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NO. 45111-5-II

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

IN RE THE DETENTION OF:
D.W., G.K., S.B., E.S., M.H., S.P., L.W., J.P., D.C., M.P.,
Respondents

**BRIEF OF APPELLANT,
DEPARTMENT OF SOCIAL AND HEALTH SERVICES**

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I. INTRODUCTION

If a person is detained by a designated mental health professional for seventy-two hours for evaluation and treatment, the facility providing the evaluation and treatment “must immediately accept on a provisional basis the petition and the person.” RCW 71.05.170. If a facility cannot provide services that a particular detained person needs, such as medical services, or if the facilities’ psychiatric beds are full and cannot therefore accommodate a detained person, then the Department of Social and Health Services (DSHS), acting through its Division of Behavioral Health and Recovery, can grant a “single bed certification,” which certifies a single bed in an emergency room or medical hospital for the duration of the 72-hour evaluation period. *See* WAC 388-865-0526. The request for the single bed certification must come from a Regional Support Network or its designee. *Id.*

These consolidated cases involve ten petitions asking the mental health commissioner to involuntarily commit each of these persons for up to fourteen days for involuntary treatment under RCW 71.05. Each of these individuals had been detained by designated mental health professionals for seventy-two hours; however, because all of the evaluation and treatment beds were full, the Pierce County Regional Support Network, which is run by Optum Health, requested and was

granted certification for single beds in otherwise non-certified medical hospitals, such as St. Joseph Hospital and Madigan. The mental health commissioner, and then the revision judge, declared the use of WAC 388-865-0526 (single bed certification) in cases in which certified beds are unavailable as violative of the detained persons' statutory and constitutional rights. The revision judge further disallowed the use of WAC 388-865-0526 in situations in which there is a lack of evaluation and treatment beds for detained persons. Because the revision judge declared an agency rule unconstitutional as applied in the civil commitment cases, instead of in a proceeding under the Administrative Procedure Act as required by law, her order should be reversed.

II. ASSIGNMENTS OF ERROR

The revision judge erred in adjudicating the legality and constitutionality of DSHS's application of WAC 388-865-0526 (single bed certification) in involuntary commitment proceedings under RCW 71.05 because DSHS was not a party to the proceedings, and because the mental health court does not and cannot comply with procedural and substantive requirements for judicial review of agency rules under the Administrative Procedure Act, RCW 34.05.

Because the legality and constitutionality of DSHS's application of WAC 388-865-0526 (single bed certification) cannot be adjudicated in

involuntary commitment proceedings under RCW 71.05, DSHS specifically assigns the following conclusions of law as error:

1. The revision judge erred in finding as a matter of law that RCW 7.24, the Uniform Declaratory Judgments Act, applies in this matter because, under RCW 7.24.146, the Uniform Declaratory Judgments Act specifically excludes state agency action reviewable under RCW 34.05. Clerk's Papers (CP) at 301 (Conclusion of Law (CL) 2).

2. The revision judge erred in finding that, because single bed certifications were granted in these cases under WAC 388-865-0526, respondents were not provided with care and treatment adequate to meet their mental health care needs. CP at 301 (CL 6).

4. The revision judge erred in finding that the application of WAC 388-865-0526 (single bed certification) in these cases was not allowed under RCW 71.05 or RCW 71.24. CP at 302 (CL 8).

5. The revision judge erred in finding that the Secretary of the Department of Social Services, in his discretion, has the power to create or find enough certified evaluation and treatment beds so as to obviate the need for the use of WAC 388-865-0526 (single bed certification) in the manner that it was used in these cases. CP at 302 (CL 8).

6. The revision judge erred in finding that WAC 388-865-0526 (single bed certification) was applied “in contravention of specific constitutional or statutory requirements, [and] in derogation of an individual’s constitutional or statutory rights” in these cases. CP 302 (CL 9).

7. The revision judge erred in assuming that, when WAC 388-865-0526 (single bed certification) is used in circumstances where certified evaluation and treatment center beds are not available, the facilities to which the persons are detained are “incapable of providing care and treatment adequate to meet the person’s mental health care needs.” CP at 302-03 (CL 10).

8. The revision judge erred in assuming that the use of WAC 388-865-0526 (single bed certification) in circumstances where certified evaluation and treatment center beds are not available violates the provisions of RCW 71.05, Const. art. XIII, § 1, and the due process clauses of the United States Constitution. CP at 302-03 (CL 10).

