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SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

DAVID J. JENKINS,

Respondent,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Appellant.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Respondent Jenkins receives public assistance from the Community Options Program Entry System (COPES), a Medicaid waiver program under which Appellant, Department of Social and Health Services (DSHS or Department), pays for in-home services for low-income disabled individuals to allow them to remain in their homes as an alternative to nursing homes or other institutions. In this lawsuit he challenges a rule by which the Department determines the need that Mr. Jenkins and other COPES recipients have for publicly paid services.

The rule, the so-called "shared living" rule, WAC 388-106-0130(3)(b),[1] adjusts the amount of publicly paid care for COPES recipients who, like Mr. Jenkins, reside with their paid caregiver. The adjustment is based on the premise that the need for publicly paid assistance in such situations is reduced because the caregivers will be performing some tasks—such as housekeeping, shopping for food, and preparing meals—for the residential unit as a whole even if they were not being paid by public funds to provide services to the recipient(s) with whom they reside.

The shared living rule is a component of the Comprehensive Assessment and Reporting Evaluation (CARE), a multi-faceted tool

[1] The rule was formerly WAC 388-72A-0095 but was renumbered as part of a consolidation of DSHS rules relating to long-term care. *See* Wash. St. Reg. 05-11-082.

developed by the Department to determine the level of need for publicly paid assistance to individuals enrolled in COPES and three other programs administered by the Department. The CARE assessment is designed to allocate limited public assistance resources on a consistent and equitable basis statewide. The mechanics of the CARE assessment system are delineated in WAC 388-106-0080 through 388-106-0140, and are described in detail in the Brief of Appellant (Br. of App.) at pages 9-19.

The superior court held that the shared living rule violates (1) the "comparability" provision of Medicaid law, (2) the Americans with Disabilities Act, (3) the Due Process and Equal Protection Clauses of the federal constitution, (4) the Privileges and Immunities Clause of the state constitution, and (5) as a result is arbitrary and capricious and outside the scope of the Department's authority. Clerk's Papers (CP) at 1189-97.

In addition, the superior court held that a long-standing DSHS rule providing that Administrative Law Judges (ALJs) do not have authority to invalidate departmental regulations violates due process. CP at 1191. The superior court rejected Mr. Jenkins' claim that the rule violates the Medicaid "choice-of-provider" provision, and in a ruling that he has not cross-appealed, reduced his requested attorneys' fees.[2] CP at 1161-65.

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[2] Although he did not appeal the "choice-of-provider" ruling, Mr. Jenkins can defend the decision below on any theory that was argued to the court below. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 32, 864 P.2d 921 (1993). The

The Department's opening brief demonstrated that the superior court's rulings were legally flawed. In his reply brief, Mr. Jenkins attempts to bolster those rulings, but, as discussed more fully below, is ultimately unsuccessful. The superior court's invalidation of the shared living rule was in error and should be reversed.

II. ARGUMENT

A. The Shared Living Rule Does Not Violate The Medicaid Comparability Requirement

Respondent argues that "[t]he Shared Living Rule violates the Federal Medicaid Comparability Statute [sic] because it offers disparate benefits to recipients within the same classification by allocating benefits based upon the care provider's living status instead of on the medical need of the individual." Brief of Respondent (Br. of Resp't) at 16. His argument relies heavily on *Gasper v. Dep't of Soc. & Health Servs.*, 132 Wn. App. 42, 129 P.3d 849 (2006), *motion for recons. pending.*[3]

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same is *not* true with respect to Mr. Jenkins' attempt to overturn part of the superior court's decision regarding attorneys' fees, a decision that he did not cross-appeal. *See* Part II.H *infra*, p. 44.

[3] As of the date of this brief, the Washington Appellate Reports citation to the *Gasper* opinion was available, but the pagination was not. Accordingly, citations in the brief are to the Court of Appeals' slip opinion, a copy of which is attached. Respondent refers throughout his brief to this case as "*Myers,*" choosing to use the name of the COPES recipient whose appeal was consolidated with that of Ms. Gasper. In *Gasper*, Division II of the Court of Appeals affirmed a Thurston County Superior Court ruling that the shared living rule violates the comparability requirement of 42 U.S.C. § 1396a(a)(10)(B), and invalidated the rule. *Gasper*, Slip Op. at 8-13. The Court of Appeals reversed the superior court's ruling that the rule violates the choice-of-provider requirement of 42 U.S.C. § 1396a(a)(23). *Gasper*, Slip Op. at 13-14. The superior court's ruling was stayed pending appeal, except as to the two recipients involved.

There are at least three reasons why both Mr. Jenkins and the *Gasper* court are incorrect. First, by applying the comparability requirement to a rule used in determining the *need* for publicly paid services, both Mr. Jenkins and the *Gasper* court confuse the *need* of the clients, as determined by the CARE tool, with the services paid for from public funds to meet that need.

The Medicaid comparability provision does not require that recipients be provided the same level of services if their needs are in fact different; it only requires that services provided to similarly situated clients be comparable. The shared living rule meets that requirement in that all recipients with live-in providers are treated the same, as are all recipients who do not reside with their caregivers.

Second, the *Gasper* court recognized that the Department "may use a reasonable method (such as the CARE assessment program) to determine a recipient's true need." *Gasper*, Slip Op. at 10.[4] However, by

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Following the issuance of the Court of Appeals' decision, both parties moved for reconsideration, and the Court of Appeals extended the stay of the superior court's ruling until 30 days following issuance of a final decision on those motions. The Court of Appeals has issued an interim order denying all but one aspect of the Department's motion for reconsideration, and directing the parties to respond to the remaining issue in their respective motions. The Department's motion to stay further consideration of the *Gasper* and *Myers* cases pending resolution of this matter is pending as of the date this brief was prepared.

[4] Similarly, Mr. Jenkins challenges only one of the many components of the CARE assessment tool, but not the tool itself. By seeking only the "base" hours calculated through his CARE assessment, he impliedly concedes that, but for the application of the shared living rule, the assessment of his level of need was correct.

requiring an individualized determination of recipients' "actual need," the *Gasper* court demonstrated a misunderstanding of the Medicaid comparability requirement. Further, the Court's opinion appears to overlook the holding of the U.S. Supreme Court that public assistance benefits need not be based on individualized determinations.

Third, both Mr. Jenkins and the *Gasper* court acknowledge that the federal government has waived the comparability requirement as to the COPES program from which Mr. Jenkins receives benefits. *Gasper*, Slip. Op. at 11-12; Br. of Resp't at 22. However, they both ignore the federal rule providing that once such a waiver for home and community-based services has been granted, "*the services provided under the waiver need not be comparable for all individuals within a group.*" 42 C.F.R. § 440.250(k) (emphasis added). Rather, they both contend that the waiver was somehow limited, a concept that finds no support or recognition in either the Medicaid statutes or regulations or in the case law interpreting them.

1. The Shared Living Rule Is Part Of The Determination Of Clients' Need For Publicly Paid Services; The Comparability Requirement Applies Only To The Services That Are Provided Once The Level Of Need Is Determined

The *Gasper* court's opinion acknowledges that the CARE assessment tool is a reasonable means to determine the "true need" of in-

home care recipients, and that the Department's assessment "process is entirely consistent with the Medicaid program's purposes." *Gasper*, Slip Op. at 10. The opinion also acknowledges that "[h]aving a live-in provider certainly may affect a recipient's need [because p]roviders will do things for themselves that reduce the needs of their clients (such as clean the house)." *Id.*

However, the *Gasper* court's holding that the Medicaid comparability provision requires an assessment of the recipient's "individual situation[]" (*Gasper*, Slip. Op. at 10) is not accurate.[5] What the Court's opinion overlooks is that the shared living rule functions as part of the CARE assessment in determining the level of need for publicly paid assistance.

Mr. Jenkins errs by conflating a recipient's *total* need for personal care services with a recipient's need for *Department-paid* personal care services. As the *Gasper* court observed, Mr. Jenkins' live-in care provider will meet some of his needs regardless of whether paid to do so. Accordingly, he receives fewer Department-paid personal care services

[5] Significantly, the *Gasper* court did not cite any authority for the proposition that public assistance benefits must be tailored to "individual situations." The reason for this absence of authority is simple—there is no support in the case law or the applicable statutes for that proposition. In addition, the statement reflects the logical flaw of the *Gasper* court's analysis. Individualized assessments are inherently difficult to calibrate so that results are consistent; thus, the consequences of the approach that the *Gasper* court would require will generate more variability—and thus *less* comparability—among similarly situated COPES recipients than does the shared living rule. It is illogical to mandate such variances in the name of comparability.

than a recipient with no such informal support. However, the Department-paid personal care services, combined with those provided by his live-in caregiver, provide Mr. Jenkins with the same total personal care services as a recipient who does not have a live-in caregiver. The total personal care services Mr. Jenkins receives are, therefore, equal in amount, duration, and scope to other long-term care recipients.[6]

It is not that Mr. Jenkins' needs are unmet; rather, the shared living rule reflects the reality that at least some of his needs for assistance will be met—as the *Gasper* court recognized—through activities that a live-in caregiver would perform even if not being paid by the Department for doing so. The combination of these informal supports, plus the paid assistance, fully meets Mr. Jenkins' needs.[7]

The confusion that is evident in Mr. Jenkins' argument and the *Gasper* court's analysis between level of need on the one hand and paid service level on the other may arise from the manner in which the calculation of hours is conducted in CARE, i.e., by first determining the base-line number of hours for those clients who have an outside caregiver

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[6] In this respect, this case is distinguishable from *Sobky v. Smoley*, 855 F. Supp. 1123 (E.D. Cal. 1994), cited by Respondent in Br. of Resp't at 18-19. In *Sobky*, the State of California's Methadone drug treatment plan was found to violate federal comparability requirements because similarly situated individuals received differing levels of state-paid treatment based solely on their county of residence, not on their need for state-paid treatment services. *Sobky*, 855 F. Supp. at 1140-44.

