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**NO. 45111-5-II**

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

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IN RE THE DETENTION OF  
DW, GK, SG, ES, MH, SP, LW, JP, DC, MP

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Appeal from the Superior Court of Pierce County  
The Honorable KATHRYN NELSON

Nos.

13-6-00138-1, 13-6-00145-4  
13-6-00155-1, 13-6-00163-2  
13-6-00167-5, 13-6-00169-1  
13-6-00170-5, 13-6-00177-2  
13-6-00214-1, 13-6-00218-3

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**BRIEF OF APPELLANT PIERCE COUNTY DMHPs**

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## I. ASSIGNMENTS OF ERROR

1. The trial court—Commissioner Adams sitting as mental health commissioner—did not have subject matter jurisdiction, the proper parties or the proper forum to rule upon the adequacy of patient treatment under a single bed certification.
2. The trial court erred in its finding of fact #4, by ignoring that Nathan Hinrichs testified that releasing patients without any treatment to the streets is inappropriate.
3. The trial court erred in its finding of fact #6, by ignoring that David Reed testified that releasing patients without any treatment to the streets is inappropriate.
4. The trial court erred in its conclusion of law #2, June 10, 2013, that “This court has the authority to declare the right of parties and individuals subject to the provisions of the Involuntary Treatment Act, chapter 71.05 RCW pursuant to the Uniform Declaratory Judgments Act, chapter 7.24 RCW.”
5. The trial court erred in its conclusion of law #8, June 10, 2013, that “Neither chapter 71.05 nor chapter 71.24 RCW provide an exception allowing that persons detained under these circumstances be detained in singly certified beds solely because of lack of capacity at certified evaluation and treatment facilities or the state hospitals.”

6. The trial court erred in its conclusion of law #9, June 10, 2013, that “When enacted, WAC 388-865-0526 did not contemplate the use of single bed certifications as a means to address lack of facilities or resources.”

7. The trial court erred in its conclusion of law #10, June 10, 2013, that “With its legislative intent to safeguard the civil rights of individuals and to require the adequate care and individualized treatment of detained individuals, chapter 71.05 RCW, together with art. XIII, sec. 1 of the Washington State Constitution and the due process clauses of the United States Constitution, do not allow the practice of using single bed certifications under WAC 388-865-0526 when there are only mental health issues to be addressed and the facility to which the person is detained on such a single bed certification is incapable of providing care and treatment adequate to meet the person’s mental health care needs.”

8. The trial court erred in its conclusion of law #11, June 10, 2013, that “Thus, under the provisions of chapter 71.05 RCW, persons may be detained for up to seventeen days only at certified evaluation and treatment facilities, except when they present medical or other needs that must be addressed elsewhere.”

9. The trial court erred in its ruling of June 10, 2013, by declaring that “2. ... individuals detained by a designated mental health professional ... have a right to be detained only to a certified evaluation

and treatment facility, and that their detention to a facility other than a certified evaluation and treatment facility is allowable under the statute only to meet a medical or other collateral need or service that cannot be provided by a certified evaluation and treatment facility.”

10. The trial court erred in its ruling of June 10, 2013 by declaring that “3. ...it is a violation of such detained person’s civil rights ... for such person to be detained on a single bed certification to a facility that is not staffed or otherwise equipped to fully and capably meet their needs for appropriate, adequate and individualized mental health care, evaluation and treatment.”

## II. STATEMENT OF THE ISSUES

1. Whether the court lacked subject matter jurisdiction, lacked necessary parties due to the nature of a RCW 71.05 hearing, and thus was an improper forum.
2. Whether RCW 7.24 regarding declaratory judgments applies to RCW 71.05 cases, particularly when a WAC is involved.
3. Whether the court has adequately considered the context of the single bed certification WAC, the protocols adopted pursuant to RCW 71.05 and the precedent of *Pierce County Office of Involuntary Commitment v. W. State Hosp.*, 97 Wash.2d 264, 644 P.2d 131 (1982).

Standard of Review: Questions of law and conclusions of law are reviewed de novo, *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 880, 73 P.3d 369 (2003).

### III. STATEMENT OF THE CASE

This appeal has to do with whether it is appropriate to adjudicate the adequacy of mental health services on a system-wide basis, in the context of a hearing on an individual's 14 day involuntary treatment petition. The patients were originally detained for 72 hours, and then petitions for 14 days of additional inpatient treatment were filed, CP 514-517, 589-592, 596-599, 603-606, 610-613, 617-620, 624-627, 631-634, 638-641, 645-648. Because the beds at the Evaluation and Treatment facilities (E&Ts) in the county were full, the patients were detained at local hospitals by virtue of the process known as "single bed certification," CP 111-135. As E&T beds became available, patients would be moved to those facilities. In each case counsel for the patient filed a motion to dismiss, arguing that because full psychiatric treatment was being delayed, patients' rights were being violated, CP 1-6, 344-347, 364-367, 400-404, 421-424, 436-440, 452-459, 471-475, 493-497. The cases were consolidated by the court, Craig Adams, commissioner, to determine whether there was a violation of the patients' rights, and if so, whether there was an appropriate remedy, CP 47-55, 189-196. The Attorney

General was invited to participate as amicus, Sarah Coats, AAG, appearing, CP 18-28. After the commissioner's ruling, a revision was sought, CP 58-59. Superior Court Judge Kathryn Nelson heard the matter and allowed DSHS and the Franciscan and MultiCare Hospitals to intervene, CP 290-292. She ruled by way of a declaratory judgment, CP 297-305, and from that decision, this appeal was taken, CP 306-329.

#### IV. ARGUMENT

A. AN INVOLUNTARY COMMITMENT HEARING IS NOT THE PROPER FORUM FOR ADDRESSING THE APPROPRIATE LEVEL OF CARE FOR MENTAL HEALTH PATIENTS ON SINGLE BED CERTIFICATIONS, DUE TO THE LACK OF SUBJECT MATTER JURISDICTION AND NECESSARY PARTIES.