9. The revision judge erred in disallowing the use of WAC 388-865-0526 (single bed certification) under the circumstances presented in these cases, and finding that this use of WAC 388-865-0526 under any circumstances is a violation of the detained person’s civil rights. CP at 303 (CL 11).

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

- A. Whether The Revision Judge Erred In Adjudicating The Validity Of The Application Of An Agency Rule In A Mental Health Proceeding When The Administrative Procedure Act (RCW 34.05) Is The Exclusive Remedy**

IV. STATEMENT OF THE CASE

A. Legal Framework

1. The Structure Of The Public Mental Health Services Delivery System

The State of Washington supports public mental health services in two primary ways. First, the Department of Social and Health Services directly operates inpatient psychiatric facilities such as Western State Hospital and Eastern State Hospital. The state psychiatric hospitals serve the most acute and potentially long-term psychiatric patients. RCW 71.24.016(1) and RCW 72.23.025(1). Second, the State provides mental health services by contracting with Regional Support Networks, such as Pierce County Regional Support Network, to distribute Medicaid and state funds in return for the provision of community inpatient and outpatient services to qualifying individuals. CP at 229-41. These contracts take a standard form, are renewed on a biennial basis, and must be consistent with available resources appropriated by the Legislature. RCW 71.24.035(5)(e) and (17)(b).

Regional Support Networks are made up of counties or groups of counties, except in Pierce County where the Regional Support Network is operated by Optum Health, a private for-profit corporation. RCW 71.24.025(20); CP at 154. The State provides funding to the Regional Support Networks by contracting with them to deliver Medicaid-funded mental health services through a system of managed care. RCW 71.24.030; RCW 71.24.035(5)(e). By law and under a separate state-funded contract with DSHS, Regional Support Networks are required to administer the Involuntary Treatment Act and “[p]rovide within the boundaries of each regional support network evaluation and treatment services for at least ninety percent of persons detained or committed for periods up to seventeen days according to RCW 71.05.” RCW 71.24.300(6)(c). Under the state-funded contract with DSHS, Regional Support Networks also agree, within available resources, to “[a]dminister and provide for the availability of all investigation, transportation, court-related, and other services provided by the state or counties pursuant to RCW 71.05.” RCW 71.24.300(6)(b). Regional support networks do this through subcontracts with community providers, such as Telecare and Greater Lakes Mental Health in Pierce County. CP at 137-40, 142-44.

The Legislature's intent in creating the Regional Support Networks was "to establish a community mental health program which shall help people experiencing mental illness to retain a respected and productive position in the community," and to "explicitly hold regional support networks accountable for serving people with mental disorders within their geographic boundaries and for not exceeding their allocation of state hospital beds." RCW 71.24.015 and .016. While the Department of Social and Health Services is the state mental health authority, it can only step in to assume the duties of a Regional Support Network if the Regional Support Network fails to meet state minimum standards or refuses to exercise its responsibilities. RCW 71.24.035(1), (4), and (16). In performing these duties, the Legislature provided that DSHS, as the state mental health authority, could not interfere in "the roles and responsibilities of county authorities as to each other under regional support networks by rule, except to assure that all duties required of regional support networks are assigned and that counties and the regional support network do not duplicate functions and that a single authority has final responsibility for all available resources and performance under the regional support network's contract with the secretary." RCW 71.24.300(3).

The counties and Regional Support Networks are separate legal entities from the State, and each has its own statutory responsibilities, as

this Court recognized in *Pierce County v. State*, 144 Wn. App. 783, 185 P.3d 594 (2008). This Court held that, “[t]he legislature recognizes that the state hospitals are separate from local communities, not a part of them. Permitting the County to use Western State Hospital to meet the 85 [now 90] percent requirement would be contrary to the legislature’s intent to maintain mentally ill individuals in the community as much as possible.” *Pierce*, 144 Wn. App. at 853.

The Regional Support Network contracts with DSHS specifically address the issue of the independent status of each party to the contract. For example, Section 17.11 of the 2011-2013 Contract between the Department of Social and Health Services and the Pierce County Regional Support Network (Optum) provides as follows:

17.11 Independent Status. For purposes of this Agreement, the Contractor acknowledged that the Contractor is not an officer, employee, or agent of DSHS or the State of Washington. The Contractor shall not hold out itself or any of its employees as, nor claim status as, an officer, employee, or agent of DSHS or the State of Washington. The Contractor shall not claim for itself or its employees any rights, privileges, or benefits, which would accrue to an employee of the State of Washington. The Contractor shall indemnify and hold harmless DSHS from all obligations to pay or withhold federal or state taxes or contributions on behalf of the Contractor or the Contractor's employees.

