

78652-6

No ~~78931-2~~

SUPREME COURT OF THE STATE OF WASHINGTON

VENNETTA GASPER AND TOMMYE MYERS
Respondents,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL AND
HEALTH SERVICES
Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENTS/
CROSS-PETITIONERS, GASPER and MYERS

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2006 OCT -6 P 3:32
BY C.J. MERRITT
CLERK

Attorneys for Respondents:

Meagan J. MacKenzie
NORTHWEST JUSTICE PROJECT
711 Capitol Way S #704
Olympia WA 98501
360-753-3610
360-753-0174 Fax

Amy L. Crewdson
COLUMBIA LEGAL SERVICES
711 Capitol Way S #304
Olympia WA 98501
360-943-6260
360-754-4578 Fax

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. STATEMENT OF THE CASE.....	3
III. ARGUMENT.....	7
A. The shared living rule is invalid because it violates state and federal Medicaid laws guaranteeing free choice of provider..	7
1. The Respondents’ Plans of Care require their caregivers to provide uncompensated care.....	7
2. The caregivers are qualified providers.....	9
3. The caregivers are willing providers.....	10
4. The record does not demonstrate how the clinical complexity classification qualifies recipients for assistance with meal preparation, housekeeping, or shopping.	11
B. This Court should affirm the Court of Appeals’ ruling on comparability.	12
1. 42 U.S.C §1396a(a)(10)(B) is plain on its face.....	12
2. Comparability requires consideration of actual need.....	14
3. Individualized determinations of need are legally required.	15
4. Comparability is not waived for the COPES program.....	17
IV. CONCLUSION	19

TABLE OF AUTHORITIES

CASES

<i>Antrican v. Buell</i> , 158 F.Supp.2d 663 (E.D.N.C. 2001).....	10
<i>Kelly Kare, Ltd. v. O'Rourke</i> , 930 F.2d 170 (2 nd Cir. 1991).....	9
<i>O'Bannon v. Town Court Nursing Ctr.</i> , 447 U.S. 773, 100 S. Ct. 2467, 65 L. Ed. 2d 506 (1980).....	9
<i>Shoop v. Kittitas County</i> , 149 Wash.2d 29, 65 P.3d 1194 (2003).....	13
<i>Sobky v. Smoley</i> , 855 F.Supp. 1123 (E.D.CA 1994).....	13, 14
<i>State v. Tarabochia</i> , 150 Wash.2d 59, 74 P.3d 642 (2003).....	12
<i>Weinberger v. Salfi</i> , 422 U.S. 749, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975).	16
<i>White v. Beal</i> , 555 F.2d.1146 (3d. Cir. 1977).....	14

STATUTES

42 U.S.C §1396a(a)(10)(B).....	11, 13
42 U.S.C. §1396a(a)(10)(b)(i) and (ii).....	12
42 U.S.C. §1396a(a)(23).....	9
42 U.S.C. § 1396n(c)(1).....	17
RCW 74.08.080.....	19
RCW 74.39A.270(4).....	9

OTHER AUTHORITIES

RAP 18.1.....	19
WSR 05-11-082.....	1

RULES

42 C.F.R. §431.51(b)(1).....	8
WAC 388-72A.....	1
WAC 388-106.....	1
WAC 388-106-0010.....	3, 16
WAC 388-106-0050.....	15
WAC 388-106-0055(3) and (5).....	16
WAC 388-106-0055(10).....	16
WAC 388-106-0095.....	11
WAC 388-106-0130.....	1, 16
WAC 388-106-0130(2)(a) and (3)(b).....	8
WAC 388-106-0200.....	1
WAC 388-106-0210.....	1
WAC 388-106-0300.....	1
WAC 388-106-0310.....	1

I. INTRODUCTION

The Department of Social & Health Services has appealed a decision invalidating a new regulation because it violates federal Medicaid law. The regulation, known as “the shared living rule,” imposes a mandatory, automatic and inflexible reduction in personal care hours for recipients who chose caregivers who reside with them.¹ Vennetta Gasper, who is 67 years old, receives personal care services through the MPC (Medicaid Personal Care) Program; Tommye Myers, who is 76 years old, receives personal care services through the COPES (Community Options Program Entry System) Program.²

Despite no improvement in the condition of either woman, and no change in their living situations, the Department reduced the paid personal care for each by more than 30 hours per month after adopting the shared

¹ This rule, along with a majority of rules governing the CARE assessment system were codified at WAC 388-72A. However, effective June 17, 2005, the rules were recodified at WAC 388-106. WSR 05-11-082. The shared living rule is WAC 388-106-0130, attached as Appendix 1.