[7] Mr. Jenkins may be confusing the level of services he receives with the efficacy of those services. If he believes that relying on his in-home provider will not be efficacious, the Department will pay for an outside provider for him.

and making a reduction based on the shared living rule. Thus, for example, the *Gasper* court stated that "DSHS violates the comparability requirement if it *reduces* a recipient's benefits based on a consideration other than the recipient's actual need." *Gasper*, Slip Op. at 10 (emphasis added). The shared living rule is but one of the many factors that combine to determine the client's "true need"; it is no more a reduction of benefits than other factors—medical diagnosis and physical and mental capacity—that are considered in the CARE assessment and that directly affect the ultimate determination as to the number of hours of paid care a recipient needs.

An alternative approach that the Department could have used in constructing the CARE assessment illustrates the point. Rather than beginning with the assumption that all clients would have an outside caregiver, the CARE assessment could have been constructed with the base number of hours calculated for those clients whose caregivers reside with them. Applying a CARE tool constructed under this scenario, clients such as hypothetical client 3[8] would receive 163 hours as their base. There would be no shared living rule deduction for those recipients living with their caregivers under that scenario and therefore no comparability

[8] *See* Br. of App. at 17-18 and the appendix thereto at A39.

violation under the *Gasper* court's formulation. Yet the result for Mr. Jenkins would be the same.

The approach described in the preceding paragraph would likely include an additive to the need calculation for those recipients whose providers don't reside with them, with the result that some recipients would claim that the differential calculation violates the comparability provision. However, what this hypothetical approach described above illustrates is that the adjustment, whether in the form of a reduction or an increase, is part of the need calculation, and not a differential level of service unrelated to need.

The point is simply this: both Mr. Jenkins and the *Gasper* court view the shared living rule as a separate calculation of service level once the need determination has been made. Instead, the shared living rule is correctly viewed as an integral part of the need determination itself. Medicaid law does not require that needs that are in fact different be treated as the same; the superior court's holding regarding comparability of service was wrong and should be reversed.

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2. The Comparability Provision Does Not Require The Department To Make An Individualized Determination Of The Extent To Which A Client's Needs Are Met By A Live-In Provider

As pointed out in the Department's opening brief, the general rule is that "[a]dministrative 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 *Gasper* court recognized as much when it stated that using a "reasonable method (such as the CARE assessment program) to determine a recipient's true need . . . is entirely consistent with the Medicaid program's purposes." *Gasper*, Slip Op. at 10.

Yet both Mr. Jenkins and the *Gasper* court depart from this well-settled rule by arguing that the Department must base its need determinations on "the realities of [recipients'] individual situations." *Gasper*, Slip Op. at 10. There is no support for this proposition; it is not a correct statement of the law.

Just as it is reasonable for the Department to determine that a recipient who depends on some assistance with most activities of daily living and has a clinically complex medical condition and significant

cognitive impairment will have a base-line need of 190 hours per month,[9] it is equally reasonable for the Department to base its final need determination on the premise that a fixed percentage of those hours will be provided by a live-in caregiver, whether paid for by the Department or not, and that the need for publicly paid services is therefore less for those whose caregivers reside with them than for those whose caregivers live elsewhere.

There is no provision of Medicaid law requiring an individualized determination of public assistance benefits. Moreover, the U.S. Supreme Court has recognized that, in the public assistance context,

> [t]he administrative difficulties of individual . . . determinations are without doubt matters which [policy makers] may consider when determining whether to rely on rules which sweep more broadly than the evils with which they seek to deal. In this sense, [a bright line rule] represents not merely a substantive policy determination [as to the benefits at issue] but also a substantive policy determination that limited resources would not be well spent in making individual determinations. It is [a] policy choice that the [beneficiaries] would be best served by a [firm] rule . . . which is also objective and easily administered.

Weinberger v. Salfi, 422 U.S. 749, 784-85, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975).[10]

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[9] This describes hypothetical client 3, discussed in Br. of App. at 17-18 and in the appendix to that brief at A39.

[10] The administrative costs of conducting the kind of individual assessments called for by the *Gasper* court's opinion would be significant, given that more than

In short, there is no basis for the proposition that the Department must make individual determinations of the "actual needs" of recipients. Mr. Jenkins' arguments to the contrary should be rejected.

3. The Comparability Requirement Has Been Waived With Respect To The COPES Program

The discussion above demonstrates that the shared living rule is part of the mechanism for determining the level of publicly paid services needed for a client receiving services under the home and community-based services programs administered by the Department, and that accordingly the Medicaid provision requiring services to be comparable is not implicated by the rule. However, assuming *arguendo* that the rule does conflict with the comparability provision, Mr. Jenkins' argument fails to recognize the effect that the waiver of that requirement has with respect to the COPES program from which he receives benefits.

The COPES program, through which Mr. Jenkins receives services, is a home and community-based services program operating under a waiver granted by the federal Centers for Medicare and Medicaid Services (CMS) pursuant to the authority of § 1915(c) of the Social

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10,500 recipients of DSHS-funded personal care services are affected by the shared living rule. Moreover, such evaluations are inherently subjective and more difficult to calibrate to assure consistency across the state. These realities in and of themselves provide a sufficient basis to justify the Department's policy decision to adopt the fixed percentage approach reflected in the shared living rule.

Security Act (42 U.S.C. § 1396n(c)(1)).[11] Mr. Jenkins acknowledges that the Department was granted a waiver of the Medicaid comparability requirement. Br. of Resp't at 22.[12]

However, Mr. Jenkins relies on the *Gasper* court's statement that "[w]ithout showing that it somehow incorporated the shared living rule into its waiver request, DSHS cannot claim that the Secretary waived the comparability requirements for those who live with their caregivers." *Gasper*, Slip Op. at 12, paraphrased in Br. of Resp't at 23. This statement is incorrect, as is the *Gasper* court's assertion that "[a] general waiver of the comparability requirement does not suffice" to authorize "varying levels of service" under the waiver. *Gasper*, Slip Op. at 13. These statements misconstrue the requirements of the statute authorizing waiver programs and understate the effect of the waiver that was granted.

First, these statements completely disregard 42 C.F.R. § 440.250(k), which specifically provides that:

> If the [state Medicaid] agency has been granted a waiver of the requirements of § 440.240 (Comparability of services) in order to provide for home or community-based services under §§ 440.180 or 440.181, *the services*

[11] A copy of the waiver is in the record at CP 963-68.

[12] There can be little doubt that the comparability provision was waived in light of the statement in CMS's guidance to states regarding waiver applications that "a waiver of §1902(a)(10)(B) [42 U.S.C. §1396a(10)(B), the comparability provision] is an integral and necessary feature of all HCBS waivers." Centers for Medicare & Medicaid Services, Application for a §1915(c) Home and Community-Based Waiver [Version 3.3] – Instructions, Technical Guide and Review Criteria at 6. Instructions for downloading this document from the CMS Web site were included in the Br. of App. at 36 n.34.

> *provided under the waiver need not be comparable for all individuals within a group.*

(Emphasis added.) Because the two C.F.R. sections cited in this rule (42 C.F.R. §§ 440.180 and 440.181) are the authority for the COPES program at issue here, this language explicitly refutes the above-quoted statements from the *Gasper* court's opinion.

Further, neither of the two cases cited by the *Gasper* court—*Beckwith v. Kizer*, 912 F.2d 1139, 1141 (9th Cir. 1990), and *Skandalis v. Rowe*, 14 F.3d 173, 176 (2d Cir. 1994)—as support for the first statement quoted actually stands for the proposition for which it is cited.

Beckwith involved a challenge to an eligibility requirement under a waiver program administered by the State of California, a challenge the Ninth Circuit rejected in part because the eligibility provision had been clearly spelled out in the waiver application. Unlike *Beckwith*, this case has nothing to do with eligibility for the programs at issue, nor has the eligibility of either Respondent ever been questioned. *Beckwith* simply has no application to the instant case.

Even more curious is the Gasper court's citation to *Skandalis*, which, like *Beckwith*, also involved a challenge to an eligibility requirement—Connecticut's exclusion from coverage under a home and community-based waiver of those individuals whose income exceeded a

specific limit even though those same persons would nonetheless be eligible for nursing home care under the state's basic Medicaid plan. The Second Circuit rejected the claims of those excluded from coverage that the income limitation was not authorized under the Medicaid Act. The court's language describing the purpose behind the statute authorizing Medicaid waiver programs is instructive:

> Unlike the Medicaid program itself, which requires participating states to provide certain services to "all individuals" who fall into the group of the mandatory categorically needy, 42 U.S.C. § 1396a(a)(10)(A)(i), *the waiver program expressly contemplates a waiver of the "comparability" requirement so that individuals within the program may receive varying levels of service*, 42 U.S.C. § 1396n(c)(3) . . . . However appalling the consequences may be to particular Medicaid claimants, *the Act authorizes a variety of harsh distinctions, which may result in disparate treatment of individuals having similar or identical needs.*

Skandalis, 14 F.3d at 181 (emphasis added) (citation and footnote and some internal punctuation omitted). Thus, not only does the *Skandalis* opinion focus on an eligibility requirement—and not a level of need issue such as present here and at issue in *Gasper*—its description of the Medicaid waiver statute demonstrates that the *Gasper* court's reading of the waiver of comparability granted to the Department is far too narrow.

The superior court's conclusion that the shared living rule violates the Medicaid comparability requirement was error and should be reversed.

B. The Shared Living Rule Does Not Violate The Washington Constitution

Mr. Jenkins also argues that the shared living rule violates the Privileges and Immunities Clause of the Washington State Constitution because the "state confers a special privilege on the person without a live-in caregiver." Br. of Resp't at 51. This argument is inaccurate; more importantly it reflects a flawed understanding of the constitutional provision on which it is based.