CP at 236. These contracts “transfer funding and responsibility for the mentally ill from the State to the regional support networks to maintain the mentally ill in their communities” *Pierce*, 144 Wn. App. at 797.

2. The Nature Of Single Bed Certifications

Single bed certifications arise in the context of civil commitments for mental health evaluation. When a Designated Mental Health Professional¹ detains a person for 72 hours for evaluation for civil commitment:

[T]he facility providing seventy-two hour evaluation and treatment must immediately accept on a provisional basis the petition and the person. The facility shall then evaluate the person's condition and admit, detain, transfer, or discharge such person in accordance with RCW 71.05.210.

RCW 71.05.170. The person detained is placed in an evaluation and treatment facility, crisis stabilization unit, or triage facility that has been certified by DSHS. RCW 71.05.020(6), (16), and (43); RCW 71.05.150, .153. The entity responsible for ensuring that a certified bed is available for the person is the Regional Support Network. RCW 71.24.300(6)(a) and (c).

If the detained person requires services that are not available at a certified facility, then the Division of Behavioral Health and Recovery can grant a "single bed certification," which certifies a single bed in an emergency room or medical hospital for the duration of the 72-hour

¹ A designated mental health professional is "a mental health professional designated by the county or other authority authorized in rule to perform the duties specified in [RCW 71.05]." RCW 71.05.020(11).

evaluation period. The DSHS rule pertaining to single bed certifications provides in relevant part as follows:

WAC 388-865-0526
Single bed certification.

At the discretion of the mental health division [now the Division of Behavioral Health and Recovery], an exception may be granted to allow treatment to an adult on a seventy-two hour detention or fourteen-day commitment in a facility that is not certified under WAC 388-865-0500...

(1) The regional support network or its designee must submit a written request for a single bed certification to the mental health division prior to the commencement of the order.... If the DSHS secretary has assumed the duties assigned to a nonparticipating regional support network, a single bed certification may be requested by a mental health division designee contracted to provide inpatient authorization or designated crisis response services.

(2) The facility receiving the single bed certification must meet all requirements of this section unless specifically waived by the mental health division.

(3) The request for single bed certification must describe why the consumer meets at least one of the following criteria:

(a) *The consumer requires services that are not available at a facility certified under this chapter or a state psychiatric hospital; ...*

(4) The mental health division director or the director's designee makes the decision and gives written notification to the requesting entity in the form of a single bed certification. The single bed certification must not contradict a specific provision of federal law or state statute.

(5) The mental health division may make site visits at any time to verify that the terms of the single bed certification are being met. Failure to comply with any term of this exception may result in corrective action. If the mental health division determines that the violation places

consumers in imminent jeopardy, immediate revocation of this exception can occur.

(6) Neither consumers nor facilities have fair hearing rights as defined under chapter 388-02 WAC regarding single bed certification decisions by mental health division staff.

(Emphasis added.) WAC 388-865-0526; CP at 179-81. The request for the single bed certification must come from the Regional Support Network or its designee. *Id.*

3. Procedural History of This Case

The named respondents in these consolidated cases were detained under RCW 71.05 for up to 72 hours for evaluation for civil commitment. As there were no certified evaluation and treatment beds available when these individuals were detained, they were detained in general hospitals under WAC 388-865-0526 (single bed certification). Once the petitioning mental health professionals filed petitions for up to fourteen days of involuntary treatment, respondents' counsel filed motions to dismiss in all of these cases, arguing that the application of WAC 388-865-0526 in these cases was improper and unconstitutional. CP at 1-6; 12-16; 344-47; 364-67; 400-04; 421-24; 436-40; 452-59; 471-75; 493-97. Three of the cases were ultimately dismissed on other grounds: one because the petitioner did not meet the burden of proof, and two others because the

respondents agreed to voluntarily accept inpatient treatment. CP at 425, 441, 460.

At the civil commitment hearing on one of these cases, respondent's attorney suggested that "everyone can be brought . . . in here to learn just how unworkable the system is." CP at 96-97. The mental health commissioner granted the request, asking the prosecutor² and the respondent's attorney to "get the State of Washington involved . . . [and] the RSN Optum involved," to consider the issue of whether "the State [can], by virtue of passing rule-making in the form of a WAC, affirmatively shift that duty [of evaluation and treatment] to a private, uh, entity which is providing medical services and not psychiatric services?" CP at 99-100.

