

NO. 39735-8

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DURRELL SLAYTON,

Respondent,

v.

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Appellant.

BRIEF OF RESPONDENT

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I. Introduction

The Washington State Legislature has long recognized “the state’s obligation to provide aid to persons with developmental disabilities.” RCW 71A.10.015. Eligibility for the specialized supports and services provided by the state to persons with developmental disabilities through the Department of Social and Health Services (“the Department” or “DSHS”) Division of Developmental Disabilities (“DDD”) extends to all those who have conditions determined to meet the definition of “developmental disability” contained in Washington’s Developmental Disabilities Act, RCW Title 71A. RCW 71A.16.020(1).

The Act defines “developmental disability” as:

..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.

RCW 71A.10.020(3)(emphasis added). The Act grants the Department authority to promulgate rules “further defining and implementing” the statutory definition. RCW 71A.16.020(2).

The Department’s DDD eligibility regulations recite the statutory definition of developmental disability, WAC 388-823-0040(1), and

indicate that in addition to meeting the statutory definition, applicants for DDD services must also “meet the requirements of a specific eligible condition defined in this chapter.” WAC 388-823-0120. *See also* WAC 388-823-0040(2)(indicating that in addition to meeting the statutory definition of “developmental disability,” DDD applicants must also “meet the other requirements [for DDD eligibility] contained in this chapter.”).

The Department’s regulations divide the statutory definition of “developmental disability” into separate eligibility rules governing most, but not all, of the possible DDD-qualifying conditions listed in the statute: mental retardation, cerebral palsy, epilepsy, autism, “another neurological condition,” and “other condition similar to mental retardation.”

There are no Department regulations further defining or otherwise implementing the additional statutory language mandating that DDD services also be provided to individuals with an “other condition .. found by the secretary ... to require treatment similar to that required for individuals with mental retardation.”

This appeal by DSHS requires that this Court address the Division of Developmental Disabilities’ on-going failure to abide by and implement its full statutory mandate. Despite repeated instruction from the lower courts that it must do so, DDD refuses to determine eligibility for clients with conditions requiring “treatment similar to that required for mental

retardation,” as the governing statute clearly requires. Instead, by this appeal, DDD seeks a declaration from this Court that the statute’s plain terms do not mean what they say. It does so via dubious grammatical arguments, and irrelevant and inaccurate claims regarding the legislative history and intent of the state Developmental Disabilities Act.

The Court should reject the Department’s assorted claims in the face of the plain language and clear intent of the governing statute, and should affirm the lower Court’s order remanding this matter to the agency with directions that the Department determine whether Respondent Durrell Slayton meets the requirements described in RCW 71A.10.020(3) and recited in WAC 388-823-0040(1) for a “condition that requires treatment similar to that required for individuals with mental retardation,” and therefore remains DDD eligible.

The Court should authorize an award of reasonable attorneys’ fees on appeal to Respondent Durrell Slayton pursuant to RAP 18.1, and Washington’s Equal Access to Justice Act (EAJA). RCW 4.84.340 *et. seq.*

II. Statement of Issues Pertaining to Appellant’s Assignments of Error

1. Do the plain terms of RCW 71A.10.020(3) include a clearly separate and distinct statutory requirement that DDD services be

provided to individuals found to have “a condition that requires treatment similar to that required for individuals with mental retardation”?

2. Do the provisions of the Department’s DDD eligibility rules that dictate that DDD applicants must “meet the requirements of a specific eligible condition defined in the Department’s rules,” in addition to meeting the statutory definition of “developmental disability,” violate the governing statute when applied by the Department to prevent a determination of DDD eligibility on a basis clearly listed in the governing statute but not defined in the Department’s rules?
3. Is the Respondent in this matter entitled to attorneys’ fees and costs on appeal pursuant to the EAJA, RCW 4.84.340, *et. seq.*, and RAP 18.1?

III. Statement of the Case

A. Facts of the Case

Respondent Durrell Slayton is a 42-year-old Western State Hospital Patient (“WSH”) who has been confined to a locked forensic ward at WSH since being found not guilty by reason of insanity on rape

and burglary charges 21 years ago. AR at 216.¹ Mr. Slayton has been diagnosed by a clinical psychologist with mild mental retardation, AR 234, and by a neuropsychologist as suffering from brain damage (referred to as Alcohol Related Neurological Disorder (ARND)) as a result of prenatal exposure to alcohol, AR 482. He also carries diagnoses of paraphelia, schizophrenia, polysubstance dependence (in remission), and antisocial personality disorder. AR 234.

