

NO. 49280-6

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

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ZACHARY COURTOIS,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES,

Respondent.

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**RESPONDENT'S BRIEF**

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## **I. INTRODUCTION**

The Pierce County Superior Court correctly denied Zackary Courtois' request for attorney's fees and costs under the Equal Access to Justice Act after he prevailed against the Department of Social and Health Services in judicial review of an administrative proceeding. Although Mr. Courtois successfully appealed the determination that he was ineligible for Developmental Disability Administration services, the same Court that overturned the Department's eligibility decision declined to grant his request for attorney's fees and costs because it found that the Department had a reasonable basis in law and fact for its actions and that its actions were substantially justified. The Court of Appeals should affirm this discretionary decision of the Superior Court.

## **II. COUNTER STATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the Superior Court abuse its discretion by denying attorney's fees and costs under the Equal Access to Justice Act when it found that the Department's actions had a reasonable basis in law and fact and were substantially justified?

2. Was the Superior Court prevented, as a matter of law, from finding that the Department's position was substantially justified because it found that the action was not supported by substantial evidence?

### **III. STATEMENT OF THE CASE**

Mr. Courtois first began receiving Developmental Disability Administration (DDA) services in 2002 under the category of "other conditions similar to mental retardation," an eligibility category that no longer exists. CP 391. Throughout his life, he has suffered from various physical and cognitive ailments that have affected his functioning. CP 250-251, 253-255, 299-301. School and medical records over the years describe a kind, respectful, social individual with verbal skills that were often considered his strength. CP 250-251, 253-255. These same records also describe an individual with pervasive difficulties focusing and completing any task. CP 250, 253-255, 258-259, 282. Among other diagnoses, Mr. Courtois was diagnosed with attention deficit hyperactivity disorder (ADHD) during this time. CP 241, 253, 259, 296. Distractibility and impulsivity stemming from his ADHD were described as the biggest behavioral concerns and were surmised to be the cause of his academic and social difficulties. CP 244, 250-251, 255, 266-267, 282. It was not until 2007 that Dr. Heather Daniels, Mr. Courtois's treating physician, first indicated that Mr. Courtois's difficulties might be

attributed to Asperger's syndrome. CP 299. But even then, diagnoses of ADHD and obsessive-compulsive disorder (OCD) remained in Dr. Daniels' list of diagnoses. *Id.*

In February of 2013, when Mr. Courtois was 17 years old, he underwent a neuropsychological evaluation at Seattle Children's Hospital. CP 300-307. During this evaluation, Mr. Courtois scored an 80 on the Wechsler Intelligence Scale for Children, a test that measures an individual's full scale intelligence quotient (FSIQ). CP 306. This evaluation report included a list of his diagnoses at the time of the test and included ADHD, OCD, Asperger's Disorder, and Receptive Expressive Language Disorder. CP 301. Additionally, diagnostic lists by Dr. Daniels both prior to and after this evaluation also included the diagnoses of ADHD and OCD. CP 299 (list of diagnoses from May 2007); CP 315 (list of diagnoses from August 2013.)

In June of 2013, approximately nine months before Mr. Courtois' eighteenth birthday, his DDA case manager began the review process required when a DDA client becomes an adult to ensure he would still be eligible for DDA services. CP 31, Board of Appeals' Finding of Fact (FF) 3; CP 391-392. At that time, DDA determined that Mr. Courtois did not meet the criteria for an eligible condition specific to age ten and older, so they terminated his services. CP 32, FF 6; CP 233.

Mr. Courtois' adoptive mother and representative, Kathy Courtois, appealed this determination and requested a hearing. CP 32, FF 7; CP 240.

In December 2013, DDA received a letter from Dr. Daniels clarifying the August 2013 list which was accompanied by a list of diagnostic criteria for autism diagnoses under the DSM-IV and DSM-5 with selective elements circled as being present issues for Mr. Courtois. CP 317. No mention was made regarding Mr. Courtois' many other previous and long-standing diagnoses, including the diagnosis of ADHD. CP 316-317. At the administrative hearing, Dr. Daniels testified that currently she does not diagnose Mr. Courtois with ADHD. CP 528.

