

APP. BRIEF

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DIVISION II

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION II

DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent,

v.

CHRISTOPHER GASTON,

Appellant.

No. 37740-3-II

DESIGNATION OF BRIEF

Appellant, through undersigned counsel, hereby designates his original brief, prematurely filed by the Appellant on July 29, 2008, prior to the complete filing of the record by the trial court on August 25, 2008, as Appellant's Opening Brief. No supplemental briefing will be filed by the Appellant.

Dated this 4th day of September, 2008.

DISABILITY RIGHTS WASHINGTON



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CERTIFICATE OF SERVICE

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I declare under penalty of perjury of the laws of the state of Washington that the forgoing is true and correct.

Dated this 4th day of September, 2008, at Seattle, Washington.

Mona Rennie
Mona Rennie

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APPELLANT'S OPENING BRIEF

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B. Statement of the Case

1. BACKGROUND

Christopher Gaston is a forty-three-year-old man with cognitive disabilities resulting in mental retardation. Administrative Record ("AR") 102-111. Mr. Gaston has a history of speech articulation difficulties and can be difficult to understand. *Id.* His parents are his legal guardians

pursuant to an order of the Superior Court for Clark County, Washington dated August 2, 2002. AR 55. His parents – Lynne and George Gaston – now live in Portland. AR 68. His mother is able to communicate with him by asking him to repeat himself or by asking him to demonstrate what he wants. Verbatim Report of Fair Hearing Transcript (“RP”), p.53.

Mr. Gaston meets the Social Security Administration’s (SSA) definition of disability, receives Supplemental Security Insurance (SSI) benefits, and has a SSA Ticket to Work Benefits Specialist. AR 121. Mr. Gaston has worked for the same employer in Vancouver – SEH America – since November 13, 1996. AR 184. With the support from his SSA Benefits Specialist in Washington, Mr. Gaston was eventually able to maintain a suitable work placement at SEH that is unique to his needs as well as obtain the specialized heavy-duty equipment exclusive to his position as a shredder. AR 216 and 120. In his last job evaluation he was found to have a 96% attendance rate. AR 184. Mr. Gaston intends to continue his employment indefinitely and has not expressed an intention to leave his job in Vancouver. AR 217; *see also* RP, pgs. 48, 49, 55 and 56.

On January 14, 1997, Mr. Gaston became eligible for Washington State's Division of Developmental Disabilities (DDD) waiver benefits¹, including Medicaid services. AR 122. Greer Gaston, Mr. Gaston's sister, has been his Medicaid Personal Care (MPC) provider for ten years. RP, p. 44; *see also* AR 124. Greer Gaston lives in Tigard, Oregon, a suburb of Portland. RP, p. 45. As his MPC provider, Greer Gaston assists Mr. Gaston in planning, shopping for, and preparing his meals including his bagged lunch for work. AR 140 and RP, p. 45.

Greer Gaston also provides transportation to Mr. Gaston's medical appointments in Vancouver and to his social and recreational activities at Vancouver Parks and Recreation. AR 141 and RP, p. 46. Greer Gaston also helps Mr. Gaston run errands including depositing his paycheck at the Washington Mutual bank in Vancouver where Mr. Gaston has an established relationship with the tellers. RP, pgs. 48-49. The MPC services provide Mr. Gaston with the supports needed to successfully maintain his independent life in Washington. RP 45.

¹ Waiver services provide an increased level of benefits to ensure individuals with disabilities are able to reside in the community of their choosing as an alternative to institutionalized living. WAC 388-515-1511. Mr. Gaston's termination of DDD waiver services is a matter in a secondary appeal currently being remanded back to the OAH (docket numbers 06-2006-A-1518 and 07-2006-A-0613). *See* Order for Remand.

2. FACTS OF WASHINGTON RESIDENCY

Mr. Gaston has lived in Vancouver, Washington since 1992. RP, p. 53. Mr. Gaston's parents moved across the river to Portland, Oregon in April 2003 when they retired. AR 102. *See also* RP, p. 54. Mr. Gaston spent approximately two weeks at their home in Oregon, commuting to his job in Washington, and participating in social activities in Washington as well as attending medical appointments and other life activities. RP, p. 58. This was a difficult time for Mr. Gaston who had come to rely on his routine and life in Vancouver. RP, p. 54. By May 2003, Mr. Gaston was able to secure a residence with friends in Vancouver, Washington. *Id.* Mr. Gaston's mother called the Department on May 6, 2003, to report Mr. Gaston's new address in Vancouver, Washington. AR 130.

Since the summer of 2003, Mr. Gaston has lived in the same residence in Vancouver and has repeatedly provided this information to the Department in his eligibility reviews. AR 43, 45, 57, 73, and 99. Since 2003, all of Mr. Gaston's annual Department assessments were conducted at his Vancouver residence.² AR 132 and 154.

Mr. Gaston spends two to four days per week working at SEH America and living at his home in Vancouver, Washington. AR 8 & 233.

As the family he lives with in Vancouver stated:

² WAC 388-828-1520 requires that all DDD Assessments be conducted in the client's residence.

Chris lives with us two to four days a week depending on his schedule. He has his own bedroom in our home and is considered part of our family.

AR 102. This home is where he receives his mail including his paystubs and correspondence from the Department, the Office of Administrative Hearings, and the Social Security Administration. AR 185,186, and 187. In addition, he has a Washington State Identification Card. AR 192. Further, Mr. Gaston has been considered a resident of the State of Washington by Social Security Administration (SSA), the Vancouver Department of Parks and Recreation Activities, and public transit authority in Vancouver and therefore eligible to take part in those programs. AR 215 and 193. Mr. Gaston lists his Vancouver address on his federal tax returns, AR 188, and he is registered to vote in Washington. AR 190.

The Department asserts that Mr. Gaston only spends “1 night per week” in Washington State. AR 246. In the “ACES Case Notes” (the Department’s computer log where Department employees document their own recollections of telephone conversations) for May 9, 2006, the “one day a week” statement was made by Department worker Pamela Wurtz and does not reflect any statements made by Lynne Gaston, Mr. Gaston’s mother and legal guardian. AR 44. On June 7, 2006, Pamela Wurtz also incorrectly stated in an e-mail to another Department employee that Mr. Gaston spends “2 days a week” in Vancouver, that receiving Medicaid

services in Washington was requirement of the MPC program, and that "[a]ll of his life seems to be in Oregon, other than his work". AR 178.

Mr. Gaston has repeatedly and consistently indicated to the Department and other agencies such as SSA that he spends between 2 to 4 days a week in Washington at his job, at his residence, and participating in activities, errands and appointments. AR 233, 102, 215, and AR 141 and RP, p. 46.

Mr. Gaston has also consistently indicated, directly and through his actions, his desire and intention to remain a Washington resident. RP, pgs. 53-57. Since 2003, Mr. Gaston has not changed his residence in Washington, his work schedule in Washington, or his intent to be a Washington resident. RP, pgs. 49-50. Additionally, his Washington State Benefits Specialist testified (by declaration) at the hearing that Mr. Gaston intended to continue working in Washington indefinitely and that his employer intended to retain him as an employee in Washington "as long as he wishes to stay with us". AR 217.

Mr. Gaston does not receive any benefits or services from the State of Oregon, nor does he have any formal or significant connections or ties with Oregon other than his relationship with his family who he visits. RP, p. 38. At the hearing the Department conceded that it had no evidence that Mr. Gaston had claimed residency in Oregon or was receiving any public benefits or services in Oregon. RP, p. 38.