Although Mr. Slayton's mental health and substance abuse-related symptoms, including delusions, hallucinations, sexual aggression, and psychosis, have been controlled and in remission in recent years, TP 301, AR 448, AR 234, the WSH staff in charge of his ongoing care report that he continues to require significant supervision, structure, and ongoing daily assistance as a result of the cognitive and adaptive functioning limitations that are associated with his mental retardation. *See e.g.*, TP 296-300, 306. Other professionals who have worked with Mr. Slayton similarly report that he requires on-going specialized treatment and adaptive assistance as a result of the intellectual and adaptive deficits that

¹ Citations in this brief are to the agency's certified administrative record (AR) to the transcript of proceedings (TP) for *In Re Durrell R. Slayton*, DSHS BOA Docket No. 05-2007-A-1729, to the clerk's papers in Superior Court designated for transmittal to the Court of Appeals (CP), to the transcripts of proceedings in Superior Court (SCTP), and to the Rule Making File for WAC Chapter 388-823 (RMF).

are attributable to his developmental disability. *See e.g.*, AR 306-310;² AR 434-436;³ AR 442,⁴ TP 314-315.⁵

B. Administrative Proceedings Below

Mr. Slayton was determined to be DDD eligible, and therefore eligible for the specialized habilitation services and other supports that are available to DDD clients at Western State Hospital, in October 2006. AR 21. Two months later, DDD claimed that the eligibility determination in his case was erroneous. AR 21-22. A review of Mr. Slayton's DDD eligibility was conducted, and the Department proposed to terminate his DDD eligibility in May 2007. AR 22. Mr. Slayton timely appealed the termination. AR 377.

² A 2007 neuropsychological evaluation conducted by Christopher J. Graver, Ph.D., contains detailed treatment recommendations to address Mr. Slayton's limited intellectual capacity described by the evaluator as "basic sensory processing deficits that appear to impact his ability to keep up with rapidly presented material." AR 308-309.

³ A 2006 psychological evaluation conducted by Patricia A. Grenelle Psy.d., and Francis J. Lexcen, Ph.D., includes a formal adaptive function assessment that concluded that Mr. Slayton's functional adaptive abilities are consistent with his IQ in the mild mental retardation range, and concludes that he requires significant support in the form of on-going supervision as a result of his developmental disability. AR 435-436.

⁴ A 2007 psychosexual evaluation and treatment plan conducted by Michael Comte, LICSW, ACSW, SOTP, indicates that "Durrell's functional abilities are in the mild range of mental retardation. He has the capacity to learn and retain information, though comprehension is limited and he processes at a very slow rate." AR 442.

⁵ Testimony of Pierce College instructor Irene Brewer indicating that Durrell Slayton has consistently required modifications in his inpatient educational program, such as one-on-one instruction, simplified materials, and alternative testing methods, to accommodate his significant intellectual deficits.

The DSHS Board of Appeals issued its Review Decision and Final Order in the resulting administrative appeal in June 2008. AR 1. The Final Order affirmed the Department's termination of Mr. Slayton's DDD eligibility. AR 39. The Final Order concluded that neither Mr. Slayton's diagnosed mild mental retardation nor his ARND met the Department's specific listed criteria for "mental retardation," or an "other condition similar to mental retardation," or any of the other "eligible conditions" defined in the Department's DDD eligibility rules. AR 41-48.

Regarding Mr. Slayton's claim that governing statute also requires that the Department determine his DDD eligibility based on having a "condition that requires treatment similar to that required for mental retardation," the Review Decision and Final Order concluded that Mr. Slayton's DDD eligibility could not be determined on this basis because the Department's regulations, specifically WAC 388-823-0120, require that DDD applicants meet both the statutory definition of "developmental disability" and "the requirements of a specific eligible condition contained in the Department's DDD eligibility rules." AR 37.

