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

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RAYMOND NIX, JR.,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

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**RESPONSE BRIEF**

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## I. INTRODUCTION

The Washington State Department of Social and Health Services, through its Division of Developmental Disabilities (DDD), serves individuals who have developmental disabilities: certain disabling conditions that arise during childhood and limit cognitive development. Raymond Nix, Jr. was initially found eligible for those services under the rules in place prior to 2005, apparently on the basis of having received special education services. When his eligibility was reviewed in 2008 under the current DDD eligibility rules, Mr. Nix no longer qualified. The Department's decision to terminate Mr. Nix's eligibility was upheld by an administrative law judge and the DSHS Board of Appeals, as well as the superior court on judicial review.

The term "developmental disability" is defined in RCW 71A.10.020(3) as including "mental retardation, cerebral palsy, epilepsy, autism, or another neurological or other condition" found by the Department to be closely related to mental retardation or to require similar treatment. The Department's rules separately define each of those five categories.

While Mr. Nix has been clinically diagnosed with mild mental retardation, his IQ is too high to qualify for DDD services under the mental retardation category. He argues that he is nonetheless eligible for DDD enrollment. First, he claims that mental retardation is an "other condition' similar to mental retardation" under the Department's rules and the governing statute. Alternatively, he argues for the first time on appeal

that federal law and the Constitution bar Washington from adopting a definition of developmental disability that distinguishes between individuals based on their diagnosed conditions.

As the ALJ, the Board of Appeals, and the superior court all found, the Department was justified in terminating Mr. Nix's eligibility because he has not been diagnosed with any condition that causes intellectual and functional disabilities, besides his non-qualifying diagnosis of mental retardation. Because mental retardation is specified as a developmental disability in statute and is separately defined in the Department's rules, it is not an "other" condition.

Should the court reach Mr. Nix's new issues on appeal, there is no federal intent to preempt Washington's state definition of developmental disabilities. And the state may rationally distinguish between persons diagnosed with mental retardation, and those diagnosed with other, more serious disorders that cause similar intellectual and functional disabilities.

## **II. COUNTER-STATEMENT OF ISSUES**

1. Under RCW 71A.10.020(3), a "developmental disability" includes four specifically named conditions (mental retardation, cerebral palsy, epilepsy, and autism), as well as "another neurological or other condition of an individual found by the secretary to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation". Under that statute, is a diagnosis of mental retardation that does not meet the state's definition of mental

retardation an “other condition” that the Department must find to be similar to mental retardation?

2. Do WAC 388-823-0700 and -0710, the regulations defining “other conditions” similar to mental retardation, apply to mental retardation itself given that mental retardation is specifically defined in a separate category of eligibility; and given that including mental retardation as an “other condition” would render the separate mental retardation rules superfluous?

3. May an appellant in an Administrative Procedure Act challenge to agency action raise new issues before the Court of Appeals?

4. Do federal Medicaid regulations restrict how Washington may define the term “developmental disability” for the purpose of determining eligibility for state services?

5. Do the state or federal constitutional guarantees of equal protection prevent Washington from tailoring the eligibility criteria for its developmental disabilities program by using different criteria for individuals diagnosed with different disabling conditions?

6. Is Appellant entitled to attorney fees under RCW 4.84.350?

### **III. COUNTER-STATEMENT OF THE CASE<sup>1</sup>**

#### **A. Washington’s Developmental Disability Program**

DSHS, through its Division of Developmental Disabilities, provides services to some of the state’s most disabled and vulnerable

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<sup>1</sup> References are to the agency Adjudicative Record (AR), the agency Report of Proceedings (RP), the agency Rule-Making File (RMF), and the superior court Clerk’s Papers (CP).

citizens. In order to be eligible for DDD services, a person must establish that he has a permanent disability, beginning before age 18, which is attributable to a qualifying condition. RCW 71A.10.020(3). One of those qualifying conditions is mental retardation. *Id.* The statute also allows the Department to define “other” qualifying conditions. *Id.*

To establish DDD eligibility under the condition of mental retardation, an applicant must have a diagnosis or finding of mental retardation from a psychologist. WAC 388-823-0200. The applicant must also show that he has an intellectual quotient (IQ) score two standard deviations below the mean—an IQ of 69 or below on most tests. WAC 388-823-0215(5).<sup>2</sup> The Department will generally use the IQ score taken closest to age 18. WAC 388-823-0230(1). Standard errors of measurement, which describe the statistical probability that a person’s actual IQ may be slightly above or below the results of a particular test, are not taken into account. WAC 388-823-0010 (definition of “FSIQ”).

To be eligible for DDD services under the condition of “‘other condition’ similar to mental retardation”, an applicant must show (among other things) that he has been diagnosed with a condition which, by

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<sup>2</sup> Washington has defined mental retardation to include only those persons with an IQ score of 69 or lower for over three decades. *See* former WAC 275-27-020(1) (1977).

definition, causes intellectual and adaptive functioning deficits. WAC 388-823-0700.<sup>3</sup>

#### **B. Clinical Definition Of Mental Retardation**

The most common clinical definition of mental retardation is supplied by the American Psychiatric Association in its Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (“DSM-IV”). AR at 25; AR at 194. Under the DSM-IV, the “essential feature[s]” of mental retardation are intellectual deficits and adaptive functioning deficits. AR at 25, 196. Mental retardation will generally be diagnosed in those with “an IQ of about 70 or below”. AR at 196. Within that range, the diagnosing professional can then specify among four degrees of severity: mild, moderate, severe, or profound. AR at 197. A diagnosis of mild mental retardation normally corresponds with an “IQ level 50-55 to approximately 70”. AR at 197, 203. The term “borderline intellectual functioning” describes a below-average IQ that is higher than the mental retardation range, generally 71 to 84. AR at 25, 202.

