

NO. 40700-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RAYMOND NIX JR.,

Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent.

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DIVISION II
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I. INTRODUCTION

Eligibility for DDD services is governed by state statute that requires that DDD services be provided both to individuals with “mental retardation,” as that term is defined by the Department, as well as to individuals with “other conditions” that are “closely related.” RCW 71A.10.020(3); RCW 71A.16.020(2).

Although the record in this case establishes that Appellant Raymond Nix’s clinically-diagnosed mild mental retardation meets every listed functional requirement contained in the Department’s regulations that define a DDD-qualifying “other condition,” and although he has previously been determined by the Department to have a DDD-qualifying “other condition,” the Department claims in these judicial review proceedings that mild mental retardation is now a “non-qualifying diagnosis” that it may properly refuse to consider as an “other condition.”

In its briefing to this Court, the Department seeks judicial approval for its refusal to determine Mr. Nix’s DDD eligibility on this statutorily-required basis. It does so by urging the Court to ignore the difference between Mr. Nix’s clinically-diagnosed mild mental retardation and the Department’s own unique definition of the statutory term “mental retardation.”

The Department's briefing also urges the Court to read a prohibition that does not exist into the plain language of its DDD eligibility rules, and to ignore the interpretation and application of its DDD eligibility regulations that is favorable to Mr. Nix that the Department itself explicitly announced in the rule-making file for the regulations at issue.

In addition, as discussed below, the Department misrepresents Mr. Nix's Medicaid and constitutional claims, and seeks to avoid liability for attorney's fees under the state Equal Access to Justice ACT ("EAJA"), RCW 4.84.340-360, by claiming that its refusal to interpret and apply its DDD-eligibility rules in Mr. Nix's case as it announced it would when the rules were promulgated, is substantially justified.

The Court should reject the Department's arguments, and should reverse the termination of Raymond Nix's DDD eligibility. The Court should invalidate the Department's interpretation and application of its DDD eligibility rules announced in Mr. Nix's case as arbitrary and capricious, and contrary to the plain language of its own regulations, the governing Developmental Disabilities Act, the diagnosis discrimination prohibition in Medicaid law, and state and federal equal protection guarantees. The Court should authorize award of statutory attorney's fees to Mr. Nix for this appeal pursuant to the EAJA.

II. ARGUMENT

- A. **The Department’s refusal to determine that Mr. Nix’s diagnosed clinical mild mental retardation is a DDD-qualifying “other condition” that is “closely related” to “mental retardation” as that term is defined by the Department, violates RCW 71A.10.020(3).**

The Developmental Disabilities Act defines a DDD-qualifying “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... ..

RCW 71A.10.020(3)(emphasis added). The statute authorizes the Department to promulgate rules “further defining” the listed conditions. RCW 71A.16.020(2). DDD has done so, defining the statutory terms, including the terms “mental retardation” and “other condition closely related to mental retardation” in its DDD eligibility regulations, WAC Chapter 388-823.

The Department admits in its briefing to this Court that its definition of the statutory term “mental retardation” deviates from, and is more restrictive than, the generally accepted clinical definition. Response Brief at 5-6. While it admits that the statutory term is not the same as the

clinical condition, the Department urges the Court to ignore the distinction, and to determine that Mr. Nix's diagnosed clinical mild mental retardation must be the same thing as the statutory term "mental retardation" used in RCW 71A.10.020(2).

If the statutory term "mental retardation," as defined by DDD, and clinical mental retardation were indeed the same thing, then the Department's claim that "it would be absurd to conclude that mental retardation is a condition that is other than yet similar to itself," Response Brief at 16, would be correct. Since it admits that it is not, the Department's tautology, asserted repeatedly in its briefing to this Court, that Mr. Nix's diagnosed clinical mild mental retardation is "mental retardation," and therefore cannot be an "other condition" that is "closely related to mental retardation," is both misleading and irrelevant.