The Review Judge determined that although a "condition that requires treatment similar to that required for mental retardation" is one of the conditions listed in RCW 71A.10.020(3) and WAC 388-823-0040(1) as a basis that may establish DDD eligibility, it is not an "eligible

condition” that is further defined anywhere in the Department’s regulations. AR 38. The Review Judge concluded therefore that determining Mr. Slayton’s DDD-eligibility based on a “condition that requires treatment similar to that required for mental retardation” would violate WAC 388-823-0120, something he had no authority to do. AR 38-39.

C. Proceedings in Superior Court

Mr. Slayton filed a Petition for Judicial Review in Thurston County Superior Court seeking the Court’s order setting aside the termination of his DDD eligibility, and invalidating as applied the agency regulations that the Department claimed prevented a determination of whether he meets the eligibility requirements listed in the governing statute for “a condition that requires treatment similar to that required for individuals with mental retardation.” CP 4-10.

The Superior Court agreed that the governing statute, RCW 71A.10.020(3), creates a separate basis for DDD eligibility for “conditions that require treatment similar to mental retardation” that the Department had failed to implement or recognize. CP 121. The Court set aside the termination of Mr. Slayton’s DDD eligibility, and ordered the agency on remand to determine whether Mr. Slayton meets the requirements for DDD eligibility based on treatment needs that are listed in the statutory

definition of developmental disability, and recited in DDD regulation WAC 388-823-0040(1). CP 121-122. The Court concluded that the listed criteria are:

- (a.) whether Mr. Slayton “has a condition or conditions that require treatment similar to that required for mental retardation;”
- (b.) whether the condition or conditions requiring such treatment originated before Mr. Slayton attained age 18;
- (c.) whether the condition or conditions requiring such treatment can be expected to continue indefinitely; and
- (d.) whether the condition or conditions requiring such treatment constitute a substantial handicap to Mr. Slayton as provided by statute, or result in substantial limitations to Mr. Slayton’s adaptive functioning as provided by Department rules.

Id.

The Superior Court did not invalidate as applied the agency regulations that the Department claimed prevented it from making the eligibility determination based on treatment needs that the governing statute requires. *See* CP 120-122. Instead, because the basic statutory definition of “developmental disability” is recited in DDD’s regulations at WAC 388-823-0040(1), the Court determined that the regulations incorporate the basic statutory eligibility criteria for a “condition requiring treatment similar to that required for mental retardation.” SCTP at 18.

Because the statutory definition of “developmental disability” is repeated in WAC 388-823-0040(1), the Court directed the Department “not to determine that WAC 388-823-0040(2) or 388-823-0120 prevent a determination of Mr. Slayton’s DDD eligibility based on his treatment needs as required by 71A.10.020(3) and WAC 388-823-0040(1).” CP 122.

In its appeal, the Department seeks reversal of the Superior Court’s interpretation and application of the governing statute, and reversal of the Superior Court’s order remanding this matter. Brief of Appellant at 2. The Department also seeks a declaration from this Court that its regulations implement every component of statutory mandate in RCW 71A.10.020(3), and that WAC 388-823-0040(2) and 388-823-0120 are valid and preclude a determination of DDD eligibility for individuals with disabilities attributable to “a condition that requires treatment similar to that required for individuals with mental retardation.” *See id* at 3.⁶

IV. Argument

A. Standard of Review

⁶ Although the Superior Court order that it is appealing did not formally invalidate any of its rules as applied in Mr. Slayton’s case, the Department’s Statement of Issues to be determined by this Court on appeal include, “Are WAC 388-823-0040(2) and 388-823-0120 consistent with RCW 71A.10.020(3) and therefore valid?” Brief of Appellant at 3. The validity of WAC 388-823-0040(2) and 388-823-0120 as applied in Mr. Slayton’s case is properly before this Court under the standard of review discussed below because Mr. Slayton’s Petition for Judicial Review sought invalidation of these rules as applied in his case, CP 9, and the issue is briefed by both parties to this Court.

In judicial review proceedings under the state Administrative Procedure Act, RCW 34.05 *et seq.*, an individual who is substantially prejudiced by a state agency adjudicative order may seek judicial review to both set aside the individual order in his case, and invalidate, on their face or as applied, the agency regulations on which the order was based. RCW 35.05.570(3); RCW 34.05.570(1)(d); RCW 34.05.530; RCW 35.05.570(2)(a); RCW 34.05.574(1).