1. DSHS, not the court, has the initial duty to determine constitutional adequacy of treatment.

Lack of trial court jurisdiction is a matter that can be raised at the appellate court level, RAP 2.5(a). A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court, RAP 2.5(a). The case of *In re Detention of W.*, 70 Wash.App. 279, 852 P.2d 1134 (1993) was cited by the Attorney General before Judge Nelson, see AMICUS BRIEF OF DSHS, at page 14, CP 73.

An involuntary commitment proceeding under RCW 71.05**Error!**  
**Bookmark not defined.** and the Superior Court Mental Proceedings Rules

(MPR) is not the proper forum for an investigation into the appropriate level of treatment for patients held pursuant to a single bed certification. *In re Detention of W.*, 70 Wash.App. 279, 852 P.2d 1134 (1993) explains the extremely limited role of the court in determining the constitutional rights of mental health patients. In that case, the trial court found a 90 day commitment appropriate, but ordered that W's treatment be at Harborview Medical Center. That was due to his significant medical care requirement, and based upon a finding that Western State Hospital could not provide W. with adequate treatment. The court of appeals held that it was improper for the trial court to make a determination regarding a statutory or constitutional level of care.

It was likewise error for the court to determine that WSH could not provide W. with adequate treatment. *Under the statutes, DSHS, not a judge or a mental health commissioner, is given the responsibility of making this determination, at least in the first instance.* A person who is involuntarily committed pursuant to RCW Ch. 71.05 has "the right to adequate care and individualized treatment." RCW 71.05.360(2). *DSHS is explicitly given the responsibility for ensuring that this right, and the constitutional rights, of that person are not violated:*

*In re Detention of W.*, at 285, (footnote omitted, emphasis added).

Then the court quotes RCW 71.05.520, *In re Detention of W.*, at 285, (emphasis in original omitted):

[DSHS] shall have the responsibility to determine whether all rights of individuals recognized and guaranteed by the

provisions of this chapter and the Constitutions of the state of Washington and the United States are in fact protected and effectively secured. To this end, the department shall assign appropriate staff who shall from time to time as may be necessary have authority to examine records, inspect facilities, attend proceedings, and do whatever is necessary to monitor, evaluate, and assure adherence to such rights. Such persons shall also recommend such additional safeguards or procedures as may be appropriate to secure individual rights set forth in this chapter and as guaranteed by the state and federal Constitutions.

The court concluded that section of its opinion by saying that

If DSHS determined that the DSHS certified facility was unable to provide W. with adequate medical care, DSHS would have the authority and duty under RCW 71.05.520 to transfer W. to a facility which would be able to provide the care to which W. is entitled. *Only an actual failure to discharge this responsibility would generate grounds for an appeal to the courts*; not merely an anticipated failure as urged by W.

*In re Detention of W.*, at 285 (*emphasis added*). Because *In re Detention of W.* found it was error for the mental health court to determine adequate treatment, likewise Commissioner Adams did not have the “responsibility”—*i.e.* subject matter jurisdiction--for making a determination regarding the adequacy of treatment. The commissioner, rather than simply denying the motion to dismiss and terminating the matter, set a hearing to determine the appropriateness of care and then entered a ruling. He should not have so acted. Judge Nelson likewise could not exercise subject matter jurisdiction. “Under the statutes, DSHS,

not a judge or a mental health commissioner, is given the responsibility of making this determination, at least in the first instance, *In re Detention of W.*, at 285. Significantly, that also was a case where an appeal was taken after a commissioner's ruling and revision to superior court was sought, *In re Detention of W.*, at 281-282.

What was learned from the testimony of David Reed from the DSHS Division of Behavioral Health and Rehabilitation was that DSHS was examining all the ramifications of single bed certifications, RP Feb. 27, 2013, pp 60-72, CP 170-182. By meeting with DMHPs, RSNs, and hospitals, DSHS was exercising their RCW 71.05.520 duties. It was inappropriate for the court to interject itself into the process, when DSHS had not made a finding that anyone's rights were being violated.

Furthermore, RCW 71.05.137 sets out the authority of mental health commissioners. The duties listed there relate to proceedings pursuant to "this chapter"--RCW 71.05. Nowhere in RCW 71.05 is the commissioner given the authority to adjudge the adequacy of treatment in the facilities in which persons are detained under this chapter. As stated above, RCW 71.05.520 specifically gives DSHS the authority to make that determination.

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2. By “inviting” participants to a “show cause” hearing the Court commissioner acted as a legislator, not as a judicial officer.

D.W. and G.K. were on the Pierce County mental health docket for a 14 day hearing on February 12, 2013, CP 7-11 and CP 348-352. The day before that hearing, counsel for the respondents filed motions to dismiss, CP 1-6 and 344-347, because they were being held at hospitals under a single bed certification, rather than at an Evaluation and Treatment facility. Counsel for the petitioner responded with a brief opposing dismissal, CP 12-16. In court, counsel for the respondents asked “to hold in abeyance a final decision until Western State Hospital can be here, until Optum can be here, until someone who can actually fix this system or try to fix this system can tell us what they’re gonna do to prevent the misuse of single bed certifications,” RP of Feb. 12, 2013 at p.5, CP 93, “so maybe, maybe somehow everyone can be brought ... in here to learn just how unworkable the system is,” RP of Feb. 12, 2013 at pp.8-9, CP 96-97. On February 25, 2013, respondents’ attorney filed a withdrawal of the motion to dismiss together with a formalized request for a “review” hearing, CP 353-354.