² The MPC and COPES programs are distinguished in part by financial eligibility criteria. Unmarried COPES clients may have monthly income up to \$1809; unmarried MPC clients may have monthly income up to \$603. MPC clients may receive *only* personal care and nursing services. WAC 388-106-0200. COPES clients must demonstrate a greater need for personal care services. *See* WAC 388-106-0310 (COPES) vs. WAC 388-106-0210 (MPC). The COPES program was created to prevent nursing home placement. COPES’ income guidelines are more generous than MPC’s and COPES offers a much richer package of services than MPC in order to keep COPES recipients out of nursing homes. Those services include adult day care, environmental modifications (e.g. wheelchair ramps), and home-delivered meals. WAC 388-106-0300. A client who meets the MPC income test and needs only personal care services will be placed on MPC even if the client also meets the COPES criteria for care, i.e., would require nursing home placement without personal care services.

living rule. The rule is not applied generally to recipients who share living situations with others, but only to recipients who choose to receive personal care services from a provider with whom the recipient lives.

The shared living rule reflects a “judgment” that someone who lives with a caregiver has less need for publicly paid services than someone who does not.³ *Jenkins v. DSHS*, Brief of Appellant, p. 38.⁴ This judgment is faulty. Respondents are not asking the Department to pay for services that benefit their caregivers. Respondents’ need for publicly paid services is not lessened because they live with their caregivers. The Department’s “judgment” penalizes Respondents by denying payment for meal preparation, housekeeping, or shopping their caregivers perform that benefit *only* the respondents.

The shared living rule violates federal and state laws guaranteeing Medicaid recipients free choice of provider. The rule also violates federal comparability requirements that ensure that all Medicaid recipients receive services that are comparable in amount, duration and scope.

³ In the remainder of this brief, references to “benefit to the caregiver” also include benefit to the caregiver’s household unit as a whole. Additionally, the words “caregiver” and “provider” are used interchangeably.

⁴ The *Jenkins* case has been consolidated with the instant case. References in this brief to the *Jenkins*’ Court of Appeals briefing will include ‘*Jenkins*’ in the reference. All other briefing references herein refer to briefs filed in the Court of Appeals in the instant case, i.e., *Gasper*.

II. STATEMENT OF THE CASE

The shared living rule is based on the principle that taxpayer money should not be paid to live-in caregivers for tasks that benefit the caregiver. However, the impact of the rule sweeps too broadly. The rule supposes a reality that assumes needs are being met because Respondents live with their caregivers. As the Court of Appeals noted:

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 per cent reduction for all recipients ignores the realities of their individual situations.

Slip Opinion at p. 10. (Emphasis added.)

The reality of the respondents' care needs is detailed in the record. As discussed earlier, COPES clients, by definition, are eligible for nursing home placement. MPC clients may be equally needy. Ms. Gasper and Ms. Myers' care needs are illustrative. Ms. Gasper is incontinent, so her bedding and clothing must be laundered separately from the caregiver's.⁵ Gasper AR 49. Ms. Gasper's 2004 assessment confirms she is incontinent and that she wets her bed and soils furniture. Gasper AR 64. (Laundry is treated as part of housekeeping. WAC 388-106-0010.) Her caregiver spends 30 extra hours per month on the 1 to 2 loads of laundry per day she

⁵ Citations to the records of the administrative hearings are cited by name of the respondent, "AR", and the relevant page number(s).

must do for Ms. Gasper alone – stripping and remaking Ms. Gasper’s bed, treating Ms. Gasper’s soiled bedding or clothing, and putting away clean laundry. Gasper AR 49. Ms. Myers requires a special renal and diabetic diet which her 2004 assessment acknowledges. Myers AR 81. She eats different kinds of foods at different times than her caregiver which requires an extra 45 hours per month of work. Myers AR 55.⁶ Overall, Ms. Green and Mr. Myers spend an additional 150 hours per month (for Ms. Gasper) and 164 hours (for Ms. Myers) providing meal preparation, housekeeping, and shopping services over and above what they do already for themselves or their households.⁷ Gasper AR 50; Myers AR 56.

Ms. Gasper is not related to her caregiver, Linda Green. Gasper AR 46. Ms. Gasper lives with Ms. Green, Ms. Green’s husband and their son. *Id.* Ms. Green has been Ms. Gasper’s caregiver since 1999. *Id.* Ms. Gasper requires around-the-clock supervision. Gasper AR 52-73.