The legislature's recent amendments to RCW 71A.10.020(3), replacing the term "mental retardation" throughout the statutory definition of "developmental disability" with the less definable yet more accepted term "intellectual disability,"¹ emphasize the point. While the legislature has granted the Department the authority to define the current statutory term "intellectual disability" as it chooses, there is clearly no evidence of

¹ RCW 71A.10.020(3), was amended in the 2010 legislative session. Act of Mar. 17, 2010, 2010 Legis. Serv. Ch 94 sec. 21, RCW 71A.10.020 (1998).

legislative intent in the plain language of the current RCW 71A.10.020(3) that clinically-diagnosed mild mental retardation may not be an “other condition” that is “closely related” to “an intellectual disability,” as defined by the Department. The Department’s claims that clinically-diagnosed mild mental retardation must be the same thing as the DDD-defined statutory term “mental retardation” contained in the previous RCW 71A.10.020(3), is similarly without statutory support.

The Court should conclude that the Department is bound by its definitions of the statutory terms at issue, including the term “mental retardation.” The governing statute, by its plain terms, both allows DDD to define the statutory term “mental retardation,” and requires that DDD eligibility be determined both for “mental retardation,” as defined by the Department, as well as for all conditions that are “closely related” to the Department’s chosen definition.

Since it is established in Mr. Nix’s case that there is no clinical distinction between individuals like Mr. Nix with diagnosed mild mental retardation and an IQ of 71, and those with the same clinical diagnosis based on an IQ score two points lower who would meet the Department’s definition of “mental retardation,”² the Court should determine that the Department’s refusal to assess whether Mr. Nix’s diagnosed clinical mild

² AR 196-197; TP 77 (testimony of Robin LaDue, Ph.D.).

mental retardation may meet its criteria for an “other condition” that is “closely related” to DDD-defined “mental retardation” violates the plain language and clear intent of RCW 71A.10.020(3).

B. Nothing in the plain language of the Department’s DDD eligibility rules prevents any specific diagnosis from consideration as a DDD qualifying “other condition.”

The Department’s DDD eligibility regulations defining “mental retardation” are WAC 388-823-0200 through 0230. The separate regulations that define a DDD-qualifying “other condition similar to mental retardation” are at WAC 388-823-0700 through 0710. The two eligibility categories are separate, and set separate and distinct eligibility criteria. Nothing in the plain language of the regulations indicates that DDD applicants are prevented or prohibited from establishing their DDD eligibility under either or both categories.

Regarding what sorts of conditions or diagnoses may be considered an “other condition,” the regulations require only that a qualifying “other condition” be “a diagnosis of a condition or disorder that by definition results in both intellectual and adaptive skills deficits.” WAC 388-823-0700(1). This is the only Department rule that defines and sets limits on what diagnoses may qualify as an “other condition.” By its plain terms, the rule does not prohibit or prevent any specific diagnosis, including diagnosed clinical mild mental retardation, from consideration.

Mr. Nix's diagnosed clinical mild mental retardation is clearly a condition that "by definition results in both intellectual and adaptive skills deficits."³ It therefore meets the specifically-listed requirements contained in WAC 388-823-0700(1) for a diagnosis that may be considered an "other condition."

Despite the Department's claims to the contrary, it is not the plain language of the rules themselves, but the Department's newly-claimed interpretation and application of those rules announced in Mr. Nix's case that prevents the Department from considering clinically-diagnosed mild mental retardation as a DDD-qualifying "other condition."

C. The limitation on "other condition" eligibility announced in Mr. Nix's case contradicts the Department's interpretation and application of its regulations announced in the administrative record, and is therefore arbitrary and capricious.

The Department's briefing to this Court attempts to justify its contradiction in Mr. Nix's case of its own statement in the 2005 rule-making file for WAC Chapter 388-823 that individuals with diagnosed clinical mild mental retardation like Mr. Nix, with an IQ slightly too high to meet the Department's definition of mental retardation, "could still be eligible under other condition," RMF 318.

³ AR 196-197 (listing the required clinical diagnostic criteria for mental retardation, including both impaired intellectual and adaptive functioning).

In response to this clear evidence in the rule-making file that the Department is violating the intended construction and application of its regulations that it itself announced when it promulgated the rules at issue, the Department claims flatly in its brief to this Court that it may willfully ignore its own interpretation and application of the regulations announced in its own rule-making file because “an administrative agency is not disqualified from changing its mind,” Response Brief at 20, and may not be “estopped from interpreting its rules in a straightforward fashion because of a statement made during the rule-making process.” Response Brief at 9.