3. PROCEDURAL HISTORY

In three annual reviews between 2003 and 2005, the Department found that Mr. Gaston was both a Washington resident and eligible to receive continued state medical assistance benefits. AR 69, 76, and 85. On January 18, 2006, the Department reduced Mr. Gaston's monthly MPC hours from 78 to 58 despite Mr. Gaston's increased needs for mobility supports. AR, 174. Although Mr. Gaston's residence in Vancouver had not changed since 2003, he received a termination of benefits notice from the Department dated June 9, 2006, which asserted that he was not a resident of Washington State. AR 92. The stated basis for the termination was the amount of time he spends in Vancouver was determined to be insufficient to maintain his residency. *Id.*

The pre-hearing conference in the appeal, held on June 22, 2006, established at least two issues: whether the Department properly reduced the payable hours of care following the assessment and whether the Department properly terminated Mr. Gaston from Medicaid services based on residency. AR 42. However, the ALJ decided to consider the latter issue – whether Mr. Gaston was a resident of Washington State – first. *Id.* The ALJ also granted full discovery prior to hearing. *Id.*

A fair hearing on the issue of residency was held on May 24, 2007. RP, p. 1. Mr. Gaston's mother and sister and Pamela Wilson from his

employer (by declaration) provided testimony. RP, p. 2. His mother testified that since 1992, Mr. Gaston has built a life and community in Vancouver, Washington, through a time consuming process of securing appropriate medical and service providers, employment, and a social network tailored to fit his unique disabilities. RP, pgs. 53-57. His sister, Greer Gaston, testified that Mr. Gaston intends to continue living in Vancouver where he spent sixteen years establishing a supported living community uniquely fitting his needs as an individual with a disability. As she testified:

Q: To the best of your knowledge, does Chris intend to continue his life in Vancouver?

A [Greer Gaston]: Absolutely. I can't imagine why he wouldn't do that. The situation that Chris is in now and the setup that he has is a situation that really allows Chris to thrive. And those situations do not come along every day for someone like Chris.

Id. The Department did not provide any evidence at the hearing that Mr. Gaston did not intend to be a Washington resident or that he was incapable of forming such an intent.

At hearing, the Department offered two primary arguments regarding its residency determination. First, the Department asserted that Mr. Gaston admitted that he lives in Oregon by listing his parents as living with him at his address in Vancouver, Washington on his eligibility review. RP, pgs. 23-25. Upon cross examination, Lynne Gaston, who had

actually provided the information, stated that she was confused by the form. RP, p. 60. Moreover, on the form Lynne Gaston clearly listed Mr. Gaston's resident address as being in Vancouver and her mailing address, as his guardian, in Portland on the form. AR 57. The form was signed by Lynne Gaston on June 25, 2003. AR 62. It quickly became apparent to both the Department and Lynne Gaston that she had not filled out the form correctly. As the Department's own ACES notes show, one month later on July 25, 2003, Lynne Gaston spoke with a Department caseworker who recorded that:

Christophers [sic] mother called to see if we had it straightened out about the address. They are getting his mail in Oregon but he has not moved. He is still employed with the same employer. We do have the address correct where he still lives. ... No further action required. Call completed.

AR 43. On the same day, Lynne Gaston wrote to the Department to ensure the correct residency information was received. AR 68.

The Department's second argument was based upon the amount of time Mr. Gaston stayed in Washington each week. RP, 23. The Department representative testified:

On June, 8, 2006, the Department sent Mr. Gaston a letter of termination for his medical benefits, as the Department did not consider him a resident of Washington since he's [inaudible] the majority of his time with his legal guardians in the State of Oregon, rather than Washington.

Id. The ALJ asked whether the Department is looking at the amount of time Mr. Gaston spends in Washington to make their decision to terminate his benefits. RP, p. 25. The Department responded, “Well, we do look at [the amount of time] in some ways, a common sense approach. The majority of the time.” *Id.* Mr. Gaston’s counsel posed this question to the Department and received this response:

Q: Do you see the words in the WAC that specifies where the person is physically located the majority of the time?
A: No....

RP, p. 27. The Department was unable to point to any provision in the law that sets forth such a durational requirement or “majority of time” standard. As the Department representative testified at the hearing:

There is nothing that explicitly says how many days you have to reside. That is not in the WAC. It says, “physically resides.” But it does not say a certain amount of days. It’s a point of clarification that you are looking at. And the only reference on it is the WAC reference...it was their opinion [in their “clarification”] that this case did not meet the residency issues...

RP, p. 29. The Department reliance on the “clarification” is consistent with the deposed testimony of another Department worker who agreed that the “clarification” was the sole basis for the Department’s decision to terminate Mr. Gaston’s benefits. AR 283. The same worker stated that the only portion of the law that refers to a person’s guardians “refers to

institutionalized clients, which Mr. Gaston is not institutionalized, so that part wouldn't apply." AR 286.

On June 29, 2007, the ALJ issued the final order determining that Mr. Gaston was not a resident of Washington based on her finding that he "lives" with his parents who have a home in Oregon. FOF, 2 and COL, 5. The ALJ concluded that the controlling subsection of the regulation was subsection 11(d) (which only applies to institutionalized individuals) that provides that "residency follows that of his guardians" because there was no evidence presented by Mr. Gaston regarding his capacity to form an intent about where he lived. COL, 6. There is no evidence in the record that Mr. Gaston has ever been institutionalized.

4. THE CLARIFICATION REQUEST

The determination to terminate Mr. Gaston's Medicaid services was based upon on the following April 19, 2006, "clarification" request to the Department's Region Office:

[WURTZ:] We have a DAC client, receiving Social Security and working part-time. He has been assigned to work at a local plant (Vancouver), works Tuesdays and Thursdays and sleeps in Vancouver on Wednesdays. The other 6 days a week he stays with his sister in Tigard or his mother in King City. Mother is the rep [sic] for his SS [sic]. He has been using this Vancouver address for residence and his Mom's for mailing for SS [sic] and for us for quite some time and no one has ever questioned it. Open on S02, S03. Mom has verified this information, and states she was told that as long as he votes and/or uses the

C Van he is eligible. We do not believe he is a resident, but it seems that Social Security does. Is he a resident per our rules?

AR 246; *see also* AR 247. There is no evidence that Lynne Gaston provided the transportation and voter registration reliance information to the Department. Wurtz also mistakenly stated that Mr. Gaston only slept one day a week in Washington in this clarification request to the Regional Office also. The Department later stated Mr. Gaston spends “two nights per week [in Vancouver] to facilitate employment” in its directive to terminate Medicaid services. AR 179.

Wurtz, the case worker who submitted the clarification request, also asserted that “DDD termed [sic] his MPC [Medical Personal Care] services because he was accessing them in Oregon, not Washington, which is a requirement of the program”. AR 178. There is no evidence that Mr. Gaston has ever accessed benefits from the State of Oregon in conflict with DDD rules. RP p. 38. Moreover the caseworker’s statement that receiving program services in Washington was a requirement of the program was plainly wrong. The regulations anticipate that Washington DDD clients will receive services in border cities like Portland, Oregon and treat them the same as in-state services. WAC 388-845-0110.

The “clarification” answer issued in Mr. Gaston’s case, Clarification #1984, states:

After much discussion, including the [Attorney General's] office, we suggest the client be terminated as failing residency. If the client wishes to take this decision to hearing, the [Attorney General's] office will be glad to assist the hearing coordinator with legal references, etc.

AR 247. Neither Mr. Gaston nor his guardians were informed or notified that such a "clarification" was requested by the Department, of the context or nature of the clarification request, or that they could participate in the "clarification" request process or contest the information provided in the "clarification" request or in any of the discussions leading up to this answer.

Prior to the hearing, Mr. Gaston sought documents from the Department through discovery (which had been approved in the case by the ALJ (AR 345)) relating to criteria relied upon and information used by the Regional Office to develop this "clarification," on February 6, 2007.

AR 235-236. The Department did not respond to Mr. Gaston's discovery requests. *Id.* The Department also refused Mr. Gaston's counsel's requests to meet and confer to discuss the requested documentation. *Id.* The Department representative failed to produce any authority forming the basis of this "clarification" statement; nor were any witnesses produced at the hearing with knowledge of the criteria that formed the basis for this "clarification" statement. *Id. See also* RP, pgs. 30-31.

Thus, Mr. Gaston submitted a Motion for Summary Judgment on the basis that Mr. Gaston was a Washington resident as a matter of law. AR 222-272. In the alternative, Mr. Gaston also requested that the Department be ordered to respond fully to these outstanding discovery requests by April 5, 2007. *Id.* The ALJ denied both motions at the commencement of the hearing held on May 24, 2007. RP, p. 40. The ALJ also prevented Mr. Gaston's counsel from questioning the Department witness about the "clarification" process at hearing. RP, p. 31.

The ALJ, by decision dated June 27, 2007, subsequently upheld the Department's decision to terminate Mr. Gaston's Medicaid services.