Venetta cannot make any decisions about her daily routine. She has to be told what to eat, what to wear, how to toilet, where to go ect. (sic) Client has poor safety awarness. (sic)

A few month(s) ago, Venetta was in the yard and walked out the back gate, then panicked and yelled for caregiver. At store[s], she tries to get into any car. Caregiver doesn’t

⁶ The Myers administrative record contains two duplicate documents. References herein are to the document that appears first in the administrative record.

⁷ Both caregivers are not asking to be paid for all of the care they provide. Their Declarations indicate they want to be paid on the same basis as an outside caregiver because there is no legitimate reason not to do so. Gasper AR 47, 50; Myers AR 53, 56.

leave her for a miute (sic) when they go places as Venetta is never aware of where she is and would be lost instantly.

Gasper AR 57; 60.

If Ms. Green's income is reduced 15%, she will no longer be able to care for Ms. Gasper. Ms. Green already provides substantial care for which she is not paid.

Altogether, I spend over 150 hours per month doing these tasks [meal preparation, housekeeping, shopping] for Venetta over and above what I would do for my own family.

If DSHS can't pay me ... [for 190 hours of care per month] which is significantly less than the actual amount of care I give Venetta every month, I cannot continue as her paid provider. That would be very sad for me, and I believe it would be traumatic for Venetta.

Linda Green Declaration, Gasper AR 50.

Ms. Myers lives with her son, John Myers, his wife and another son, Ricky, who is disabled. Myers AR 52. Mr. Myers has been her caregiver since 1994. *Id.* If Mr. Myers' income is reduced 15%, he will have to find employment outside the home in order to support his family.

Mom wants me to keep taking care of her. She gets very upset any time we talk about changing providers or having someone else come in. However, I just cannot do it unless DSHS will award her the full 190 hours she would get with another provider. If she does not get that amount, her preferred provider (me) will have to get a job outside the home and be unavailable to care for her.

John Myers Declaration, Myers AR 56.

If the shared living rule is upheld, Ms. Myers will have to hire another caregiver and the 15% reduction in personal care hours will not be imposed. Ms. Gasper will have to leave the Green residence.⁸ Both women will be deprived of their caregivers of choice.⁹

Some version of a shared living rule has existed for the MPC program for many years. There was no such rule for COPES recipients before 2004. Ms. Gasper's earlier assessments make apparent that case managers exercised discretion in applying the former shared living rule to MPC recipients. Gasper AR 79-94. While those assessments indicate she lived with her caregiver, there is no discussion or application of the former shared living rule. Her 2002 and 2003 assessments awarded 184 hours per month. Gasper AR 84, 92. This award reflected Ms. Gasper's personal care needs *despite* the version of the shared living rule then in effect. Ms. Gasper and Ms. Myers are not asking the state to provide a new benefit; they are challenging the state's new rule and its impact on them.

⁸ The Department persists in asserting that Ms. Gasper could choose an outside provider. Petition for Review, FN 7. This is not the case. If Ms. Green is no longer her paid provider, Ms. Gasper will be forced to leave the Green residence. AR 47.

⁹ Respondents' caregivers earn between \$9.43 and \$10.31 per hour. They simply cannot absorb a 15% reduction in their incomes no matter how much affection they have for Ms. Gasper and Ms. Myers.

III. ARGUMENT

A. The shared living rule is invalid because it violates state and federal Medicaid laws guaranteeing free choice of provider.

1. The Respondents' Plans of Care require their caregivers to provide uncompensated care.

A careful review of the respondents' 2004 assessments reveals that their case manager assessed Ms. Gasper's and Ms. Myers' individual need for assistance with meal preparation, housekeeping, and shopping despite the shared living rule. Gasper AR 68-70; Myers AR 80-82. Ms. Gasper's case manager found Ms. Gasper was "totally dependent" on her caregiver for each of these tasks. *Id.* Ms. Myers' case manager found that Ms. Myers was totally dependent on her caregiver for meal preparation and housekeeping and needed extensive assistance with shopping. *Id.*

Case managers must complete this part of the assessment process in order to develop clients' care plans, e.g., Ms. Myers' care plan requires her caregiver to prepare a renal diet. Myers AR 81.