Standardized IQ tests have “a measurement error of approximately 5 points,” AR at 196; so there is “no statistical difference” between scores 5 points apart. RP at 77. An IQ test result of 74 may thus be evidence that an individual’s true IQ is 69, or 79. *See* RP at 77. Because there is an equal chance that actual IQs could be either higher or lower than measured

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<sup>3</sup> The term “adaptive functioning” refers to an individual’s ability to perform the kinds of tasks required for daily living—including motor skills, social and communication skills, personal care skills, and community living skills. *See* RP at 24. It provides a technical measurement for what was once referred to as a handicap or disability.

on a given test, DSHS does not apply standard errors of measurement. WAC 388-823-0010. The DSM-IV takes the measurement error into account by allowing psychologists the discretion to diagnose mental retardation in individuals with IQ scores between 70 and 75 provided that significant adaptive functioning deficits are also present. AR at 196-97.

### C. Mr. Nix's Developmental History

Raymond Nix is a 34 year-old man who has suffered cognitive and behavioral problems since childhood. AR at 20-22.<sup>4</sup> Over the years, his IQ score was found to be as high as 74 at the age of 15, AR at 22; and as low as 64 at the age of 29. AR at 24. At age 15 Mr. Nix's examining psychologist found that he was operating in the borderline range of intellectual functioning with an IQ of 74. AR at 22. At the age of 17, his IQ score was 71 and he was diagnosed with "possible mental retardation." AR at 23. The psychologist who examined Mr. Nix at the age of 22 found him to have an IQ of 72 and a diagnosis of borderline intellectual functioning. The first diagnosis of mild mental retardation contained in the record came in 2005, when Mr. Nix was 29 and his IQ was found to have declined to 64. AR at 24.<sup>5</sup>

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<sup>4</sup> Because Mr. Nix did not assign error to any findings of fact made by DSHS in the Final Order, those findings are verities on review. RCW 34.05.546(7); *Hilltop Terrace Homeowners' Ass'n v. Island Cy.*, 126 Wn.2d 22, 39, 891 P.2d 29 (1995).

<sup>5</sup> Mr. Nix asserts that school psychologists "concluded that Mr. Nix met the diagnostic criteria for mild mental retardation" during childhood. Op. Br. at 9. That statement is misleading and unsupported by the record.

In Alaska, Mr. Nix was designated as having mild mental retardation for the purpose of qualifying for special education services. AR at 20; *see* AR at 183. The Federal Way school district later concluded that Mr. Nix qualified for special education because his "profile . . . is consistent with that of a mentally retarded student." AR at 20-21; *see* AR at 183. The Department accepts a school psychologist's finding of mental

The Department will not accept an IQ score that is attributable to an illness or injury occurring after age 18. WAC 388-823-0215(2), -0700(1)(d). Mr. Nix began drinking heavily at the age of 15; by the time he was diagnosed with mental retardation—at age 29—he had been heavily using alcohol for 14 years. AR at 23. As the DSHS Board of Appeals noted in its final order, alcohol abuse can lead to cognitive decline. AR at 27. The psychologist who originally diagnosed Mr. Nix with mental retardation “strongly suspected” that his declining IQ score was “due to chronic alcohol abuse.” AR at 24.

**D. Procedural History**

At some point prior to 2005, Mr. Nix became a DDD client. *See* AR at 160. He was initially found eligible for DDD enrollment under the “other condition” category. AR at 131. A Department eligibility specialist explained at hearing that, under the rules in place prior to 2005, Mr. Nix’s history as a special education student would have been adequate to support his application for eligibility, regardless of his diagnosed conditions. RP at 34-35; *see* AR at 24.

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retardation as an alternative to a diagnosis by a clinical psychologist. WAC 388-823-0200. But just as DDD eligibility criteria differ from diagnostic criteria, so too do the administrative qualifications to receive special education services differ from the diagnostic criteria for mental retardation. AR at 187, 188 (identifying “WAC 392-171-421a” and a “categorical designation of Raymond as Mild M.R. [mentally retarded]” as the basis for finding Mr. Nix eligible for special education in 1992 and 1993); *compare*, *e.g.*, former WAC 392-171-421(2)(a) (1992) (eligibility requirements for the special education category of mild mental retardation include IQ “from approximately 51 through 75”), *with* AR at 203 (diagnostic criteria for mild mental retardation include “IQ level 50-55 to approximately 70”). It is misleading to equate the two.

In 2008, Mr. Nix was not receiving any paid services from DDD. When he requested new services, his request prompted a mandatory review of his eligibility. AR at 20; WAC 388-823-1010(3). The Department determined that Mr. Nix did not meet current eligibility requirements, and notified him that his eligibility for the developmental disability program would be terminated. AR at 20. He requested administrative review. AR at 20. Following an evidentiary hearing, an administrative law judge concluded that Mr. Nix was not eligible for DDD enrollment. AR at 62-80.

Mr. Nix appealed the ALJ's decision to the DSHS Board of Appeals. AR at 51-61. In its Final Order, the Board of Appeals affirmed the termination of Mr. Nix's DDD eligibility. AR at 39. The Board first found that Mr. Nix's diagnosis of mental retardation does not qualify him for DDD services, because his IQ scores at the relevant age (closest to age 18) were above the cutoff of 69. AR at 29. The Board then rejected the argument that a diagnosis of mental retardation that fails to meet the criteria for mental retardation eligibility should be considered an "other condition similar to mental retardation" for the purpose of establishing DDD eligibility. AR at 30. Mr. Nix's request for reconsideration was denied. AR at 1.

Mr. Nix petitioned for judicial review in Thurston County Superior Court. CP at 9-46. While conceding that he did not meet DDD eligibility criteria for "mental retardation," he argued that his diagnosis of mild mental retardation is an "other condition' similar to mental retardation"

under the Department's rules and governing statute. CP at 62-70. The superior court upheld the agency Final Order on the grounds that "an individual whose sole relevant diagnosis is mental retardation can only be eligible for DDD services if that diagnosis meets the requirements of the 'mental retardation' rules". CP at 151.