The reviewing court may set aside a final agency order based on a determination that the order (or the statute or rule on which the order is based) violates constitutional provisions; or is outside the agency's statutory authority; or is arbitrary or capricious; or is not supported by substantial evidence; or that the agency has erroneously interpreted or applied the law. RCW 34.05.570(3).

The court may declare the agency regulations on which the offending order was based invalid, on their face or as applied, on a showing that: the rules at issue violate constitutional provisions; or are outside the statutory authority of the agency; or erroneously interpret or apply the law; or are arbitrary and capricious. RCW 34.05.570(2)(c).

An appellate court applies the standards in RCW 34.05.570 "directly to the record before the agency, sitting in the same position as the superior court." *Utter v. State, Dept. of Social and Health Services*, 140

Wn.App. 293, 299, 165 P.3d 399 (Div II, 2007)(quoting *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998)).

The determination that an agency has erroneously interpreted and applied its governing statute is a question of law that a reviewing court reviews de novo under the error of law standard. *Waste Mgmt. of Seattle, Inc. v. Utilities and Transp. Comm'n.*, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994); *Utter*, 140 Wn.App. at 300.

While the Court may give deference to an agency's interpretation of a statute that is both ambiguous and within the agency's special expertise, *Waste Mgmt. of Seattle*, 123 Wn.2d at 628, the Court is "not bound by an agency's interpretation of a statute." *City of Redmond*, 136 Wn.2d at 46, 959 P.2d 1091. No deference is given to an agency interpretation that conflicts with the plain language and clear intent of its governing statute, *Waste Mgmt. of Seattle*, 123 Wn.2d at 628.

In reviewing the requirements of an agency's governing statute, the Court's goal is to "determine the legislature's intent and carry it out." *Campbell v. State, Department of Social and Health Services*, 150 Wn.2d 881, 894, 83 P.3d 999 (2004)(citing *State v. J.M.* 144 Wn.2d 472, 480, 28 P.3d 720 (2001)). If a statute's meaning is plain, "then the court must give effect to the plain meaning as expressing what the legislature intended,"

Campbell, 150 Wn.2d at 894, and will reject an agency interpretation that is contrary to the plain meaning of the governing statute it is charged with administering. *Waste Mgmt. of Seattle*, 123 Wn.2d at 628.

B. The plain meaning and clear intent of the governing Developmental Disabilities Act is that the Department will determine DDD eligibility on every basis listed in RCW 71A.10.020(3)

In determining the plain meaning of a statute, the Court considers the “ordinary meaning of words, basic rules of grammar, and the statutory context,” *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 838-39, 215 P.3d 166 (2009), and must “interpret and construe the statutes so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *State v. Hirschfelder*, 148 Wn.App. 328, 336, 199 P.3d 1017 (Div. 2, 2009)(quoting *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005)). The Court will only resort to other tools of statutory construction, including consideration of legislative history, where the statute is ambiguous and the legislative intent is not apparent from the text. *Cherry v. Muni. of Metro. Seattle*, 116 Wash.2d 794, 799, 808 P.2d 746 (1991).

In the present case, while the legislature’s definition of a DDD-qualifying “developmental disability” in RCW 71A.10.020(3) is less than concise, its terms and grammar are clear and unambiguous. The text

unambiguously directs DDD to determine client eligibility for the specific diagnoses that the statute lists- mental retardation, cerebral palsy, epilepsy, autism- as well as for disabilities:

“attributable to 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.”

RCW 71A.10.020(3)(emphasis added).

The ordinary usage of the common conjunction “or” prior to the clause in question clearly and unambiguously instructs the Department that either an “other condition found to be closely related to mental retardation” or an “other condition found to require treatment similar to that required for mental retardation” qualify an applicant for DDD eligibility. *See Shelton Hotel Co. v. Bates*, 4 Wn.2d 498, 507, 104 P.2d 478 (1940)(commenting that where “the language of a statute is plain and free from ambiguity, it must be held to mean exactly what it says.”).

Because the statute in this case unambiguously indicates that either one or the other condition may establish eligibility, the legislature’s clear intent is that Department must determine client eligibility on both bases.

