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NO. 45111-5-II

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

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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

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

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## I. INTRODUCTION

The Administrative Procedure Act (APA) is a painstakingly crafted statutory scheme addressing administrative agency action, rulemaking, and judicial review. The appellees and revision judge in this case ignored those statutory provisions and instead attempted to invalidate an agency rule, and to review agency actions applying the rule, without reference to the statutory scheme specifically designed to address such claims. Compounding its error, the trial court's "authority" to declare the use of the single bed certification rule invalid rested on a statute, the Uniform Declaratory Judgments Act, that by its very terms does not apply to review of administrative agency actions and rules.

The revision judge ruled 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). She concluded that the application of the single bed certification rule when certified evaluation and treatment center beds are not available is a *per se* 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). Because the appellees' exclusive avenue for judicial review of the application of the single bed certification rule is the APA, the revision

judge lacked subject matter jurisdiction to issue this declaratory judgment, and her decision must be overturned.

**A. The Appellees Failed to Properly Invoke The Superior Court’s Jurisdiction To Adjudicate The Validity Of The Application Of The Single Bed Certification Rule**

1. Appellees’ failure to petition for judicial review under the APA deprives the revision judge of subject matter jurisdiction to consider a challenge to the application of the single bed certification rule.

Appellees argue that they do not need to exhaust administrative remedies because the APA fails to provide adequate, speedy and meaningful relief for “those unlawfully detained in a Tacoma emergency room without access to funds or legal counsel.” Appellees’ Br. at 28-29. Appellees misunderstand DSHS’s argument. DSHS did not raise the issue of exhaustion of administrative remedies either on revision or on appeal;<sup>1</sup> rather, DSHS argued that pursuant to explicit statutory language, the APA is the exclusive means of obtaining judicial review of agency action, and the Uniform Declaratory Judgments Act specifically excludes agency action. RCW 34.05.510; RCW 7.24.146.

Appellees confuse judicial review of an agency action with the administrative remedies available under the APA. Exhaustion of administrative remedies refers to the “administrative remedies available

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<sup>1</sup> DSHS did argue that appellees were required to exhaust their administrative remedies in its amicus brief filed on March 5, 2013, in the mental health court; however, it neither briefed nor argued that issue on either revision or appeal.

within the agency whose action is being challenged, or available within any other agency authorized to exercise administrative review.” RCW 34.05.534. These administrative remedies typically take the form of administrative hearings, also called “fair hearings,” before an administrative law judge. *See* ch. 388-02 WAC. Because the single bed certification rule provides that “[n]either consumers nor facilities have fair hearing rights as defined under chapter 388-02 WAC regarding single bed certification decisions by mental health division staff,” the granting of the single bed certification is the agency action. WAC 388-865-0526(6); RCW 34.05.010(3) (“application of an agency rule or order”). Accordingly, the appellees’ exclusive means to judicial review of the application of the single bed certification rule would have been to file a petition under the APA within 30 days of the granting of the certification. RCW 34.05.514(1); RCW 34.05.542(2), (3); RCW 34.05.570(2), (4).

The APA allows for judicial review of “all agency action,” including actions in addition to rulemaking and adjudicative orders. RCW 34.05.570(4). Any party “whose rights are violated by an agency’s failure to perform a duty that is required by law to be performed may file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection requiring performance,” and “the court may hear evidence, pursuant to RCW 34.05.562, on material issues of fact raised by

the petition and answer” in these cases. RCW 34.05.570(4)(b). Contrary to appellees’ assertion, the APA can provide “adequate, speedy and meaningful relief,” because the superior court in a judicial review under the APA can issue a declaratory judgment when an agency “rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner.” RCW 34.05.570(2)(b). Moreover, a party may move the reviewing court for a temporary remedy “after a petition for review has been filed.” RCW 34.05.550(2). The appellees could have sought this relief by petitioning the superior court for APA judicial review within 30 days of the issuance of the single bed certifications, but they did not do so.

Moreover, the APA provides a mechanism for building an appropriate record on judicial review that a civil commitment proceeding lacks. As noted in DSHS’s opening brief, mental health proceedings under ch. 71.05 RCW are solely intended to ascertain whether a person 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). Because DSHS is not a party in short-term commitment cases, it cannot defend a challenge to its own rules in those cases and build an appropriate record.