While the Department actually assesses client need for meal preparation, housekeeping, and shopping in shared living situations and devises care plans to address those needs, the shared living rule prevents the case manager from awarding personal care hours for the performance

of tasks related to those needs.¹⁰ This is true even when the information the case manager has gathered proves, as with Ms. Myers, that a caregiver does not prepare meals for a client at the same time as the caregiver prepares meals for himself or that the routine housekeeping the caregiver does for her family, as with Ms. Gasper, does not meet her client's needs.

The Department expects and requires Ms. Gasper's caregiver to change the bed linens when they are soiled. The Department simply will not pay for her to do it. It would be unacceptable to the Department if Ms. Myers' caregiver offered her meals prepared for his family that disregarded Ms. Myers' diabetes and renal failure. The Department simply will not pay him to prepare those special meals.

The parties agree that federal Medicaid law requires states to design long term care programs so that recipients may obtain services from any qualified Medicaid provider that undertakes to provide the services to

¹⁰ The shared living rule provides: The department will deduct from the base hours to account for your informal supports . . . as follows: The CARE tool determines the adjustment for informal supports by determining the amount of assistance available to meet your needs, assigns it a numeric percentage, and reduces the base hours assigned to the classification group by the numeric percentage. . . . If you and your paid provider live in the same household, the status under subsection (2)(a) of this section must be [marked as] met for the following IADLs: (i) Meal preparation, (ii) Housekeeping, (iii) Shopping, and (iv) Wood supply. WAC 388-106-0130 (2)(a) and (3)(b). Respondents challenge the entire shared living rule, including subsections (3)(a) and (3)(c), which have similar provisions for recipients who live with other recipients, with or without their provider(s).

them.¹¹ As the Court of Appeals notes, this requirement is reiterated in State law.¹² Court of Appeals Slip Opinion at p. 13. As the Court of Appeals also noted, this right is not absolute. *Id.* at p. 14. However, the Court of Appeals erred in holding that the shared living rule falls into one of the limited exceptions where a state is allowed to abridge free provider choice. These exceptions are limited to situations where the providers are either unqualified or unwilling to provide services. Neither situation exists here.

2. The caregivers are qualified providers.

Medicaid recipients cannot choose to receive care from an unqualified provider.¹³ That proposition is not in dispute. All parties agree, however, that Ms. Green and Mr. Myers are qualified providers. Gasper AR 43; Myers AR 50.

¹¹ 42 U.S.C. §1396a(a)(23); 42 C.F.R. §431.51(b)(1) *See* Corrected Brief of Appellant, p. 32.

¹² RCW 74.39A.270(4).

¹³ The Court of Appeals cited *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 100 S. Ct. 2467, 65 L. Ed. 2d 506 (1980) and *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, (2nd Cir. 1991) for the proposition that “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.” Court of Appeals Slip Opinion at p. 14. Both of these cases addressed a recipient’s right to select providers who were no longer *qualified* because their Medicaid contracts with the state had been revoked (*O'Bannon*) or terminated (*Kelly Kare*).

3. The caregivers are willing providers.

The Court of Appeals' reliance on *Antrican v. Buell*, 158 F.Supp.2d 663 (E.D.N.C. 2001) to support its holding that Medicaid recipients' right to free provider choice is not violated when providers refuse or discontinue service because of low rates is misplaced. In *Antrican*, a class of plaintiffs asserted that Medicaid rates were so low that few North Carolina dentists wished to participate in the Medicaid program. They challenged those rates on the basis that they violated the right to free provider choice.

The low reimbursement rates challenged in *Antrican* applied to *all* participating dentists, i.e., *providers*; here the challenged reduction applies only to *recipients* with live-in providers. *Antrican* would be persuasive authority in the instant case only if North Carolina's system paid for 100% of needed dental care for some recipients, but paid for only 85% of needed dental care for others even though there was no difference in their actual need for care.

If a 15% reduction in personal care hours does not violate free choice of provider, what percentage reduction would? What if the Department proposed to reduce the hours awarded to shared living recipients by 99% instead of 15%? It could make the same argument that provider choice is not implicated because the client can still "choose" a

live-in provider. That argument would fail for the same reason it should fail here.

4. The record does not demonstrate how the clinical complexity classification qualifies recipients for assistance with meal preparation, housekeeping, or shopping.