C. Summary of Argument

The Department violated Mr. Gaston's constitutional right to travel when it terminated his Medicaid services due to frequent visits with his family a few miles away in Portland. The ALJ's decision upholding the Department's termination violates the law and was not supported by substantial evidence. The overwhelming weight of the evidence shows Mr. Gaston is a resident of Washington and eligible for Medicaid services.

The Department's reliance on an informal "clarification" to determine residency is arbitrary and capricious because it is inconsistent with the weight of evidence, Washington case law, the Department's own residency regulation, and the APA rulemaking procedures effectively

denying Mr. Gaston due process of law. Finally, the ALJ's conclusion that Mr. Gaston's residency automatically followed that of his legal guardians was an error of law because the Department's residency regulation limits the application only to persons who had been institutionalized, a condition precedent that Mr. Gaston does not meet.

D. Argument

The issue is whether the final administrative order upholding the Department's termination of Mr. Gaston's Medicaid services on the basis of non-residency comports with the law. Judicial review of a final administrative decision by the Office of Administrative Hearings and Appeals (OAH) is governed by the Washington Administrative Procedure Act (APA), RCW 34.05. *Bond v. Department of Social and Health Services*, 111 Wash. App. 566, 571, 45 P.3d 1087 (Div. II 2002).

The APA permits relief when the final agency decision is arbitrary and capricious, outside the agency's statutory authority, is not supported by substantial evidence, or is unconstitutional. RCW 34.05.570(3)(a), (b), (e) and (i); *see also William Dickson Co. v. Puget Sound Air Pollution Agency*, 81 Wash. App. 403, 914 P.2d. 750 (1996). The courts may also reverse administrative decisions that erroneously interprets or applies the law. RCW 34.05.570(3)(d); *see also Seattle Area Plumbers v Washington State Apprenticeship and Training Council*, 131 Wash. App. 862, 129

P.3d. 838 (2006). Reviewing courts conduct a *de novo* review when appeals involve questions of law. *Tapper v. Employment Security Department*, 122 Wn.2d 397, 498, 858 P.2d 494 (1993). For the reasons stated below, this Court may substitute its own interpretation of the regulation for the agency's interpretation and reverse the final agency order. *See* RCW 34.05.574; *see also Seattle Area Plumbers* at 871.

1. Mr. Gaston should not be forced to choose between necessary Medicaid Services and visiting his family in Oregon.

The termination of Mr. Gaston's Medicaid services based on the amount of time he spends traveling across state lines to visit his family in Portland violates state law and his constitutional right to travel. Requiring a recipient of public services to remain in a state for a certain period of time or to spend a certain amount of time in a state as a condition of receiving services – a durational requirement – improperly impinges on the constitutional right to interstate travel. *See Memorial Hospital v. Maricopa County*, 415 U.S. 250, 269 (1974) (a state's durational residence requirement as a condition of receiving medical care lacked a compelling state interest and was unconstitutional as a violation of the equal protection clause). The right to travel between states is fundamental and has been firmly established in jurisprudence. *United States v. Guest*, 383 U.S. 745, 757 (1966). Any state policy that impinges or chills that

fundamental right is subject to strict scrutiny. *In re U.S. ex rel. Missouri State High School Activities Ass'n*, 682 F.2d 147 (8th Cir. 1982) (citing *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 1331 (1969)).

Additionally any classification that deters interstate migration or penalizes the exercise of the constitutional right to travel is unconstitutional unless the classification is supported by a compelling state interest. *Shapiro* at 631 & 634. In *Shapiro*, the Supreme Court found that planning of welfare budgets, providing an objective test of residency, or minimizing the opportunity for recipients to receive payments from more than one state were not compelling state interests. *Shapiro* at 634-63. There, the Supreme Court rejected the state durational requirement as an improper condition for new residents to receive benefits because it created a classification that invidiously discriminated against new residents in violation of equal protection. *Shapiro* at 627.

Here, the Department decision creates a suspect and discriminatory classification of individuals with disabilities who visit out-of-state family members, like Mr. Gaston. This classification penalized Mr. Gaston for the amount of time he spends visiting his family in Oregon by terminating the very benefits Mr. Gaston relies upon to maintain his residency as well as his health and safety.

Mr. Gaston's connection with the Washington is even stronger than that of the plaintiffs in *Shapiro* as Mr. Gaston has been a Washington resident since 1992, has a home in Washington, votes in Washington, and contributes to the community by working in Washington. Unlike the *Shapiro* defendants, the Department has also not establish or offered a compelling state interest to substantiate terminating Mr. Gaston's Medicaid benefits based on the amount of time he spends exercising his constitutional right to travel.

Individuals have the fundamental right to interstate travel to seek Medicaid in a different state than where they are physically residing. *Duffy v. Meconi*, 508 F. Supp.2d 399 (D. Del. 2007). In *Duffy*, the plaintiff was a 33-year-old Medicaid recipient with developmental disabilities who lived an intermediate care facility for persons with mental retardation in North Carolina. Her parents relocated from North Carolina to Delaware, wanted her to relocate near them in Delaware, and applied for Medicaid services for her in Delaware although she still lived in North Carolina. The Delaware Department of Health and Social Services denied their application because the plaintiff was not a resident of Delaware. The *Duffy* court rejected Delaware's refusal to process and approve the plaintiff's application for Medicaid until she physically resided in the state

as a violation of the right to interstate travel, finding that the policy was merely a disguised durational residency requirement. *Id.*

Similarly, terminating Mr. Gaston's receipt of Medicaid services based on the amount of time he visits his family in Oregon is a disguised durational requirement because such a policy requires that he stay in Washington for an undetermined period of time or lose his Medicaid services. The policy also impinges on his right to travel because it penalizes Mr. Gaston for visiting his family in Oregon by conditioning his receipt of necessary Medicaid services on foregoing such interstate travel.

The Department understands that such restrictions on travel are improper. An express prohibition against such durational residency requirements is set forth in the Department's own pertinent residency regulation which states that: "[a] person does not need to live in the state for a specific period of time to be considered a resident" in order to receive medical services. WAC 388-468-0005(2). This regulation reflects the Department's duty to protect Mr. Gaston's constitutionally protected rights. Nonetheless, the Department terminated Mr. Gaston's Medicaid services in violation of its own regulations and long-established jurisprudence establishing and protecting the constitutional right to travel.

The Department's termination of Mr. Gaston's Medicaid services violated its own regulation that allows for termination of services when a

recipient temporarily leaves the state. The only promulgated rule regarding the amount of time a recipient of public services or benefits can spend out of state is WAC 388-468-0005(4) which states that a client can temporarily be out of the state for more than one month but must supply the Department with adequate information to demonstrate the intent to continue to reside in the state of Washington. There is no evidence in the record that Mr. Gaston's visits to his family in Oregon ever exceeded 30 consecutive days (the visits are usually only for a few days). Accordingly, Mr. Gaston never violated the terms of WAC 388-468-0005(4). Therefore, Mr. Gaston's routine of visiting his family for part of each week does not require any additional notification to the Department or any demonstration of intent to live in Washington.

It is also irrelevant to his program eligibility whether Mr. Gaston receives his Medicaid Personal Care services in Vancouver or Portland. Washington State allows out-of-state medical care in border cities, finding the receipt of "services in a recognized out-of-state bordering city on the same basis as in-state services". WAC 388-501-0175 and WAC 388-845-0110(9). Portland is recognized as a bordering city. *Id.*

While not reflected in any regulation and rejected by WAC 388-468-0005(2), the Department imposed an arbitrary restriction on Mr. Gaston's ability to visit Portland by terminating Medicaid services based

on the amount of time he spends traveling. The final order should be reversed because it erroneously upheld a disguised durational requirement.

2. Terminating Medicaid services based on a Department's informal "clarification" rather than the applicable residency regulation is arbitrary and capricious and violates due process.

Courts provide agency deference with questions of fact and will not interfere with the decisions made by an agency so long as there are no questions of law. *Pierce County v. State*, 185 P.3d 594 (Div. II 2008). However, when agency decisions are arbitrary, tyrannical, or predicated upon a fundamentally wrong basis, then the courts may intervene to protect the rights of individuals. *Pierce County* at 617. An agency's action is arbitrary and capricious when it is willfully unreasonable, without consideration, and in disregard to the facts and circumstances. *Buell v. City of Bremerton*, 80 Wash.2d 518, 526, 495 P.2d 1358 (1972); see also *Brown v. State, Dept. of Health, Dental Dicipinary Bd.*, 94 Wash. App. 7, 972 P.2d 101 (1999). Courts will not defer to agency determinations that conflict with the relevant statute. *Waste Management of Seattle, Inc. v. Utilities and Transp. Comm'n*, 123 Wash.2d 621, 869 P.2d 1034 (1994).