#### IV. ARGUMENT

Mr. Nix does not dispute that his IQ is too high to qualify him as developmentally disabled under the Department's definition of mental retardation. Instead, he argues that his diagnosis of mild mental retardation makes him eligible under the category "other condition similar to mental retardation." If mental retardation is an "other condition similar to mental retardation", Mr. Nix would likely qualify as developmentally disabled.<sup>6</sup>

Mr. Nix claims that the clear language of the Department's eligibility rules provide that mental retardation is an "other condition"; and, if not, that the rules are invalid because the governing statute requires the Department to treat a non-qualifying diagnosis of mental retardation as a condition other than mental retardation. He also argues essentially that the Department is estopped from interpreting its rules in a straightforward fashion because of a statement made during the rule-making process. Because mental retardation is not a condition other than itself, Mr. Nix's

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<sup>6</sup> The one issue remaining for decision on remand would be whether Mr. Nix meets the adaptive functioning requirements for "other condition" eligibility. WAC 388-823-0710. While the ALJ entered initial findings regarding Mr. Nix's adaptive functioning, AR at 76, those findings are not part of the Department's Final Order because the Board of Appeals did not find it necessary to reach that issue.

arguments are contrary to the clear language of the regulations and statute and should be rejected by this Court.

For the first time on appeal, Mr. Nix also raises federal preemption and equal protection arguments. Even if the court were to reach those new issues, they have no merit. Federal Medicaid law does not preempt Washington from using its own definition of developmental disability, because such a state law designation is not a Medicaid service subject to federal oversight. And the constitutional guarantee of equal protection does not prevent the state from distinguishing between individuals with different diagnoses for the purpose of allocating public benefits among the disabled.

**A. Standard Of Review**

The Administrative Procedure Act governs this Court's review of agency action. *See generally* RCW 34.05.570; *Utter v. Dep't of Soc. & Health Servs.*, 140 Wn. App. 293, 402, 165 P.3d 399 (2007). The standard of review of agency orders in adjudicative proceedings is set forth in RCW 34.05.570(3). The statute provides nine grounds for determining whether the agency decision should be reversed. This case involves three: (1) whether the order exceeds the statutory authority of the agency; (2) whether the agency interpreted or applied the law erroneously; and (3) whether the agency has failed to decide all issues requiring resolution. Under the APA the challenging party bears the burden of demonstrating the invalidity of the agency decision. RCW 34.05.570(1)(a).

The validity of an agency rule is a question of law reviewed *de novo*. *Local 2916, IAFF v. Pub. Empl. Relations Comm'n*, 128 Wn.2d 375, 379, 907 P.2d 1204 (1995). While an agency rule is invalid if it exceeds the scope of the agency's authority, *see* RCW 34.05.570(2)(c), "rules adopted pursuant to a legislative grant of authority are presumed to be valid and should be upheld on judicial review if they are reasonably consistent with the statute being implemented." *Campbell v. Dep't of Soc. & Health Servs.*, 150 Wn.2d 881, 892, 83 P.3d 999 (2004) (internal quotation marks omitted).

The legislature has charged DSHS with developing and applying eligibility criteria for developmental disability services. RCW 71A.16.020(2). DSHS is required to define "another neurological or other condition" through rule-making. RCW 71A.10.020(3). The Department's eligibility criteria for developmental disabilities services should thus be given substantial weight as interpretations of RCW 71A.10.020(3). The Department is also entitled to "great deference" to its interpretation of its own regulations, "absent a compelling indication that the agency's regulatory interpretation conflicts with legislative intent or is in excess of the agency's authority." *Silverstreak v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 884-85, 154 P.3d 891 (2007) (internal quotations omitted).

**B. Eligibility For The Developmental Disability Program Requires A Diagnosis Of Mental Retardation, Cerebral Palsy, Epilepsy, Autism, Or An “Other Condition” Found By The Department To Be Similar To Mental Retardation**

Washington’s system of services for individuals with developmental disabilities is established in RCW Title 71A. DSHS may only provide such services to “eligible” individuals. RCW 71A.18.020. A person is eligible for DDD enrollment if the Department “finds that the person has a developmental disability as defined in RCW 71A.10.020(3).” RCW 71A.16.020(1).

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

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

Former RCW 71A.10.020(3) (2008) (emphasis added).<sup>7</sup> A person thus has a developmental disability only if he has a qualifying condition. *Id.*

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<sup>7</sup> Here and throughout, this brief quotes the statute as it was when the Department terminated Mr. Nix’s eligibility. The legislature recently replaced the term “mental retardation” with “intellectual disability.” Laws of 2010, ch. 94, §21. The term “substantial handicap” was also changed, to “substantial limitation.” *Id.* Those changes were effective June 10, 2010; but were not intended “to expand or contract the scope or application” of the statute. *Id.* at §1.

Four qualifying conditions are named in the statute: mental retardation, cerebral palsy, epilepsy, and autism. *Id.* The Department can add “other” conditions to that list, provided that it determines those new conditions to be similar to mental retardation—either closely related or requiring similar treatment. *Id.*

The Department has adopted rules splitting the category of “other” conditions into two sub-categories. In the first, the Department has found that a permanent medical disorder of the central nervous system is a developmental disability if it causes certain intellectual and physical impairments. WAC 388-823-0600. In the second, the Department has found that a neurological, nervous system, or chromosomal disorder is a developmental disability if it causes intellectual and adaptive functioning<sup>8</sup> impairments. WAC 388-823-0700. That second sub-category is called “‘other condition’ similar to mental retardation.” *Id.*

**C. Mental Retardation Is Not An “Other Condition” Under WAC 388-823-0700**

Mr. Nix claims that the Department was incorrect to interpret WAC 388-823-0700 to exclude his diagnosis of mild mental retardation from consideration under the “other condition” category of eligibility. His argument must be rejected because it is contrary to the clear language of the rules and would render the mental retardation eligibility rules superfluous. Any contrary statement made by the Department during rule-making is not an “interpretive statement” entitled to deference under the

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<sup>8</sup> See definition *supra* at 5, fn.3.