Prior to the "stakeholder" hearing scheduled for February 27, 2013, respondents' attorney withdrew all of the pending motions to dismiss, asking the mental health commissioner to hold a "review" hearing on the manner in which WAC 388-865-0526 was applied in these cases. CP at 353-54, 373-74, 389-90, 410-11, 426-27, 442-43, 461-62. At the February 27, 2013 hearing, Nathan Hinrichs, the supervisor of the Pierce County Regional Support Network's designated mental health

² The prosecuting attorney represents the individuals or agencies petitioning for involuntary commitment or detention, and defends all challenges to these commitments, and the attorney general represents the state hospitals in 90- and 180-day civil commitment proceedings when the state hospital is the petitioner. RCW 71.05.130.

professionals, attested to a significantly rising number of detentions resulting in single bed certifications. CP at 115, 123-28. He also testified that, without the availability of single bed certifications, “we would have people that are potentially dangerous being released. . . . either they could be hurt or other people could be hurt. . . . somebody could come to harm.” CP at 130. David Reed, a supervisor in the Policy & Planning Unit of the Division of Behavioral Health and Recovery, testified that single bed certifications are used both in situations in which the evaluation and treatment centers cannot provide the care or services that the detained person needs, and when the evaluation and treatment center beds are full and therefore the Regional Support Network cannot offer the detained person an evaluation and treatment bed during the 72-hour evaluation period. CP 179-80. He also stated that when WAC 388-865-0526 was written, “the lack of inpatient capacity we had in the communities at that time was not foreseen” and he did “not think single bed certs were developed to meet this need.” CP at 172. Mr. Reed testified that, while the treatment in the hospital with the single certified bed is “not optimum,” the alternative of the individuals spending the 72 hours out on the streets is “not at all” optimal. CP 171-81.

Mr. Reed also testified that the section he supervises at the Division of Behavioral Health and Recovery convened a stakeholder

workgroup to specifically review the use of single bed certifications. The group, consisting of Regional Support Network members, providers and others interested in the process, was identifying the issues and developing potential solutions. CP at 171-73. At the time of the hearing, the workgroup was finishing up its work. CP at 171-73.

The mental health commissioner filed an Opinion of the Court on March 6, 2013, finding that “WAC 388-865-0526(3)(a) is invalid if it allows boarding strictly due to lack of capacity.” CP at 54. The mental health commissioner further stated that, “[i]ndividuals may not be validly placed in a single bed certification UNLESS there is some documented mental need or other need apart from mere insufficient capacity for that housing” CP at 55 (emphasis in original). The mental health commissioner found that WAC 388-865-0526(3)(a) was inconsistent with statutory authority for mental health commitments, concluding that the rule:

[G]oes well beyond merely “filling in the gaps [in the statutes]”, it changes both the intent of the Involuntary Treatment Act and abrogates the legislatively established rights of the patient. The act of psychiatric boarding is not consistent with the legislative intent and purpose of RCW 71.05. It is a different issue if the person requires medical care predominate to or in conjunction with their needed mental care; but, psychiatric boarding due to mere overcrowding is not consistent with the purpose of the statute and is therefore invalid.

CP at 52.

The Pierce County Prosecutor filed a Motion for Revision, and DSHS filed a request to file an amicus brief, which was granted. CP 57-59, 60-81, 82-88, 204-05. Franciscan Health System joined Multicare Health System's request to file an amicus brief opposing revision, which was granted. CP at 214-15, 216-28. The respondents' attorney filed a brief opposing revision, but in response to DSHS's argument that the Administrative Procedure Act was the exclusive remedy, also argued that the revision judge could revise the mental health commissioner's order by focusing on the requirements for adequate care and individualized treatment, and that DSHS is a "proxy" for the Regional Support Network, and therefore already a party to the proceedings. CP at 252-59, RP (Mar. 29, 2013) at 10-15. At the revision hearing on March 29, 2013, the revision judge asked for briefing on the "proxy" issue, whether RCW 7.24, the Uniform Declaratory Judgments Act, applied in this case, and the effect that the mental health commissioner's ruling would have if upheld. RP (Mar. 29, 2013) at 27-29.