The Department claims that Respondents’ “clinically complex medical conditions automatically qualify them for additional assistance with special care needs, including laundry and meal preparation activities.” Corrected Brief of Appellant, p. 44. There is no support in the record for this assertion, nor do the Department’s rules support it. The shared living rule requires a finding that a client in a shared living situation has *no* need for paid assistance with meal preparation, housekeeping, or shopping. Yet, a clinically complex recipient who actually needs no paid help with meal preparation and/or housekeeping and/or shopping receives the *same number* of personal care hours as a clinically complex recipient who does need assistance in one or more of these areas.¹⁴

¹⁴ The base rate for the clinically complex groups, such as Group C, is based on the existence of at least one clinically complex medical condition + an “ADL score” which does *not* consider whether the client needs assistance with meal preparation, shopping or housekeeping. WAC 388-106-0095.

B. This Court should affirm the Court of Appeals' ruling on comparability.

1. 42 U.S.C §1396a(a)(10)(B) is plain on its face.

A State plan for medical assistance must provide that the medical assistance made available to any individual shall not be less in amount, duration or scope than the medical assistance made available to any other such individual.¹⁵

The state cites no authority that comparability does not apply to individuals within a category. Corrected Brief of Appellant pp. 37-38. In fact, the statute clearly compares services between “individuals” within the same group, contrary to the Department’s assertion that the requirement means comparing groups of recipients to other groups.

Unambiguous statutes are not subject to judicial construction. *State v. Tarabochia*, 150 Wash.2d 59, 63, 74 P.3d 642 (2003). It is inappropriate to look to the legislative history of a statute where legislative intent can be determined from the statute’s plain language. *Shoop v. Kittitas County*, 149 Wash.2d 29, 36, 65 P.3d 1194 (2003).

¹⁵ A state plan for medical assistance must provide that the medical assistance made available to any *individual* described in subparagraph (A) shall not be less in amount, duration, or scope than the medical assistance made available to any such other *individual*, and shall not be less in amount, duration, or scope than the medical assistance made available to *individuals* not described in subparagraph (A). 42 U.S.C. §1396a(a)(10)(b)(i) and (ii) (Emphasis added.)

The State of California unsuccessfully made the same argument against a Medicaid comparability claim that the Department makes here. *Sobky v. Smoley*, 855 F.Supp. 1123 (E.D.CA 1994).

In *Sobky*, Medicaid recipients challenged California's failure to offer Medicaid-funded methadone treatment in every county. That failure denied treatment to some eligible individuals while others received treatment because they lived in counties where treatment was offered.

The district court rejected California's claim that the comparability statute was:

designed to ensure comparability *between* the various groups that comprise the categorically needy, not to ensure comparability *within* each such group.

Id. at 1140.

Instead, the court found that:

42 U.S.C. § 1396a(a)(10)(B) creates an equality principle by which all categorically needy individuals must receive medical assistance which is no less than that provided to any other categorically or medically needy individual.

Id. at 1139.

The court held that language of the statute was plain and that "all relevant reported cases and scholarly authority ... supported this conclusion." Citing *White v. Beal*, 555 F.2d.1146 (3d. Cir. 1977). (Other citations omitted.) *Sobky* at 1141.

2. Comparability requires consideration of actual need.

The Department argues that recipients in shared living situations *always* have less need.

... the shared living rule reflects an *expectation* that at least some of her [Gasper and Myers] needs for assistance will be met through activities that a live-in caregiver would perform even if not being paid ... for doing so.

Petition for Review, p. 11. (Emphasis added.) The Department's expectations are irrelevant.¹⁶ The un rebutted evidence proves that not all of Respondents' need for assistance with meal preparation, housekeeping, and shopping are met because they live with their caregivers.

The Department asks the Court to separate the determination of need from the provision of services. Petition for Review, p. 11. The Department claims that "... informal supports, plus the paid assistance, fully meets [Respondents'] needs" *Id.* The un rebutted evidence in the record does not support this claim.¹⁷ The un rebutted evidence in the record

¹⁶ The Department concedes that comparability hinges on recipient need. Corrected Brief of Appellant, p. 44.

¹⁷ In fact, the Department acknowledges that Ms. Gasper and Ms. Myers need substantial assistance with housekeeping, shopping and meal preparation. For example, Ms. Green is expected as the paid provider to "Take client to store, Do all shopping for client, Carry heavy packages for client, Put items away, Pick up medications. Client is taken along on shopping trips as she is unable to be left at home. She is unable to participate in the task of shopping as much as a child would be." Gasper AR 70. Similarly, Mr. Myers is expected to "Make food accessible to client, Prepare breakfast, Prepare dinner, Prepare lunch, Ask for client's choices, Prepare renal diet. Client is not able to do any meal prep. She is too weak, unsteady, and unable to stand that long . . . After dialysis at 2:30 AM client is hungry. Client adheres to a Renial [sic] diet." Myers AR 81.

establishes that Respondents' need for assistance with meal preparation, housekeeping, and shopping is *not* met by virtue of the shared living arrangement.