APA, and in any case does not prevent either the Department or the court from applying the plain meaning of the rules.

**1. Mental retardation is not a condition other than itself.**

According to its title, WAC 388-823-0700 provides the Department's "definition for an '*other* condition' similar to mental retardation". (Emphasis added.)<sup>9</sup> It describes the evidence a DDD applicant must provide in order to substantiate "an '*other* condition' similar to mental retardation." WAC 388-823-0700 (emphasis added). The question is: "other" than what?

"Where statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself." *In re Detention of C.W.*, 147 Wn.2d 259, 279, 53 P.3d 979 (2002). "In the absence of a specific statutory definition, words in a statute are given their common law or ordinary meaning." *State v. Chester*, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997). Under the plain language of the Department's rules, mental retardation is not an "other condition similar to mental retardation." See RMF at 82 (public comment from advocacy organizations Columbia Legal Services and TeamChild describing WAC 388-823-0710 as applying to "individuals who do not have a formal diagnosis of mental retardation").

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<sup>9</sup> Section headings are "an integral part of the law" when they are placed in the original act by the Legislature without a contrary instruction. *State v. Lundell*, 7 Wn. App. 779, 782 n.1, 503 P.2d 774 (1972). The section headings in Chapter 388-823 WAC were placed there by DSHS, not the Code Reviser, Wash. St. Reg. 05-13-130; and are therefore an integral part of the regulations themselves.

The word “other” in this context is an adjective meaning “being the one (as of two or more) left : not being the one (as of two or more) first mentioned or of primary concern : REMAINING”; “not the same : DIFFERENT”; or “MORE, ADDITIONAL.” *Webster’s Third New International Dictionary* 1598 (2002). In order to be an “other condition” similar to mental retardation, an applicant’s condition or diagnosis must first be “not mentioned” in, “different” from, or “additional” to those conditions already expressly included within the definition of developmental disabilities. So an applicant’s claim that he has mental retardation, cerebral palsy, epilepsy, or autism is not evaluated under the “other condition” eligibility criteria. Rather, those four conditions are separately defined by the Department. If Mr. Nix wishes to qualify for DDD services on the basis of a diagnosis or finding of mental retardation (of any severity, whether mild or profound), he must meet the definition provided in WAC 388-823-0200 through -0230.

Nor is mental retardation a condition “similar to” mental retardation. The dictionary definition of the word “similar” is “having characteristics in common : very much alike : COMPARABLE” or “alike in substance or essentials : CORRESPONDING.” *Webster’s Third New International Dictionary* 2120 (2002). Thus “similar” connotes two things that are alike, not two things that are identical. Especially when read in conjunction with the word “other” appearing in the same phrase, it is clear that an “other condition similar to mental retardation” cannot be mental retardation itself. Mr. Nix’s diagnosis of mild mental retardation is not

*similar to* mental retardation—it *is* mental retardation. AR at 197 (describing degrees of severity for mental retardation). It is a basic principle of construction that statutes (and regulations) should be read in a way that avoids strained or absurd results. *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002); *Washington Cedar & Supply Co., Inc. v. Dep't of Labor & Indus.*, 137 Wn. App. 592, 598, 154 P.3d 287 (2007). It would be absurd to conclude that mental retardation is a condition other than, yet similar to, itself.

**2. If a diagnosis of mental retardation is an “other condition,” the existing mental retardation rules are superfluous.**

To interpret WAC 388-823-0700 as Mr. Nix urges would bypass the mental retardation rules entirely, rendering them pure surplusage. Regulatory language “must be construed so that all the language is given effect and no portion is rendered meaningless or superfluous.” *Kilian*, 147 Wn.2d at 21.

The requirements for eligibility under the mental retardation category, WAC 388-823-0200 through -0230, are similar to the requirements under “other condition,” WAC 388-823-0700 and -0710, in that both categories require intellectual and functional impairments. But the “other condition” rules are less stringent in three ways.

First: both categories require a diagnosis or finding of a condition. But the mental retardation rules specifically require that condition to be mental retardation. WAC 388-823-0200. Second: both categories require below-average intellectual functioning. But the mental retardation rules

require that the applicant have an IQ no higher than 69, WAC 388-823-0215(5); while “other condition” allows for eligibility based on an IQ as high as 78, or even based on academic delays without any proof of low IQ. WAC 388-823-0710(1)(a). And third: both categories require an adaptive functioning score two standard deviations below the mean. But the mental retardation rules require that the adaptive functioning testing be done by the diagnosing professional as part of diagnosing mental retardation, WAC 388-823-0200(3); while “other condition” requires only that the test be recent, and allows the Department to provide the testing if the applicant does not have a recent score. WAC 388-823-0710(1)(b).

For each element the mental retardation criteria are more rigorous, so that any person meeting those criteria would also qualify under “other condition.” Mr. Nix’s interpretation would render the mental retardation rules meaningless. If mental retardation is an “other condition,” the Department could forego the mental retardation category entirely because those rules would be subsumed under WAC 388-823-0700. The “other condition” rules must be interpreted in light of the entire chapter to avoid that absurd result.