The Department’s core claim on appeal, re-stated repeatedly in its briefing to this Court, is that the clause in question should be read to create a single “other condition” eligibility category that DDD is free to further

define in its regulations with reference to only “conditions closely related [i.e., similar] to mental retardation” and without any consideration of or reference to conditions that “require treatment similar to that required for individuals with mental retardation,” *see e.g.*, Brief of Appellant at 16.

Although the Department would prefer the construction it proposes, it must be rejected by the Court because it would render superfluous and meaningless the entire reference in the statute to DDD-qualifying conditions that “require treatment similar to that required for individuals with mental retardation,” and would fail to give effect to the full statutory directive that DDD serve all individuals with conditions listed in the statutory definition. *See e.g., Hirschfelder*, 148 Wn.App. at 336; *Roggenkamp*, 153 Wn.2d at 624; *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)).

In support of its claim that the legislature intended a single “other condition” eligibility category that DDD may further define without reference to the treatment needs language in the statute, the Department points to the sentence immediately following the definition of “developmental disability” in RCW 71A.10.020(3). That sentence contains directions to the Department that it:

... .. 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

Id.

The Department claims that this limit in the second sentence of RCW 71A.10.020(3) on its ability to further define “neurological and other conditions” should be read to indicate legislative authorization for it to define “neurological and other conditions” in a manner that ignores the “treatment needs” language in the previous sentence. *See* Brief of Appellant at 20-21.

This claim is meritless. The requirement in the statute that it not base its definition of “neurological and other conditions” solely on IQ scores in no way relieves the Department of the explicit requirement that it implement the full statutory directive in the preceding sentence defining who DDD must serve.

The Court should conclude that the plain language of DDD’s statutory mandate in RCW 71A.10.020(3) is clear and unambiguous. In addition to the other listed conditions, the statute clearly indicates that either a condition “closely related to mental retardation” or a condition “that require treatment similar to mental retardation” may establish an applicant’s DDD eligibility.

Because the statute clearly lists two alternative types of “other conditions” that may establish DDD eligibility, the legislature’s obvious intent is that the Department will have some process and criteria for determining DDD eligibility for both types. The Department’s claims to the contrary erroneously interpret the plain meaning and clear intent of the governing statute.

C. The Department’s regulations that it claims prevent the determination of DDD eligibility based on treatment needs required by RCW 71A.10.020(3) violate the governing statute

Agency regulations will be presumed valid on judicial review only if they are shown to be “reasonably consistent with the statute being implemented.” *See Campbell*, 150 Wn.2d at 892. In this case, the regulations are not reasonably consistent with the statute because governing statute clearly requires that DDD determine eligibility based on a specific condition that the Department’s regulations clearly ignore.

The Department claims in its briefing that its DDD eligibility regulations in WAC Chapter 388-823 “reflect its expert interpretation of the statutory language,” and adequately implement the entire statutory mandate in 71A.10.020(3). Brief of Appellant at 35. It specifically claims that its regulations defining “another neurological condition,” and an “other condition similar to mental retardation” fully implement the entire

statutory requirement that it determine DDD eligibility for “neurological or other condition” that “are closely related to mental retardation or require treatment similar to that required for individuals with mental retardation.” Brief of Appellant 40-42.

The Department’s claims are not supported by the 363-page rule-making file for WAC Chapt. 388-823 that was transmitted to the Superior Court by the Department pursuant to RCW 34.05.566(1), and is part of the agency record under review in this matter. *See* RMF 1-363.

Although not cited in the Department’s briefing, nothing in the rule-making file supports the Department’s claims that it in some manner it incorporated “conditions requiring similar treatment” into its regulations, or made any expert determination that it was unnecessary to do so. The statutory language is simply ignored. *See e.g., Gasper v. Department of Social and Health Services*, 132 Wn.App. 42, 50 129 P.3d 849 (Div. II, 2006.) (holding that the agency’s rule-making file may be presumed to contain all supporting information and rationale for resulting rule).

Because its rules clearly do not implement every basis for DDD eligibility in the governing statutory definition of “developmental disability,” the Department regulations that require that DDD applicants have one of the six “qualifying conditions” that are defined in its rules, in

addition to meeting the statutory definition of “developmental disability,” violate RCW 71A.10.020(3), and are therefore invalid as applied by the Department in Mr. Slayton’s case.