Due process also mandates the Department to administer public assistance programs pursuant to written, objective, and ascertainable standards. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970) (due process

requires objective procedures and fair hearings in connection with termination of public benefits and services). The due process requirement ensures fair administration of public benefits and services that is free from arbitrary or capricious decision-making. *Id.*

Here, the Department applied an invisible ad hoc process and “clarification” rather than the application of its own properly adopted residency regulation. The Department has admitted that it based its termination of Mr. Gaston Medicaid services on an informal “clarification” of residency requirements from the Regional Office rather than the criteria set forth in the applicable residency regulation or any other law. RP, p. 29 and AR 246, 247, and 283.

This termination of benefits is arbitrary and capricious for at least two reasons: First, the information provided in the solicitation of this “clarification” was inaccurate and based solely on a Department caseworker’s subjective opinion. AR 178, 246, and 247. This inaccuracy predetermined an outcome based on erroneous or limited facts. In the “clarification”, the Regional Office was inaccurately informed by the caseworker that Mr. Gaston spent only one night a week in Washington and six days each week in Oregon. AR 246-47. However, the record does not support this statement. Mr. Gaston spends two to four days a week in Washington. AR 91. Moreover the “clarification” request submitted to

the Region Office did not mention any of the other factors demonstrating Mr. Gaston resides in Washington including his community of medical and service providers, recreational and social contacts, his voter registration, his Washington ID card, or his receipt of mail at his Washington address. Where an opinion, like the “clarification” here, is based on erroneous or partial facts, the opinion itself is inherently suspect as speculation, conjecture, and guesswork. *See Berndt v. Department of Labor and Industries of State*, 44 Wash.2d 138, 265 P.2d 1037 (1954).

Second, in interpreting regulations, words are to be given their plain meaning. *Conway v. DSHS*, 131 Wash. App. 406, 416 (2005); *see also Rozner v. City of Bellevue*, 116 Wash.2d 342, 347, 804 P.2d 24 (1991). Rules must also be interpreted in way that does not create absurd results or violate the pertinent statutory scheme. *Alderwood Water Dist. v. Pope & Talbot, Inc.*, 62 Wash.2d 319, 321, 382 P.2d 639 (1963).

Here, the “clarification” precludes state residency where an individual spends an undefined amount of time outside of the state, even in border towns. This additional residency requirement finds no support in the plain language of the applicable residency regulation, WAC 388-468-0005, or the statutory scheme considering the receipt of Medicaid services in Portland the same as in Vancouver, WAC 388-845-0110(9). At the deposition on January 30, 2007, the Department representative admitted

that the Department determination that Mr. Gaston was not a Washington resident was based solely on the “clarification” from the Regional Office that was itself based solely on the amount of time Mr. Gaston allegedly spent out of the state. AR 283. The Department representative could not identify any requirement in applicable state statutes or regulations that imposed such time limits or that supported Mr. Gaston’s termination based upon the amount of time he spent in Washington. AR 283.

Instead the applicable portions of the Department’s residency regulation require only that to be a Washington resident for purposes of medical programs such as Medicaid services a person must: “[c]urrently [live] in Washington and [intend] to continue living here permanently or for an indefinite period of time”. WAC 388-468-0005 (1). The regulation specifically rejects the use of the type of time or durational requirements used here by the Department. *Id* at (2).

Department workers interpreting regulations “may not speculate as to the intent of [a] regulation or add words to the regulation.” *Multicare Medical Center v. DSHS*, 114 Wash.2d 572, 591 (1990), *superseded by statute on unrelated grounds*. Here, the Department did not simply amend the residency regulation by internal administrative fiat but it amended it in a manner that was directly contrary to its terms by adding a prohibited time or durational requirement to the residency calculus. Mr. Gaston’s

benefits were terminated based on some informal advice from the Department's Regional Office that was at odds with the requirements of the Department's own residency regulation. As such, the termination was arbitrary, capricious, not in accordance with law, violated Mr. Gaston's constitutional right to due process, and was the product of unlawful procedures and failure to follow prescribed procedures. Therefore, the order upholding the termination should be reversed.

3. Determining where Mr. Gaston lives involves interpreting the residency regulation and is, therefore, a question of law.

When reviewing mixed questions of law and fact in an administrative decision, the Court of Appeals accepts the agency's unchallenged factual findings, applies the substantial evidence standard to challenged findings of fact, and independently determines both the applicable law and the application of law to the facts. *Western Ports Transp., Inc. v. Employment Sec. Dept. of State of Washington*, 110 Wash. App. 440, 41 P.3d 510 (2002).

The ALJ erroneously identified mixed conclusions of law and fact as solely factual findings when she found that Mr. Gaston "lives" in Oregon and merely "stays" in Washington³. FOF, 2 and 6. The

³ In Mr. Gaston's related DDD eligibility appeal (docket numbers 06-2006-A-1518 and 07-2006-A-0613), the Department's own Board of Appeals (BOA) recently considered the issue of where someone lives for residency purposes. *See* Order for Remand. In that case, the BOA found that where Mr. Gaston "lives" is a legal question – not a factual

distinction between a purely factual finding versus a mixed finding of law and fact is important because it will dictate this Court's standard of review. The ALJ is usually afforded deference when reviewing questions of pure fact. *Galvis v. State, Dept. of Transp.*, 140 Wash. App. 693, 167 P.3d 584 (2007). However, the same deference does not apply to legal questions involving application of fact to law. *Id.* The application of statute to a set of facts is a question of law, and appellate review is *de novo*. *State v. Rodman*, 94 Wn. App. 930, 973 P.2d 1095 (1999); *see also Tapper v. Employment Security Department*, 122 Wn.2d 397, 858 P.2d 494 (1993).

The pertinent residency regulation, WAC 388-468-0005, does not define where someone "lives". Instead the regulation establishes a multi-factor test to determine residency. WAC 388-468-0005(1)-(12). The first prong of the legal standard for residency states "a resident is a person who currently lives in Washington and intends to continue living here permanently or for an indefinite period of time." WAC 388-468-0005(1)(a). Mr. Gaston demonstrates his intent to be a Washington resident by having a residence in Vancouver where he keeps his belongings, receives his mail, and spends between two to four nights a

question - because it involves the application of a legal standard. *Id.* Where the Department views residency as a legal question in one review and a factual question in another highlights the arbitrary and inconsistent standard used in determining Mr. Gaston's eligibility based on residency.

week. AR 102, 185, 186, and 187. As his sister testified at the hearing Mr. Gaston “absolutely” intended to keep living in Washington due to his “situation” including his established social network and his employment. RP, pgs. 53-57.

Mr. Gaston further demonstrated his intent to be a Washington resident by maintaining 96% attendance rate at his supported workplace in Vancouver, Washington, pursuant to WAC 388-468-0005(1)(c). AR 184. This commitment to his job has been unchanged for over 12 years. AR 184. Finally, Mr. Gaston demonstrates his intent by maintaining his social life with community members and with friends at Vancouver Parks and Recreation events. AR 217; *see also* RP, pgs. 48, 49, 55 and 56. For example, an important aspect of Mr. Gaston’s life is his ability to proudly visit his local Vancouver bank each payday and visit with his favorite bank teller, the result of many years of relationship building in the community. RP, pgs. 48-49. The ALJ failed to adequately apply these facts to the legal standards set forth in Washington case law or the Department’s own residency regulation.

Washington courts have addressed the legal question of where someone resides or lives in other contexts. In *State v. Gardner*, 133 Wash. App. 1014 (Div. I 2006), the Court acknowledged the State’s proper use of Black’s Law Dictionary to define “live in a place” as “to reside there, to

abide there, to occupy as one's home.” Courts have also looked at the statutory language and applied the Webster’s Dictionary definition of “live”:

If a statute is plain and unambiguous, its meaning must be derived from the language of the statute itself. *Harmon v. Department of Soc. and Health Servs.*, 134 Wash.2d 523, 530, 951 P.2d 770 (1998). We find that there is no ambiguity in the statutory definition. Under the applicable dictionary definition, “live” means “to occupy a home: dwell, reside.” Webster's Third New Int'l Dictionary 1323 (1986).

