive functioning deficits, is a reasonable implementation of the legislature’s intent. Because Mr. Slayton has failed to provide any convincing statutory argument to the contrary, either textual or historical, the Department’s final order terminating his DDD eligibility must be upheld and the superior court’s order overturned.

RESPECTFULLY SUBMITTED this 1 day of March, 2010.

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