The court conducted such a hearing on Feb. 27, 2013, CP 111-188. Although the court called it a “show cause” hearing, it was an exercise in

legislative fact finding. Regarding setting such a hearing, Commissioner

Adams said,

*I'm concerned that this becomes a systemic issue and that we have some players who are not present who need to be present because of ... Office of Pierce County Involuntary Commitment against Western State where the Supreme Court affirmed a writ of mandate [mandamus] finding that it was the duty of the State Hospital to take patients irrespective of overcrowding and irrespective of other issues.*

RP of Feb. 12, 2013 at p.9, CP 97, emphasis added. He further stated, RP

of Feb. 12, 2013 at p.11, CP 99, emphasis added:

*I think Mr. Opdyke has hit the nail pretty squarely on the head when he asks the Court to kick the can down the road a short period of time. What I want to do is set a show cause return date the week of February 25. And I will leave it to you gentlemen—and I apologize for the short fuse on this, but *I think we need to get the State of Washington involved, I think we need to get the RSN Optum involved,* and adjudicate what issues we have as to what is the proper remedy.*

And at RP of Feb. 12, 2013 at p.14-15, CP 102-3, he stated, emphasis

supplied:

*It may well be that Ms. Coats from the office of the attorney general -- ...I believe she has a dog in the fight, which I believe is appropriate. ... There may be someone from Optum Corporate or the like which wants to come in. I guess my invitation is: *You all come; this is an issue of significant concern. ...but it is time for a day of reckoning on this issue.*"*

Putting those quotations together, he said, *“I’m concerned that ... we have some players who are not present who need to be present... .”* *“... I think we need to get the State of Washington involved, I think we need to get the RSN Optum involved... .”* *“I guess my invitation is: You all come; this is an issue of significant concern.”* *“...but it is time for a day of reckoning on this issue.”* That language has the tenor of a legislative committee chairman deciding to hold hearings on a topic and putting out the call for impacted interest groups to appear before the committee to participate. Courts, on the other hand, typically resolve disputes *among the parties in front of them.*

3. An involuntary commitment hearing is not appropriate for evaluations of system-wide levels of care.

In a RCW 71.05 case, the only parties are the petitioners and the respondents. There is a singular issue in those cases: whether the patient needs an additional period of mental health treatment. A mental health proceeding operates under specialized rules, Superior Court Mental Proceedings Rules, (MPR). There is no procedure under those rules for adding parties, nor should there be. The petitioner, a designated mental health professional (DMHP) was the party initiating the action. DMHPs do evaluations only; they have no ability to treat or control treatment facilities, see RCW 71.05.

DSHS, through the Attorney General consented to attend that Feb. 27, 2013 hearing acting as amicus, and was not a party, RP of Feb. 27, 2013, CP 111 and Amicus Brief DSHS, CP 18-28. OptumHealth, the Regional Support Network (RSN) did send a witness to that hearing, RP of Feb. 27, 2013, pages 44-59, CP 154-169, but has not appeared as a party. They control the delivery of services in Pierce County, and as such would appear to be a necessary party under CR 19. The hospitals were not at that hearing, but later appeared as amicus and then as parties on revision, see Amicus brief of MultiCare, CP 216-228 and Amicus Brief of Franciscans, CP 274-279, and order for intervention, CP 290-292. Not having the appropriate parties, a RCW 71.05 hearing was not an appropriate forum.

On some level, Commissioner Adams appeared to know that he was on shaky legal ground. When delivering his opinion he said,

...secondly, I'm asked to dismiss. I do not believe that the case law allows a dismissal of the petition, and I will decline to dismiss the underlying petition. *I think the remedies for this really lie with either the state legislature or with a higher court if proper injunctive relief were to be brought.*

RP of March 6, 2013, CP 193, emphasis added. At that point, the commissioner was correct: Dismissal was not appropriate, see CP 12-16, and the remedy belonged with the legislature or a higher court after injunctive relief. He should not have held a hearing nor have issued any

further ruling. Commissioner Adams was well-intentioned, but what emerged was a ruling in search of parties and a forum.

**B. THE UNIFORM DECLARATORY JUDGMENTS ACT, RCW 7.24, DOES NOT AUTHORIZE COURTS TO REVIEW AGENCY REGULATIONS THEREUNDER.**

From Commissioner Adams' ruling, a motion for revision was filed pursuant to RCW 2.24.050, CP 57-59. Judge Nelson heard the revision and her ruling took the form of a declaratory judgment. Inextricably bound up in the matter was the single bed certification rule authorizing hospital stays. The Uniform Declaratory Judgments Act, RCW 7.24, cannot apply to cases which turn on a review of the validity of a WAC provision. Specifically, the last sentence of RCW 7.24.146 excludes state agency action review as was done in this case: "This chapter does not apply to state agency action reviewable under chapter 34.05 RCW." Judge Nelson's ruling has limited the efficacy of a WAC provision, which is promulgated by agency action. RCW 7.24 excludes review of state agency action, because RCW 34.05, the Administrative Procedures Act (APA), "establishes the *exclusive* means of judicial review of agency action," RCW 34.05.510 (emphasis added). In RCW 34.05, there are two procedures for obtaining a declaratory judgment involving an agency rule. The first is a petition for declaratory judgment to the agency, RCW 34.05.240(1), and the second is a petition for declaratory

judgment to Superior Court, RCW 34.05.570(2)(b)(i), with the agency being made a party to that action, RCW 34.05.570(2)(a). Those APA procedures were obviously not followed in this case.

A fairly recent dispute between Pierce County and the state regarding responsibility for care and funding for mental health patients, and involving the application of a WAC provision was procedurally handled by filing in Thurston County: *Pierce County v. State*, 144 Wash.App. 783, 185 P.3d 594 (2008).

The County initiated this lawsuit in November 2002 and in an amended complaint sought relief *under the Administrative Procedure Act, chapter 34.05 RCW*, and for breach of contract and constitutional provisions. The State filed counterclaims, alleging breach of contract. In 2005, the County filed several motions for partial summary judgment, seeking declaratory relief to: (1) establish that the Department had sole responsibility for caring for long-term patients; (2) challenge the imposition of liquidated damages under the contract and under former WAC 388-865-0203; and (3) establish that Western State Hospital is within the boundaries of the Pierce County Regional Support Network and that the County may use the hospital to meet its obligation to provide 85 percent of short-term care within the County's boundaries.