In the first place, Mr. Jenkins' argument is predicated upon the notion that the Department has created two classes of recipients—those with live-in caregivers and those who do not reside with their caregivers—and that these two classes are inherently different. This is not accurate. To the extent there is a differentiation between recipients, it is because the recipients themselves have made a choice to receive services from a particular provider. Thus, Mr. Jenkins could choose to receive assistance from someone other than the person with whom he lives. The fact that he has made a different choice, which by its nature results in a reduced need for publicly paid services, does not mean that one choice creates a privilege not enjoyed by those who make the second choice.

Further, article I, § 12 of the state constitution provides greater protection than the federal Equal Protection Clause applies only as to

"those fundamental rights which belong to the citizens of the state by reason of such citizenship." *Grant Cy. Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 813, 83 P.3d 419 (2004).[13] Recognizing this limitation, Mr. Jenkins argues that participation in COPES is such a right: "The Medicaid program is a statutory entitlement program *held by all the citizens of the state.*" Br. of Resp't at 48 (emphasis in original). He further asserts that "[t]he state must provide Medicaid benefits *to all citizens* within the state who qualify. It is a long-standing and fundamental right everyone in this state enjoys just by being a citizen of this state." *Id.* at 49 (emphasis in original omitted). These statements are exactly wrong.

First, there is no obligation on the part of the state to participate in the Medicaid program at all—participation by the states is completely voluntary. *Independent Acceptance Co. v. State of California*, 204 F.3d 1247, 1249 (9th Cir. 2000). Just as the Legislature has plenary power over annexation (the issue in *Grant County*), it also has the plenary power to

[13] The *Grant County* case involved a challenge to the petition method of annexing unincorporated property into cities, on the basis that the statute authorizing the petition granted a special privilege to certain property owners. The Supreme Court rejected the argument, noting that "the legislature enjoys plenary power to adjust the boundaries of municipal corporations and may authorize annexation without the consent of the residents and even over their express protest." 150 Wn.2d at 813 (emphasis in original omitted).

completely withdraw the state from participation in the Medicaid program.[14]

Second, states have considerable discretion in structuring their Medicaid programs; subject to the approval of the federal government, states determine who is eligible for the program, the services that will be offered, the payment levels to service providers, and operating procedures. *Rite Aid of Pa., Inc. v. Houstoun*, 171 F.3d 842, 845 (3d Cir. 1999). While some services are mandatory, others are optional. *See* 42 U.S.C. § 1396a(a)(10); *M.A.C. v. Betit*, 284 F. Supp. 2d 1298, 1302 (D. Utah 2003).

States' flexibility is especially important to waiver programs such as the COPES program from which Mr. Jenkins receives benefits. As explained in the Department's brief, Br. of App. at 30, waivers are designed specifically to encourage experimentation and innovation in offering services. *Bryson v. Shumway*, 308 F.3d 79, 82 (1st Cir. 2002). For example, states may limit the number of otherwise eligible persons who participate in a waiver program. *Id.* at 86 (upholding a limit of 130 participants in a state-wide home and community-based services waiver).

There is simply no support for the proposition that the shared living rule violates the Washington Constitution.

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[14] Likewise, Congress retains plenary power to amend, adjust, or completely abolish the Medicaid program as well.

C. The Shared Living Rule Does Not Violate The Fourteenth Amendment To The U.S. Constitution

Mr. Jenkins argues that the shared living rule violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution. Br. of Resp't at 34-39, 52-55. The shared living rule is rationally related to the state's legitimate interest in allocating limited resources across a needy population; the rule violates neither provision.

1. Due Process

Mr. Jenkins asserts that "[t]he Shared Living Rule should be invalidated [as violative of due process] because it creates an irrebuttable presumption that is not rationally related to a legitimate legislative goal." Br. of Resp't at 37. That assertion is incorrect.

As explained in Appellant's opening brief, the U.S. Supreme Court has expressed reluctance to interfere with conditions on "noncontractual claim[s] to receive funds from the public treasury" such as the claim asserted by Mr. Jenkins in this case. *Weinberger v. Salfi*, 422 U.S. 749, 772, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975), discussed in Br. of App. at 52. Rather, the Court reaffirmed a long-standing principle governing such determinations:

> Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as Social Security, we must recognize that the Due Process Clause can be thought to interpose a bar only if the

> [condition on receipt] manifests a patently arbitrary classification, utterly lacking in rational justification.

Salfi, 422 U.S. at 768 (internal punctuation marks omitted) (quoting *Flemming v. Nestor*, 363 U.S. 603, 611, 80 S. Ct. 1367, 1373, 4 L. Ed. 2d 1435 (1960)).

Mr. Jenkins relies on two cases cited—but not relied upon—by the *Salfi* court: *Jimenez v. Weinberger*, 417 U.S. 628, 636, 94 S. Ct. 2496, 2501, 41 L. Ed. 2d 363 (1974), and *U.S. Dep't of Agriculture v. Murry*, 413 U.S. 508, 513-14, 93 S. Ct. 2832, 2835, 37 L. Ed. 2d 767 (1973), both cited in *Salfi* at 422 U.S. 772, and discussed in Br. of Resp't at 35-38. Neither supports Mr. Jenkins' due process arguments.

Jiminez was a challenge to a Social Security Act provision denying benefits with respect to a disabled worker's illegitimate children who were born after the establishment of the disability and who, under state law, were not permitted to inherit from the wage earner. There was no such prohibition with respect to post-disability legitimate children, nor with respect to children whose illegitimacy was the result of technical defects with their parents' marriages.

The *Jiminez* plaintiffs asserted that the prohibition violated their due process and equal protection rights, and the Supreme Court agreed. In doing so, the *Jiminez* Court distinguished *Dandridge v. Williams*, 397 U.S.

471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970), which upheld Maryland's cap on benefits to a single family under its cash assistance program.

> This special deference to Maryland's statutory approach was necessary because, "(g)iven Maryland's finite resources, its choice is either to support some families adequately and others less adequately, or not to give sufficient support to any family." [397 U.S.] at 479, 90 S. Ct., at 1159. Here, by contrast, there is no evidence supporting the contention that to allow illegitimates in the classification of appellants to receive benefits would significantly impair the federal Social Security trust fund and necessitate a reduction in the scope of persons benefited by the Act.

Jimenez, 417 U.S. at 633 (internal quotation marks omitted).

Mr. Jenkins seizes on this language and asserts that there is not "even a scintilla of evidence in the record to demonstrate how paying care providers [for work that benefits the entire household] would have any effect whatsoever [sic] COPES fund and necessitate a reduction in the scope of persons benefited by it." Br. of Resp't at 38. This is a remarkably ill-informed statement.

In the first place, there is no "COPES fund." Unlike such federal Social Security programs as Old Age and Survivors Insurance and Medicare, which are supported by a trust fund, the state's participation in the COPES program depends on a biennial appropriation by the Legislature exercising its constitutional duty to allocate state resources among many competing demands. *See, e.g.,* Laws of 2005, ch. 518, § 205,

appropriating approximately $2.5 billion for programs for disabled adults and the elderly.[15]

Second, the amount appropriated, while significant, is in the end a finite amount, and the Department is prohibited from spending any more than the amount appropriated. *See* article VIII, § 4 of the Washington State Constitution ("No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law . . ."). As our Supreme Court has observed:

> Long ago, we recognized the central object of section 4 was ""to secure to the legislative department of the government the exclusive power of deciding how, when, and for what purposes the public funds shall be applied in carrying on the government."" *State v. Clausen,* 94 Wash. 166, 173, 162 P. 1 (1917) (quoting *Humbert v. Dunn,* 84 Cal. 57, 59, 24 P. 111 (1890)).

Washington Ass'n of Neighborhood Stores v. State, 149 Wn.2d 359, 365, 70 P.3d 920 (2003).[16]

Finally, it does not require "even a scintilla" of common sense to understand that not paying live-in providers for work that they would do anyway allows more recipients to be served within the finite amount of

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[15] Similarly, the federal government's participation is dependent upon a congressional appropriation. *See* 42 U.S.C. § 1396b (authorizing payment of a portion of states' approved Medicaid expenditures "[f]rom the sums appropriated therefor").

[16] *See also* RCW 43.88.260(1) ("It shall be unlawful for any agency head or disbursing officer to incur any cash deficiency and any appointive officer or employee violating the provisions of this section shall be subject to summary removal.").

money appropriated by the Legislature. Conversely, any increase in the cost of the COPES program will generate one of three results: (1) fewer people being able to participate; (2) participants receiving fewer services; or (3) moneys currently appropriated for other worthwhile programs being re-directed by the Legislature to the COPES program. The shared living rule avoids these consequences by taking advantage of informal supports and paying providers only for those services that benefit the recipient and no one else. It is rationally related to the allocation of finite resources across a needy population, and that provides a sufficient basis to meet Mr. Jenkins' due process challenge.

Mr. Jenkins' reliance on the *Murry* case is likewise misplaced. Although *Murry* invalidated a food stamp eligibility rule, only three justices voted to do so on substantive due process grounds. Further, all three of the opinions that made up the *Murry* decision relied heavily on decisions that the *Salfi* Court held inapplicable in the public assistance context.[17] *Murry* provides no support for Mr. Jenkins' argument.

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[17] *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d. 551 (1972), (holding that an Illinois statute establishing a presumption of unfitness for unwed fathers in child dependency proceedings violated the Due Process Clause of the federal constitution), and *Vlandis v. Kline*, 412 U.S. 441, 93 S. Ct. 2230, 37 L. Ed. 2d 63 (1973) (invalidating state statute providing that for purpose of paying tuition at a state funded college or university, the student's out-of-state residence status continued throughout the student's time at the college).