These claims fundamentally misunderstand both the role of the Court conducting judicial review, and the preeminent importance of the rule-making file in judicial review proceedings under the APA, RCW Chapter 34.05, involving arbitrary and capricious agency action.

In judicial review proceedings under the APA, where, as here, the appellant asserts that the governing regulations, as interpreted and applied by the agency in his case, are arbitrary and capricious, the reviewing court “must consider the relevant portions of the rule-making file” to determine the agency's explanations and rationale for the action at issue. *See Washington Independent Telephone Ass'n v. Washington Utilities and Transp. Com'n*, 148 Wn.2d 887, 906, 64 P.3d 606 (2003). The required

Concise Explanatory Statement in the rule-making file is particularly crucial on judicial review of an agency action related to its rule making because it provides the reviewing Court with the agency's official explanation, construction, and rationale for the resulting rules. *See Anderson, Leech & Morse, Inc. v. Washington State Liquor Control Bd*, 89 Wn.2d 688, 693, 575 P.2d 221 (1978).

The requirement that the Court conducting judicial review consider the rule-making file, and only the rule-making file, in determining whether an agency action related to its rule making is arbitrary and capricious, is nearly absolute. *See Gaspers v. DSHS*, 132 Wn.App. 42, 50, 129 P.3d 849 (Div.II, 2006).⁴ In *Gaspers*, the Court rejected the agency's efforts to provide new evidence containing its rationale and explanation for a challenged rule because:

[t]he rule making file is required to have all the information the agency gathered in formulating and adopting the rule. the Court could presume that it had all relevant information in the record already through the rule making file.

Id; *See also Musselman v. DSHS*, 132 Wn.App. 841, 854, 134 P.3d 248 (Div. II, 2006)(commenting that because the Court must determine the validity of a rule "as of the time the agency adopted it," the rule-making file must be considered on judicial review "because it contains information

⁴ (*Reversed on other grounds, in part, by Jenkins v. DSHS*, 160 Wn.2d 287, 157 P.3d 388, (2007)

the agency considered contemporaneously with adopting the rule”); *See also Rite Aid v. Houstoun*, 171 F.3d 842, 851 (3rd Cir., 1999)(commenting that the Court conducting judicial review of an agency action related to rule making will consider only “the administrative record already in existence, and not “base its review on any ‘post-hoc rationalizations’ made by the Department.”).

Similarly, in the present case, the record by which the Court will determine whether the Department’s newly-announced interpretation and application of its DDD eligibility rules is arbitrary and capricious is the rule-making file for the regulations at issue. The Department’s post hoc claims and rationalizations contained in its briefing for its refusal to consider Mr. Nix’s diagnosed clinical mild mental retardation as a DDD-qualify “other condition” are irrelevant to the Court’s review.

The Department’s newly-claimed interpretation of its “other condition” eligibility rules in Mr. Nix’s case is not supported in the plain language of the rules themselves, and is directly contradicted in the rule-making file for those rules. There is no other evidence the Department can point to in the record in that supports its claim that it may properly refuse to assess whether Mr. Nix’s diagnosed clinical mild mental retardation may be a DDD-qualifying “other condition.”

The Court should conclude that the Department’s failure to abide by the interpretation and application of its “other condition” eligibility rules announced in the 2005 rule-making file for the current governing regulations is “willful and unreasoning and taken without regard to the

attending facts or circumstances” and is therefore arbitrary and capricious.

See Washington Independent Telephone Ass'n, 148 Wn.2d at 904.⁵

D. Absent the Department’s determination that Mr. Nix’s mild mental retardation is a “non-qualifying diagnosis,” the record in this case establishes that he meets every listed requirement in the Department’s eligibility rules for a DDD-qualifying “other condition.”

The Department claims in its briefing that if Mr. Nix prevails in his legal claims in this case, the Court would need to remand the matter back to the agency for a determination of Mr. Nix’s DDD eligibility under its rules that define a DDD-qualifying “other condition.” Response Brief at 9. This is incorrect. Upon rejecting the Department’s claim that mild mental retardation is a “non-qualifying diagnosis,” the Court should reverse the DDD termination in Mr. Nix’s case because the record establishes that his mild mental retardation meets every listed requirement for a DDD qualifying “other condition.”