*Pierce County v. State*, at 800-801 (*emphasis added*). That is an appropriate procedural approach, rather than having the issue adjudicated within the context of an involuntary commitment hearing.

Furthermore, Community petitioners are not “proxies” for DSHS for the purpose of APA requirements. The attorney for the patients, in

response to the argument that the state had not been made a party to the action as required by RCW 34.05, put forth the proposition to the trial court that all mental health petitioners are essentially the same—that there is no legal distinction between community petitioners and petitioners from state institutions. (Thus the requirement to name the agency as a party would be essentially fulfilled.) However, RCW 71.24 and 71.05 set out a division between short term community treatment, and long term state hospital facility treatment. There is a difference in petitioners between short and long term commitments: DMHPs or E&T mental health providers file petitions prior to state hospital commitments, and state hospital employees file continued long term requests.

The state contracts with RSNs who then contract with various providers for delivery of mental health services. Each entity participating in those contracts is a separate legal unit who can sue and be sued. Although there is a similarity of duties between petitioners prior to and after state hospital commitments, they are legally distinguishable. Just because DMHPs are clothed with the ability to detain and file petitions, does not mean that DSHS is a party to the action for the purpose of ruling on the validity of a WAC in a 71.05 hearing. That the interests of community and state petitioners are legally distinguishable is plain from

cases like, e.g., *Pierce County Office of Involuntary Commitment v. W.*

*State Hosp.*

C. THE RATIONALE OF *PIERCE COUNTY OFFICE* IS THAT TREATMENT--ALTHOUGH LESS THAN OPTIMAL--IS PREFERABLE TO NO TREATMENT AT ALL.

Turning from procedural issues to substantive and policy arguments, *Pierce County Office of Involuntary Commitment v. W. State Hosp.*, 97 Wash.2d 264, 644 P.2d 131 (1982 is instructive).

1. Historical Background—*Pierce County Office*

Pierce County has experienced its mental health resources being stretched thin in the past resulting in a case reaching the court of appeals: *Pierce County Office of Involuntary Commitment v. W. State Hosp.*, 97 Wash.2d 264, 644 P.2d 131 (1982). The issue in that case was where to appropriately place persons detained by a designated mental health professional when local facilities were overcrowded. That issue has been raised once again in this instance.

*Pierce County Office* provides a historical and legal background. However, there are changes in the legal and practical landscape between 1982 and 2013. In *Pierce County Office*, the Superior Court had issued a writ of mandamus requiring Western State Hospital (WSH) to accept the patients that Pierce County DMHPs detained, even though it required WSH to exceed the capacity of its evaluation and treatment facility. WSH

appealed. From *Pierce County Office*, at 266-67, we learn the following. In 1982, there were 22 certified E&T facilities in 22 counties served by WSH, one of which was run by WSH. Pierce and King Counties would apply to WSH only if their local beds were filled. DMHPs had not sought court orders to compel local facilities to accept patients beyond their capacities, just Western State Hospital. WSH operated a 52 bed E&T and had a 217 bed capacity for its long term care. The court noted that exceeding the stated capacity of any facility jeopardized the physical safety of patients and staff, adversely affected the facility's ability to adequately treat its patients, and risked the facility's loss of certification, accreditation and Medicare certification.

Today, WSH does not provide any short-term E&T beds. There is now a distinction drawn legislatively and practically between short-term and long term stays--72 hour detentions and 14 day commitments on the one hand, and 90 and 180 day commitments on the other. See RCW 71.24, The Community Mental Health Services Act, which was passed in 1982, about the same time as the Court of Appeals' decision in *Pierce County Office*, *supra*. RCW 71.24.016(1) in pertinent part reads:

The legislature intends that eastern and western state hospitals shall operate as clinical centers for handling the most complicated long-term care needs of patients with a primary diagnosis of mental disorder. It is further the intent of the legislature that the community mental health service

delivery system focus on maintaining mentally ill individuals in the community.

(That same distinction--short-term and local vs. long-term and state--exists in the division of petitioner representation between Prosecuting Attorneys and the Attorney General, RCW 71.05.130.) Presently, with Western State Hospital not operating an Evaluation and Treatment facility, Pierce County is served by two 16 bed E&Ts, Telecare Recovery Partnership, located on the grounds of Western State Hospital, and Greater Lakes Recovery Center, located in Parkland/Spanaway, CP 124-154.

2. Current Practice: RCW 71.05 Procedure

A good overview of the state mental health system is found in *Pierce County v. State*, 144 Wash.App. 783,185 P.3d 594 (2008) under the section entitled “I. THE PUBLIC MENTAL HEALTH SYSTEM,” at pp. 796-800. For Pierce County’s local practice, see RP Feb. 27, 2013, CP 111-188. At the time of a person’s detention, a DMHP will contact one of the local Evaluation and Treatment (E&T) facilities, or even an out-of-county facility for placement, see testimony of Nathan Hinrichs, CP 116-124. If there are no beds available, the DMHP will seek permission to detain the patient at a local hospital pursuant to a “single bed certification,” WAC 388-865-0526. That is done by contacting Western State Hospital with information regarding the hospital where the detention

took place, CP 118. The single bed certification will authorize the patient to stay at the medical facility. There the patient will stay until a bed opens up at an Evaluation and Treatment facility. If the transfer is made prior to the expiration of the 72 hour hold, that facility will evaluate and file a 14 day petition if warranted, RCW 71.05.230(1). However, if the transfer to an E&T is not made within the 72 hour period, another DMHP will do an additional mental status evaluation and file the 14 day petition if needed. (Since evaluators at the E&Ts do not travel, DMHPs perform 14 day evaluations and petitions by contract with OptumHealth, Pierce County's Regional Support Network, CP 120.) DMHPs are authorized to file 14 day petitions by RCW 71.05.230(4). A second petitioner is required, RCW 71.05.230(4)(b) or (d), and is usually a medical professional at the hospital where the DMHP has evaluated the patient.