During a hearing on May 20, 2013, the revision judge upheld the mental health commissioner's ruling as follows:

This court is ruling *de novo* that RCW 71.05, with its legislative intent to safeguard the civil rights of individuals, and Article XIII, Section 1 of the State Constitution, and the U.S. Constitution's due process clause, as illustrated in recent federal decisions, do not allow the practice of using

single bed certifications when there are only mental health issues to be addressed. This is true no matter how widespread, economical, or convenient it may be to proceed otherwise.

CP at 286-87. Hearing was set for June 10, 2013, for the presentation of the findings of fact and conclusions of law.

On June 10, 2013, the judge granted the motion for revision, but the essence of her findings were little different than the mental health commissioner's findings of March 8, 2013. CP at 47-55, 297-305. The revision judge also granted Multicare Health Systems, Franciscan Health Systems, and DSHS intervenor status for appeal, and stayed the effect of her ruling until December 10, 2013. CP at 56, 290-92.

The Department of Social and Health Services and the petitioners timely appealed. CP 306-18, 319-29.

V. ARGUMENT

A. **The Validity Of An Agency Rule Cannot Be Adjudicated In A Commitment Proceeding Under RCW 71.05 Because The Agency That Adopted The Rule Is Not A Party To The Proceeding, And Because The Commitment Court Does Not, And Cannot, Comply With Procedural And Substantive Requirements For Judicial Review Of Agency Rules Under The Administrative Procedure Act, RCW 34.05**

In her Findings of Fact and Conclusions of Law, the revision judge found that the application of WAC 388-865-0526 (single bed certification) in these cases was done "in contravention of specific constitutional or

statutory requirements, [and] in derogation of an individual's constitutional or statutory rights." CP at 302 (CL 9). In doing so, she assumes that when WAC 388-865-0526 (single bed certification) is used in circumstances where certified evaluation and treatment center beds are not available, the facilities to which the persons are detained are "incapable of providing care and treatment adequate to meet the person's mental health care needs," violating their civil rights set forth in RCW 71.05, Const. art. XIII, § 1, and the due process clauses of the United States Constitution. CP at 302-03 (CL 10). She concluded that this use of WAC 388-865-0526 (single bed certification) under any circumstances is a violation of the detained person's civil rights, and declared that the agency rule could not be used in this manner. CP at 303 (CL 11).

The issue of whether the revision judge improperly adjudicated the application of WAC 388-865-0526 in mental health proceedings rather than a proceeding under the Administrative Procedure Act is a question of law. Questions of law are reviewed *de novo*. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). Because the validity of an agency rule, including the application of that rule, can only be adjudicated in a proceeding under the Administrative Procedure Act, the revision judge's ruling must be overturned.

1. Neither The Mental Health Commissioner Nor The Revision Judge Has The Authority To Adjudicate The Validity Of An Agency Rule

Mental health proceedings under RCW 71.05 are solely intended to ascertain whether the person at issue suffers from a mental disorder that renders that person either gravely disabled or a danger to self or others, and if so whether that person should be treated in an inpatient facility for up to fourteen days, or in the community for up to 90 days. RCW 71.05.230 and .240(3). Mental health hearings are not designed to either adjudicate the validity of an agency rule or the application of that rule, yet that is exactly what the mental health commissioner and the revision judge did in these cases by issuing declaratory judgments invalidating the application of WAC 388-865-0526 (single bed certification). Because the Administrative Procedure Act is the “exclusive” means to challenge the State’s application of its agency rule, the judgment invalidating the application of WAC 388-865-0526 in these cases must be overturned.

The approval of the applications for single bed certification in these cases constituted agency action. “Agency action” is defined as “licensing, the implementation or enforcement of a statute, the adoption or *application of an agency rule* or order, the imposition of sanctions, or the granting or withholding of benefits.” Emphasis added.

RCW 34.05.020(3). The Administrative Procedure Act is the “exclusive means of judicial review of agency action.” RCW 34.05.510. *See generally Wells Fargo Bank v. Wash. State Dep’t of Rev.*, 166 Wn. App. 342, 358-61, 271 P.3d 268, 277-78 (2012); *review denied* 175 Wn.2d 1009, 285 P.3d 885 (discussion of history of exclusivity of Administrative Procedure Act review). Therefore, under the exclusive authority of the Administrative Procedure Act, an agency rule may only be challenged by a person with standing by petitioning for a declaratory judgment in the Thurston County Superior Court. RCW 34.05.570(2)(b)(i).³ Because a mental health proceeding is not a proceeding under Administrative Procedure Act, neither the mental health commissioner nor the revision judge had the legal authority to adjudicate the legality of the application of WAC 388-865-0526 (single bed certification).