**3. *Pitts v. DSHS* applied the “other condition” rule to a diagnosis of epilepsy because the epilepsy eligibility rule expressly incorporated the “other condition” rule at that time.**

Mr. Nix mistakenly relies on *Pitts v. Dep’t of Soc. & Health Servs.*, 129 Wn. App. 513, 119 P.3d 896 (2005), for the proposition that a condition specifically listed in the statutory definition of developmental

disability can be considered an “other condition.” Op. Br. at 19-20. He overlooks that the epilepsy rule expressly incorporated the “other condition” rule at the time.

In *Pitts*, the applicant argued that he was developmentally disabled on the basis of a diagnosis of epilepsy. *Pitts*, 129 Wn. App. at 519. Applying the epilepsy eligibility rule, former WAC 388-825-030(4) (2005), the court determined that the applicant was not DDD-eligible because he did not have the required “substantial handicap.” *Id.* at 526-30. At that time, the eligibility rules provided three ways for a person with a diagnosis of epilepsy to prove a substantial handicap. *Id.* at 526; former WAC 388-825-030(4)(c) (2005). One way was to meet the “other condition” eligibility requirements. Former WAC 388-825-030(4)(c)(ii) (2005). Accordingly, the *Pitts* court applied the “other condition” rule only as part of its analysis of whether the applicant met the substantial handicap requirement of the epilepsy rule. 129 Wn. App. at 529 (“Under [the epilepsy rule], a person with epilepsy may also demonstrate a substantial handicap if he or she meets the conditions of [the other condition rule]”). The court did not state or imply that epilepsy was an “other condition”.

Unlike the pre-2005 epilepsy rule, the current mental retardation rules do not incorporate “other condition” as a factor in eligibility. *Pitts* provides no support for applying the “other condition” rules to a diagnosis of mental retardation in the absence of an express regulation.

**4. The concise explanatory statement is not a binding interpretive rule.**

Mr. Nix argues that the Department's concise explanatory statement made during the rule-making process is a binding official interpretation of WAC 388-823-0700. Statements made during the rule-making process are not law, and cannot overcome the plain language of the rule itself.

An agency is required to prepare a "Concise Explanatory Statement" (CES) when it engages in rule-making. RCW 34.05.325. The CES must identify the reasons for the adoption of an agency rule; describe changes made to the rule between the initial proposal and the final promulgation; and respond to comments received from the public, "indicating how the final rule reflects agency consideration of the comments, or why it fails to do so." RCW 34.05.325(6). The purpose "is (1) to assure the agency actually considered all arguments made and (2) to facilitate court review" of the rule-making process. *Anderson, Leech & Morse, Inc. v. Liquor Control Bd.*, 89 Wn.2d 688, 693, 575 P.2d 221 (1978). Mr. Nix does not claim that the Department's rule-making process was procedurally deficient. Instead, he claims that the CES contained an "explicit promise" that binds the agency. Op. Br. at 22.

In 2005 the Department promulgated the current chapter 388-823 WAC. One purpose of the new rules was to "make major changes to the eligibility criteria" for "other condition" eligibility. RMF at 1. In

response to a public comment during the rule-making process, the Department stated:

An individual may . . . be diagnosed with mild mental retardation under DSM-IV criteria, but not meet the eligibility criteria under [the mental retardation rules]. However, that individual could still be eligible under “other condition,” which by statute does not use IQ as the sole determinant.

RMF at 318. The statement is somewhat ambiguous as to whether the Department meant that mental retardation (rather than some different condition) would be the qualifying diagnosis for that hypothetical individual. But even accepting Mr. Nix’s interpretation of the CES, it does not bind the Department from later adopting an interpretation better supported by the plain language of the rules. An agency is not precluded from changing its interpretation of a statute or regulation. *Lockheed Shipbuilding Co. v. Dep’t of Labor & Indus.*, 56 Wn. App. 421, 430, 783 P.2d 1119 (1989); see *NLRB v. Local Union 103, Int’l Ass’n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 351, 98 S. Ct. 651, 54 L. Ed. 2d 586 (1978) (“An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes.”).

A CES does not take the place of an official policy statement or interpretive statement. While a CES is a necessary part of the rule-making

process, policy and interpretive statements are a discretionary method for agencies to inform the public of how the agency intends to apply its rules or statutes. RCW 34.05.230. When issuing a policy or interpretive statement the agency is required to follow certain formal steps, including publishing the statement in the Washington State Register. RCW 34.05.230(4). Because the CES was not published in the state register, it was not an interpretive or policy statement.

Even if the CES were a formal policy or rule interpretation, such statements are “advisory only.” RCW 34.05.230(1). They do “not implement or enforce the law,” and “serve only to aid and explain the agency’s interpretation of the law.” *Wash. Educ. Ass’n v. Pub. Disclosure Comm’n*, 150 Wn.2d 612, 619, 80 P.3d 608 (2003). Such statements are not subject to the notice-and-comment process that the APA requires for enacting binding regulations. Department regulations are law; interpretive statements are not.<sup>10</sup>

Mr. Nix urges this Court to ignore the plain text of WAC 388-823-0700 and instead apply a statement made during the rule-making process. Since the CES is not a source of law and does not reflect the Department’s understanding of its own rules, it is entitled to no deference or preclusive effect.

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<sup>10</sup> In some circumstances, equitable estoppel may prevent an agency from repudiating an interpretive statement once a third party has detrimentally relied upon it. *Silverstreak, Inc. v. Dep’t of Labor & Indus.*, 159 Wn.2d 868, 889, 154 P.3d 891 (2007). But Mr. Nix has not argued estoppel; and in any case cannot establish detrimental reliance on the concise explanatory statement. *See Campbell*, 150 Wn.2d at 902-04 (Department not estopped from terminating DDD eligibility because, *inter alia*, no detrimental reliance).