In addition, in attempting to dismiss the significance of the *Salfi* decision on the basis of cases decided *before* it was handed down, Mr. Jenkins ignores two decisions made subsequent to the *Salfi* case that further undercut his due process argument. In *Mathews v. Lucas*, 427 U.S. 495, 96 S. Ct. 2755, 49 L. Ed. 2d 651 (1976), the Supreme Court rejected a challenge to a provision of the Social Security Act that limited survivors' benefits for illegitimate children unless they were actually residing with or being supported by the deceased beneficiary at the time of death.[18]

The *Lucas* opinion acknowledged that the legislative purpose in requiring illegitimate children but not legitimate children to show actual need was "obviously to serve administrative convenience" (*id.* at 509):

> Such presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, are permissible under the Fifth Amendment, so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny.

Id. (citing *Salfi*, 422 U.S. at 772). Particularly relevant to this case is the following observation by the *Lucas* court:

> [T]he constitutional question is not whether such a presumption [in favor of legitimate children] is required, but whether it is permitted. Nor, in ratifying these statutory classifications, is our role to hypothesize independently on the desirability or feasibility of any possible alternative

[18] Because legitimate children and those illegitimate children who could inherit from the deceased worker under state law did not have to demonstrate actual dependency, the *Lucas* plaintiffs alleged that the statute violated substantive due process.

> basis for presumption. These matters of practical judgment and empirical calculation are for Congress. . . . Our role is simply to determine whether Congress' assumptions are so inconsistent or insubstantial as not to be reasonably supportive of its conclusions that individualized factual inquiry in order to isolate each nondependent child in a given class of cases is unwarranted as an administrative exercise. In the end, the precise accuracy of Congress' calculations is not a matter of specialized judicial competence; and we have no basis to question their detail beyond the evident consistency and substantiality.

Lucas, 427 U.S. at 515-16.

Similarly, in *Califano v. Boles*, 443 U.S. 282, 99 S. Ct. 2767, 61 L. Ed. 2d 541 (1979), the Supreme Court upheld a provision of the Social Security Act denying survivors' benefits to parents of deceased workers' children who had never been married to the decedent. The *Boles* opinion rejected the argument that the statute impermissibly excluded some potential beneficiaries who in fact were dependent on the wage earner, contrary to the goal of the statute:

> We have repeatedly stated that there is no constitutional requirement that "a[n eligibility requirement] filte[r] out those, and only those, who are in the factual position which generated the congressional concern reflected in the statute." *Weinberger v. Salfi*, 422 U.S., at 777, 95 S. Ct., at 2472; *Mathews v. De Castro*, 429 U.S., at 189, 97 S. Ct., at 436. In sum, we conclude that the denial of mother's insurance benefits to a woman who never married the wage earner bears a rational relation to the Government's desire to ease economic privation brought on by the wage earner's death.

Id. at 293 (second brackets in original).

Both of these opinions are instructive to the instant case. As in *Lucas*, here the Department, acting pursuant to its legislatively delegated rule-making authority, has made a policy judgment that recipients whose caregivers reside with them have a lesser need for publicly funded assistance than those whose caregivers reside elsewhere, and that, in the words of the *Lucas* Court's opinion, "individualized factual inquiry in order to isolate each [recipient for whom this judgment is not accurate] is unwarranted as an administrative exercise." *Lucas*, 427 U.S. at 516.

Further, as in *Boles*, the fact that the Department's judgment may not "filter" every case with precision does not invalidate its application even in those instances where the Department's judgment may not be accurate. Because there is a clear connection between this judgment and the state's legitimate interest in allocating its limited resources, the Department's judgment should be upheld, and Mr. Jenkins' due process arguments should be rejected.

2. Equal Protection

Mr. Jenkins' argument regarding the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution is equally unpersuasive. Citing not one case in support, he simply argues that the shared living rule violates the constitutional provision because "[u]nder the Shared Living Rule, persons with live-in caregivers receive less

benefit hours than other persons in the 'exact same classification' who have a care provider who lives outside the home." Br. of Resp't at 53. He is wrong.

As explained in the Department's opening brief, the shared living rule recognizes that a recipient whose provider lives with him has a lesser need for publicly paid services than one whose provider does not reside with him, because the live-in provider will perform some of the covered services even if not paid to do so by the Department. Br. of App. at 14. This reality was acknowledged by the *Gasper* court, Slip. Op. at 10. Thus, there is no differential treatment between persons in the "exact same classification," and the factual predicate for Mr. Jenkins' argument is missing.

Moreover, Mr. Jenkins concedes—as he must, because there is no support to the contrary—that the test to be applied under the Equal Protection Clause is whether the rule is rationally related to a legitimate state interest. Br. of Resp't at 52; *see also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

Whether the Department should, as a matter of policy, pay a live-in provider for services that he or she would perform without being paid to do so may be debatable. What is not debatable is whether the

Department's policy choice *not* to pay for such services is rationally related to the state's interest in allocating its limited financial resources. This Court should reject Mr. Jenkins' equal protection argument.

D. The Shared Living Rule Does Not Violate The Americans With Disabilities Act

Mr. Jenkins also argues that the shared living rule violates the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (the ADA). Br. of Resp't at 55-64. His argument is based on an incorrect factual predicate and a tortured reading of the ADA, its implementing regulations, and the case law interpreting them.

First, as explained in the Department's opening brief, the shared living rule is predicated on the conclusion that recipients who live with their providers have a lesser need for publicly paid services than those who do not—thus any differentiation is based on the recipients' choice of provider, not on their disability.[19] Br. of App. at 46-47. Accordingly, the predicate for an allegation of an ADA violation—discrimination based on disability—is simply not present in this case.

Second, Mr. Jenkins relies heavily on *Townsend v. Quasim*, 328 F.3d 511 (9th Cir. 2003), a case that has no relevance to the issues in this

[19] Curiously, Mr. Jenkins appears to acknowledge as much when he states that "[t]he fact that [he] has a live-in care provider has nothing to do with his disability." Br. of Resp't at 63. The Department agrees with this statement. Because the differentiation in the level of need that he has is based exclusively on the fact that he has a live-in provider, there is no discrimination against him based on his disability.

case. *Townsend* was a class action brought on behalf of disabled persons who, under Medicaid law, were eligible for Medicaid-funded nursing home care, but whose income exceeded the maximum income for COPES eligibility. They claimed that this violated a rule adopted by the Department of Justice under the ADA requiring public entities to "administer services . . . in the most integrated setting appropriate to the needs of qualified persons with disabilities." 28 C.F.R. § 35.130(d).

The Department argued that it did not have a community-based services program for persons whose incomes exceed the categorically needy income limits, i.e., the *Townsend* class, and that the ADA did not require the state to establish a new program to serve the class members.[20] The District Court agreed and granted summary judgment to the state. *Townsend v. Quasim*, 163 F. Supp. 2d 1281, 1288 (W.D. Wash. 2001).[21] On appeal, the Ninth Circuit reversed and remanded the case for trial, holding that the state's provision of long-term care to members of the class only in nursing homes was a violation of the regulation, but allowing the

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[20] *See* 28 C.F.R. § 35.164 ("This subpart does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity . . . ."). *See also Skandalis v. Rowe*, 14 F.3d 173, 182 (2d Cir. 1994) (holding that under Secretary of Health and Human Services' interpretation of Medicaid Act, states can choose to pay home care costs only for individuals whose income was below designated threshold).

[21] In a ruling that was not appealed, the District Court also rejected the argument that the ADA prohibited differentiation of services based on income level. *Townsend*, 163 F. Supp. 2d at 1285 ("The ADA does not require fundamental alterations of an essential eligibility requirement.").

state to establish its fundamental alteration defense at trial. *Townsend*, 328 F.3d at 520.[22]

The *Townsend* decision has no significance for the instant case:

- The *Townsend* class consisted of persons who did not meet the financial eligibility requirements for COPES, the program in which Mr. Jenkins participates;
- *Townsend* had nothing to do with level of need or service to COPES recipients;
- Unlike *Townsend,* this case does not involve an issue of services being provided in a more integrated setting.

Most importantly, unlike Mr. Townsend, there is nothing in the record suggesting that Mr. Jenkins is at risk of being involuntarily placed in a nursing home.[23] In short, *Townsend* has no implications for this case.

The shared living rule does not violate the ADA, and this Court should reject Mr. Jenkins' contrary arguments.

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[22] On remand the parties entered into an agreement to stay the litigation pending the state's establishment of limited COPES-like programs for members of the *Townsend* class. Under the terms of the court-approved stay agreement, the case will be dismissed on June 1, 2006, absent further action to reactivate the litigation. *See* U.S. District Court for the Western District of Washington Cause No. C00-0944Z.

[23] Mr. Jenkins' statement that "the State keeps open the offer to move [him] to a nursing home . . . but refuses the same services in a community setting" (Br. of Resp't at 63-64) is simply untrue. As a COPES recipient, Mr. Jenkins is by definition eligible for nursing home care, but if his current caregiver refuses to provide services at the compensation level provided under the CARE assessment, he retains the option to remain in his home and receive services from someone who doesn't live with him. The choice is entirely his.

E. Choice Of Provider Requirements Do Not Render The Shared Living Rule Invalid

The superior court rejected Mr. Jenkins' argument that the shared living rule violates the requirement that Medicaid patients be afforded a choice of qualified and willing providers. *See* 42 U.S.C. § 1396a(a)(23); RCW 74.39A.270(4). The *Gasper* court also rejected a similar argument advanced by the respondents in that case. *Gasper*, Slip Op. at 13-14.

Mr. Jenkins renews his choice-of-provider argument in his brief (Br. of Resp't at 27-34) contending that "[t]he Shared Living Rule materially interferes with David Jenkins' right under federal law to choose any qualified provider of his choosing," *Id.* at 27. This formulation reflects a misunderstanding of both state and federal law with respect to choice-of-provider requirements.

1. The Shared Living Rule Is Consistent With Federal Choice Of Provider Requirements

Medicaid law requires that no recipients should be denied a choice of *willing and qualified* providers:

> [A]ny individual eligible for medical assistance . . . may obtain such assistance from any institution, agency, community pharmacy, or person, *qualified to perform* the service or services required . . . who *undertakes to provide* him such services[.]