The revision judge specifically cited RCW 7.24, the Uniform Declaratory Judgments Act, as authority for issuing a declaratory

³ The APA also allows for judicial review of a rule in the context of “any other *review proceeding* under this section.” *See* RCW 34.05.570(2)(a) (emphasis added). This refers to other forms of judicial review under the APA—primarily judicial review of adjudicative proceeding orders under RCW 34.05.570(3). Under this alternative, if a court conducts judicial review of an agency adjudicative order that relied on a rule, the respondent may plead and pursue judicial review of the validity of a rule as part of that “review proceeding.” *See* RCW 34.05.570(2). Of course, RCW 71.05 proceedings are not such “review proceedings.”

judgment in this case. CP at 301. However, the Uniform Declaratory Judgments Act applies only to persons under the following circumstances:

RCW 7.24.020

Rights and status under written instruments, statutes, ordinances.

A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

An agency rule is not a “deed, will, written contract or other writings constituting a contract,” nor is it “a statute, municipal ordinance, contract or franchise.” Indeed, the Uniform Declaratory Judgments Act explicitly provides that, “[t]his chapter [RCW 7.24] does not apply to state agency action reviewable under chapter 34.05 RCW.” RCW 7.24.146. Because the revision judge’s decision was a review of the application of an agency rule, the Uniform Declaratory Judgments Act does not apply.

Secondly, when the validity of the application of an agency rule is challenged, the agency *shall be made a party* to the proceeding.” RCW 34.05.570(2)(a) (emphasis added). As the Supreme Court ruled on multiple occasions, a court does not have authority to review a rule if the agency is not made a party to a proper proceeding under the

Administrative Procedure Act. *See Judd v. AT&T*, 152 Wn.2d 195, 204, 95 P.3d 337, 342 (2004) (“Although Judd challenges the validity of the . . . disclosure regulations and the waiver provisions of the 1999 disclosure regulations, Judd has not brought an APA action and has not made the WUTC a party to these proceedings”); *City of Bremerton v. Spears*, 134 Wn.2d 141, 164, 949 P.2d 347, 358 (1998) (“The State Patrol has never been a party to this action, and the proper promulgation of the rule is therefore not before this Court.”). In addition to the fact that a mental health hearing is not a proceeding under the Administrative Procedure Act, the Department of Social and Health Services is also not a party in a mental health hearing under RCW 71.05.230 and .240(3).

As noted in the Statement of the Case above, the Regional Support Networks, not the Department of Social and Health Services, are required to “[p]rovide within the boundaries of each regional support network evaluation and treatment services for at least ninety percent of persons detained or committed for periods up to seventeen days according to RCW 71.05.” RCW 71.24.300(6)(c). Accordingly, the mental health professionals petitioning for involuntary commitment in such cases would not be acting on behalf of DSHS, but rather on behalf of the Regional Support Networks or their subcontracted providers. RCW 71.24.045(1) and (2); RCW 71.24.300(6)(c).

At the core of the declaratory judgments were the Regional Support Network's requests for, and DSHS's grants of, single bed certifications. The procedural course and substance of this challenge to WAC 388-865-0526 did not consider, much less comply with, RCW 34.05.570. No petition has been filed in the Thurston County Superior Court to review the rule. Rather, the petitions were filed in the Pierce County Superior Court, as required under RCW 71.05 for mental health cases. And the Department of Social and Health Services, an indispensable party to a challenge of its own rules under RCW 34.05.570(2)(a), *see Judd*, and *City of Bremerton*, was not a party to these mental health proceedings. Therefore, under the plain language of the APA and binding precedent of the Supreme Court, this Court should conclude that these RCW 71.05 proceedings do not authorize review of the validity of agency rules and vacate the ruling because it constitutes review of a rule's validity, which is beyond the statutory parameters of a mental health proceeding.