Dammarell v. Dammarell, 96 Wash. App. 1031 (Div. I 1999). The Washington Supreme Court has concluded that the term “lives with” unambiguously means “living or dwelling in fact on a permanent or temporary basis”. *State Farm Mut. Auto. Ins. Co. v. Ruiz*, 134 Wash.2d 713, 722, 952 P.2d 157 (1998). The *Ruiz* Court chose to not limit the meaning of “lives” based on a static definition but rather to afford a broad and “elastic” view including “temporary stays as well as permanent living arrangements.” *Id.*, citing *Davis v. State Farm Mut. Auto. Ins. Co.*, 583 So.2d 225, 230 (Ala.1991).

Most recently, this Court held, in *State v. Vant*, No. 35779-8 (Div. II July 1, 2008), that the term “residence” included even a temporary dwelling, place, abode or habitation that a person intended to return to as compared to a place of a temporary sojourn or a transient visit, quoting

Webster's Dictionary. Accordingly, this Court held that the home of a person's mother was the person's residence even though the person did not live at her mother's home "full time" but only "off and on" and was not there at the time of the operative event in the case but she received her mail there, kept personal belongings there, and intended to return there.

In each of these cases, the courts have first looked to the plain language of the rule involved where one was implicated or to common usage where one was not. Here, the residency regulation does provide definitions of residency, which Mr. Gaston meets. Mr. Gaston is a "person who currently lives in Washington" because, as Washington courts have held "living" encompasses a broad array of living arrangements. Mr. Gaston's practice of visiting his elderly parents and his sister at their respective homes several days each week does not mean that he does not live in Washington. Living in Washington can mean anything from temporary stays to permanent living arrangements. Mr. Gaston has provided evidence of his intent to consistently and indefinitely maintain his residence in Vancouver, Washington, as the dwelling where he stays throughout his work week, receives his mail, and keeps his belongings. AR 184, 43, 45, 57, 73, and 99.

Therefore, the record contains substantial un rebutted evidence supporting the legal conclusion that Mr. Gaston resides in Washington.

This Court may independently determine whether these facts establish that Mr. Gaston has met both the common law and the regulatory definition of being a Washington resident.

4. Neither the Department nor the ALJ met their burden to determine Mr. Gaston was no longer a Washington resident.

Washington courts apply a substantial evidence standard to an administrative agency's findings of fact. *Galvis v. State, Dept. of Transp.*, 140 Wash. App. at 708; *see also* WAC 388-02-0490 and RCW 34.05.570(3)(e). Here, there is no substantial evidence to establish Mr. Gaston lost his Washington residency.

The final order states that the ALJ could not make a determination regarding Mr. Gaston's intent as he was not at the hearing; therefore, residency follows that of his guardians as set forth in WAC 388-468-0005(11)(d). COL, 6. The ALJ's sua sponte requirement that Mr. Gaston attend the hearing and express his intention to reside in Washington in order to establish his residency in Washington is not in accordance with law and therefore was arbitrary and capricious. (See Error 2 above). This subsection of the regulation states that residency is where the parents or guardians are located only when a person is institutionalized *and* either a minor or "client twenty-one years of age or older, who became incapable

of determining residential intent before reaching age twenty-one.” *Id*
(emphasis added).

Mr. Gaston has never been institutionalized (see Error #5 below) nor was there evidence regarding his incapacity to form residential intent or that his parents lacked the legal authority as his guardians to establish his residence in Oregon for him. There is ample evidence establishing Mr. Gaston’s demonstrated intent to remain a Washington resident including his home in Vancouver where he sleeps, keeps his belongings, and receives his mail and his outstanding attendance rate at his supported employment. AR 184, 43, 45, 57, 73, and 99. It is also uncontroverted that Mr. Gaston takes great pleasure in his life in Vancouver, including his job and participation in his community. AR 217; *see also* RP, pgs. 48, 49, and 53-57.

A preponderance of the evidence is the standard of proof the Department must establish at an administrative hearing. WAC 388-02-0485. In the present case, Department failed to meet this standard because it did not provide evidence that substantiates its basis for its termination of benefits based on residency. And the evidence that the Department did present was flawed. The Department substituted a “clarification” from its Region Office to substantiate the termination based on residency rather than the regulation itself. The “clarification” request itself was based on

erroneous and incomplete facts, insuring a flawed result. Department staff also testified that they did not believe that spending only a portion of the week in Washington to facilitate employment constituted residing or living in the State even though the Department's own residency regulation prohibited the use of such time or durational requirements. RP, 23. Under these circumstances the testimony of the Department's witnesses cannot be considered substantial enough to support a finding that Mr. Gaston was not a resident of Washington. The ALJ's reliance upon such flawed evidence was arbitrary and capricious and not supported by substantial evidence. (See Error 2 above).

The Department's other primary source of evidence regarding its basis to terminate benefits was an admitted error that Lynne Gaston made when filling out a form. RP, p. 60. However, on the same form Lynne Gaston clearly listed Mr. Gaston's resident address as being in Vancouver and her mailing address, as his guardian, in Portland on the form. AR 57. Lynne Gaston called the Department and clarified any confusion regarding her residence versus Mr. Gaston's residence on July 25, 2003. AR 43. To ensure the Department received this information, on the same day, Lynne Gaston wrote to the Department informing it of her correct mailing address as Mr. Gaston's guardian and Mr. Gaston's correct resident address in Vancouver. AR 68. Accordingly the ALJ's finding that by Ms.

Gaston's mistaken statement on a form was adequate to show that Mr., Gaston was not a resident of Washington was arbitrary and capricious and not supported by substantial evidence.

Finally, the Department's representative did not contest that Mr. Gaston works at least two days a week in Vancouver, Washington. AR 274. The Department also does not contest that Mr. Gaston resides multiple nights a week in Vancouver. *Id.* Nor has the Department contested any of the testimony or declarations regarding Mr. Gaston's life in Vancouver and his intention to continue living his life in Vancouver. AR 217; *see also* RP, pgs. 48, 49, and 53-57.

The fact that Mr. Gaston wants to keep his life, residence, and employment in Washington should not be undermined simply because his guardians retired and moved across the river to Oregon. The amount of time Mr. Gaston travels between his family's homes in Oregon and his home in Washington demonstrates his commitment to maintaining his Washington residency and should be sufficient to do so. The ALJ's order should be overturned because it lacks substantial evidence and instead presumes Mr. Gaston is incapable of forming intent.

5. Mr. Gaston has never been institutionalized; therefore, terminating his benefits based on a law limited to institutionalized individuals is an error.

Interpretation of regulations is purely a question of law. *Posterna v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 1030 (2001).

The Court of Appeals may grant relief if the final administrative order erroneously interpreted or applied the law. RCW 34.05.570(3)(b), (d); *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004). An ALJ's decision must be consistent with the law and not exceed its statutory authority. WAC 388-02-0490; *see also Leschi Imp., Council v. Wash. State Highway Comm.*, 84 Wash.2d 271, 279, 535 P.2d 774 (1974). An agency's decision is also contrary to law where the agency violates rules governing its exercise of discretion. *Pierce County Sheriff v. Civil Service Comm.*, 98 Wash.2d 690, 694, 658 P.2d 648 (1983).

When there is a dispute involving both the interpretation of court rule and inferences drawn from facts, the Court of Appeals determines the law independently and applies it to the facts as found by the lower court unless those findings are clearly erroneous. *Interstate Production Credit Ass'n v. MacHugh*, 90 Wn. App. 650, 953 P.2d 812 (1998). Whether the agency's construction of a statute is accorded deference depends on whether the statute is ambiguous, but the courts retain ultimate authority to

interpret statute. *Waste Management of Seattle, Inc. v. Utilities and Transp. Com'n*, 123 Wash.2d at 627-628.