The regulations that contain the Department’s eligibility criteria for a DDD-qualifying “other condition” are WAC 388-823-0700 and 0710.

The Administrative Law Judge who conducted the administrative hearing

⁵ The Department’s briefing fails completely to respond to Mr. Nix’s related argument that its determination that mild mental retardation is no longer a condition that may establish DDD eligibility as an “other condition” is a new and generally applicable limitation on DDD eligibility that is invalid because it has been implemented by the Department without use of required formal rule-making procedures in RCW Chapter 34.05. *See* RCW 34.05.570(2)(c).

in Mr. Nix's case made specific findings that Mr. Nix's condition meets every listed functional requirement for DDD eligibility in these regulations. AR 76.

Specifically, the ALJ found that the record demonstrated that Mr. Nix meets every listed functional requirement in WAC 388-823-0700. The ALJ found that the record established that Mr. Nix's adaptive and intellectual deficits are life-long, and originated before age 18, and are attributable to his mild mental retardation and not "mental illness or other emotional, social or behavioral disorder." *See* WAC 388-823-0700; AR 76.

The ALJ also found that record of IQ and adaptive function testing in Mr. Nix's case established that he has the demonstrated substantial limitations in his cognitive and adaptive functioning required by WAC 388-823-0710. *Id.* The ALJ also specifically found that the significant impairment in Mr. Nix's adaptive functioning demonstrated in recent testing is not attributable to anything other than his diagnosed developmental disability as required by WAC 388-823-0710(1)(b). *Id.*

Since these are the criteria for a DDD-qualifying "other condition" listed in the Department's regulations, Mr. Nix's DDD eligibility is established. Upon rejecting the Department's claim that mild mental

retardation is a “non-qualifying diagnosis,” the Court need not remand this matter for further proceedings

E. The Department’s assertion that Mr. Nix’s Medicaid and constitutional claims are “raised for the first time on appeal” ignores both the record from the proceedings below and the role of the Court of Appeals conducting judicial review.

The Department asserts in its briefing that Mr. Nix’s constitutional and Medicaid claims were not “raised in a timely fashion,” and should be “disregarded” on that basis. Response Brief at 23. The assertion that Mr. Nix’s Medicaid and constitutional claims were raised only before the Court of Appeals is simply false. The Petition for Judicial Review, filed in the Superior Court in this case, specifically sought reversal of the agency action terminating Mr. Nix’s DDD eligibility in part because:

the Department’s interpretation and application of its regulations contained in WAC Chapter 388-823 to terminate Mr. Nix’s DDD eligibility prevents Mr. Nix from accessing Medicaid-funded DDD-administered benefits and services that he is eligible to receive under federal Medicaid law. The Department’s action therefore violates federal Medicaid law.

CP at 13. And because:

the Department’s interpretation and application of its regulations contained in WAC Chapter 388-823 to terminate Mr. Nix’s DDD eligibility violates state and federal constitutional due process and equal protection provisions.

Id.

In addition, although Mr. Nix requested that the Administrative Law Judge who conducted the agency hearing in his case “make detailed findings of fact regarding his history and condition that may be necessary for further proceedings in his case,” AR 105, there is no requirement that an appellant in an agency administrative hearing raise constitutional or statutory arguments at the administrative hearing level that the agency decision-maker has no authority to rule on. *See* WAC 388-02-0225(1) (confirming that “neither an ALJ nor a review judge may decide that a DSHS rule is invalid or unenforceable. Only a court may decide this issue.”).

Further, in judicial review proceedings under the Administrative Procedure Act, Chapter 34.05 RCW, the review by the Court of Appeals of the agency action is *de novo*. *Utter v. State, Dept. of Social and Health Services*, 140 Wn.App. 293, 299, 165 P.3d 399 (Div. 2, 2007) (commenting “[w]e apply the standards of RCW 34.05 directly to the record before the agency, sitting in the same position as the superior court.”)(*quoting City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998)).

Mr. Nix’s claim that the Department’s denial of services in his case, including Medicaid-funded services, based solely on the agency’s determination that he has a “non-qualifying diagnosis,” violates federal

Medicaid law and the state and federal constitutional guarantee of equal protection, were timely and properly raised, and are properly before this Court for consideration.