3. The rationale of *Pierce County Office* is that even non-optimal treatment is preferable to releasing mentally ill persons without treatment.

The court in the *Pierce County Office* case addressed the option of simply releasing patients when mental health professionals were faced with an overcrowded situation, at 270 (*emphasis added*):

Nevertheless, it must be presumed that he [a DMHP] will exercise that discretion in good faith, and that when he takes such a person into custody, he is satisfied that the person is indeed dangerous to himself or others or is gravely disabled. While there is not the compelling

necessity of confining a mentally disturbed person that exists with respect to a sentenced felon, *the public policy favoring evaluation and treatment of such persons is a strong one. This court cannot lightly say that the legislature intended that such persons receive no treatment at all, rather than to overcrowd the available facilities. Treatment delayed and inadequate must surely be better than no treatment at all.*

A similar thought is expressed, at 268-69, emphasis added:

However, to alleviate the problem for the state hospital in this way only creates a further dilemma. *If a detainee is not committed, what is to be done with him? When there is a surplus of patients over the capacity of all available facilities, must a person be left in the streets, posing a danger to himself and others, because of the lack of facilities?*

That states the correct legal principle: Treatment delayed and less than optimal must surely be better than no treatment at all. Judge Nelson's ruling would mean that DMHPs may not detain persons who otherwise meet criteria for detention when the Evaluation and Treatment facilities are full. Judge Nelson's ruling stands the *Pierce County Office* rationale on its head, effectively ruling that *no* treatment is somehow preferable to *slow* treatment. That cannot be an appropriate approach, either from a societal policy standpoint, or an individual patient's standpoint. Both Nathan Hinrichs and David Reed testified at the February 27, 2013 hearing that releasing detainable patients into the community untreated was simply not appropriate, RP Feb. 27, 2013, pp 21, 71, CP 131, 181.

Judge Nelson's ruling is that nothing but inpatient placement in an evaluation and treatment facility over the full 17 days (72 hour initial detention and 14 day commitment) satisfies RCW 71.05.360(2)'s "right to adequate care and individualized treatment," CP 303. However, the *Pierce County Office* case did not take that approach. That case dealt with a choice between no treatment at all, or treatment in a certified but overcrowded facility. Given that choice, the court approved the certified-but-overcrowded option. The choice here is similar: between no treatment at all, or, after a brief hospital stay, treatment in a certified but not overcrowded facility. Now, once a bed becomes available in an Evaluation and Treatment facility, the patient gets full treatment in a facility that is not operating in excess of capacity. In *Pierce County Office* the court approved a patient getting the full 14 days at a certified facility, but the treatment was not optimal due to overcrowding. Here the patients may get less than the full 14 days at an E&T, but when they arrive it is not overcrowded. Of course a full 14 days of treatment in an E&T is the goal—*i.e.*, optimal care both as to length and quality. But if reduced quality but full length treatment was judicially approved in *Pierce County Office*, reduced length but full quality treatment should be approved as well. *Pierce County Office*, with its reality-based result, should control. Giving detainable persons *no* treatment is inappropriate for public policy

reasons; treatment, even though it may not be optimal, is judicially preferred to no treatment.

4. Non-optimal treatment does not equate to being less-than-constitutionally adequate.

Judge Nelson ruled that the single bed certification procedure constitutes a violation of the due process clauses of the US Constitution. *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982), held that an involuntarily committed, mentally retarded individual has a constitutional right to “minimally adequate or reasonable training to ensure safety and freedom from undue restraint.” However, the Court cautioned against imposing expansive obligations on the states for care of such individuals

By so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized. Moreover, there certainly is no reason to think judges or juries are better qualified than appropriate professionals in making such decisions. \* \* \* For these reasons, the decision, if made by a professional, is presumptively valid; *liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.*

*Youngberg*, at 322-23 (*emphasis added; footnotes omitted*).

Therefore, while both Nathan Hinrichs and David Reed testified that it was not “optimal” to house individuals in medical hospital beds,

doing so does not necessarily fall below the constitutional standards of *Youngberg*. Moreover, the undisputed evidence is that single bed certifications are used to ensure that individuals like the respondents are not out on the street and posing a danger to themselves and/or others, but rather are housed for a few days in a warm and dry facility.

The United States Supreme Court has “always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended.” *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997). Substantive due process analysis is disfavored because it places a matter largely “outside the arena of public debate and legislative action.” *Id.* The doctrine must be carefully utilized “lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.” *Id.*

Under *Glucksberg*, there is a “threshold requirement” to identify a carefully described “fundamental right found to be deeply rooted in our legal tradition” that is supported by “concrete examples.” *Glucksberg*, 521 U.S. at 722. Until and unless there is a specific and carefully described due process right, there is no need for the court to require “more than a reasonable relation to a legitimate state interest to justify the

action,” nor is there “the need for complex balancing of competing interests in every case.” *Id.* at 722.

The danger posed by the application of substantive due process in factual and legal contexts where it has no historical roots has been recognized by the Washington Supreme Court as well:

Where courts attempt to mandate novel changes in public policy through judicial decree, they erode the protections of our constitutions and frustrate the constitutional balance . . . . Examination of history and tradition is therefore necessary to identify fundamental rights as the basis for judicial decision-making. This inquiry must not hinge upon the judges' subjective feelings but must be based upon objective consideration of historical understanding.

*Andersen v. King Cnty.*, 158 Wn.2d 1, 68-69, 138 P.3d 963 (2006) (*J.M. Johnson, J., concurring*).