42 U.S.C. § 1396a(a)(23)(A) (emphasis added); *see also* 42 C.F.R § 431.51(b) (providers must be both "[q]ualified" and "[w]illing" to furnish Medicaid services).

Medicaid recipients do not have the unbridled right to receive services from any person of their choosing, because the choice-of-provider requirement is not absolute. *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785, 100 S. Ct. 2467, 65 L. Ed. 2d 506 (1980) (characterizing the Medicaid choice-of-provider requirement as "the right to choose among a range of *qualified* providers, without government interference") (emphasis in original). *See also Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, 177 (2d Cir. 1991) (rejecting a claim that decertification of the recipient's preferred provider violated freedom of choice because "a Medicaid recipient's freedom of choice rights are necessarily dependent on a provider's ability to render services"). As the *Gasper* court observed, "forcing a recipient to change caregivers or to physically relocate when the current care provider is no longer willing or qualified does not violate the choice of provider rules." *Gasper*, Slip Op. at 14 (citing *O'Bannon*, 447 U.S. at 785).

Furthermore, the choice-of-provider requirement allows the Department to (1) establish the fees it will pay providers and (2) set reasonable standards relating to provider qualifications. 42 C.F.R. § 431.51(c). "Within specified limits, a recipient may seek to obtain services from any *qualified* provider, but *the provider* determines whether

to furnish services to the particular recipient." 56 Fed. Reg. 8832-01 (Mar. 1, 1991) (emphasis added).

There is no evidence in this case that Mr. Jenkins has been denied a choice of a willing and qualified provider. His contention is based on his assertion that if the Department determines his need at anything less than the "base" hours calculated by the CARE assessment, he will "lose his provider of choice because [the live-in provider] will have to seek work outside the home." Br. of Resp't at 33. In other words, his provider is no longer willing to provide services to Mr. Jenkins unless he receives a sufficient level of payment.

If a particular provider decides to no longer furnish services to a Medicaid recipient, then he or she no longer is "willing" to "undertake" those services. 42 U.S.C. § 1396a(a)(23)(A); 42 C.F.R § 431.51(b). A Medicaid recipient does not have the right to choose a provider who withdraws from the program or who, like the provider here, is reluctant to limit the number of hours for which he is paid to those allowed by the Department.

A state's allegedly low level of payments does not amount to a violation of the choice-of-provider requirement. *Antrican v. Buell*, 158 F. Supp. 2d 663, 671 (E.D.N.C. 2001), *partially aff'd on other grounds sub. nom. Antrican v. Odom*, 290 F.3d 178 (4th Cir. 2002), *cert. denied*, 537 U.S. 973, 123 S. Ct. 467, 154 L. Ed. 2d 329 (2002). *Buell* involved a claim that the rates paid for dental care were so low that few dentists were

willing to participate, and that recipients' freedom of choice were violated as a result. The court rejected this claim, noting that "[w]hether in the interest of higher profits or because rates are too low to remain solvent, health care providers may choose not to participate in a Medicaid program." *Buell,* 158 F. Supp. 2d at 671. The statute "does not encompass the right to free access to [providers] unwilling to service Medicaid patients." *Id.*[24]

The same rationale applies here. The fact that Mr. Jenkins' current live-in provider may not be willing to furnish and receive payment at the lesser numbers of hours authorized by the Department through its standard assessment does not rise to the level of a violation of the choice-of-provider requirement.

2. The Shared Living Rule Is Consistent With State Law

Mr. Jenkins also argues that the shared living rule violates RCW 74.39A.270(4), which provides, *inter alia*, that "[c]onsumers and prospective consumers retain the right to select, hire, supervise the work of, and terminate any individual provider providing services to them." *See* Br. of Resp't at 33. However, as the *Gasper* court recognized, this statute

[24] The *Buell* court's conclusion relied in part on the following statement of congressional intent: "It is possible that some *providers of service may still not be willing* or considered qualified to provide the services included in the State plan. This provision *does not obligate the State to pay the charges of the provider without reference to its schedule of charges or its standards of care." Buell*, 158 F. Supp. 2d at 671 (quoting S. Rep. No. 744, 90th Cong., 1st Sess. (1967)) (emphasis added by court) (internal quotation marks omitted).

does not create an independent choice of provider rule that is different from federal law.

RCW 74.39A.270(4) was enacted as section 6(4) of Initiative 775, approved by the voters in November 2001. Laws of 2002, ch. 3.[25] The initiative's primary purpose was to allow individual providers to organize and bargain their wages collectively with the state. Because collective bargaining is predicated upon the existence of an employer-employee relationship, the initiative provided that—contrary to the then-existing practice—providers would be considered state employees, but "[s]olely for the purposes of collective bargaining." Init. 775, § 6(1), codified as RCW 74.39A.270(1). To assuage concerns of advocacy groups that this pseudo-employment relationship would hamper the ability of an individual recipient to choose his or her provider, the drafters of the initiative included the following language:

> Consumers and prospective consumers [of in-home care services] *retain* the right to select, hire, supervise the work of, and terminate any individual provider providing services to them.

Init. 775, § 6(4), codified as RCW 74.39A.270(4) (emphasis added).

Nothing in this language indicates an intent to expand the right of consumers of in-home care services. In fact, just the opposite is true: the

[25] The full text of the initiative can be found on the Secretary of State's homepage at http://www.secstate.wa.gov/elections/initiatives/people.aspx?y=2001 by clicking on "View Complete Text" (viewed May 22, 2006).

use of the verb "retain" is strong evidence that the purpose was to maintain the status quo, and nothing more. Because no other state statute addressed the issue, the status quo was defined by the Medicaid choice-of-provider law. As the *Gasper* court recognized, "[T]his section does not create an independent choice of provider rule that is different from federal law." *Gasper*, Slip Op. at 13. Mr. Jenkins' assertion that there is a separate state right to choice of provider is without merit.

F. Requiring Administrative Law Judges To Follow Agency Rules Does Not Violate Due Process

Separate from his challenge to the shared living rule, Mr. Jenkins challenges WAC 388-02-0225, which prohibits ALJs assigned to conduct adjudicative proceedings from declaring agency rules invalid. As explained in the Department's opening brief, the rule is a valid exercise of the Department's rule-making authority and is consistent with the legislative direction that public assistance programs "shall be administered uniformly throughout the state . . . ." Br. of App. at 57 (quoting RCW 74.08.090). The rule is also consistent with the Administrative Procedure Act, RCW 34.05, and with the generally held view that ALJs are fact-finders but not policy-makers, and are bound by the agency's view of the law. Br. of App. at 57-65.

Mr. Jenkins' response combines a misreading of out-of-state cases with a misleading characterization of Washington cases, and reflects a misunderstanding of how the administrative process works. He asserts that the rule is "arbitrary and capricious" (Br. of Resp't at 64), exceeds the agency's authority (*id. at* 70), and violates his due process rights (*id.* at 76). None of the arguments are well-founded, and all should be rejected.[26]

1. Respondent's Reliance On Oregon Jurisprudence Is Both Misleading And Misplaced

Mr. Jenkins relies on several Oregon cases[27] for the proposition that requiring ALJs to follow agency rules is arbitrary and capricious. Br. of Resp't at 64-67. Significantly,

- All four of the decisions address the authority of agencies, not individual ALJs;
- In none of these cases did the court hold that an agency determination of constitutionality is required;[28]
- None of the cases cited by Mr. Jenkins stand for the broad proposition that he asserts, i.e., that prohibiting an ALJ from invalidating an agency rule violates due process.

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[26] Mr. Jenkins appears to have abandoned his argument that the rule violates the federal Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (Conclusion of Law 2.12, CP at 1191), as he does not support that proposition in his brief.

[27] *Schultz v Springfield Forest Products*, 151 Or. App. 727, 951 P.2d 169 (1997); *Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131 (1991); *Cooper v. Eugene School Dist. No. 4J*, 301 Or. 358, 723 P.2d 298 (1986), *appeal dismissed by* 480 U.S. 942, 107 S. Ct. 1597, 94 L. Ed. 2d 784 (1987); *Employment Div. v. Rogue Valley Youth for Christ*, 307 Or. 490, 770 P.2d 588 (1989).

[28] In fact, the *Schultz* court stated that an agency should make such determinations "infrequently, and always with care . . . ." 151 Or. App. at 730.

At most, these Oregon cases stand for the proposition that there is little harm in allowing an agency to opine on the constitutionality of a statute or rule. As the Oregon Supreme Court stated:

> If an agency decides a constitutional issue, though needlessly, the only result is that it will be affirmed on judicial review if the decision was right and reversed if the decision was wrong.

Cooper v. Eugene School Dist. No. 4J, 301 Or. 358, 364, 723 P.2d 298 (1986), *appeal dismissed by* 480 U.S. 942, 107 S. Ct. 1597, 94 L. Ed. 2d 784 (1987).[29] Saying that there is little risk of harm in allowing an agency to decide a constitutional issue is a far cry from the proposition advanced by Mr. Jenkins that he has a right to having an individual ALJ do so in the first instance. In short, the Oregon cases relied upon by Mr. Jenkins do not support the broad right to a constitutional determination by an ALJ that he asserts.

2. Respondent's Arguments Regarding Washington Law Miss The Mark

As discussed in the Department's opening brief, Washington courts have consistently held that Washington administrative agencies do not have authority to invalidate the statutes and regulations under which

[29] Not only was this seemingly casual statement not necessary to the decision, it is overly simplistic. Most adjudicative proceedings in the public assistance context have only two parties: the person seeking additional benefits and the agency itself. If WAC 388-02-0225 is invalidated, decisions issued by DSHS review judges or ALJs which are final (*see* WAC 388-02-0215(4) and (5)) become the decision of the agency itself. At the risk of stating the obvious, an agency cannot appeal its own decision, and public assistance recipients who benefit from the decision would have no incentive to do so. Thus, there will not always be an opportunity to correct an erroneous decision via judicial review.

they operate. Br. of App. at 60-62. Rather than address the opinions cited by the Department, Mr. Jenkins instead attempts to cloud the issue by mischaracterizing other holdings of Washington courts.