**D. Mental Retardation Is Not “Another Neurological Or Other Condition” Under RCW 71A.10.020(3)**

Contrary to Mr. Nix’s argument, RCW 71A.10.020(3) does not require the Department to accept a diagnosis of mild mental retardation as “another neurological or other condition.” The legislature specifically defined “developmental disability” to include mental retardation, as well as “another neurological or other condition”. RCW 71A.10.020(3) (emphasis added). The Department has discretion in how it defines the “another neurological or other condition” category. In fact, the legislature recognized that category as largely undefined when, in the next sentence, added that the Department “shall promulgate rules which define” it. *Id.* Nothing in the statute requires mental retardation to fall within the scope of “another neurological or other condition” eligibility.

By the use of the word “another”, the legislature clearly indicated that the four listed conditions were excluded from “another neurological or other condition.” Like the word “other”, *supra* at 15, “another” excludes things previously mentioned. “Another” refers to something “different or distinct from the first one named or considered”; or “being one more in addition to one or a number of the same kind : ADDITIONAL.” *Webster’s Third New International Dictionary* 89 (2002). The eligibility category “another . . . condition” does not encompass Mr. Nix’s mild mental retardation diagnosis because it is not a condition “different or distinct from” or “in addition to” mental retardation. Rather, mild mental

retardation refers to mental retardation in those with an IQ between 50 or 55 up to “approximately 70”. AR at 197. It is not a separate condition.

The legislature has already determined that mental retardation is a developmental disability on its own terms; the statute clearly does not require the Department to also designate mental retardation as falling within the phrase “another neurological or other condition.”

**E. Mr. Nix’s Federal Preemption And Constitutional Arguments Are Raised For The First Time On Appeal And Should Be Disregarded**

Mr. Nix argues that Washington is preempted by federal law from adopting a definition of “developmental disability” that excludes persons diagnosed with mild mental retardation, whose IQ scores are in the borderline range; and that differentiating between mental retardation and other disabling conditions is unconstitutional. Those theories are raised for the first time before this Court. “Out of fairness to the trial court and the opposing party, theories advanced for the first time on appeal generally will not be considered.” *Espinoza v. City of Everett*, 87 Wn. App. 857, 872-73, 943 P.2d 387, (1997) (citing RAP 2.5(a)); *see, e.g., Wells v. Western Wash. Growth Mgmt. Hearings Bd.*, 100 Wn. App. 657, 681, 997 P.2d 405 (2000) (applying RAP 2.5(a) in APA context); *but see Snohomish Co. v. Hinds*, 61 Wn. App. 371, 375, 810 P.2d 84 (1991) (reaching alleged APA jurisdictional defect raised for the first time on appeal).

Had Mr. Nix raised his claims in a timely fashion, the Department could have supplemented the record with material facts about

Washington's Medicaid program (to show that the Medicaid rules do not apply to the state determination of developmental disability) and about the class of persons who qualify for services under the "other condition" rules (to show that the line drawn by those rules has a rational basis). RCW 34.05.562. The court should decline to reach new issues in the absence of an appropriate record for reviewing the agency action. *Musselman v. Dep't of Soc. & Health Servs.*, 132 Wn. App. 841, 853-54, 134 P.3d 248 (2006) (new rule challenge raised on appeal).

**F. The Federal Medicaid Act Does Not Preempt Washington's Definition Of Developmental Disabilities**

Mr. Nix argues that Washington's statutory definition of "developmental disability" is preempted by federal law from differentiating between a person diagnosed with mental retardation, and a person diagnosed with another condition similar in some ways to mental retardation. He relies on the Medicaid Act's diagnosis discrimination provision, 42 C.F.R. § 440.230. That argument is without merit.

Federal law preempts state law only if it was the "clear and manifest purpose of Congress" to do so. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (internal quotations omitted). "Congress may preempt local law by explicitly defining the extent to which its enactments preempt laws (express preemption). Preemption may also occur where the federal government intends to exclusively occupy a field (field preemption) and where it is impossible to comply with both state and federal law (conflict preemption). . . . There is

a strong presumption against preemption.” *Campbell*, 150 Wn.2d at 897. The mere fact that “federal [Medicaid] moneys are used for some Department services” is insufficient to demonstrate federal preemption of Washington’s DDD eligibility rules. *Id.* Medicaid law does not require states to create a specific state agency to serve persons with developmental disabilities, and does not require them to use any particular definition of “developmental disability.”

**1. Enrollment in the DSHS Division of Developmental Disabilities is not a Medicaid service.**

As a condition of receiving federal Medicaid funding, states cannot “arbitrarily deny or reduce” certain Medicaid services to a person solely on the basis of that individual’s diagnosis or condition. 42 C.F.R. § 440.230(c); 42 U.S.C. § 1396a(a)(10)(B)(i). The diagnosis discrimination provision applies only to Medicaid services that are “required” under 42 C.F.R. § 440.210 or .220. 42 C.F.R. § 440.230(c). Enrollment with the state Division of Developmental Disabilities is not a required Medicaid service. DDD serves individuals who are developmentally disabled under state law, whether or not they are eligible for medical assistance through Medicaid under federal law. Enrollment in the DDD program always results in the expenditure of state funds, but does not necessarily implicate federal Medicaid dollars.

Moreover, the only service to which DDD enrollees are automatically entitled is case management. *See* WAC 388-823-0030. Case management, while potentially a Medicaid service, is not required

under 42 C.F.R. § 440.210 or .220. Because DDD eligibility is not a required Medicaid service, Mr. Nix's claim that Washington's definition of developmental disability violates Medicaid law must fail. *See Rodriguez v. City of New York*, 197 F. 3d 611, 617 (2nd Cir. 1999) (lack of a required service is "fatal" to a claim of diagnosis discrimination).