Additionally, Judge Nelson ruled that the single bed certification procedure constitutes a violation of art. XIII, § 1 of the Washington Constitution, which states in relevant part as follows:

Educational, reformatory, and penal institutions; those for the benefit of youth who are blind or deaf or otherwise disabled; for persons who are mentally ill or developmentally disabled; and such other institutions as the public good may require, shall be fostered and supported by the state, *subject to such regulations as may be provided by law.*

Wash. Const. Art. XIII, § 1 (*emphasis added*). *Pierce County Office*, at 271-72, acknowledged that the “foster and support” provision does not

place the entire financial burden on the State, and that the Washington Constitution gives the Legislature great discretion in determining how much financial support is required and what illnesses and infirmities will be treated. Therefore, even if the Legislature's current choices affect residential and community services such that some 72 hour evaluations occur in a hospital, the Washington Supreme Court has consistently held that the Legislature is entitled to make such policy choices.

D. THE SINGLE BED CERTIFICATION PROCESS IS THE STATUTORY AND REGULATORY METHOD FOR ADDRESSING OVERCROWDING

1. The *Pierce County Office* case commented on the lack of a process to deal with overcrowding.

As mentioned above, *Pierce County Office* dealt with the issue of what to do in response to overcrowding at Evaluation and Treatment facilities. Mentioned twice in the opinion was the observation that neither the legislature, nor the regulations supporting RCW 71.05 gave direction regarding what to do in overcrowded situations. The first mention is located at 267-268:

For aught that is revealed in the statute, no thought was taken by its drafter (or the drafters of the regulations passed pursuant to RCW 71.05.540, requiring the department to establish standards to be met by a public or private facility certified as an evaluation and treatment center) of the possibility that a particular facility might be called upon to exceed its capacity; and so there are no directions as to the proper procedure to follow in that event.

The second mention is located at page 268: “It should be obvious that every such facility has a capacity beyond which it cannot perform these functions--at least not ‘immediately’. Yet nothing is said in the statute or regulations about capacity.” The court there was looking for guidance with respect to overcrowding, and at that time it found none. However, we now have that guidance in the form of WAC 388-865-0526.

2. WAC 388-865-0526 and 388-865-0500 contain the procedure to follow in the event of overcrowding.

RCW 71.05.560 states in pertinent part: “The department shall adopt such rules as may be necessary to effectuate the intent and purposes of this chapter... .” Among the rules adopted in that regard is WAC 388-865-0526, “Single bed certification”:

At the discretion of the mental health division, 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; or for a maximum of thirty days to allow a community facility to provide treatment to an adult on a ninety- or one hundred eighty-day inpatient involuntary commitment order. For involuntarily detained or committed children, the exception may be granted to allow treatment in a facility not certified under WAC 388-865-0500 until the child's discharge from that setting to the community, or until they transfer to a bed in a children's long-term inpatient program (CLIP).

(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. In the case of a child, the facility must submit the written request directly to the mental health division. 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; or

(b) The consumer is expected to be ready for discharge from inpatient services within the next thirty days and being at a community facility would facilitate continuity of care, consistent with the consumer's individual treatment needs.

(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.

This is the capacity regulation that was not available to the court at the time of *Pierce County Office*. It allows exceptions to the requirement that persons detained or committed be exclusively held in a certified facility, at the discretion of the mental health division. A second WAC provision sheds light, WAC 388-865-0500:

(1) The mental health division certifies facilities to provide involuntary inpatient evaluation and treatment services for more than twenty-four hours within a general hospital, psychiatric hospital, inpatient evaluation and treatment facility, or child long-term inpatient treatment facility.

(2) Compliance with the regulations in this chapter does not constitute release from the requirements of applicable federal, state, tribal and local codes and ordinances. Where regulations in this chapter exceed other local codes and ordinances, the regulations in this chapter will apply.

(3) This chapter does not apply to state psychiatric hospitals as defined in chapter 72.23 RCW or facilities owned or operated by the department of veterans affairs or other agencies of the United States government.

From these two provisions we see that the method contemplated for overcrowding of certified facilities (E&Ts) is via “an exception ... granted to allow treatment to an adult on a seventy-two hour detention or fourteen-day commitment in a facility that is not certified,” WAC 388-865-0526, and the certifying of a single bed as a mental health bed within that otherwise uncertified facility, which may be “a general hospital,” WAC 388-865-0500.

Thus, the WAC provisions cited above provide a sufficient legal basis for DMHPs to detain individuals to general hospitals when the certified facilities are full. It is the regulatory method for dealing with overcrowding which may occur at the local level. The trial court did conclude that “When enacted, WAC 388-865-0526 did not contemplate the use of single bed certifications as a means to address lack of facilities or resources, RP June 6, 2013, p 6, CP 302. However, Mr. Reed’s testimony appears only to refer to the level of SBCs now being used, rather than not being contemplated for overcrowding at all: “... I think when the WAC that creates single bed certs was written, the lack of inpatient capacity we had in the communities at that time was not foreseen,” RP Feb. 27, 2013, p. 62, CP 172.

3. There is no medical/psychiatric distinction in WAC 388-865-0526.

Judge Nelson erred when she ruled that the single bed certification exception is allowable only for physical medical reasons. There are a number of problems with that reasoning.

- a. The statute already allows for transfer to a medical facility.

RCW 71.05.210 already allows for transfer of a mental health patient to a medical facility if physical health concerns warrant it:

An evaluation and treatment center admitting or accepting any person pursuant to this chapter whose physical condition reveals the need for hospitalization shall assure that such person is transferred to an appropriate hospital for evaluation or admission for treatment. Notice of such fact shall be given to the court, the designated attorney, and the designated mental health professional and the court shall order such continuance in proceedings under this chapter as may be necessary, but in no event may this continuance be more than fourteen days.

RCW 71.05.210 (final paragraph.) When a patient has a physical condition requiring hospitalization, the purpose of the move is to get the patient to a medical bed. Since the primary purpose of that bed is a medical bed, there is no need for a procedure to “deem” it as anything other than a medical bed. Therefore importing into the WAC a limitation as to medical necessity only is a strained reading as to its purpose.

- b. The general purpose of WAC 388-865-0526 involves mental health.