Thus, for example, he states that "[i]t is well settled that ALJs are free to announce new principles of law during an adjudication" (Br. of Resp't at 67) (citing *Budget Rent A Car Corp. v. Dep't of Licensing*, 100 Wn. App. 381, 997 P.2d 420 (2000), *aff'd in part, rev'd in part,* 144 Wn.2d 899 (2001)). What the *Budget* court *actually* said, however, is that *agencies*, not their ALJs, have authority to make policy through their adjudications:

> [T]he Ninth Circuit [has] recognized that administrative agencies are generally free to announce new principles during adjudication, but observed that agencies may not do so if it would constitute an abuse of discretion or circumvent APA requirements. We adopt this standard here.

100 Wn. App. at 387 (footnotes and internal punctuation omitted).

Similarly, *Nguyen v. Dep't of Health Med. Quality Assurance Comm'n*, 144 Wn.2d 516, 544, 29 P.3d 689 (2001), quoted at Br. of Resp't at 69, is inapposite. The issue in *Nguyen* was the burden of proof necessary to establish grounds for disciplinary action against a medical license in proceedings before the Medical Quality Assurance Commission. The entire proceedings were conducted by a panel of the Commission, and

there was no issue relating to use of an ALJ. *Nguyen* provides no support for Mr. Jenkins' argument regarding WAC 388-02-0225.

Likewise, Mr. Jenkins' statement that "[n]either the Constitution nor the APA forecloses review at the agency level" (Br. of Resp't at 71) misses the mark. While it is true that neither the federal nor state constitution—both of which were adopted long before the concept of administrative law arose—specifically *precludes* ALJs from issuing opinions about the constitutionality of statutes or rules, that absence does not convert to the affirmative mandate for which Mr. Jenkins argues.[30]

Moreover, the APA specifically contemplates that ALJ decisions will be subject to review at the agency level. *See* RCW 34.05.464 (providing for agency level review of initial orders issued by ALJs). Further, RCW 34.05.449(1) requires that ALJs and other presiding officers conduct adjudicative proceedings "in conformity with applicable rules . . . ."

In sum, Mr. Jenkins' arguments that WAC 388-02-0225 violates Washington law lack merit and should be rejected.

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[30] While neither constitution specifically mentions the role of ALJs, both allocate governmental powers among the three branches, and both this Court and the United States Supreme Court have consistently recognized that determining the validity of statutes and rules is an essentially judicial function. "Both history and uncontradicted authority make clear that 'it is emphatically the province and duty of the judicial department to say what the law is.'" *In re: Salary of Juvenile Director*, 87 Wn.2d 232, 241, 552 P.2d 163 (1976) (quoting *U.S. v. Nixon*, 418 U.S. 683, 703, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974)) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L. Ed. 60 (1803)).

3. WAC 388-02-0225 Is Consistent With Medicaid Law

Finally, Mr. Jenkins attempts to argue that Medicaid law requires that ALJs have the authority to rule on the validity of agency rules. Br. of Resp't at 72-73. He is incorrect. The federal rules regarding the hearing rights for Medicaid recipients are set forth at 42 C.F.R §§ 431.205 through .250. The only substantive issues that must be considered at the requisite hearing are specified in 42 C.F.R. § 431.241, and nowhere does that section suggest that the hearing officer must be able to rule on the validity of agency rules. Further, like the Washington APA, the federal rules contemplate agency review of ALJs' decisions at the agency level, and the one court that has considered the issue held that agency level review of both facts and law comports with both Medicaid law and due process. *Gomolisky v. Davis*, 716 N.E.2d 970, 973-74 (Ind. Ct. App. 1999), *transfer denied by* 735 N.E.2d 228 (Ind. 2000) ("Although agency review is not mandated by the federal Medicaid regulations, we cannot say that Indiana's Medicaid hearing system, which provides for such review, contravenes those regulations. . . . Further, the requirements of due process are satisfied in the agency review process."). Like his other arguments, Mr. Jenkins' contention that WAC 388-02-0225 violates Medicaid law should be rejected.

G. The Superior Court Did Not Have Authority To Compute Back Benefits Or Award Interest, And Erred By Including Costs That Are Not Recoverable

Mr. Jenkins argues that RCW 74.08.080(3) is the "other provision of law" required under RCW 34.05.574 in order to authorize the superior court's award of "damages" in the form of back benefits. Br. of Resp't at 78. What RCW 74.08.080(3) *actually* says is that when a public assistance recipient successfully appeals a denial, "assistance shall be paid from date of the denial of the application for assistance." The statute does *not* state that the court is to determine the amount of the benefit to be paid and enter a judgment for damages; it simply says that the benefits are to be paid.

RCW 34.05.574(1) directs that "[t]he court shall remand to the agency for modification of agency action." In addition to being consistent with this direction, remanding to the agency for calculation of any back benefits following a successful appeal is especially appropriate where, as here, the benefits consist not of a cash payment to the recipient, but of services to be performed by a third party, and paid to that party, to the extent that services were actually performed. No COPES recipient is entitled to payment of cash benefits, and there was no basis in the record for the superior court to determine whether and to what extent the services had in fact been provided by Mr. Jenkins' provider, who is not a party to

this litigation. It was error for the trial court to enter a judgment for back benefits, and Mr. Jenkins' argument to the contrary should be rejected.

Likewise, there is simply no basis for interpreting the attorneys' fee provision of RCW 74.08.080 to permit a court to include items beyond those specified in RCW 4.84.010 as costs. By doing so, the superior court departed from the consistent interpretation given similar language in other statutes and should be reversed. *See* cases discussed in Br. of App. at 70-72.[31]

Finally, Mr. Jenkins attempts to defend that part of the superior court's order awarding prejudgment and postjudgment interest on the basis of the contract between the Department and Mr. Jenkins' provider. Br. of Resp't at 78-79. Assuming *arguendo* Mr. Jenkins prevails in this appeal, it is possible that *if* Mr. Jenkins' caregiver has in fact been (1) providing services and (2) submitting complete, accurate, and timely billings for the full amount, the *caregiver* may have a claim for interest on any unpaid amounts either under his contract or pursuant to RCW 39.76. But there is no basis in the record on which either the superior court or this Court could base such a determination. Even if there were, it would be the

[31] Mr. Jenkins is correct that "[t]he amount of costs awarded by a trial court is reviewed under the abuse of discretion standard." Br. of Resp't at 77. However, "[a] trial court necessarily abuses its discretion if its ruling is based on an erroneous view of the law." *Atwood v. Shanks*, 91 Wn. App. 404, 409, 958 P.2d 332, *review denied*, 136 Wn.2d 1029 (1988).

caregiver—who is not a party—and not Mr. Jenkins, to whom the interest would be owed. It was error for the superior court to award interest, and Mr. Jenkins' arguments to the contrary lack merit.

H. Mr. Jenkins' Argument About Attorneys' Fees Are Not Properly Before This Court

Mr. Jenkins did not cross-appeal any of the superior court's rulings. However, in his brief, Mr. Jenkins assigns error to the trial court's ruling denying attorneys' fees and costs for co-counsel. Br. of Resp't at 2. This issue is not properly before this Court and should be disregarded. RAP 5.1(a) ("A party seeking review of a trial court decision reviewable as a matter of right *must file a notice of appeal.*") (emphasis added); RAP 5.2(f) (A party already named as a respondent to an appeal "who wants relief from the decision must file a notice of appeal or notice for discretionary review with the trial court clerk . . ."); RAP 2.4(a) ("The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.").

In any event, "in order to reverse a fee award, it must be shown that the trial court manifestly abused its discretion." *Scott Fetzer Co. v.*

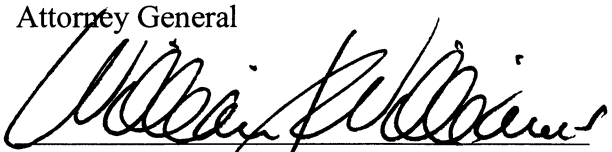
Weeks, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993). Respondent has made no such showing in this case.

III. CONCLUSION

For the reasons set forth above and in the Brief of Appellant, this Court should vacate the decision below and remand this matter to the superior court with instructions to affirm the Department's administrative determination.

RESPECTFULLY SUBMITTED this 24th day of May, 2006.

ROB MCKENNA
Attorney General



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CERTIFICATE OF SERVICE

SHARON PAAKKONEN states and declares as follows:

On May 24, 2006, I served a true and correct copy of REPLY BRIEF OF APPELLANT on each of the parties to this action, as indicated below:

Gregory A. McBroom Livengood Fitzgerald & Alskog 121 Third Avenue PO Box 908 Kirkland, WA 98083-0908	☒ ☐ ☐ ☐ ☐	By United States Mail By Facsimile By Legal Messenger By Overnight Mail By E-Mail
Rajiv Nagaich Law Offices of Johnson & Nagaich 31919 6th Avenue S., Ste. A-100 Federal Way, WA 98003-5210	☒ ☐ ☐ ☐ ☐	By United States Mail By Facsimile By Legal Messenger By Overnight Mail By E-Mail

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BY J. HERRITT

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

Dated this 24th day of May, 2006, at Lacey, Washington.

Sharon Paakkonen

Sharon Paakkonen, Legal Assistant

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

VENETTA GASPER and TOMMYE MYERS, Respondents. v. DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Appellants.	No. 33088-1-II PUBLISHED OPINION

PENOYAR, J. — The Department of Social and Health Services (DSHS) recently implemented the "shared living rule,"[1] which reduces the number of home care hours it will fund for clients who live with their paid caregivers. DSHS believed this rule was consistent with the policies of not paying for services that benefit the entire household and of not paying for services that other support mechanisms already provide. Venetta Gasper and Tommye Myers, disabled Medicaid recipients living with their paid caregivers, challenged the reduction in their care hours. The trial court invalidated the shared living rule, finding it violated federal choice of provider and comparability requirements. Agreeing that the shared living rule violates federal comparability requirements, we affirm.