Here, the ALJ made an error of law when she determined that Mr. Gaston's residency is determined by the location of his guardians pursuant to subsection 11(d) of WAC 388-468-0005. COL, 5. The referenced law limits consideration of a guardian's residency to "*an institutionalized ... client twenty-one years of age or older, who became incapable of determining residential intent before reaching twenty-one years of age*" WAC 388-468-0005(11)(d)(ii) (emphasis added). Mr. Gaston is not and has never been institutionalized. The ALJ's ruling directly contradicts the plain language of this regulation. When the language of the law is clear, the words should be afforded their plain meaning. *See Harmon* at 530. We can assume the Department meant to include the words, "if institutionalized" when determining residency follows that of a guardian for individuals over twenty-one whose disability prevents them determining residential intent.

Conversely, the applicable residency regulation, subsection 11(c) of WAC 388-468-0005, states that residency (when Medicaid eligibility is based on disability) is where the noninstitutionalized person lives. Here Mr. Gaston's is noninstitutionalized, his Medicaid eligibility is based on disability, but the regulations still affords him the ability to determine

residency based on where he lives. The location of an individual's guardian is irrelevant when considering whether an individual with an established presence in the community has met the residency requirements. The ALJ decision disregards the facts regarding Mr. Gaston's independence as well as Mr. Gaston's very claims appealing the medical assistance determination so that he can keep the supports necessary to maintain his life in Washington. The erroneous application has a discriminatory impact as it strips away the right of an individual with disabilities to express residency simply because he has an out-of-state guardian.

Furthermore, Mr. Gaston demonstrates his intent when he chooses to continue working and maintaining his residence in Washington. AR 217; *see also* RP, pgs. 48, 49, and 53-57. By ignoring Mr. Gaston's demonstrated intent, and instead focusing on choices made by his guardians for their own personal living arraignments, the final order impermissibly alters the multi-factor approach promulgated under WAC 388-468-0005(1) – (12).

Mr. Gaston's guardianship status is not wholly irrelevant in considering residency. In addition to Mr. Gaston's demonstrated intention to live in Washington, the ALJ may consider the intention of his guardians that Mr. Gaston live in Washington as well. In Washington, the statutory

presumed Mr. Gaston's incapacity and that Mr. Gaston's guardians lacked the authority to facilitate his intent to live in Washington (and testify about it) without substantial evidence. The ALJ also erroneously applied the residency regulation as well as limited the choice of Mr. Gaston contrary to the legislative intent.

Finally, the conclusion of law determining that Mr. Gaston needed to "affirmatively" state his intention to reside in Washington is also more restrictive than provided in the regulation, which merely states that an individual needs to live and intend to continue living in Washington permanently or for an indefinite period of time. WAC 388-468-0005(1)(a). The ALJ's holding that Mr. Gaston could not form intent and therefore his residency must follow that of his guardian is unsupported by the express language of state regulations and should, therefore, be overturned.

E. Conclusion

For the foregoing reasons the ALJ's decision determining that Mr. Gaston is not a resident of Washington State should be reversed and benefits should be restored effective the date of his wrongful denial. Mr. Gaston also respectfully requests that this Court award costs, fees and other expenses pursuant to RCW 4.84.350 and 74.08.080 and make any other orders and

award any other relief, including temporary or permanent injunctive relief
necessary to protect or preserve the interests of Mr. Gaston.

Dated this 28th day of July, 2008.

A handwritten signature in black ink, appearing to read 'Emily Cooper', written over a horizontal line.

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F. Appendix

1. Final Order
2. WAC 388-468-0005
3. WAC 388-515-1511
4. WAC 388-828-1520
5. Clarification
6. WAC 388-501-0175
7. WAC 388-845-0110
8. RCW 34.05.570
9. RCW 34.05.574
10. WAC 388-02-0490
11. WAC 388-02-0485
12. RCW 11.88.005

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of July, 2008, I caused to be served by legal messenger a copy of the foregoing APPELLANT'S

OPENING BRIEF to the following:

Scott Middleton
Assistant Attorney General
7141 Cleanwater Drive SW
Olympia, WA 98504-0124

I declare under penalty of perjury of the laws of the state of Washington that the forgoing is true and correct.

Dated this 28th day of July, 2008, at Seattle, Washington.

Mona Rennie
Mona Rennie

FILED
COURT OF APPEALS
DIVISION II
08 JUL 29 PM 1:45
STATE OF WASHINGTON
BY _____
DEPUTY

BEFORE THE WASHINGTON STATE OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF SOCIAL AND HEALTH SERVICES

In Re:

CHRISTOPHER GASTON

APPELLANT

Docket No. 06-2006-B-1113

DSHS#: 3028273

MAILED

FINAL ORDER

JUN 27 2007

VANCOUVER OFFICE OF
ADMINISTRATIVE HEARINGS

Gina L Hale, Senior Administrative Law Judge (SALJ) conducted a hearing by telephone conference call on May 24, 2007. The Appellant, Christopher Gaston, did not appear, but was represented by Julie Wilchins, Attorney At Law and Emily Cooper, Attorney At Law. Melissa Mathson, Fair Hearings Coordinator, appeared and represented the Department of Social and Health Services - Columbia River Community Services Office (Department). Present as witnesses were Greer Gaston, and Lynne Gaston. Present as observers were George Gaston and Jeffery Beach.

ISSUE

Whether the Department correctly denied medical assistance benefits to the Appellant on the basis that he was no longer a resident of the State of Washington.

RESULT

Yes. The Department correctly denied benefits to the Appellant who was no longer a Washington State resident.

FINDINGS OF FACT

1. The Appellant has been a recipient of benefits through the State of Washington and its Division of Developmental Disabilities (DDD).
2. The Appellant lives at home with his mother and father who have been his legal guardians since August 2002.
3. The DDD staff became aware that the Appellant and his family had moved to the State of Oregon. As a result, the Appellant was terminated from the DDD program on the basis that he was no longer was a resident of the state of Washington.
4. The Appellant's family moved in April 2003 to the State of Oregon. The Appellant continues to be under the guardianship of his parents and does reside in their home several days each week.
5. The Appellant is employed in Vancouver. His parents had attempted to drive him to and from work daily once they moved to State of Oregon. However, that situation became difficult to maintain and the living arrangements changed.

6. The Appellant stays with friends in Vancouver two to three days per week , facilitating his ability to get to work.

7. The Appellant has many activities in the Vancouver area in addition to his employment.

8. It is the Appellant's position that he remains a resident of the State of Washington for the purpose of receiving medical assistance.

CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction to hear this matter pursuant to Revised Code Of Washington (RCW) 74.08.080 and Chapter 388-02 Washington Administrative Code (WAC).

2. The Washington Administrative Code regulation which pertains to the residency requirements is WAC 388-468-0005.

3. It is the Appellant's position that Subsection 2 is applicable in this case. In that Subsection, the regulation indicates that a person does not have to live in the state of Washington for any specific period of time in order to be considered a resident.

4. Therefore, based on that regulation it is the Appellant's view that he continues to be a resident of the State of Washington and therefore is entitled to the benefits provided by the state of Washington.

5. The undersigned concludes that the more applicable section is Section 11. The undersigned concludes that where the Appellant's legal guardians have moved to another state, his residency has moved with them.

6. Additionally, in this particular case, the Appellant has been a recipient of DDD services. In order to qualify for those services an individual must be a vulnerable adult with certain deficiencies. Therefore, it is questionable as to whether the Appellant would have the ability to form the intent or be able to express his intent regarding residency. There is a true question regarding his competency. He was not at the hearing and therefore no test could be made of his competency regarding that issue. In the absence of the Appellant stating affirmatively where his intent to reside is, the undersigned is not permitted to make that assumption for him. Rather, the undersigned shall apply the regulation which indicates that the Appellant's residency follows that of his guardians.

DECISION

The Department's decision to terminate the Appellant's benefits on the basis that he is no longer a resident of the State of Washington is **AFFIRMED**.

/////
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/////
/////

000008

SERVED on the date of mailing.


Gina L. Hale
Senior Administrative Law Judge
Office of Administrative Hearings

A copy was sent to:

Christopher Gaston, Appellant
Columbia River CSO, Department Rep
Medical Assistance Eligibility, Program Admin
Emily Cooper, Appellant Rep

APPEAL RIGHTS

Reconsideration: You have the right to request that the Administrative Law Judge (ALJ) reconsider this Final Order. RCW 34.05.470 and WAC 388-02-0605. Your request must be in writing and must be received by the ALJ within ten (10) calendar days of the mailing date of the Final Order. If the reconsideration request is not received within this ten-day period, it will not be considered, and the timeline to ask for superior court review continues to run.