Mr. Courtois's adaptive skills were not tested until April 2014, when the Franklin Pierce School District gave the Adaptive Behavior Assessment System-II. CP 170; see also CP 254 (the District did not test his adaptive behavior in 2002 because it was not an area of concern.) Mr. Courtois' mother, Kathy Courtois, provided responses about Mr. Courtois' adaptive skills. *Id.* She consistently indicated that he "never when needed" completes adaptive skills tasks and he received the very low score of fifty on this test. *Id.*; CP 433. No details about his adaptive skills are reported other than descriptions based on Kathy Courtois' evaluations of his skills. CP 170.

Subsequent to the June 2013 determination, the administrative rules setting forth the criteria for DDA eligibility were updated. CP 32, FF 9. So, at the end of July, 2014, DDA staff reviewed Mr. Courtois' application under the new rules and again found that he was ineligible for DDA services. CP 32, FF 10; CP 392, CP 398.

A hearing regarding Mr. Courtois' eligibility was held on January 26, 2015. CP 31, FF 1; CP 84. The Administrative Law Judge found that Mr. Courtois did not meet his burden of proof to show that he was eligible for DDA services under the eligible condition of autism and held in favor of DDA. CP 31, FF 1; CP 84. Mr. Courtois appealed to the Board of Appeals. CP 31, FF 2; CP 76. The Board of Appeals affirmed the initial order. CP 55.

The Board of Appeals Review Judge found that Mr. Courtois did not prove two necessary elements for eligibility. First, Mr. Courtois did not show that either his FSIQ or his adaptive skills scores were free from the influence of other diagnoses, including mental health diagnoses. CP 52, Board of Appeals' Conclusion of Law (CL) 14; CP 54, CL 16. The Review Judge relied on the fact that Mr. Courtois had diagnostic lists spanning the testing time periods, which listed mental health diagnoses as well as other disabilities. *Id.* The Review Judge noted that the fact that Dr. Daniels says Mr. Courtois no longer suffers from these past mental

health ailments does not negate the fact that he was diagnosed with them at the times the test were given. *Id.* And, because Dr. Daniels was not the one who gave the tests, she cannot speak to whether those scores were unduly influenced by those other conditions at the time of testing. *Id.* Second, the Review Judge found that there was insufficient evidence to prove that the adaptive skills test was effectively administered by a qualified professional because all the evidence about the test indicates that the only data considered were the responses given in the parent evaluation. CP 53, CL 15.

Mr. Courtois requested reconsideration of this Review Decision and Final Order, but this request was denied. CP 21-30; 1-2. In August 2015, Mr. Courtois filed for judicial review with the Pierce County Superior Court. CP 1. In May 2016, the Superior Court reversed the Board of Appeals and found Mr. Courtois eligible for DDA services. CP 625-626. Mr. Courtois then moved for reasonable attorney's costs and fees for the judicial review. CP 631. This motion was denied as the Court found the Department had a reasonable basis in law and fact for the agency action, and that the Department was substantially justified in its action. CP 642.

## IV. ARGUMENT

### A. Standard of Review

The Superior Court's decision on the issue of attorney fees under Washington's Equal Access to Justice Act is reviewed for an abuse of discretion. *Raven v. Department of Social and Health Services*, 177 Wn.2d 804, 832, 306 P.3d 920, 933 (2013). The issue is not whether this Court would award a different amount, but only whether the trial court abused its discretion. *See Chuong Van Pham v. City of Seattle, Seattle City Light*, 159 Wn.2d 527, 540, 151 P.3d 976, 982 (2007). "An abuse of discretion is present only if there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons." *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725, 728, (1995) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). "Three steps are included in this analysis: first, the court has acted on untenable grounds if its factual findings are unsupported by the record; second, the court has acted for untenable reasons if it has used an incorrect standard, or the facts do not meet the requirements of the correct standard; third, the court has acted unreasonably if its decision is outside the range of acceptable choices given the facts and the legal standard." *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922, 925 (Div. 2, 1995). Application of this highly

restrictive standard is necessary to prevent the Court from investing “substantial additional time addressing the merits of the underlying legal issue,” as it would “fail to produce the normal law-clarifying benefits that come from an appellant decision on a question of law or would strangely distort the appellate process.” *Constr. Indus. Training Council v. Wash. St. Apprenticeship & Training Council*, 96 Wn. App. 59, 66, 997 P.2d 655 (Div. I, 1999). The abuse of discretion standard of review under which this Court operates should not be conflated with the substantial evidence standard applied by the Superior Court.