This conclusion not only follows the statute and case law, it reflects the practical needs for respect between coordinate branches of government. The mental health commissioner and the revision judge reviewed the validity of the application of WAC 388-865-0526, but they did not have the benefit of DSHS's rulemaking files and records. The

Washington Supreme Court has long established that agency expertise and the agency rulemaking files and records are critical to ensure that the reviewing court can properly defer to agency expertise, and to ensure that courts allow agencies to function within their delegated powers. *See generally Northwest Ecosystem Alliance v. Wash. Forest Practices Bd.*, 149 Wn.2d 67, 78-79, 66 P.3d 614, 619 (2003); *Aviation West Corp. v. Wash. State Dep't of Labor and Indus.*, 138 Wn.2d 413, 418-21, 980 P.2d 701, 704-705 (1999). In these mental health cases, DSHS is not a party, and thus had no opportunity to present its case. Moreover, the rulemaking file or any other rulemaking records that are critical to consideration of the legal issues are not part of the evidence that a mental health commissioner can consider.

The respondents are not without remedy: they can file a petition for rulemaking under RCW 34.05.330 or they can petition for judicial review of a rule under RCW 34.05.570. They cannot challenge the validity of an agency rule in a RCW 71.05 proceeding, nor can a mental health commissioner or judge in such an action issue a declaratory judgment invalidating an agency rule.

The respondents may argue that judicial review under the Administrative Procedure Act is not the appropriate vehicle to challenge the validity of WAC 388-865-0526 because subsection (6) provides that,

“Neither consumers nor facilities have fair hearing rights as defined under chapter 388-02 WAC regarding single bed certification decisions by mental health division staff.” This provision simply means that WAC 388-865-0526 does not create cognizable administrative hearing rights in either the consumers or the providers. There is no limitation on the right of the consumers to judicial review of rule validity under the procedures and with the parties required by the Administrative Procedure Act.

2. Because The Proceeding Below Turned Into A Claim Regarding The Validity Of A DSHS Rule, DSHS Became An Indispensable Party To Such A Claim Under CR 19(B)

This Court should also vacate the ruling below because, once the fourteen-day mental health cases were turned into claims reviewing the wisdom or validity of the single bed certification rule, DSHS became an indispensable party.

Whether a person is necessary or indispensable is governed by CR 19(a) and (b). Professor Tegland explained the relationship between “necessary” and “indispensable” parties as follows:

If the court concludes that a person is a necessary party, but that the person cannot be joined as a party (usually for lack of jurisdiction or for improper venue), the court must then determine under CR 19(b) whether the action can continue in the absence of the necessary party. If a party is so important to the action that the action cannot

continue in the absence of that party, the party is often termed *indispensable*.

3A Karl B. Tegland, *Washington Practice, Rules Practice*: CR 19(b) at 413-14 (5th ed. 2006). Indispensable means that in “equity and good conscience the action . . . should be dismissed, the absent person being thus regarded as indispensable.” CR 19(b). Whether a person can be considered indispensable depends on the factors in CR 19(b):

The factors to be considered by the court include: (1) to what extent a judgment rendered in the persons absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the persons absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

CR 19(b). If these mental health cases are considered claims regarding the validity of the single bed certification rule, then DSHS is an indispensable party. Each factor in CR 19(b) points this direction. First, the ruling (if effective against DSHS) is prejudicial because it purports to limit DSHS’s application of its adopted rule. Second, no measures can lessen or avoid the prejudice of the ruling that declares the partial invalidity of DSHS’s rule. Third, turning these civil commitment cases into a claim against the validity of a DSHS rule cannot provide adequate relief, because DSHS is not – and cannot be – a party. Fourth, there is a readily available

procedure under the Administrative Procedure Act to address the application and validity of an agency rule, so that these RCW 71.05 proceedings do not need to be cobbled into impromptu rule review procedures.

For all these reasons, a proceeding under RCW 71.05 should not be turned into a claim regarding the validity of a rule. The single bed certification rule is part of the complex system of evaluation and treatment authorized and funded by legislation, and implemented by DSHS, the Regional Support Networks, and community providers. Under CR 19(b), DSHS is an indispensable party to a claim seeking invalidation of the rule. But because DSHS was not a party, the revision judge's adjudication of the validity of the application of WAC 388-865-0526 was improper and should be vacated under CR 12(b)(7), which authorizes dismissal of claims where an indispensable party is absent.

3. The Revision Judge's June 10, 2013 Order Finding the Application of WAC 388-865-0526 Unconstitutional Has Adverse Ramifications For DSHS.

Although not a party to the mental health proceedings at issue in this case, a declaratory judgment concerning WAC 388-865-0526 has adverse consequences to DSHS if left unchallenged. First of all, future litigants will likely argue that DSHS is collaterally estopped from relitigating the issue of the validity of WAC 388-865-0526 because a

court has already ruled that it is invalid. Indeed, the mental health commissioner clearly intended that his findings be used on a preclusive basis, as indicated by his encouragement to patients to file lawsuits “to redress any Constitutional or statutory violation.” CP at 55.