Ms. Gasper and Ms. Myers do not want paid help with meal preparation, housekeeping, or shopping which benefit their caregivers. Indeed, their caregivers already provide a substantial amount of unpaid assistance which benefits *only* Ms. Gasper and Ms. Myers. Gasper AR 50; Myers AR 56.

3. Individualized determinations of need are legally required.

The Department contends that the Court of Appeals erred in holding that the comparability provision requires the Department to make individualized determinations of the degree to which a recipient's need is met by a shared living situation. Petition for Review, p. 12, citing *Weinberger v. Salfi*, 422 U.S. 749, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975).¹⁸

¹⁸The *Salfi* plaintiffs challenged a Social Security statute intended to protect the integrity of the Social Security Trust Fund. The statute precluded an award of survivor's benefits to surviving widows or stepchildren where the widow was married to the decedent wage earner less than 9 months prior to the decedent's death. The Department cites no authority that Medicaid recipients are not entitled to an individualized determination of their need for medically necessary services.

This contention is surprising since the Department’s own regulations require an individualized determination of need. WAC 388-106-0050 provides:

An assessment is an in-person interview in your home or your place of residence that is conducted by the department to inventory and evaluate *your* ability to care for *yourself*.”

(Emphasis added.) Two explicit purposes of this rule are to: “evaluate your living situation and environment” and to “determine availability of informal supports and other nondepartment paid resources.” WAC 388-106-0055(3) and (5).

As part of this assessment, the Department gathers information regarding 11 activities of daily living, as well as the three instrumental activities of daily living (meal preparation, housekeeping, and shopping).¹⁹ As discussed above, Respondents’ case manager conducted an individualized determination of need in accordance with Department rules by determining Respondents’ need for assistance with meal preparation, housekeeping, and shopping in order to develop an individual written plan of care as required by WAC 388-106-0055(10).

¹⁹ Activities of Daily Living and Instrumental Activities of Daily Living are defined in WAC 388-106-0010. WAC 388-106-0130, which contains the shared living rule at (3), is attached as Appendix 1. Subsection (2) of the rule demonstrates that the Department employs a system to determine not only a recipient’s need for assistance with each activity of daily living, but also to determine the degree to which each of those needs is met on an informal (unpaid) basis.

The Department also acknowledged that it must perform individualized determinations of need in its briefing in the *Jenkins*’ case. *See Jenkins* Brief of Appellant, p. 9: “Eligibility for ... COPES or any of the other home and community long-term care programs ... is determined by an individualized assessment of ... need for publicly paid services.”

4. Comparability is not waived for the COPES program.

The Court of Appeals made the correct decision regarding comparability in relation to the COPES program, but the Court’s analysis did not discuss all of the reasons why comparability is not waived for COPES clients.

MPC clients receive personal care services pursuant to Washington’s Medicaid State Plan. *See* Brief of Respondents, Appendix 2, for relevant excerpts from the State Plan and the COPES Waiver Agreement. The State Plan, like the COPES Waiver Agreement, is approved by the federal government.

The federal statute that authorizes the COPES waiver has a salutary purpose. 42 U.S.C. § 1396n(c)(1) allows the federal government to approve waivers when a state has made:

... a determination that but for the provision of such [waiver] services the individuals would require the level of care provided in a ... nursing facility ...

This salutary purpose only makes sense if comparability is waived to expand services to waiver clients, not reduce them. Providing fewer services to COPES clients than are provided to MPC clients will not achieve the purpose of the COPES program, but may serve to accelerate nursing home placement.

COPES clients are entitled to *all* State Plan services, plus additional services necessary to prevent nursing facility placement.

Relationship to State Plan service:

Personal care services are included in the State plan, but with limitations. The waived service will serve as an *extension* of the State plan service in accordance with documentation provided in Appendix G of this waiver request.

Id. at Appendix 1-10, ¶4 . (Emphasis added.)

The COPES Waiver Agreement makes clear that the purpose of the waiver is to *expand* services to COPES clients.

A waiver of the amount, duration and scope of services requirements . . . is requested, in order that services *not otherwise available* under the approved Medicaid State plan may be provided to individuals served on the waiver.

Brief of Respondents: Appendix 1-2, ¶ 10. (Emphasis added.)