If the reconsideration request is timely, the ALJ then has twenty (20) days to either decide the request or mail you and the other parties a written notice specifying the date the ALJ will decide the request. The reconsideration request is denied if no action is taken by the ALJ within the twenty-day period. If the request is timely, the timeline to ask for superior court review will start on the date the reconsideration order is mailed.

Superior Court Review: You also have the right to appeal this Final Order to superior court within thirty (30) calendar days of the mailing date of the Final Order. RCW 34.05.542(3) and WAC 388-02-0645. You do not need to file a request for reconsideration before requesting review in superior court. DSHS cannot request superior court review. Please refer to WAC 388-02-0650 for information about how to serve your request for superior court review.

000009

WAC 388-468-0005
Residency.

Subsections (1) through (4) applies to cash, the Basic Food program, and medical programs.

(1) A resident is a person who:

(a) Currently lives in Washington and intends to continue living here permanently or for an indefinite period of time;
or

(b) Entered the state looking for a job; or

(c) Entered the state with a job commitment.

(2) A person does not need to live in the state for a specific period of time to be considered a resident.

(3) A child under age eighteen is a resident of the state where the child's primary custodian lives.

(4) With the exception of subsection (5) of this section, a client can temporarily be out of the state for more than one month. If so, the client must supply the department with adequate information to demonstrate the intent to continue to reside in the state of Washington.

(5) Basic Food program assistance units who are not categorically eligible do not meet residency requirements if they stay out of the state more than one calendar month.

(6) A client may not receive comparable benefits from another state for the cash and Basic Food programs.

(7) A former resident of the state can apply for the GA-U program while living in another state if:

(a) The person:

(i) Plans to return to this state;

(ii) Intends to maintain a residence in this state; and

(iii) Lives in the United States at the time of the application.

(b) In addition to the conditions in subsection (7)(a)(i)(ii), and (iii) being met, the absence must be:

(i) Enforced and beyond the person's control; or

(ii) Essential to the person's welfare and is due to physical or social needs.

(c) See WAC 388-406-0035, 388-406-0040, and 388-406-0045 for time limits on processing applications.

(8) Residency is not a requirement for detoxification services.

(9) A person is not a resident when the person enters Washington state only for medical care. This person is not eligible for any medical program. The only exception is described in subsection (10) of this section.

(10) It is not necessary for a person moving from another state directly to a nursing facility in Washington state to establish residency before entering the facility. The person is considered a resident if they intend to remain permanently or for an indefinite period unless placed in the nursing facility by another state.

(11) For purposes of medical programs, a client's residence is the state:

(a) Paying a state Supplemental Security Income (SSI) payment; or

(b) Paying federal payments for foster or adoption assistance; or

(c) Where the noninstitutionalized individual lives when Medicaid eligibility is based on blindness or disability; or

(d) Where the parent or legal guardian, if appointed, for an institutionalized:

(i) Minor child; or

(ii) Client twenty-one years of age or older, who became incapable of determining residential intent before reaching age twenty-one.

(e) Where a client is residing if the person becomes incapable of determining residential intent after reaching twenty-one years of age; or

(f) Making a placement in an out-of-state institution; or

(g) For any other institutionalized individual, the state of residence is the state where the individual is living with the intent to remain there permanently or for an indefinite period.

(12) In a dispute between states as to which is a person's state of residence, the state of residence is the state in which the person is physically located.

[Statutory Authority: RCW 74.08.090, 03-20-060, § 388-468-0005, filed 9/26/03, effective 10/27/03. Statutory Authority: RCW 74.04.050, 74.04.055, 74.04.057 and 74.08.090, 98-16-044, § 388-468-0005, filed 7/31/98, effective 9/1/98.]

WAC 388-515-1511

What are the general eligibility requirements for waiver services under the four division of developmental disabilities (DDD) home and community based services (HCBS) waivers?

This section describes the general eligibility requirements for waiver services under the four DDD home and community based services (HCBS) waivers.

(1) The four DDD HCBS waivers are:

- (a) Basic;
- (b) Basic plus;
- (c) Core; and
- (d) Community protection.

(2) The requirements for services for DDD HCBS waivers are described in chapter 388-845 WAC. The department establishes eligibility for DDD HCBS waivers. To be eligible, you must:

- (a) Be an eligible client of the division of developmental disabilities (DDD);
- (b) Meet the disability criteria for the Supplemental Security Income (SSI) program as described in WAC 388-475-0050;
- (c) Require the level of care provided in an intermediate care facility for the mentally retarded (ICF/MR);
- (d) Have attained institutional status as described in WAC 388-513-1320;
- (e) Be able to reside in the community and choose to do so as an alternative to living in an ICF/MR;
- (f) Need waiver services as determined by your plan of care or individual support plan, and:
 - (i) Be able to live at home with waiver services; or
 - (ii) Live in a department contracted facility, which includes:
 - (A) A group home;
 - (B) Group training home;
 - (C) Child foster home, group home or staffed residential facility;
 - (D) Adult family home (AFH); or
 - (E) Adult residential care (ARC) facility.
 - (iii) Live in your own home with supported living services from a certified residential provider; or
 - (iv) Live in the home of a contracted companion home provider; and
- (g) Be both Medicaid eligible under the categorically needy program (CN-P) and be approved for services by the division of developmental disabilities.

[Statutory Authority: RCW 74.04.050, 74.04.057, 74.08.090, 74.09.500, 74.09.530, and Washington state 2007-09 operating budget (SHB 1128). 08-11-083, § 388-515-1511, filed 5/20/08, effective 6/20/08.]

JAN-30-07 TUE 05:20 PM VANCOUVER CSU
 Answer to Clarification Request

FAX NO. 360 750 8938

P. 07
 Page 1 of 1

Answer To Clarification Request	
Return to Clarification List	Click here to print this page

Question: CID# 3028273 We have a DAC client, receiving Social Security and working part-time. He has been assigned to work at a local plant, works Tuesdays and Thursdays and sleeps in Vancouver on Wednesdays. The other 6 days a week he stays with his sister in Tigard or his mother in King City. Mother is the rep for his SS. He has been using this Vancouver address for residence and his Mom's for mailing for SS and for us for quite some time and no one has ever questioned it. Open on S02, S03. Mom has verified this information, and states she was told that as long as he votes and /or uses C Van he is eligible. We do not believe he is a resident, but it seems that Social Security does. Is he a resident per our rules?

Answer: If he were on SSI, we would consider him a resident of the state that pays his supplement. 388-468-0005 Residency - he is not receiving SSI/SSP, so SSA's decision on his residency is not binding. Residency is not an eligibility factor for SSD. When I reviewed the rule, I do not see any reference to voter registration or use of public transportation as evidence of residency. From your description, his usual and customary residence is Oregon. He stays in Vancouver 1 night per week. I would be interested to know who the LL is where he is staying - it appears it is a relative? In any case I think you are on the right track. Sorry for the delay in your answer.

*Medical clarification request by Pam Wurtz at 4/19/2006 11:27:43 AM
 Reply by Jane Seidel at 5/2/2006*

If you have a question about the answer given, please respond to the person who replied to the clarification listed above. For technical comments or questions, please email.

000246

CLARIFICATION # 1984

(Status: ARCHIVED)

Date Requested: 4/20/2006 9:19:00 AM

- Requestor: Ruth Holt
- Program: Medical
- Subject: Residency
- Source: EA-Z Manual
- WAC: 388-468-0005
- RCW: ..

Question:

We have a DAC client, receiving Social Security and working part-time. He has been assigned to work at a local plant (Vancouver), works Tuesdays and Thursdays and sleeps in Vancouver on Wednesdays. The other 6 days a week he stays with his sister in Tigard, OR. or with his mother in King City, OR. Mother is the representative for his Social Security. He has been using the Vancouver address where he sleeps for residence and his Mom's for mailing. No one has ever questioned it. He is open on S02 and S03. Mom has verified this information, and states she was told that as long as he votes and /or uses transportation van he is eligible. We do not believe he is a resident, but it seems that Social Security does. Is he a resident per our rules?