However, the APA provides a mechanism for building a record of the material facts relevant to deciding a challenge to the application of an agency rule. RCW 34.05.562.

Declaratory judgment, such as that rendered by the revision court, is barred if previously available judicial review under the APA was not timely pursued.<sup>2</sup> The “loss of the remedy provided by the APA through failure to file a timely petition for review does not render that remedy inadequate, or give rise to a right to extraordinary writs.” *Bock v. Bd. of Pilotage Comm’rs*, 91 Wn.2d 94, 98, 586 P.2d 1173 (1978). In other words, “if APA review was available, the extraordinary writs are not.” *Id.* In *Bock*, Bock failed to seek review of an agency action within the applicable 30-day deadline. *Id.* at 100. Bock instead filed a petition for writs of mandamus, prohibition, and declaratory judgment. *Id.* at 96. But because Bock failed to timely pursue remedies under the APA, the Washington Supreme Court held that the superior court “had no jurisdiction to review the Board’s action, and should have dismissed the action on that ground.” *Id.* at 100. Because the procedure to challenge the Board’s actions was prescribed by the APA, “jurisdiction can be obtained only under [the APA].” *Id.*

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<sup>2</sup> As noted in DSHS’s opening brief, relief under the Uniform Declaratory Judgments Act is not available with regard to “state agency action reviewable under chapter 34.05 RCW.” RCW 7.24.146.

Here, as in *Bock*, judicial review of the application of the single bed certification rule was only available under the APA. RCW 34.05.570. As in *Bock*, the superior court's jurisdiction could be obtained only under the APA. Loss of an APA remedy through the appellees' inaction does not confer alternative jurisdiction in the civil commitment court.

In a case involving the Department of Labor and Industries, this Court held that plaintiffs "cannot avoid the exclusive remedy provisions of the [Industrial Insurance] Act by invoking the trial court's authority to grant equitable relief." *Davis v. Dep't of Labor & Indus.*, 159 Wn. App. 437, 443, 245 P.3d 253 (2011). While *Davis* is not an APA case, it is analogous to this case because in both cases the Legislature created specific statutory procedures for challenging the agencies' action. In *Davis*, workers had filed a class action lawsuit asserting that the Department of Labor and Industries impermissibly allocated their third party settlements in violation of the takings clause of the Constitution. *Id.* at 439-40. While the superior court declined to rule on whether it had subject matter jurisdiction over the industrial insurance issues raised in the lawsuit, this Court reversed and remanded for dismissal, holding that even if the legal claims had merit, "they cannot survive dismissal unless the named plaintiffs have properly invoked the superior court's jurisdiction."

*Id.* at 440, 443. In other words, “the trial court should have dismissed the lawsuit for lack of subject matter jurisdiction.” *Id.* at 442.<sup>3</sup>

Here, despite the fact that its jurisdiction was not properly invoked, the revision court proceeded to issue declaratory relief based on its determination of the appropriate application of an agency rule. CP at 302-04. Just as in *Davis*, appellees cannot obtain non-APA judicial review while avoiding the exclusive remedy provisions of the APA. And, just as in *Davis*, this Court must overturn the revision court’s declaratory judgment because the appellees failed to properly invoke the superior court’s jurisdiction.

In another analogous case, landowners brought a claim in superior court against the City of Kirkland, rather than seeking review of city ordinances from the Growth Management Hearings Board. *Davidson Serles v. City of Kirkland*, 159 Wn. App. 616, 622, 246 P.3d 822 (2011). The landowners asserted that the superior court had subject matter jurisdiction to grant a writ or declaratory judgment because of

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<sup>3</sup> Courts have recently taken a closer look at the meaning of “subject matter jurisdiction” as it relates to the APA. In her concurring opinion in *Sprint Spectrum, LP v. State, Dep’t of Rev.*, 156 Wn. App. 949, 235 P.3d 849 (2010), Judge Becker distinguished between circumstances in which a party failed to invoke a court’s jurisdiction, which relates to subject matter jurisdiction, and circumstances in which a party has failed to comply with procedural requirements, which does not. *Id.* at 964-67. In this case, the appellees failed to properly invoke the superior court’s jurisdiction to adjudicate the validity of the application of an agency rule; accordingly, the revision court lacked subject matter jurisdiction.

article IV, section 6 of the Washington Statute Constitution. *Id.* at 626. The superior court dismissed the landowners' claims for failure to properly invoke the court's jurisdiction, and the Court of Appeals affirmed. *Id.* at 624, 627-28. Accordingly, appellees' failure to properly invoke the superior court's jurisdiction concerning a challenge to the application of the single bed certification rule should result in a reversal of the revision judge's decision because "[l]ack of jurisdiction over the subject matter renders the superior court powerless to pass on the merits of the controversy brought before it." *Skagit Surveyors and Eng'rs, LLC v. Friends of Skagit Cnty.*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998).