**B. The Superior Court did not Abuse its Discretion in Denying Attorney’s Fees and Costs under the Equal Access to Justice Act**

A prevailing, qualified party is not automatically entitled to attorney fees under RCW 4.84.350, the Equal Access to Justice Act (EAJA). “RCW 4.84.350(1) contemplates that an agency action may be substantially justified, even when the agency's action is ultimately determined to be unfounded. “This may occur, for example, when the agency's determination, though ultimately unsupported by the evidence, was made on the best available evidence at the time of the decision.” *Raven*, 177 Wn.2d at 832–33 (citing *Kettle Range Conservation Grp. v. Dep't of Natural Res.*, 120 Wn. App. 434, 469–70, 85 P.3d 894 (2003)). The award is not granted if the agency’s action was “substantially justified.” RCW 4.84.350. Although the

term “substantially justified” is not statutorily defined, Washington courts have followed federal courts in construing the term to mean that the state is required to show that the agency action had a reasonable basis in law and in fact.<sup>1</sup> *See Pierce v. Underwood*, 487 U.S. 552, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988); *Constr. Indus. Training Council*, 96 Wn. App. at 68.

**1. Judicial review under the Administrative Procedure Act and the EAJA have separate standards**

Mr. Courtois argues that, as a matter of law, the superior court should have been prevented from making a finding that the Department was substantially justified in its actions for the purpose of the EAJA because the court previously found that, under the Administrative Procedure Act (APA), those actions were not supported by substantial evidence. Appellant Brief at 25. However, the argument that the standards of APA judicial review and the EAJA are equivalent conflicts with both the plain language of the statute and case law interpreting it. Mr. Courtois concedes that there is no published Washington case supporting this position. *Id.* at 22.

In its ruling from the bench, the Superior Court determined that the standard for fee shifting under the EAJA is not directly equivalent to the

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<sup>1</sup> Washington’s Equal Access to Justice Act was patterned after the federal Equal Access to Justice Act. *See* federal Equal Access to Justice Act, Pub. L. No. 99-80, 99 Stat. 183 (codified at 28 U.S.C. § 2412 & 5 U.S.C. §§ 504, 555). As a consequence, our courts have often turned to federal case law for guidance. *See, e.g., Constr. Indus. Training Council*, 96 Wn. App. at 64-65.

standard of review applied to judicial review of agency action under the APA: “The outcome of the litigation, favorable to Mr. Courtois, it doesn't automatically follow that the Department's position was unreasonable and not substantially justified.” VRP at 15. This follows the reasoning in *Constr. Indus. Training Council*: that equating the two standards would create the “undesirable effect” of an award under the EAJA when the law appeared to have been favorable to the government, or at least unsettled, before it lost its case. *Constr. Indus. Training Council*, 96 Wn.2d at 67 (citing *Pierce v. Underwood*, 487 U.S. 552, 561 (1988)).

**2. The Department's actions were substantially justified**

To be substantially justified, the Department's decision need not be correct, only reasonable. *Id.* In determining whether agency action is substantially justified, the court examines whether the agency has a statutory authority to act, whether it has a duty to construe the substantive law liberally in favor of protected individuals, and whether or not there is guiding precedent on point. *See Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 892-93, 154 P.3d 891 (2007). In addition, agency action taken with an effort to balance “sensitive, sometimes competing or conflicting interests in a controversial area” is substantially justified, making it appropriate for the court to deny an award under the EAJA. *See,*

*e.g., Plum Creek Timber Co. v. Wash. State Forest Practices Appeals Bd.*, 99 Wn. App. 579, 595-96, 993 P.2d 287 (2000).

The Superior Court applied the correct legal standard, finding that the Department was substantially justified in its action. CP 642. In this case, the primary issue of dispute was the interpretation of a rule regarding the effect of dual diagnoses in determining eligibility for DDA services. When considering the arguments of the Department, the Court stated

I disagree... that the arguments by the Department were difficult to make. The arguments made then and now, they don't seem to me that they were a reach. The arguments were made in good faith. They are very interesting issues in this case.

The questions for the Court then were much closer questions than the petitioner now asserts. The legal answers for me were not obvious. I believe the Department's arguments then were fair under both the law and the facts.

VRP at 15-16.