Since the statute already allows transfer of a patient to a medical facility if necessary and since there would be no point for a single bed certification rule to deem a medical bed a medical bed, the purpose of the rule must be to “deem” a medical bed a *psychiatric* bed. Thus, this rule concerns *mental health treatment*. A physical health distinction is nowhere to be found in the rule. The general purpose of the single bed certification process is contained in the first two sentences of WAC 388-865-0526.

At the discretion of the mental health division, 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; or for a maximum of thirty days to allow a community facility to provide treatment to an adult on a ninety- or one hundred eighty-day inpatient involuntary commitment order. For involuntarily detained or committed children, the exception may be granted to allow treatment in a facility not certified under WAC 388-865-0500 until the child's discharge from that setting to the community, or until they transfer to a bed in a children's long-term inpatient program (CLIP).

A close reading of this rule reveals the following: **Promulgation.** The exception from a certified facility is given “at the discretion of the mental health division.” The mental health division grants exceptions under its competency, which is *mental health*. **Purpose.** The purpose of the exception is “to allow treatment.” What kind of treatment is contemplated? It can only be referring to *mental health* treatment. **Short-term.** Furthermore, the single bed certification applies clearly for our purposes to those “on a 72 hour detention or a 14 day commitment.” (Significantly, a single bed certification may survive a patient going to court and receiving a 14 day order.) **Location.** A patient may be detained at a facility “not certified under WAC 388-865-0500,” which specifically includes a “general hospital.” **Long-term.** Here the treatment contemplated is continued *mental health treatment* by an E&T after a long term commitment by the court, in lieu of going to a state hospital. (The

practical effect is to allow those who may be ready for discharge within 30 days of receiving their 90 day order to stay at the E&T rather than experience a potentially disruptive move to WSH.) **Children.** Children can be held at a non-certified facility, *for mental health treatment*, until they get discharged or transfer to a CLIP facility.

Mental health treatment is solely contemplated throughout this statement of purpose. Nothing in it contemplates exceptions for medical reasons. As stated above, if a transfer is to a hospital *for medical reasons*—a different purpose than psychiatric treatment--no “exception” would be necessary.

- c. “Services” in WAC 388-865-0526(3)(a) is to be construed in light of its usage in (3)(b)—the immediate context.

Judge Nelson’s error in importing into WAC 388-865-0526(3)(a) a “medical only” limitation stems from not giving sufficient weight to the context. WAC 388-865-0526(3) reads as follows:

- (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; or
  - (b) The consumer is expected to be ready for discharge from inpatient services within the next thirty days and being at a community facility would facilitate continuity of

care, consistent with the consumer's individual treatment needs.

As to the importance of context, *State v. Jackson*, 137 Wash. 2d 712, 729, 976 P.2d 1229 (1999)(*citation omitted*) is instructive:

The Court of Appeals' determination as to the meaning of "shelter" is further buttressed by the doctrine of *noscitur a sociis*. Under this doctrine "the meaning of words may be indicated or controlled by those with which they are associated." ... Further, under that doctrine "[i]t is ... familiar policy in the construction of terms of a statute to take into consideration the meaning naturally attaching to them from the context, and to adopt the sense of the words which best harmonizes with the context."

If the clause in (3)(a) stood alone, without (3)(b), it might be understandable to jump to the conclusion that "services that are not available" meant medical services. However, the term "services" is used immediately in the next subsection, (3)(b): "...ready for discharge from inpatient services..." "Services" there clearly refers to mental health treatment. The choice in (3)(b) is whether *to continue to receive inpatient mental health treatment/services* in a short-term or a long-term facility; the choice in (3)(a) must be whether *to receive mental health treatment/services* in a certified or a non certified facility. Therefore to graft in a physical health limitation to "services" in subsection (3)(a) when the immediate context and usage in subsection (3)(b) refers to mental health, is not a reasonable construction.

- d. “Services” in WAC 388-865-0526(3)(a) is to be construed in light of the general purposes set out at the beginning of the rule—the larger context.

In addition to looking at the immediate context to construe “services” in (3)(a), the larger context of the entire rule must be considered. As demonstrated above, the purpose of this WAC regards the appropriateness of allowing mental health treatment on an exceptional basis to occur 1) in non-certified facilities as opposed to certified facilities or 2) in short-term as opposed to long-term facilities. Whatever follows the statement of general purpose must be construed in light of those purposes. The purpose-giving, introductory sentences to WAC 388-865-0526 set the parameters for what follows.

WAC 388-865-0526(3) simply restates and condenses the two introductory purpose sentences into two options. Put plainly, it says: (3) give us the reason (a) the patient needs a non-certified placement, or (b) an extended short-term facility stay rather than transfer to long-term care. The word “services” in (3) is a synonym for “treatment” in the introductory purpose statements. And “treatment” there refers to *mental health* treatment.

In summary, WAC 388-865-0526 allows the Mental Health Division, at their discretion, to grant exceptions to certified placement for the purpose of *mental health treatment*, for adults or children under all

recognized durations of detention or commitment. General medical hospitals are specifically named in WAC 388-865-0500 as possible single bed certification locations. There is therefore no basis for limiting single bed certifications to a medical necessity; single bed certifications are available for any mental health detainee if there are no E&T beds available.

4. DMHP protocols require detention decisions to be made without reference to bed availability.

RCW 71.05. requires the development of protocols to guide DMHPs in their detention decisions.

The department shall develop statewide protocols to be utilized by professional persons and county designated mental health professionals in administration of this chapter and chapter 10.77 RCW. The protocols shall be updated at least every three years. The protocols shall provide uniform development and application of criteria in evaluation and commitment recommendations, of persons who have, or are alleged to have, mental disorders and are subject to this chapter.

The initial protocols shall be developed not later than September 1, 1999. The department shall develop and update the protocols in consultation with representatives of county designated mental health professionals, local government, law enforcement, county and city prosecutors, public defenders, and groups concerned with mental illness. The protocols shall be submitted to the governor and legislature upon adoption by the department.