The Court should conclude that the Department’s DDD eligibility regulations are not reasonably consistent with the governing statute because they ignore one of the DDD-qualifying conditions that the statute explicitly lists. The Court should also conclude that WAC 388-823-0120 and WAC 388-823-0040(2) violate the governing statute when applied by DDD to preclude a determination of applicant eligibility based on treatment needs as defined in the statute.

D. The Department’s recitation of the legislative history of the Developmental Disabilities Act is irrelevant

The Department’s detailed description in its briefing of the legislative history of RCW 71A.10.020(3), and its examination of the differences between the state and federal definitions of “developmental disability,” Brief of Appellant at 22-29, are irrelevant for two reasons.

First, as the Department concedes in its briefing, the definition of a DDD-qualifying “developmental disability” in RCW 71A.10.020(3) is not ambiguous. Where the legislative intent is clear from the statutory terms (as both parties agree it is in this case) the Court need not resort to other tools of statutory construction, including consideration of legislative

history, to determine its meaning. *See Cherry v. Muni. of Metro. Seattle*, 116 Wash.2d at 799.

Second, the Department's broad claims that the Superior Court's order in Mr. Slayton's case "fundamentally changes the definition of developmental disability in Washington law," and violates the intent of the governing state statute as evidenced by its legislative history, ignores both the Superior Court's specific directions to the agency on remand, and the source of those directions.

The Superior Court's order in this matter did not remand the case to the Department to conduct an open-ended standard-less inquiry into Mr. Slayton's functional needs. This Court's order directs the Department to determine whether any of Mr. Slayton's diagnosed conditions meet the four plainly listed criteria for DDD eligibility based on "other condition found to require treatment similar to that required for mental retardation" that are explicitly listed in both RCW 71A.10.020(3) and WAC 388-823-0040(1).⁷

⁷ Upon review of the text of the statute and regulation, the Court concluded that those are: (a) whether Mr. Slayton "has a condition or conditions that require treatment similar to that required for mental retardation;" (b) whether the condition or conditions requiring such treatment originated before Mr. Slayton attained age 18; (c) whether the condition or conditions requiring such treatment can be expected to continue indefinitely; and (d) whether the condition or conditions requiring such treatment constitute a substantial handicap to Mr. Slayton as provided by statute, or result in substantial limitations to Mr. Slayton's adaptive functioning as provided by Department rules. CP 121-122.

This Court should reject the Department's references to legislative history to claim that the Superior Court's order in this matter somehow broadly violates the intent of the Developmental Disabilities Act. The lower court's order does nothing more than recite the exact treatment needs-related eligibility criteria that are apparent in the plain text of RCW 71A.10.020(3) and WAC 388-823-0040(1). Since the terms of the statute are clear and unambiguous, the Department's resort to legislative history to argue against them should be rejected by the Court.

E. The Department's claim that its rules defining "other condition similar to mental retardation" "have remained basically unchanged" since 1989 is both irrelevant and inaccurate

The Department asserts in its briefing that the Court should show deference to its claims that its regulations in WAC Chapter 388-823 that define "other neurological conditions" and "other conditions similar to mental retardation" implement the statutory mandate that DDD services be provided to all individuals with disabilities that are attributable to an "other condition ... found by the secretary to require treatment similar to that required for individuals with mental retardation." RCW 71A.10.020(3); *See* Brief of Appellant at 38.

The Department claims that deference to its determination is required because "the basic contour" of its current regulations defining

“other conditions” has “remained the same” and has not been repudiated by the legislature since the enactment of the current version of RCW 71A.10.020(3) in 1989. *Id* (citing *State ex rel. Evergreen Freedom Found. V. Washington Educ. Assn.*, 140 Wn.2d 615, 635-36, 999 P.2d 602(2000)).

The Department’s claims are irrelevant because, as described above, resort to this sort of evidence of claimed legislative approval and acquiescence is necessary and appropriate only where statute is ambiguous and legislative intent cannot be derived from its plain terms. *See Cherry v. Muni. of Metro. Seattle*, 116 Wash.2d at 799; *see also Shelton Hotel Co. v. Bates*, 4 Wn.2d at 507. Here, where the governing statute explicitly and unambiguously directs the Department to determine DDD eligibility for “conditions requiring treatment similar to that required for mental retardation,” the lack of further legislative direction to the Department that it really must do so is irrelevant.