The nature of collateral estoppel was thoroughly discussed in *State Farm Mutual Auto. Ins. Co. v. Avery*, 114 Wn. App. 299, 304, 57 P.3d 300, 303 (2002):

Collateral estoppel, also called issue preclusion, bars relitigation of any issue that was actually litigated in a prior lawsuit. . . . One of the purposes of issue preclusion is to encourage respect for judicial decisions by ensuring finality. . . . Collateral estoppel is an affirmative defense. The party asserting it has the burden of proof. The question is always whether the party to be estopped had a full and fair opportunity to litigate the issue. And that turns on four primary considerations: whether the identical issue was decided in a prior action; whether the first action resulted in a final judgment on the merits; whether the party against whom preclusion is asserted was a party to that action; and whether application of the doctrine will work an injustice.

(Internal citations removed). Although other jurisdictions, including the United States Supreme Court, have generally concluded that the offensive use of nonmutual collateral estoppel is not available against the government in civil cases, Washington courts have never considered this question.⁴ Because DSHS is not a party to fourteen day commitment

⁴ *E.g., U.S. v. Mendoza*, 464 U.S. 154, 160, 104 S. Ct. 568, 78 L. Ed. 2d 379 (1984) (a rule allowing nonmutual collateral estoppel against the government “would substantially thwart the development of important questions of law by freezing the first

proceedings, it will always be unable to fully and fairly litigate any issues concerning the single bed certification rule that might result in a ruling that others may attempt to use preclusively.

Another consequence of the review judge's decision, if left unchallenged, is that the mental health commissioners and other judicial officers in Pierce County might use the decision as a basis to require DSHS to appear and show cause why it should not be held in contempt for continuing to issue single bed certifications when there are no certified beds available. Neither the Pierce County Regional Support Network, which is responsible for providing certified beds, nor DSHS, which promulgated the single bed certification rule, was a party below. If left undisturbed, the revision judge's findings that the treatment is not "optimal" in medical hospitals and not equal to treatment in evaluation and treatment centers would form the basis for future contempt orders.

Finally, and most importantly, the revision judge's decision invalidating DSHS's application of WAC 388-865-0526 (single bed certification), if upheld, would likely result in detained persons being

final decision rendered on a particular legal issue"); *Hercules Carriers, Inc. v. Florida Dep't of Transp.*, 768 F.2d 1558, 1579 (11th Cir. 1985) (holding that "the rationale outlined by the Supreme Court in *Mendoza* for not applying nonmutual collateral estoppel against the government is equally applicable to state governments."). Two Washington cases have allowed the doctrine to be used defensively. See *Public Utility Dist. No. 1 of Pend Oreille Cnty., v. Tombari Family Ltd P'ship*, 117 Wn.2d 803, 819 P.2d 369 (1991); *Seattle Exec. Servs. Dep't v. Visio Corp.*, 108 Wn. App. 566, 577, 31 P.3d 740 (2001).

released any time that a certified bed is not available, where they could pose a danger to themselves or others. As the supervisor of the Pierce County Designated Professionals said, “we would have people that are potentially dangerous being released. . . . either they could be hurt or other people could be hurt. . . . somebody could come to harm.” CP at 130. Any concerns surrounding the application of this rule should be thoughtfully handled in the manner which the Legislature created for the exclusive adjudication of these issues.

VI. CONCLUSION

For the reasons stated above, the Department of Social and Health Services respectfully asks this Court to overturn the revision judge’s ruling of June 10, 2013.

RESPECTFULLY SUBMITTED this 31st day of October, 2013.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read "Sarah J. Coats", with the number "27153" and a checkmark-like symbol written below it.

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PROOF OF SERVICE

I, *Beverly Cox*, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. I hereby certify that on October 31, 2013, I caused to be served a true and correct copy of this **BRIEF OF APPELLANT, DEPARTMENT OF SOCIAL AND HEALTH SERVICES** and this **PROOF OF SERVICE** on the following individuals, in the manner indicated below:

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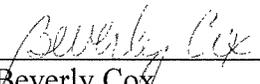
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 31 day of October 2013, at Tumwater, Washington.



Beverly Cox
Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

October 31, 2013 - 3:44 PM

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