F. The Department’s termination of Mr. Nix’s DDD eligibility and associated denial of Medicaid-funded Community Protection services, based solely on the etiology of his developmental disability, is unlawful diagnosis discrimination, and violates Mr. Nix’s right to equal protection.

1. The Medicaid Act prohibits discrimination in the provision of Medicaid-funded services based solely on diagnosis.

The Department’s briefing mischaracterizes Mr. Nix’s Medicaid claim as a “preemption argument.” It is not. While state law governs DDD eligibility, the services and benefits that have been denied to Mr. Nix by the Department’s termination of DDD eligibility in his case are Medicaid services.⁶ By opting to participate in the Medicaid program, the state has agreed to comply with the requirements of the Medicaid law. *See Alexander v. Choate*, 469 U.S. 287, 289 n.1, 105 S. Ct. 712 (1985). The Court therefore need only determine that the Medicaid diagnosis discrimination prohibition applies to the Department’s action in Mr. Nix’s

⁶ The eligibility review that resulted in the DDD termination on appeal in this case was initiated as a result of Mr. Nix’s request for re-enrollment in The Community Protection Program, AR 24. The Community Protection Program is one of four Medicaid-funded “Home and Community Based Services (HCBS) waivers” administered by DDD as an alternative to institutional care. WAC 388-845-0005; WAC 388-845-0015

case. It need not assess or determine whether federal law has preempted or overridden any state law.

The Department's briefing does not directly address the claim that its denial of access to Medicaid-funded Home and Community Based waiver services to mildly mentally retarded DDD applicants, while providing those same services to DDD clients with identical intellectual and functional limitations, is unlawful diagnosis discrimination. The Department claims instead that the diagnosis discrimination prohibition in Medicaid law does not apply to the DDD eligibility determination in Mr. Nix's case, Response Brief at 25. Alternatively, the Department claims that its new interpretation of its "other condition" eligibility rules that denies access to Medicaid-funded Home and Community Based waiver services to mildly mentally retarded DDD applicants, has been authorized by the federal Medicaid agency. Response Brief at 26-27.

Both of the Department's claims are meritless. It is undisputed in this case that the services denied to Mr. Nix by the DDD termination in his case are Medicaid-funded. Also, while the waiver agreement between the Department and the federal Medicaid agency permits the Department to offer services in the Community Protection program only to individuals determined to meet the definition of "developmental disability" contained in state law, there is no indication that the Department was granted

permission to violate the Medicaid diagnosis discrimination prohibition in its determination process.

Because its action in Mr. Nix's case has denied him access to Medicaid-funded Community Protection services based solely on his diagnoses, rather than his functional or medical needs, the Court should conclude that the Department's termination of Mr. Nix's DDD eligibility, and associated denial of Medicaid-funded Community Protection services that are available only to DDD clients, violates Medicaid's diagnosis discrimination prohibition.

2. **State and federal constitutional equal protection guarantees prohibit the Department's denial of DDD services to Mr. Nix while providing those same services to other similarly-situated applicants with different diagnoses but exactly the same functional and intellectual disabilities.**

The Department urges the Court to determine that its classification at issue in Mr. Nix's case has a rational basis, and therefore does not violate state and federal constitutional equal protection guarantees. The Department claims to have classified mild mental retardation as a "non-qualifying diagnosis" that it may refuse to consider as a DDD-qualifying "other condition" based on a determination that people with conditions that the Department agrees may be DDD-qualifying "other conditions" are different from, and may have different (and presumably greater) needs and

limitations than persons like Mr. Nix who suffer only from mild mental retardation. Response Brief at 32-33.

The Department's claims ignore that the record in this case demonstrates that: (1) mild mental retardation meets the listed definition contained in the Department's regulations of a qualifying "other condition" AR 196-197, and (2) Mr. Nix suffers from all of the specified intellectual and adaptive deficits that the Department's regulations defining a DDD-qualifying "other condition" require. AR 76. Based on this record, Mr. Nix would therefore be DDD eligible but for the Department's determination that his is a non-qualifying diagnosis. AR 76.