**2. The federal Medicaid agency has approved the restriction of Community Protection waiver services to individuals with a developmental disability under state regulations.**

Mr. Nix objects that the diagnosis discrimination rule applies because DDD enrollment may allow him to receive services through the Community Protection waiver, which is a Medicaid-funded program. Op. Br. at 26. Washington's Community Protection waiver is a home- and community-based services waiver authorized under 42 U.S.C. § 1396n(c) and by agreement between the state and the federal Medicaid agency. DDD enrollment is one of several requirements for participation in the Community Protection waiver. WAC 388-831-0030(1).<sup>11</sup> Mr. Nix's argument that he must be developmentally disabled because he should qualify for the Community Protection waiver is thus circular: if he is not developmentally disabled under state law, he is not eligible for the waiver. That requirement has been approved by the federal Medicaid agency, whose decision is entitled to deference.

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<sup>11</sup> Participation in that program is not an entitlement, even for those individuals who are eligible. WAC 388-831-0400; WAC 388-845-0035.

The U.S. Department of Health and Human Services' Centers for Medicare and Medicaid Services (CMS) is responsible for ensuring that Washington implements its Medicaid program appropriately. Washington may only be reimbursed for Medicaid expenditures if its State Plan and waivers meet with federal approval. 42 U.S.C. § 1396. Even if Medicaid law were implicated here, in the Community Protection waiver CMS has specifically waived the Medicaid requirement that Washington make similar services available to persons who do not have a developmental disability under state law. *See DSHS Application for a §1915(c) HCBS Waiver (Community Protection)* at 6 (Nov. 1, 2006), *online at* <http://www.dshs.wa.gov/pdf/adsa/ddd/CPWaiver.pdf>, \*7 (last visited Aug. 12, 2010) (waiving 42 U.S.C. § 1396a(a)(10)(B)). So the federal program defers to state law in determining who has a developmental disability.

CMS approval is required for all Medicaid waiver programs. CMS is thus fully aware of Washington's definition of developmental disability. *See Id.*, Appendix B-1 at 1-2, \*20-21 (waiver participants must meet definition of developmental disability "as contained in state law and stipulated in state administrative code"; reciting RCW 71A.10.020(3)). CMS has never questioned that definition as being in possible conflict with federal law. As the federal agency tasked with implementing the Medicaid program, CMS's opinion is entitled to deference. *Alaska Dep't of Health & Soc. Servs. v. Ctrs. for Medicare & Medicaid Servs.*, 424 F.3d 931, 939 (9th Cir. 2005).

**G. Washington's Definition Of Developmental Disability Rationally Distinguishes Between Mental Retardation And Other Conditions**

Mr. Nix claims that DSHS' eligibility criteria for developmental disability services violate the equal protection clause of the federal and state constitutions. Under equal protection analysis, a legislative classification that does not involve a suspect class or a fundamental right will receive a minimum level of scrutiny from the courts, and the challenger bears the burden of showing that the classification is purely arbitrary. *Gossett v. Farmers Ins. Co.*, 133 Wn.2d 954, 979, 948 P.2d 1264 (1997). Mr. Nix concedes that the rational basis test applies here. Op. Br. at 27; *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442-43, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (addressing the problems of the "large and diversified group" of persons with developmental disabilities "is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals").

Under rational basis review, a statute is constitutional if: (1) all members of the class created within the statute or regulation are treated alike, (2) reasonable grounds exist to justify the exclusion of parties who are not within the class, and (3) the classification created by the statute bears a rational relationship to the legitimate purpose of the statute. *Campbell*, 150 Wn.2d at 900.

Mr. Nix argues in part that DSHS has "no legitimate state interest in denying mildly mentally retarded applicants access to DDD services" and that such individuals must therefore be eligible under either the mental

retardation category or the “other condition” category. Op. Br. at 27-28. But the state has broad discretion in establishing classifications in social and economic legislation without violating the equal protection clause. *Ford Motor Co. v. Barrett*, 115 Wn.2d 556, 565, 800 P.2d 367 (1990). DSHS may rationally deny DDD eligibility to a person with a diagnosis of mental retardation and an IQ of 70 or above—while allowing eligibility for persons with the same diagnosis and a lower IQ, or with a different diagnosis and the same IQ.

**1. DSHS reasonably excludes persons with IQ scores over 69 from the class of persons with mental retardation.**

The Department may rationally exclude Mr. Nix from eligibility under the mental retardation category. The Department’s mental retardation eligibility rules apply equally to persons with a diagnosis of mental retardation, of any degree; provided that each individual demonstrate an IQ score of two standard deviations below the mean (generally, below 70). WAC 388-823-0215. Most persons with a diagnosis of mild mental retardation qualify under that rule. *See* AR at 197, 203 (clinical definition of mild mental retardation includes persons with “IQ level 50-55 to approximately 70”). Some individuals with IQ scores between 70 and 75 are clinically diagnosed with mild mental retardation. AR at 196-97. Those individuals do not qualify for DDD eligibility under the mental retardation category. WAC 388-823-0215.

While a person such as Mr. Nix with an ineligible IQ of 71 differs only marginally from a person with an eligible IQ of 69, the state does not

violate equal protection by using a bright-line rule to differentiate between individuals. *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315-16 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993) (line-drawing “inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration”). A rule does not violate equal protection merely due to some over- or under-inclusiveness. *Andersen v. King County*, 158 Wn.2d 1, 32, 138 P.3d 963 (2006) (citing *Heller v. Doe*, 509 U.S. 312, 321, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993)); *Campbell*, 150 Wn.2d at 901.

An IQ of 69 or below is a legitimate cut-off point for distinguishing those with mental retardation from those without. *See* AR at 197 (clinical definition sets cut-off at 70). The state can rationally determine that, in the aggregate, persons with IQ scores below 70 are more disabled (thus potentially more in need) than those with higher IQs. That distinction is rationally related to the legislative purpose of providing services to developmentally disabled persons. RCW 71A.10.015.