Because appellees focused solely on the application of the single bed certification rule to circumstances in which there is a shortage of evaluation and treatment beds, they are limited to the exclusive forum in which such claims must be adjudicated, the Administrative Procedures Act. RCW 34.05.510. Accordingly, the revision judge erred in issuing declaratory relief outside of the APA, and lacked the authority to do so.

2. The APA provides for judicial review of constitutional claims, and the presence of constitutional issues does not excuse the appellees from the requirements of the APA.

Appellees argue that because they are raising constitutional issues and issues concerning conditions of detention, they can bypass the APA. They are wrong on both counts. The APA allows for judicial review of

any agency action if the party claims the action was unconstitutional, outside the statutory authority of the agency, or arbitrary or capricious. RCW 34.05.570(4)(c). Additionally, under the APA, a petition for declaratory judgment of the validity, constitutional or otherwise, of a rule can be raised at any time. For example, the Washington State Supreme Court ruled on the constitutionality of the burden of proof in an APA case in *Hardee v. Dep't of Soc. & Health Servs.*, 172 Wn.2d 1, 2-3, 256 P.3d 339 (2011). This Court has ruled on the constitutionality of a legislative appropriation of motor vehicle fuel excise tax revenues for a park maintenance fund in an APA case. *Washington Off-Highway Vehicle Alliance v. State*, 163 Wn. App. 722, 260 P.3d 956 (2011). “Couching [their] current claims in constitutional terms does not excuse” the appellees from bringing their challenge of the application of a DSHS rule under the APA. *Evergreen Washington Healthcare Frontier, LLC v. DSHS*, 171 Wn. App. 431, 453, 287 P.3d 40 (2012).

Appellees argue that they are not required to proceed under the APA because the issues involved are “conditions of detention” and “interpretation of a statute” and “questions of broad public import.” Appellees’ Br. at 29-31. However, these are not the focus of the Findings Of Fact And Conclusions Of Law And Order; rather, the revision judge’s sole focus was on the use of the single bed certification rule in

circumstances in which evaluation and treatment beds are unavailable. CP at 301-304. Because of this limited focus on WAC 388-865-0526, appellees must use the APA as the exclusive forum to adjudicate such claims. RCW 34.05.510.

Moreover, it is unclear what the appellees consider to be “adequate relief.” If it is the declaratory relief that the revision judge granted, as noted above, such relief is barred if previously available judicial review under the APA was not timely pursued. *Bock*, 91 Wn.2d at 98. If it is the dismissal of a petition for detention, appellees and the mental health commissioner agreed that this was not an appropriate remedy under *Detention of Swanson*, 147 Wn.2d 259 (2002) because the commissioner had “no jurisdiction to craft such relief.” CP at 54.<sup>4</sup> The revision judge apparently agreed as well, as her Order likewise did not provide for the dismissal of civil commitment petitions as a remedy. CP at 297-305.

If the creation of more evaluation and treatment beds is the “adequate relief” that the appellees seek, then a civil commitment case is not the appropriate forum. This is because the Pierce County Regional Support Network [Optum], which is “unambiguously” required to provide at least 90 percent of the short-term care in Pierce County including

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<sup>4</sup> Appellees withdrew their motions to dismiss the civil commitment petitions prior to the mental health commissioner’s “stakeholder” hearing on February 27, 2013. CP at 353-54, 373-74, 389-90, 410-11, 426-27, 442-43, 461-62.

evaluation and treatment services, is not a party in this case, and this relief is outside the scope of a civil commitment proceeding. RCW 71.24.300(6)(c); *Pierce County*, 144 Wn. App. 783, 852, 185 P.3d 594 (2008).<sup>5</sup> If improvement in the quality of the mental health treatment during the 72-hour detention is the relief that appellees seek, a civil commitment hearing does not provide “adequate, speedy and meaningful relief” because (1) neither the facilities in which the detainees are placed nor Optum are parties to the civil commitment proceedings, and (2) a civil commitment hearing that is focused on whether the detainee meets the standards of RCW 71.05.240(3) for further commitment is not conducive to litigating whether the treatment received “is such a substantial departure from accepted professional judgment, practice, or standards” as to require relief. *Youngberg v. Romeo*, 457 U.S. 307, 322-23 (1982).