[1] WAC 388-106-0130(3)(b), formerly WAC 388-72A-0095.

FACTS

This case involves the legality of one provision in DSHS's Comprehensive Assessment Reporting Evaluation (CARE) assessment tool[2]. DSHS uses the CARE tool to evaluate the number of hours it will pay a caregiver to assist disabled clients in four different Medicaid programs. WAC 388-106-0050, -0055, -0070.

In a CARE evaluation, the evaluator scores the client on factors such as the client's ability to perform daily activities and the client's mental status. WAC 388-106-0085 through -0115. These numerical scores are put into a formula that calculates the client's "base" assistance level in hours of care. WAC 388-106-0080, -0125. If DSHS determines that informal supports like friends or family members are already helping the recipient meet certain needs, DSHS will apply a second formula to reduce the number of care hours for which the client qualifies. WAC 388-106-0130. The shared living rule at issue here automatically reduces the allowed care hours by approximately 15 percent if the caregiver resides with the client. WAC 388-106-0130(3)(b).

DSHS implemented the shared living rule on the theory that live-in caregivers must clean their own houses, go shopping, and cook meals for their own benefit, and that the state should not pay for tasks that benefit the entire household. Through a study, DSHS determined that caregivers spend between 26 and 46 percent of their time on household tasks like cleaning and shopping. Citing RCW 74.39A.005, DSHS claims the shared living rule furthers the legislative policy of not using public funds to displace a client's naturally occurring informal support.

Gasper and Myers live with their caregivers and receive Medicaid-funded home health care. Gasper is severely developmentally disabled and lives with Linda Green, an unrelated paid caregiver. Before the recent changes, Gasper was receiving funding for 184 hours of care per month. Under the CARE assessment, her base hours are 190, but are reduced to 152 through the shared living rule. Green states that she already spends more than 184 hours per month caring for Gasper and that she is unwilling to provide additional unpaid care. Green estimates she spends approximately 14 hours per week in extra cleanup and laundry for Gasper, beyond what she performs for herself and her family (Green's husband and teenage son also live in the house). She also estimates an extra 75 hours per month in food preparation time because Gasper's eating schedule and diet differ from the family's.

Myers is an elderly woman who lives with her disabled son Ricky, her son John, and John's wife. John is Myers's paid caregiver. Myers is diabetic and requires kidney dialysis three times per week. Under the previous assessment, she was receiving 184 hours of paid care. The CARE assessment set her base hours at 190, but reduced them to 153 after applying the shared living rule.

Like Green, John estimates that he spends more than 184 hours per month on his mother's care. In addition to the chores he performs for himself and his wife, John estimates he spends an extra eight hours per month shopping for his mother's special diet, 100 hours per month extra on housekeeping, and 45 hours per month extra on meal preparation.

Gasper and Myers challenge the shared living rule, asserting that it does not take into account the additional hours their caregivers provide that do not benefit the caregivers or the household in general. They claim their actual need for help with certain household tasks should have been evaluated and not automatically deemed met by their shared living situations.

DSHS claims that the shared living rule must be considered in the context of the entire CARE assessment. The assessment does not break down each task by hours needed to perform it but, rather, pays the caregiver for the extra time spent on household tasks for severely impaired persons by allotting more hours to those clients with more serious disabilities. DSHS argues that the shared living rule takes into account only that portion of the housework benefiting the entire household and that the caregivers are still being paid for work that benefits only the recipient.

Gasper and Myers requested hearings before administrative law judges (ALJs) to challenge the reductions in paid hours. The ALJs, who lacked the power to invalidate a department rule, affirmed the reduction. DSHS's Board of Appeals issued expedited decisions affirming the ALJs' decisions.

Gasper and Myers (hereafter Gasper) then filed actions in Thurston County Superior Court seeking both review of the administrative decisions and a declaratory judgment invalidating the shared living rule. The two cases were consolidated.

DSHS responded to both petitions. Appended to the response was the declaration of Penny Black, director of the Home and Community Services Division of the DSHS Aging and Disability Services Administration. Black explained the background and design of the CARE assessment tool and, in particular, the shared living rule. The trial court granted Gasper's motion to strike Black's declaration, but it allowed DSHS to supplement the record with the rule making file relating to the adoption and implementation of the CARE assessment tool.

After hearing arguments, the trial court invalidated the shared living rule and reversed the two administrative decisions. Specifically, the trial court ruled that DSHS exceeded its statutory authority by violating federal choice of provider protections[3] and comparability requirements.[4]

ANALYSIS

I. Excluded declaration

Peggy Black's declaration explained the CARE assessment tool and DSHS's justification for the shared living rule. Excluding this declaration limited the record to the agency rule making file and the records from the parties' administrative proceedings. DSHS claims that the trial court abused its discretion by limiting the information it considered on review.

Under the Administrative Procedure Act (APA), judicial review is limited to the agency record. RCW 34.05.558; *Motley-Motley, Inc. v. Pollution Control Hearings Bd.*, 127 Wn. App. 62, 76, 110 P.3d 812 (2005), *review denied*, 2006 Wash. LEXIS 15 (citing *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 110 Wn. App. 498, 518, 41 P.3d 1212 (2002), *aff'd*, 149 Wn.2d 17 (2003)). A court may consider additional evidence only to resolve certain legal issues, not one of which is raised here. RCW 34.05.562(1).

The trial court has the discretion to limit its review to the administrative record before it. *Wash. Independent Tel.*, 110 Wn. App. at 518. A trial court abuses its discretion when its decision is manifestly unreasonable, is exercised on untenable grounds, or is based on untenable

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[3] 42 U.S.C. § 1396a(a)(23) allows "any individual eligible for medical assistance [to] . . . obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform . . . the service or services required."

[4] 42 USC § 1396a(a)(10)(B)(i) states that the medical assistance a state provides for any categorically needy individual "shall not be less in amount, duration, or scope" than the assistance provided to any other categorically needy individual.

reasons. *In the Matter of the Personal Restraint of Davis*, 152 Wn.2d 647, 691, 101 P.3d 1 (2004).

In this case, the court struck Black's declaration but ordered that the rule making file, in its entirety, be admitted into the record. The rule making file is required to have all the information the agency gathered in formulating and adopting the rule. RCW 34.05.370; *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 906, 64 P.3d 606 (2003). The trial court had no obligation to supplement the administrative record. Because the trial court could presume that it had all relevant information in the record already through the rule making file, we hold that the trial court did not abuse its discretion by striking Black's declaration.

II. The Medicaid program

Medicaid is a program that provides medical assistance to financially needy individuals. *Rodriguez v. City of New York*, 197 F.3d 611, 613 (2nd Cir. 1999), *cert. denied*, 531 U.S. 864 (2000). Federal and state governments fund and run it jointly, with the federal government reimbursing the state for a portion of the state's expenditures. *Rodriguez*, 197 F.3d at 613; *Skandalis v. Rowe*, 14 F.3d 173, 174-75 (2nd Cir. 1994). State participation in the program is optional. If a state chooses to participate, it must formulate a plan (state plan) that includes certain federally mandated forms of medical assistance, including nursing home care. 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a)(4); *Rodriguez*, 197 F.3d at 613.

States also have the option of providing in-home care services instead of nursing home care for those who would otherwise qualify for a nursing home. 42 U.S.C. § 1396n(c). In order to get federal reimbursement for this in-home care, states must receive a waiver from the Secretary of Health and Human Services (Secretary). 42 U.S.C. § 1396n(c)(1). This case involves these "waivered" Medicaid home care services.

III. Standard of review for agency decisions

A. Scope

Here we review an administrative rule's validity.

> In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

RCW 34.05.570(2)(c); *Devine v. Dep't of Licensing*, 126 Wn. App. 941, 956, 110 P.3d 237 (2005) (a rule that conflicts with a statute is beyond an agency's authority). In its conclusions of law, the trial court declared the shared living rule invalid because the agency exceeded its statutory authority by promulgating a rule that conflicted with federal law. Specifically, the trial court concluded as a matter of law that the rule violated "state and federal laws regarding freedom of choice of provider and comparability requirements." Clerk's Papers (CP) at 259. Because this is an issue of law, we review the trial court's conclusion de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

B. Deference to agency determinations

When a court reviews an agency's construction of a statute that the agency administers, the court must first ask whether Congress has directly spoken to the precise question at issue. *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). If Congress's intent is clear, the court, as well as the agency, must give effect to Congress's unambiguously expressed intent. *Chevron*, 467 U.S. at 842-43; *Edelman v. State ex rel. Pub. Disclosure Comm'n*, 152 Wn.2d 584, 590, 99 P.3d 386 (2004). If, however, the court determines that Congress has not directly addressed the precise question at issue, and

the statute is silent or ambiguous, the question for the court is whether the agency's answer is based on a permissible statutory construction. *Chevron*, 467 U.S. at 843.

Here, DSHS urges us to defer to its interpretation of the Medicaid statute because of its expertise in administering that law. Furthermore, DSHS argues that the provider choice and comparability provisions do not directly address the shared living rule, so we should defer to DSHS. Gasper argues that the provider choice and comparability provisions are not ambiguous and, therefore, no deference is warranted.

The comparability provision clearly demonstrates Congress's intent to provide comparable services to similarly situated recipients. 42 USC § 1396a(a)(10)(B); *Martin v. Taft*, 222 F. Supp. 2d 940, 977 (S.D. Ohio 2002) (finding the concepts of comparability and equality are neither vague nor ambiguous). The provider choice provision is equally straightforward and demonstrates Congress's intent to allow a recipient to choose a qualified and willing provider. 42 U.S.C. § 1396a(a)(23). Therefore, we need not defer to DSHS's interpretations of these two provisions.