**2. DSHS reasonably excludes persons with a diagnosis of mental retardation from the class of persons with “other conditions” considered developmental disabilities.**

The Department may also rationally exclude Mr. Nix from eligibility under the “other condition” category. The DDD eligibility rules use different criteria for each category of eligibility. For instance, a

person diagnosed with mental retardation can establish eligibility based on a psychologist's diagnosis and an IQ in the mentally retarded range. WAC 388-823-0200 through -0230. In contrast, a person with cerebral palsy must have a physician's diagnosis and a demonstrated need for physical assistance with basic tasks. WAC 388-823-0300 through -0330. Those different approaches do not signal an equal protection violation: mental retardation is a very different condition from cerebral palsy, even though both fall within the state's definition of developmental disability. The state may distinguish between different things.

So too with "other condition." Persons with any diagnosis other than those named in RCW 71A.10.020(3) are treated identically as a class: they must show that their condition causes intellectual and functional disabilities, and they must show that their condition is not specifically defined elsewhere in the rules. That different approach is rational because a diagnosis other than mental retardation is, by definition, different from mental retardation. Where persons who are not similarly situated are treated differently, there is no equal protection violation; only where members of the same class are treated differently may a person proceed with an equal protection claim. *Forbes v. City of Seattle*, 113 Wn.2d 929, 943, 785 P.2d 431 (1990).

Mr. Nix claims that he has “exactly the same functional and intellectual disabilities” as some persons who are considered developmentally disabled under state law. Op. Br. at 28. But individuals diagnosed with the types of conditions that qualify under WAC 388-823-0700 differ considerably from individuals such as Mr. Nix who have similar IQs and adaptive functioning scores.<sup>12</sup> For instance, people with the genetic condition called Angelman’s Syndrome suffer sleep disturbances and seizures. Those with Smith-Magenis Syndrome suffer sleep disturbances and behavioral problems—as do those with Sanfilippo Syndrome, who also suffer degenerative physical disabilities and seizures. Those with Rett Syndrome suffer autism-like social disabilities in addition to degenerating speech and hand motion abnormalities that make communication exceedingly difficult. The genetic and neurological disorders that meet the “other condition” criteria thus present burdens beyond those imposed by mild mental retardation in a person with a borderline IQ.

The class of persons with a diagnosis of, *e.g.*, Rett Syndrome are substantially different from the class of persons without such a diagnosis; the state may rationally distinguish between them. A person such as Mr. Nix, with a diagnosis of mild mental retardation and an IQ in the

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<sup>12</sup> The record does not contain any description of conditions that the Department has found to qualify under the “other condition” rules. But production of empirical evidence is not required to sustain the rationality of a classification; rational speculation will suffice. *Andersen*, 158 Wn.2d at 32-33 (citing *Gossett v. Farmers Ins. Co.*, 133 Wn.2d 954, 979-80, 948 P.2d 1264 (1997)). And if the current record is insufficient, the court should decline to consider this newly-raised issue altogether. See argument, *supra* at 23.

“borderline” range above 70, is not situated identically to a person with an “other condition” diagnosis. Such different diagnoses provide a legitimate basis for the state to set different IQ limits for mental retardation and “other condition” eligibility.

If Mr. Nix’s arguments are accepted, DSHS would not be able to structure its eligibility criteria to provide DDD services to persons who have severe developmental disabilities but borderline IQs. Instead it would have to set a single IQ score limit for all individuals, regardless of the real differences between their disabilities. The current criteria rationally serve valid state interests.

**H. The Agency Action Was Substantially Justified; There Is No Basis For Awarding Attorney Fees**

Mr. Nix requests an award of attorney fees under Washington’s Equal Access to Justice Act (EAJA), RCW 4.84.350. Even if Mr. Nix were to prevail in this appeal, his request for fees should be denied because the Department was substantially justified in terminating his eligibility.

Under the EAJA, if the court finds that “the agency action was substantially justified” it may 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*, 159 Wn.2d at 892 (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. Yet the prevailing party was denied attorney fees under RCW 4.84.350(1). *Id.* at 891-93. 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 892-93.

In this case, Mr. Nix argues that an "other condition" is not "other" than anything at all, relying essentially on estoppel grounds based on the concise explanatory statement. Even if his appeal is successful, Mr. Nix's case for attorney fees is even weaker than that of the appellant in *Silverstreak* who actually alleged and proved the traditional elements of estoppel.

The Department was substantially justified in terminating Mr. Nix's eligibility under the plain language of its statute and rules. Attorney fees should be denied.

## V. CONCLUSION

Mr. Nix concedes that he does not meet the Department's criteria for DDD eligibility under the condition of mental retardation. His argument that a diagnosis of mental retardation that falls below the severity required to meet DDD criteria is nonetheless a condition other than, and similar to, mental retardation should be rejected. Neither federal

Medicaid law nor constitutional equal protection principles prevent Washington from distinguishing between persons with different disabilities for the purpose of administering its developmental disability program. The Department's Final Order should be affirmed.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of August, 2010.

ROBERT M. MCKENNA  
Attorney General

A handwritten signature in black ink, appearing to read "Jonathon Bashford", is written over a horizontal line.

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STATE OF WASHINGTON  
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NO. 40700-1 BY RONALD R. CARPENTER

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

RAYMOND NIX, JR.,  
  
Petitioner,  
  
v.  
  
DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES,  
  
Respondent.

CERTIFICATE OF  
SERVICE

I certify that on August 25, 2010, I served a true and correct copy of the RESPONSE BRIEF on all parties or their counsel of record electronically by email and by depositing in the U.S. Mail with first class postage prepaid, addressed as follows:

Todd Carlisle  
Northwest Justice Project  
715 Tacoma Ave S  
Tacoma, WA 98402  
Email: toddc@nwjustice.org

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 25th day of August, 2010, at Tumwater, Washington.

Cheryl Chafin  
Cheryl Chafin, Legal Assistant

ORIGINAL