Date Assigned: 5/5/2006 3:46:00 PM

Priority: Medium

Assigned To: Mary Beth Ingram

Date Answered: 6/9/2006 2:20:00 PM

Answer:

After much discussion, including the AAG office, we suggest that the client be terminated as failing residency. If the client wishes to take this decision to hearing, the AAG office will be glad to assist the hearing coordinator with legal references, etc. Please let me know what happens on this case so I can monitor and communicate with the AAG office on it. Thank you.

- Source Reference: Other
- WAC Reference: --
- RCW Reference: ..
- Manual Reference:
- Outcome of Clarification: No action needed
- Memo for the Outcome: None
- CC Email to Groups: None
- Remove from Web-Archive: yes
- Date Archived: 1/16/2007 9:04:00 AM

ADMINISTRATOR APPROVAL	
Administrator Name:	Mary Beth Ingram
Approved by Administrator:	✓ yes
Date Approved:	6/9/2006 2:22:00 PM

000247

WAC 388-501-0175

No Washington State Register filings since 2003

Medical care provided in bordering cities.

(1) An eligible Washington state resident may receive medical care in a recognized out-of-state bordering city on the same basis as in-state care.

(2) The only recognized bordering cities are:

(a) Coeur d'Alene, Moscow, Sandpoint, Priest River, and Lewiston, Idaho; and

(b) Portland, The Dalles, Hermiston, Hood River, Rainier, Milton-Freewater, and Astoria, Oregon.

[Statutory Authority: RCW 74.04.050 and 74.08.090. 00-01-088, § 388-501-0175, filed 12/14/99, effective 1/14/00. Statutory Authority: RCW 74.08.090. 94-10-065 (Order 3732), § 388-501-0175, filed 5/3/94, effective 6/3/94. Formerly WAC 388-82-130.]

WAC 388-845-0110

Are there limitations to the waiver services I can receive?

There are limitations to waiver services. In addition to the limitations to your access to nonwaiver services cited for specific services in WAC 388-845-0115, the following limitations apply:

- (1) A service must be offered in your waiver and authorized in your plan of care or individual support plan.
- (2) Mental health stabilization services may be added to your plan of care or individual support plan after the services are provided.
- (3) Waiver services are limited to services required to prevent ICF/MR placement.
- (4) The cost of your waiver services cannot exceed the average daily cost of care in an ICF/MR.
- (5) Waiver services cannot replace or duplicate other available paid or unpaid supports or services.
- (6) Waiver funding cannot be authorized for treatments determined by DSHS to be experimental.
- (7) The Basic and Basic Plus waivers have yearly limits on some services and combinations of services. The combination of services is referred to as aggregate services or employment/day program services.
- (8) Your choice of qualified providers and services is limited to the most cost effective option that meets your health and welfare needs.
- (9) Services provided out-of-state, other than in recognized bordering cities, are limited to respite care and personal care during vacations.
 - (a) You may receive services in a recognized out-of-state bordering city on the same basis as in-state services.
 - (b) The only recognized bordering cities are:
 - (i) Coeur d'Alene, Moscow, Sandpoint, Priest River and Lewiston, Idaho; and
 - (ii) Portland, The Dalles, Hermiston, Hood River, Rainier, Milton-Freewater and Astoria, Oregon.
- (10) Other out-of-state waiver services require an approved exception to rule before DDD can authorize payment.

[Statutory Authority: RCW 71A.12.030, 71A.12.120 and Title 71A RCW. 07-20-050, § 388-845-0110, filed 9/26/07, effective 10/27/07.
Statutory Authority: RCW 71A.12.030, 71A.12.12 [71A.12.120] and chapter 71A.12 RCW. 06-01-024, § 388-845-0110, filed 12/13/05, effective 1/13/06.]

RCW 34.05.570
Judicial review.

(1) Generally. Except to the extent that this chapter or another statute provides otherwise:

(a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;

(b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;

(c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and

(d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.

(2) Review of rules. (a) A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section. In an action challenging the validity of a rule, the agency shall be made a party to the proceeding.

(b)(i) The validity of any rule may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county, when it appears that the 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. The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(ii) From June 10, 2004, until July 1, 2008:

(A) If the petitioner's residence or principal place of business is within the geographical boundaries of the third division of the court of appeals as defined by RCW 2.06.020(3), the petition may be filed in the superior court of Spokane, Yakima, or Thurston county; and

(B) If the petitioner's residence or principal place of business is within the geographical boundaries of district three of the first division of the court of appeals as defined by RCW 2.06.020(1), the petition may be filed in the superior court of Whatcom or Thurston county.

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

(3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(f) The agency has not decided all issues requiring resolution by the agency;

(g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

(4) Review of other agency action.

(a) All agency action not reviewable under subsection (2) or (3) of this section shall be reviewed under this subsection.

(b) A person 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. Within twenty days after service of the petition for review, the agency shall file and serve an answer to the petition, made in the same manner as an answer to a complaint in a civil action. The court may hear evidence, pursuant to RCW 34.05.562, on material issues of fact raised by the petition and answer.

(c) Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion, or an action under (b) of this subsection can be granted only if the court determines that the action is:

(i) Unconstitutional;

(ii) Outside the statutory authority of the agency or the authority conferred by a provision of law;

(iii) Arbitrary or capricious; or

(iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.

[2004 c 30 § 1; 1995 c 403 § 802; 1989 c 175 § 27; 1988 c 288 § 516; 1977 ex.s. c 52 § 1; 1967 c 237 § 6; 1959 c 234 § 13. Formerly RCW 34.04.130.]

Notes:

Findings -- Short title -- Intent -- 1995 c 403: See note following RCW 34.05.328.

Part headings not law -- Severability -- 1995 c 403: See RCW 43.05.903 and 43.05.904.

Effective date -- 1989 c 175: See note following RCW 34.05.010.

RCW 34.05.574

Type of relief.

(1) In a review under RCW 34.05.570, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order. The court shall set out in its findings and conclusions, as appropriate, each violation or error by the agency under the standards for review set out in this chapter on which the court bases its decision and order. In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency. The court shall remand to the agency for modification of agency action, unless remand is impracticable or would cause unnecessary delay.

(2) The sole remedy available to a person who is wrongfully denied licensure based upon a failure to pass an examination administered by a state agency, or under its auspices, is the right to retake the examination free of the defect or defects the court may have found in the examination or the examination procedure.

(3) The court may award damages, compensation, or ancillary relief only to the extent expressly authorized by another provision of law.

(4) If the court sets aside or modifies agency action or remands the matter to the agency for further proceedings, the court may make any interlocutory order it finds necessary to preserve the interests of the parties and the public, pending further proceedings or agency action.

[1989 c 175 § 28; 1988 c 288 § 517.]

Notes:

Effective date -- 1989 c 175: See note following RCW 34.05.010.

WAC 388-02-0490

How is a position proven at hearing?

The ALJ decides if a party has met the burden of proof. The ALJ writes a decision based on the evidence presented during the hearing and consistent with the law.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0490, filed 9/1/00, effective 10/2/00.]

WAC 388-02-0485

What is the standard of proof?

Standard of proof refers to the amount of evidence needed to prove a party's position. Unless the rules or law states otherwise, the standard of proof in a hearing is a preponderance of the evidence. This standard means that it is more likely than not that something happened or exists.

[Statutory Authority: RCW 34.05.020. 00-18-059, § 388-02-0485, filed 9/1/00, effective 10/2/00.]

RCW 11.88.005
Legislative intent.

It is the intent of the legislature to protect the liberty and autonomy of all people of this state, and to enable them to exercise their rights under the law to the maximum extent, consistent with the capacity of each person. The legislature recognizes that people with incapacities have unique abilities and needs, and that some people with incapacities cannot exercise their rights or provide for their basic needs without the help of a guardian. However, their liberty and autonomy should be restricted through the guardianship process only to the minimum extent necessary to adequately provide for their own health or safety, or to adequately manage their financial affairs.

[1990 c 122 § 1; 1977 ex.s. c 309 § 1; 1975 1st ex.s. c 95 § 1.]

Notes:

Effective date -- 1990 c 122: "This act shall take effect on July 1, 1991." [1990 c 122 § 38.]

Severability -- 1977 ex.s. c 309: "If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1977 ex.s. c 309 § 18.]