IV. Comparability

Analyzing whether the shared living rule meets federal comparability requirements entails a factual inquiry as well as a legal inquiry. *Martin*, 222 F. Supp. 2d at 977. The trial court's finding of facts determined:

> 2.3 The Department automatically reduces by 15% the personal care hours of recipients who live with their paid care providers. An automatic reduction is also applied to recipients who live in the same household as another recipient.
>
> 2.4 This shared living reduction is applied regardless of whether a recipient's needs for assistance with meal preparation, housekeeping, shopping, and wood supply are actually met by the shared living situation.

2.5 The shared living reduction is not applied to recipients who live with someone other than the recipient's paid care provider or another recipient. ···

2.8 Petitioners' needs for assistance with housekeeping, shopping and meal preparation are not fully met by their shared living situation.

CP at 258.

We review findings of fact under a substantial evidence standard, which is a quantum of evidence sufficient to persuade a rational, fair-minded person the finding is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). DSHS assigned error to each of these findings. It disputes the findings by attempting to demonstrate that recipients with live-in caregivers will always have certain needs met.

Based on a fair reading of chapter 388-106 WAC and the administrative records for Gasper and Myers, we hold that substantial evidence supports the trial court's findings of fact.

The trial court found that the shared living rule violates Medicaid's "comparability" requirement. CP at 259. That requirement states that the medical assistance a state provides for any categorically-needy individual "shall not be less in amount, duration, or scope" than the assistance provided to any other categorically needy individual. 42 USC § 1396a(a)(10)(B)(i).

The comparability requirement grew out of Congress's concern about previous disparities in servicing the medical needs of various needy groups. *Schweiker v. Hogan*, 457 U.S. 569, 573 n.6, 102 S. Ct. 2597, 73 L. Ed. 2d 227 (1982). For example, Congress wanted the amount, duration, and scope of assistance provided to an individual receiving assistance for the aged to be the same as the amount, duration, and scope of benefits provided to an individual receiving assistance for the blind. *Schweiker*, 457 U.S. at 573 n.6.

Courts have found that states violated the comparability requirement when they treated some recipients differently from other recipients with a similar level of need. *Schott v.*

Olszewski, 401 F.3d 682, 688-89 (6th Cir. 2005) (finding treatment was not comparable when Medicaid did not reimburse recipient for medical expenses she paid out of pocket after she was wrongfully denied coverage); *White v. Beal*, 555 F.2d 1146, 1151-52 (3rd Cir. 1977) (finding statute was illegal when it covered eyeglasses for those suffering from eye diseases but did not cover glasses for patients when refractive error caused poor eyesight).

Because Medicaid's overarching purpose is to provide for an individual recipient's needs, the comparability provision requires comparable services when individuals have comparable needs. *See* 42 U.S.C. § 1396a(a)(10). The question in this case is whether Gasper was offered the same amount of medical assistance available to "any other such individual." 42 U.S.C. § 1396a(a)(10)(B).

DSHS may use a reasonable method (such as the CARE assessment program) to determine a recipient's true need. This process is entirely consistent with the Medicaid program's purposes. However, DSHS violates the comparability requirement if it reduces a recipient's benefits based on a consideration other than the recipient's actual need. *White*, 555 F.2d at 1151. Having a live-in provider certainly may affect a recipient's need. Providers will do things for themselves that reduce the needs of their clients (such as clean the house). However, to simply impose an automatic 15 percent reduction for all recipients ignores the realities of their individual situations.

Clearly, each household differs in both the total number of hours spent on chores and in each household member's ability to do the work. However, without an evaluation to determine which needs live-in providers meet when they work on their own behalf, DSHS has created a system in which recipients like Gasper will have certain needs unmet while others with

comparable disabilities will receive adequate services. Therefore, the shared living rule as applied here violates the comparability requirement.

V. Waiver of the Comparability Requirement

We next consider DSHS's argument that it obtained a waiver of the comparability requirement.

A. Medicaid waiver rules

In order to obtain any reimbursement for home health care services, a state must apply for a waiver from the Secretary under 42 U.S.C. § 1396n(c); *McMillan v. McCrimon*, 807 F. Supp. 475, 481 (C.D. Ill. 1992). State participation in the section 1396n(c) waiver program is entirely voluntary. *Skandalis*, 14 F.3d at 181. Unlike the Medicaid program itself, which requires participating states to provide certain services to all categorically needy individuals, the waiver program expressly allows states to request a waiver of the "comparability" requirement so that individuals within the program may receive varying levels of service. 42 U.S.C. § 1396n(c)(3), (c)(10); *Skandalis*, 14 F.3d at 181.

Under these provisions, states may target patients in a waiver class defined by a specific illness or by other circumstances. *See Skandalis*, 14 F.3d at 183 (upholding a state waiver plan that provided home care only to the categorically needy); *Beckwith v. Kizer*, 912 F.2d 1139, 1140 (9th Cir. 1990) (upholding a waiver program targeting those hospitalized for more than 90 days). Defining a waiver class sometimes involves difficult policy judgments concerning where services would be used most efficiently. *Beckwith*, 912 F.2d at 1141.

B. DSHS's waiver application

DSHS claims that, in its waiver application to the Secretary, it specifically requested a waiver of the Medicaid Act's comparability requirement. In applying for the waiver, DSHS used

a boilerplate application form available through the Center for Medicare and Medicaid Services (CMS).[5] The boilerplate form does indeed contain standardized language about waiving comparability requirements. Centers For Medicare & Medicaid Services, Section 1915(c) Home And Community-Based Services Waiver Application (Version 06-95) at 4.

However, the boilerplate language waiving comparability does not give states complete freedom to provide different services to different people. States still must describe the waiver class by defining the target groups that will receive services under the waiver. *Skandalis*, 14 F.3d at 181; 42 C.F.R. § 441.301(b)(3).

According to the statutory language, the Secretary, not the state, grants the waiver. 42 U.S.C. § 1396n(c)(1),[6] (c)(3).[7] Without showing that it somehow incorporated the shared living rule into its waiver request, DSHS cannot claim that the Secretary waived the comparability requirements for those who live with their caregivers. *See Skandalis*, 14 F.3d at 176; *Beckwith*, 912 F.2d at 1141 (upholding states' limits on services under the waiver where the states had described in the waiver how they intended to limit services).

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[5] CMS is the federal agency that administers the Medicare program and works with the states to administer Medicaid. It approves Medicaid waivers and State Medicaid Plans.

[6] "The Secretary may by waiver provide that a State plan approved under this subchapter may include as 'medical assistance' under such plan payment for part or all of the cost of home or community-based services." 42 U.S.C. § 1396n(c)(1).

[7] "A waiver granted under this subsection may include a waiver of the requirements of section 1396a(a)(1) of this title (relating to statewideness), section 1396a(a)(10)(B) of this title (relating to comparability), and section 1396a(a)(10)(C)(i)(III) of this title (relating to income and resource rules applicable in the community)." 42 U.S.C. § 1396n(c)(3).

C. CMS approval

DSHS claims that CMS authorized the shared living rule because CMS authorized its Medicaid plan. Gasper claims that CMS was not aware of the shared living rule because the rule was not described in any materials given to it. Furthermore, Gasper claims that CMS does not have the authority to waive federal Medicaid laws.

There is no proof that a specific waiver was sought or obtained for so that varying levels of service could be given under the shared living rule. A general waiver of the comparability requirement does not suffice.

VI. Provider choice

Even though we have determined that the shared living rule is invalid, DSHS may nonetheless reduce the care hours of those who live with their paid caregivers *after* it has found that a client's needs are actually met through his or her shared living situation. Because the issue of provider choice could still arise in this context, we address it below.

The federal Medicaid Act says that a state plan must:

> provide that (A) any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . . who undertakes to provide him such services.

42 U.S.C. § 1396a(a)(23).

Gasper claims state law also guarantees provider choice under RCW 74.39A.270(4), which states, "Consumers and prospective consumers retain the right to select, hire, supervise the work of, and terminate any individual provider providing services to them." However, this section does not create an independent choice of provider rule that is different from federal law.

Gasper argues that the shared living rule interferes with her right to choose a provider because her benefit reduction was based solely on her choice of provider, i.e., Gasper must choose someone other than her preferred provider in order to obtain the level of service she needs.

Medicaid recipients do not have an absolute right to receive continued service from their preferred providers. *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785, 100 S. Ct. 2467, 65 L. Ed. 2d 506 (1980). For example, recipients cannot claim a state has violated their right to the provider of choice when providers refuse or discontinue service because of low rates. *Antrican v. Buell*, 158 F. Supp. 2d 663, 671 (E.D.N.C. 2001), *aff'd*, 290 F.3d 178 (4th Cir. 2002).

Furthermore, forcing a recipient to change caregivers or to physically relocate when the current care provider is no longer willing or qualified does not violate the choice of provider rules. *O'Bannon*, 447 U.S. at 785; *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, 178 (2nd Cir. 1991). Therefore, although the shared living rule violates comparability requirements, it does not violate the choice of provider rules. No provider or recipient may demand additional hours or greater pay than DSHS guidelines allow. *Antrican*, 158 F. Supp. 2d at 671.

VII. Attorney fees

Gasper requests attorney fees on appeal under RCW 74.08.080(3).[8] Because she prevails, we grant her request upon compliance with RAP 18.1.

Affirmed.

Penoyar, J.

We concur:

Bridgewater, J.

Van Deren, A.C.J.

[8] RCW 74.08.080(3) states: When a person files a petition for judicial review . . . of an adjudicative order entered in a public assistance program, no filing fee shall be collected. . . . In the event that the superior court, the court of appeals, or the supreme court renders a decision in favor of the appellant, said appellant shall be entitled to reasonable attorneys' fees and costs.