The Waiver Agreement does not authorize the shared living rule, i.e., it does not allow COPES recipients to receive fewer services than MPC recipients. The Department cites no authority that the COPES Waiver Agreement's comparability waiver language, cited above, allows

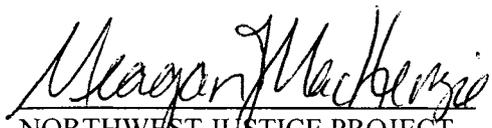
the Department to impose the shared living reduction on Ms. Myers, a COPES recipient, while not imposing the reduction on Ms. Gasper, an MPC recipient.

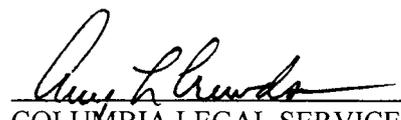
IV. CONCLUSION

The judgment of the Court of Appeals that the shared living rule is invalid because it violates federal comparability requirements should be affirmed. The judgment of the Court of Appeals that the shared living rule does not violate state and federal guarantees to free provider choice should be reversed. The Court should award attorneys' fees to Columbia Legal Services pursuant to RCW 74.08.080 and RAP 18.1.

RESPECTFULLY SUBMITTED this 6th day of October, 2006.

Attorneys for Gasper/Myers:


NORTHWEST JUSTICE PROJECT
Meagan J. MacKenzie, WSBA 21876


COLUMBIA LEGAL SERVICES
Amy L. Crewdson, WSBA 9468

PROOF OF SERVICE

I certify that a true and correct copy of the foregoing Respondents' Supplemental Brief was hand-delivered to William L. Williams and Michael M. Young, Assistant Attorneys General, at 670 Woodland Square Loop SE, Lacey WA 98503 on October 6, 2006.

I certify that I served a true and correct copy of the foregoing Respondents' Supplemental Brief on Dmitri L. Iglitzin at Schwerin, Campbell & Barnard, 18 W Mercer Street., Ste. 4001 Seattle, WA 98119-3971 and Gregory A. McBroom at Livengood Fitzgerald & Alskog at 121 3rd Ave, Kirkland, WA 98033 by US mail, postage prepaid on October 6, 2006.

I declare the foregoing to be true and correct under penalty of perjury under the laws of the State of Washington.

Signed at Olympia, Washington on October 6, 2006.


Meagan J. MacKenzie

Appendix

Appendix #	Description
1-1 thru 1-4	Washington Administrative Code 388-106-0130

WAC 388-106-0130 How does the department determine the number of hours I may receive for in-home care?

(1) The department assigns a base number of hours to each classification group as described in WAC 388-106-0125.

(2) The department will deduct from the base hours to account for your informal supports, as defined in WAC 388-106-0010, as follows:

(a) The CARE tool determines the adjustment for informal supports by determining the amount of assistance available to meet your needs, assigns it a numeric percentage, and reduces the base hours assigned to the classification group by the numeric percentage. The department has assigned the following numeric values for the amount of assistance available for each ADL and IADL:

Meds	Self Performance	Status	Assistance Available	Value Percentage	
Self administration of medications	Rules for all codes apply except independent is not counted	Unmet	N/A	1	
		Met	N/A	0	
		Decline	<1/4 time	.9	
			Partially met	1/4 to 1/2 time	.7
			1/2 to 3/4 time	.5	
			>3/4 time	.3	
Unscheduled ADLs	Self Performance	Status	Assistance Available	Value Percentage	
Bed mobility, transfer, walk in room, eating, toilet use	Rules apply for all codes except: Did not occur/client not able and Did not occur/no provider = 1; Did not occur/client declined and independent are not counted.	Unmet	N/A	1	
		Met	N/A	0	
		Decline	<1/4 time	.9	
			Partially met	1/4 to 1/2 time	.7
			1/2 to 3/4 time	.5	
			>3/4 time	.3	

Scheduled ADLs	Self Performance	Status	Assistance Available	Value Percentage
Dressing, personal hygiene, bathing	Rules apply for all codes except: Did not occur/client not able and Did not occur/no provider = 1; Did not occur/client declined and independent are not counted.	Unmet	N/A	1
		Met	N/A	0
		Decline	N/A	0
		Partially met	<1/4 time	.75
			1/4 to 1/2 time	.55
	1/2 to 3/4 time	.35		
	>3/4 time	.15		