Since Mr. Nix is clearly similarly situated to others with different diagnoses but exactly the same DDD-qualifying intellectual and adaptive deficits, the Department's refusal to consider his diagnosed clinical mild mental retardation as an "other condition" in no way serves the rationale claimed by the Department. The Court should conclude that the Department's claims that Mr. Nix's mild mental retardation may not be a DDD-qualifying "other condition" violates the state and federal constitutional guarantee of equal protection.

G. The Department's failure to fully determine Mr. Nix's DDD eligibility is not "substantially justified." The Court should

authorize an award of reasonable attorney's fees on appeal to Mr. Nix, pursuant to RCW 4.84.350.

The Department does not dispute in its briefing that if the Court reverses its termination of DDD eligibility in this case, Mr. Nix will be a "qualified prevailing party," eligible for an award of attorney's fees for this appeal under the State EAJA, RCW 4.84.350. The Department claims, however, that the Court should withhold a fee award in Mr. Nix's case because its termination of Mr. Nix's DDD eligibility had "a reasonable basis in law and fact" and was, therefore, "substantially justified." Response Brief at 33.

Arbitrary and capricious agency action cannot be "substantially justified." If the Court concludes that the Department's newly-announced interpretation and application of its "other condition" eligibility rules in Mr. Nix's case is arbitrary and capricious, it should award fees under the EAJA.

It is undisputed that the Department's actions in Mr. Nix's case directly contradict explicit claims it made in the rule-making file in the record. It is also established that the Department has persisted in claiming a construction of its DDD eligibility regulations that is not supported by the plain language of its governing statute even after being informed by

the Courts in previous judicial review proceedings that its claimed construction was in error. *See* AR 189-193.⁷

Given the circumstances of this case, the Court should reject the Department's claims that its action was "substantially justified" when it refused to determine whether Mr. Nix's diagnosed clinical mild mental retardation meets its listed eligibility criteria for a DDD-qualifying "other condition." The Court should authorize an award of attorney's fees to Mr. Nix in this case, pursuant to the EAJA, RCW 4.84.350.

III. CONCLUSION

The Court should conclude that the Department's recent re-interpretation of its DDD eligibility rules governing "other conditions" that are "closely related" to "mental retardation" is arbitrary and capricious, and unlawfully denies Appellant Raymond Nix, and other similarly situated individuals with diagnosed clinical mild mental retardation, access to DDD benefits and services.

The Court should reverse the Department's termination of Mr. Nix's DDD eligibility, and should invalidate the Department's claimed

⁷ Decision and Final Order on Petition for Judicial Review of Agency Order and for Declaratory Judgment *Darren B v. DSHS*, Thurston County Superior Court Cause No. 07 2 01364 1 Dated 4/11/2008 (concluding in a factually analogous case that after determining that the appellant "did not have the substantial level of mental retardation that the Department's rules defining DDD eligibility based on mental retardation require, it was error for the Department not to assess his demonstrated mild mental retardation under Department's regulations governing DDD eligibility based on having an "other condition found by the secretary to be closely related to mental retardation.").

interpretation and application of its DDD eligibility rules announced in Mr. Nix's case and used to terminate his DDD eligibility. The Court should authorize an award of reasonable attorney's fees and costs to Mr. Nix.

RESPECTFULLY SUBMITTED this 27th day of September, 2010.

NORTHWEST JUSTICE PROJECT

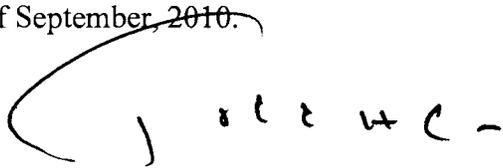
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CERTIFICATE OF SERVICE

I certify that today, the 27th day of September, 2010, a true and accurate copy of the foregoing **Appellant's Reply Brief** in the above-entitled matter was, by agreement, sent by both first-class mail and e-mail to the attorney for Respondent in this matter; Jonathon Bashford, Assistant Attorney General, Attorney for the State of Washington Department of Social and Health Services, P.O. Box 40124, 7141 Cleanwater Dr. S.W., Olympia, WA 98504-0124. E-mail: jonb@ATG.WA.GOV.

DATED this 27th day of September, 2010.



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