The Department's actions in this case were substantially justified. In order to be eligible for DDA services, Mr. Courtois had the burden to show that his FSIQ and adaptive skills test scores reflected limitations caused by a developmental disability, not limitations caused by another condition. WAC 388-823-0720, -0740. The Review Judge found that Mr. Courtois did not meet this burden because he did not show that his qualifying FSIQ and adaptive skills scores were caused by his developmental disability, and not his other diagnoses that were present at

the time of testing. CP 52, CL 14; CP 54, CL 16. Mr. Courtois argued that DDA had erroneously interpreted or applied WAC 388-823-0720(2) and -0740(2). He argued that the requirements in WAC 388-823-0720(2) and -0740(2) only apply if an individual is dually diagnosed at the time of the Department determination because WAC 388-823-0720(2)(a) and WAC 388-823-0740(2)(a) were written in the present tense. Appellant's Brief at 19. However, the Department's differing interpretation of this rule was substantially justified. WAC 388-823-0720 says:

(2) The FSIQ score cannot be attributable to mental illness or other psychiatric condition occurring at any age; or other illness or injury occurring after age eighteen.

(a) If you are dually diagnosed with a qualifying condition and mental illness, other psychiatric condition, or other illness or injury, you must provide acceptable documentation that your intellectual impairment, measured by a FSIQ test, would meet the requirements for DDA eligibility without the influence of the mental illness, other psychiatric condition, or other illness or injury.<sup>2</sup>

This regulation must be read in its entirety. The first part of subsection (2) lays out the fundamental purpose of this provision: the score itself cannot be attributable to another illness to ensure the test itself accurately reflects the actual disability. Subsection (2)(a) then articulates what an individual must prove if they are dually diagnosed in order to satisfy that purpose.

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<sup>2</sup> The text of WAC 388-823-0720 and -0740 are substantially the same regarding this requirement, except WAC 388-823-0720 applies to FSIQ test scores and WAC 388-823-0740 applies to adaptive skills test scores. While I quote only one of these provisions, the argument is equally applicable to the other.

Focusing solely on the present tense of (2)(a) would ignore this relationship between subsections (a) and the main text of (2) and it would completely ignore the main purpose of this requirement. Appellant's interpretation also would ignore the fact that the focus of the rule is on the test score itself. WAC 388-823-0720(2) ("The FSIQ score cannot be attributable . . . "); WAC 388-823-0740(2) ("The adaptive skills test score cannot be a result of . . . "). Thus, what matters is the individual's diagnoses at the time of the test and only someone who observed or administered the test should be able to express an opinion about whether any other factors influenced the score. A plain reading of this entire regulation supports DDA's interpretation that any time an individual carries dual diagnoses at the time the score is obtained, there has to be documentation from an individual with actual knowledge of the performance on the test to indicate the score is the product of the disability.

Although Mr. Courtois ultimately prevailed on judicial review, the Superior Court accepted that the Department's argument, above, was substantially justified when considering whether to award fees under the EAJA. VRP at 15. Mr. Courtois's burden here is to show that this decision of the Superior Court was an abuse of discretion. The Superior Court made just two findings in the decision on appeal: "(1) the

Department had a reasonable basis in law and fact for the agency action [and] (2) the Department was substantially justified in its action.” CP 642. Mr. Courtois has not shown that this exercise of the Superior Court’s discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons.

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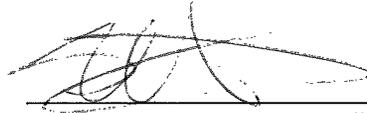
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**V. CONCLUSION**

The Department respectfully requests that this Court affirm the decision of the Superior Court to decline Mr. Courtois' request for attorney's fees and costs under the Equal Access to Justice Act.

RESPECTFULLY SUBMITTED this 21 day of December, 2016.

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**CERTIFICATE OF SERVICE**

I certify that on the date indicated below, I served a true and correct copy of the foregoing RESPONDENT’S BRIEF on all parties or their counsel of record as follows:

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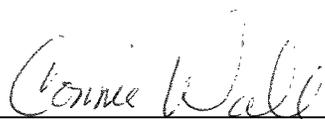
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

EXECUTED this 21<sup>st</sup> day of December, 2016 at Tumwater,  
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\_\_\_\_\_  
CONNIE WALL, Legal Assistant

**WASHINGTON STATE ATTORNEY GENERAL**

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