IADLs	Self Performance	Status	Assistance Available	Value Percentage
Meal preparation, Ordinary housework, Essential shopping*	Rules for all codes apply except independent is not counted.	Unmet	N/A	1
		Met	N/A	0
		Decline	N/A	0
		Partially met	<1/4 time	.3
			1/4 to 1/2 time	.2
	1/2 to 3/4 time	.1		
	>3/4 time	.05		

IADLs	Self Performance	Status	Assistance Available	Value Percentage
Travel to medical	Rules for all codes apply except independent is not counted.	Unmet	N/A	1
		Met	N/A	0
		Decline	N/A	0
		Partially met	<1/4 time	.9
			1/4 to 1/2 time	.7
	1/2 to 3/4 time	.5		
	>3/4 time	.3		

Key:

> means greater than

< means less than

*Results in 5% deduction for each IADL from the base hours. Remaining hours may be used for completion of household and personal care tasks.

(b) To determine the amount of reduction for informal support, the value percentage is divided by the number of qualifying ADLs and IADLs needs. The result is value A.

Value A is then subtracted from one. This is value B. Value B is divided by three. This is value C. Value A and Value C are summed. This is value D. Value D is multiplied by the "base hours" assigned to your classification group and the result is base in-home care hours reduced for informal supports.

(3) Also, the department will adjust in-home base hours for the following shared living circumstances:

(a) If there is more than one client living in the same household, the status under subsection (2)(a) of this section must be met or partially met for the following IADLs:

- (i) Meal preparation,
- (ii) Housekeeping,
- (iii) Shopping, and
- (iv) Wood supply.

(b) If you and your paid provider live in the same household, the status under subsection (2)(a) of this section must be met for the following IADLs:

- (i) Meal preparation,
- (ii) Housekeeping,
- (iii) Shopping, and
- (iv) Wood supply.

(c) When there is more than one client living in the same household and your paid provider lives in your household, the status under subsection (2)(a) of this section must be met for the following IADLs:

- (i) Meal preparation,
- (ii) Housekeeping,
- (iii) Shopping, and
- (iv) Wood supply.

(4) After deductions are made to your base hours, as described in subsections (2) and (3), the department may add on hours based on your living environment:

Condition	Status	Assistance Available	Add On Hours
Offsite laundry facilities, which means the client does not have facilities in own home and the caregiver is not available to perform any other personal or household tasks while laundry is	Unmet	N/A	8

done.

Client is >45 minutes from essential services (which means he/she lives more than 45 minutes one-way from a full-service market).	Unmet	N/A	5
	Met	N/A	0
	Partially met	<1/4 time	5
		between 1/4 to 1/2 time	4
		between 1/2 to 3/4 time	2
		>3/4 time	2
Wood supply used as sole source of heat.	Unmet	N/A	8
	Met	N/A	0
	Declines	N/A	0
	Partially met	<1/4 time	8
		between 1/4 to 1/2 time	6
		between 1/2 to 3/4 time	4
		>3/4 time	2

(5) In the case of New Freedom consumer directed services (NFCDS), the department determines hours as described in WAC 388-106-1450.

(6) The result of actions under subsections (2), (3), and (4) is the maximum number of hours that can be used to develop your plan of care. The department must take into account cost effectiveness, client health and safety, and program limits in determining how hours can be used to meet your identified needs. In the case of New Freedom consumer directed services (NFCDS), a New Freedom spending plan (NFSP) is developed in place of a plan of care.

(7) You and your case manager will work to determine what services you choose to receive if you are eligible. The hours may be used to authorize:

(a) Personal care services from a home care agency provider and/or an individual provider.

(b) Home delivered meals (i.e. a half hour from the available hours for each meal authorized).

(c) Adult day care (i.e. a half hour from the available hours for each hour of day care authorized).

(d) A home health aide if you are eligible per WAC 388-106-0300 or 388-106-0500.

(e) A private duty nurse (PDN) if you are eligible per WAC 388-71-0910 and 388-71-0915 or WAC 388-551-3000 (i.e. one hour from the available hours for each hour of PDN authorized).

(f) The purchase of New Freedom consumer directed services (NFCDS).

[Statutory Authority: RCW 74.08.090, 74.09.520, 74.39A.030. 06-16-035, § 388-106-0130, filed 7/25/06, effective 8/25/06. Statutory Authority: RCW 74.08.090, 74.09.520, 74.39A.010 and 74.39A.020. 06-05-022, § 388-106-0130, filed 2/6/06, effective 3/9/06. Statutory Authority: RCW 74.08.090, 74.09.520. 05-11-082, § 388-106-0130, filed 5/17/05, effective 6/17/05.]