Among those protocols is the following:

**207–Availability of resource.**

Availability of a detention bed will not be a factor in determination of detention.

If the individual meets the detention criteria, the DMHP can explore the following options after determining the availability of local resources.

- Pursue resources (detention beds) in counties within close proximity, or
- elsewhere within the state, or
- utilize a Single Bed Certification

When a person is detained to a non E&T bed in a hospital due to lack of available ITA beds in the state the DMHP will follow all applicable Washington State laws for the ITA or LRA process including:

1. The DMHP will make the decision to detain (or not) the person within the legally required time frames.
2. The person will be served the ITA or LRA Revocation paperwork
3. The DMHP will request a single bed certification from the State Hospitals in their catchment area and deliver a copy of it to the hospital where the person is held.
4. The DMHP will file the ITA or LRA Revocation paperwork with the Superior court of the county the person is physically present (suggested that DMHP get a court certified copy of the legally filed paperwork to send with the client once an E&T bed is found). RCW 71.05.160, RCW 71.05.340 and RCW 71.34.710, RCW 71.34.780.
5. The DMHP does not have the legal authority to dismiss or “drop” the ITA or LRA hold. This must be done by the treating physician or person in charge of the facility. RCW 71.05.210 and RCW 71.34.770.

**“Single Bed Certification”** refers to the process or result of a DBHR designee request for a one-time waiver that allows involuntary treatment to occur in a facility that is not certified under WAC 388-865-0500 when:

- An involuntarily detained individual requires services not available in an E&T, a state hospital; or

- An involuntarily detained individual is expected to be ready for discharge from inpatient services within the next thirty days and being at a community facility would facilitate continuity of care, consistent with the individual's treatment needs; or
- For involuntarily detained children, a hospital may request an exception to allow treatment in a facility not certified under WAC 388-865-0500 until the child's discharge from that setting to the community, or until they transfer to a bed in a children's long-term inpatient program (CLIP).

Reference: WAC 388-865-0526

If no resources are available, the DMHP will follow RSN and county practices.

Report to the Legislature, Protocols, Designated Mental Health

Professionals, RCW 71.05.214, December 2011,

<http://www.dshs.wa.gov/pdf/dbhr/mh/dmhpprotocolsreport2011.pdf>. Note

the directive that “Availability of a detention bed will not be a factor in determination of detention.” Without the SBC process which allows detention to a hospital bed, availability of a detention bed would frequently become the *primary* factor in determination of detention.

Otherwise, a DMHP would check bed availability, and would then not detain a person who clearly met detention criteria if there were no beds available. Invalidating the SBC process would force the DMHPs to violate the statutorily adopted protocols. What Judge Nelson’s ruling would do is change the process from a patient-centered system to a resource-limited system. When the E&Ts are full, the DMHP could not

detain the person. Patients would be released to navigate the minefield of their mental illness as best they could, regardless of whether they were dangerous to self or others or were gravely disabled.

Furthermore, this protocol specifically addresses the issue of availability of resources. It clearly shows that the single bed certification system is designed to deal with bed capacity or overcrowding: “**207— The Availability of resource,**” and “If no resources are available... .” <http://www.dshs.wa.gov/pdf/dbhr/mh/dmhpprotocolsreport2011.pdf>. This is the legislative directive that the court in *Pierce County Office* was searching for.

## V. CONCLUSION

Overcrowding of inpatient mental health facilities is a resource problem which is foremost a legislative issue. “[T]he problem is one which can be solved only by the legislature, as it is one of providing for the creation and funding of adequate facilities,” *Pierce County Office* at 272. The legislature has provided funding in the 2013 budget for three new 16 bed evaluation and treatment facilities in the state. The Pierce County RSN is applying to the state to have one of those facilities allocated to Pierce County. If so, that would help alleviate the overcrowding problem in the future.

That being said, this court must decide this current appeal in favor of the appellants. This issue should never have been before this court. Mental Health Commissioner Adams should not have held a hearing on the issue of adequacy of care with respect to single bed certifications. Neither a mental health commissioner nor a judge, but rather DSHS is given the responsibility for making initial determinations regarding adequacy of care, *In re the Detention of W*. The commissioner and then the judge exceeded their authority--they had no subject matter jurisdiction.

Although Judge Nelson issued a declaratory judgment, The Uniform Declaratory Judgment Act, RCW 7.24, does not allow agency regulations to be reviewed under it. Agency rules (WACs) must be reviewed under the Administrative Procedure Act, RCW 34.05. That process was not followed, thus Judge Nelson's ruling should not stand.

The rationale and policy of the *Pierce County Office* case is dispositive: rather than release people with mental health problems to the streets, treatment that may be less than optimal is judicially acceptable. Slow treatment is to be preferred over no treatment. There is a legislative and administrative single bed certification process in WAC 388-865-0500 and WAC 388-865-0526 which provides a reasoned approach to facility overcrowding. Those rules do not limit the applicability of the SBC process to physical medical health issues. The DMHP protocols, adopted

pursuant to statute, speak to bed availability and the requirement for detention decisions to be made without an eye on bed availability, for the good of the patient.

For these reasons, the declaratory judgment of Judge Nelson should be vacated, and the matter dismissed.

Respectfully submitted this 31st day of October, 2013.

Mark Lindquist  
Pierce County Prosecuting Attorney



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Kenneth L. Nichols, WSBA #12053  
Deputy Prosecuting Attorney

**PROOF OF SERVICE**

I, *Deborah Keator*, state and declare 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, PIERCE COUNTY DMHPs** and this **PROOF OF SERVICE** on the following individuals, in the manner indicated below:

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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<sup>st</sup> day of October, 2013, at Tacoma, WA.



Deborah Keator  
Legal Assistant

**PIERCE COUNTY PROSECUTOR**  
**November 01, 2013 - 10:12 AM**

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