The decision of the appellees to focus on the application of the single bed certification rule in these cases was a deliberate choice. Having made that choice, the appellees could have challenged the application of WAC 388-865-0526 a year ago by properly filing a petition for judicial review under the APA in the superior court. Because they eschewed the exclusive forum for the adjudication of those claims, the revision judge’s decision should be reversed.

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<sup>5</sup> The Legislature increased the 85 percent requirement to 90 percent in 2006. Laws of 2006, ch. 333, §106.

3. Appellees had other remedies available to redress their concerns about the adequacy of treatment and the conditions of detention.

At the time of their detentions, each of the appellees could have used an administrative process to redress their complaint about the mental health treatment they received and the condition of their detention, but they did not do so. DSHS requires each regional support network to maintain a process for reviewing consumer complaints and grievances:

**WAC 388-865-0255 Consumer grievance process.**

The regional support network must develop a process for reviewing consumer complaints and grievances. A complaint is defined as a verbal statement of dissatisfaction with some aspect of mental health services. A grievance is a written request that a complaint be heard and adjudicated, usually undertaken after attempted resolution of a complaint fails. The process must be submitted to the mental health division for written approval and incorporation into the agreement between the regional support network and the mental health division. . . .

WAC 388-865-0255. This process must “[e]nsure acknowledgment of receipt of the grievance the following working day,” with a “written acknowledgment mailed within five working days . . . .”

WAC 388-865-0255(2) and (3). Grievances must be “investigated and resolved within thirty days,” and information about the grievance process must be “made available to all current or potential users of publicly funded mental health services and advocates in language that is clear and understandable to the individual . . . .” WAC 388-865-0255(3) and (4).

This grievance process must include a formal process for dispute resolution, referral to an ombuds service for assistance at all levels of the grievance and fair hearing processes, and participation of other people chosen by the grievant in the dispute resolution process. WAC 388-865-0255(6)-(8). The process ensures that the grievant is mailed a written response within thirty days from the date it is received by the regional support network, and the grievances must be resolved, even if the person is no longer receiving services. WAC 388-865-0255(9)-(10).

None of the appellees apparently filed complaints or grievances. Each of the appellees was represented by the Pierce County Division of Assigned Counsel during the 72-hour evaluation period and could have easily been directed to this process, but there is no indication in the record that their counsel did so. This personal and prompt resolution under WAC 388-865-0255 of the detainee's complaints is a remedy that is not available within the context of a civil commitment proceeding under RCW 71.05.

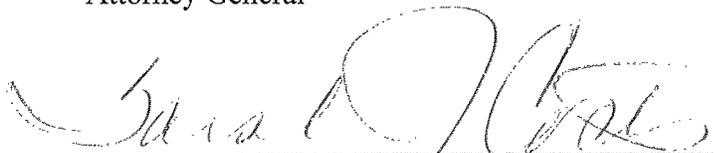
## **II. CONCLUSION**

The revision court lacked the subject matter jurisdiction to consider the matter of the application of the single bed certification rule in these cases because the appellees failed to utilize the exclusive remedy available to them under the APA. Moreover, there are other

administrative remedies available to those detained for 72 hours of evaluation in order to address their concerns about the quality of treatment and conditions of detention. For all of these reasons, the order of the revision judge should be overturned.

RESPECTFULLY SUBMITTED this 28 day of February, 2014.

ROBERT W. FERGUSON  
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A handwritten signature in cursive script, appearing to read "Sarah J. Coats", written over a horizontal line.

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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 February 28, 2014, I caused to be served a true and correct copy of this **REPLY 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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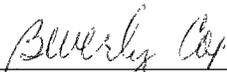
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 28 day of February 2014, at Tumwater, Washington.

  
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Beverly Cox  
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