In addition, the Department’s claim that its regulations that define DDD eligibility for “other conditions similar to mental retardation” have remained “basically unchanged” since the enactment of the current version of RCW 71A.10.020(3) in 1989 is inaccurate.

The Department repealed its existing DDD eligibility regulation and adopted proposed WAC Chapt. 388-823 in July 2005. RMF 253. The previous regulation, former WAC 388-825-030, was analyzed by this

Court in *Pitts v. DSHS*, 129 Wn.App. 513, 119 P.3d 896 (Div. II, 2005). To establish DDD eligibility based on “Another Neurological Disorder or Other Condition,” former regulation required only evidence of low IQ or participation in special education services, and evidence of “a substantial handicap” as demonstrated by adaptive function testing that DDD administered. *See Pitts*, 129 Wn.App. at 529-530 (listing the eligibility requirements contained in former WAC 388-825-030(6)(b)).

In contrast, the Department’s current regulations governing “other conditions similar to mental retardation” list among its eligibility criteria a new and significant requirement that the individual demonstrate that their “other condition” is “a diagnosis of a condition or disorder that by definition results in both intellectual and adaptive skills deficits.” *See* WAC 388-823-0700(1).⁸

DDD’s current “other condition” eligibility rules both significantly modify previous eligibility requirements, and 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 the governing statute. The Department’s claims to the contrary should be rejected by the Court.

⁸ Much of the DSHS BOA Review Decision and Final Order in Mr. Slayton’s case below consists of the Review Judge’s analysis of this rule, and determination that Mr. Slayton had not demonstrated a required qualifying diagnosis. *See* CP 40-48.

F. The Court should authorize an award of reasonable attorneys' fees on appeal to Respondent Durrell Slayton pursuant to RAP 18.1, and Washington's Equal Access to Justice Act ("EAJA")

The EAJA provides, in pertinent part:

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.

RCW 4.84.350(1).⁹

Here, Mr. Slayton is considered to have prevailed if he obtains any relief from the Department's action terminating his DDD eligibility on any of the grounds addressed in the briefing. Upon establishing his entitlement to relief under the EAJA, the Department then has the burden of showing that fees should be denied by the Court because its action in Mr. Slayton's case were "substantially justified." *See, The Language Connection, LLC v. Employment Security Dept.*, 149 Wn.App. 575, 586,

⁹ A "qualified party" for purposes of an EAJA award is defined as "an individual whose net worth did not exceed one million dollars at the time the initial petition for judicial review was filed..." RCW 4.84.340(5). Mr. Slayton's affidavit of financial need confirming his financial eligibility for an EAJA award will be separately filed and served no later than 10 days prior to oral argument in this matter as required by RAP 18.1(c).

205 P.3d 924 (Div. I, 2009). To meet this burden, the Department would have to demonstrate that its termination of Mr. Slayton's DDD eligibility, and DDD's failure to determine his eligibility on a basis clearly listed in its governing statute, "had a reasonable basis in law and fact." *Id.*

The Department cannot meet this burden. It is established in this case that the Department does not determine DDD eligibility on a required basis that is clearly listed in its authorizing statute despite being told by the Superior Court in both the *Bannan* case and Mr. Slayton's cases that it must do so. *See* CP 53-57; CP 143-145.

The lack of an award of attorneys' fees award below does not prevent an award of attorney's fees by this Court. Mr. Slayton's Petition for Judicial Review in Superior Court was filed on July 24, 2008. CP 4. The petition requested an award pursuant to the EAJA. CP 9. Although the Petition explained in a footnote that federal regulations in effect at that time prohibited Mr. Slayton's attorneys, employed by the Northwest Justice Project (NJP), from claiming or collecting attorney fees, *id.*, it did not waive Mr. Slayton's rights to such fees. *See id.*

The Congressional restriction that prevented a recipient of federal funds from the Legal Services Corporation (LSC), such as NJP, from claiming or collecting attorneys' fees was eliminated as part of the federal

government's fiscal year 2010 appropriations bill.¹⁰ Effective December 16, 2009, the LSC suspended enforcement of 45 C.F.R. § 1642.3, which implemented the now-repealed restriction.

Although it was prevented from doing so at the trial court level, NJP may now seek an award of reasonable attorneys' fees for its work on behalf of Mr. Slayton on appeal as authorized by the EAJA and permitted by the Legal Services Corporation.¹¹

All of the requirements for an award of reasonable attorneys' fees to Mr. Slayton on appeal are met in this case. The Court should authorize an award of reasonable attorneys fees and costs on appeal pursuant to RAP 18.1, and Washington's Equal Access to Justice Act ("EAJA").

V. Conclusion

This appeal requires the Court to address the DSHS Division of Developmental Disabilities' failure to abide by and implement its full statutory mandate. The Court should instruct DDD that the language and intent of its governing statute are clear, and that the statute means what it says: In addition to the six DDD-qualifying conditions listed in the statute

¹⁰ Appropriations and Budget for Fiscal year 2010, 111th Congress, 1st Session, P.L. No. 111-117(2009).

¹¹ It is well settled that a prevailing party represented by an agency providing civil legal services to the poor may recover reasonable attorneys' fees as authorized by statute, even if the legal services are provided to the client at no cost. *See e.g., Council House, Inc. v. Hawk*, 136 Wn.App. 153, 147 P.3d 1305 (Div. I, 2006)(citing *Blair v. Washington State University*, 108 Wn.2d 558, 571, 740 P.2d 1379 (1987)).

that DDD's eligibility rules recognize and further define, the plain language of RCW 71A.10.020(3) requires that DDD also determine client eligibility for "other conditions .. found by the secretary ... to require treatment similar to that required for individuals with mental retardation."

The Court should review DDD eligibility regulations WAC 388-823-0120 and WAC 388-823-0040(2), and should determine that these regulations violate the governing statute as applied by DDD to preclude it from determining whether an applicant meets the eligibility criteria listed in RCW 71A.10.020(3) and WAC 388-823-0040(1) for DDD eligibility based on a "condition that requires treatment similar to that required for individuals with mental retardation."

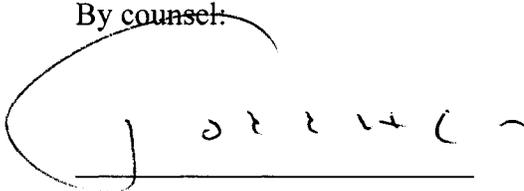
The Court should affirm the lower Court's order remanding Mr. Slayton's case to the agency with directions that the Department determine whether Respondent Durrell Slayton meets the requirements described in RCW 71A.10.020(3) and recited in WAC 388-823-0040(1) for "a condition that requires treatment similar to that required for individuals with mental retardation."

The Court should authorize an award of reasonable attorneys' fees and costs on appeal to Respondent Durrell Slayton pursuant to RAP 18.1, and Washington's Equal Access to Justice Act (EAJA).

RESPECTFULLY SUBMITTED this 29th Day of January, 2010.

Durrell Slayton, Respondent

By counsel:

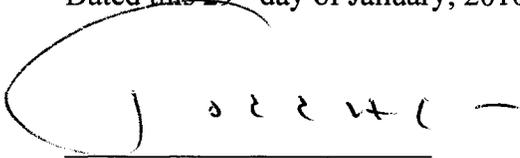
A handwritten signature in black ink, appearing to read "Todd Carlisle", is written above a horizontal line. A large, sweeping circular flourish is drawn around the signature, starting from the left and ending on the right side of the line.

Northwest Justice Project, by
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Certificate of Service

I certify that today, the 29th Day of January, 2010, a true and accurate copy of the foregoing **Brief of Respondent** in the above-entitled matter was, by agreement, sent by first class mail and by email to the attorney for the Appellant in this matter; Jonathon Bashford, Assistant Attorney General, Attorney for the State of Washington Department of Social and Health Services, 7141 Cleanwater Dr. SW, Olympia, WA. 98504-0124. Email: jonb@ATG.WA.GOV.

Dated this 29th day of January, 2010

A handwritten signature in black ink, appearing to read "Todd H. Carlisle", is written above a horizontal line. The signature is somewhat stylized and includes a large loop at the beginning.

Todd H. Carlisle

Attorney for Respondent

A faint, vertical stamp or text is visible on the right side of the page. It appears to be a date stamp, possibly indicating the date of filing or receipt, but the text is too light to read accurately.