

FILED  
COURT OF APPEALS

10 JUL 26 PM 1:18

STATE OF WASHINGTON

BY *VHC* CLERK

NO. 40700-1-II

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

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**RAYMOND NIX, JR.,**

Appellant

v.

**STATE OF WASHINGTON  
DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES,**

Respondent.

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**APPELLANT'S OPENING BRIEF**

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**ORIGINAL**

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## I. INTRODUCTION

These judicial review proceedings seek to reverse a Department of Social and Health Services' ("the Department" or "DSHS") action terminating Appellant Raymond Nix's eligibility for services provided by the Division of Developmental Disabilities ("DDD").

Eligibility for DDD services is governed by state law requiring that DDD services be provided both to individuals with "mental retardation," as defined by the Department, as well as to individuals with "other conditions" that are "closely related." RCW 71A.10.020(3);<sup>1</sup> RCW 71A.16.020(2).

Although Appellant Raymond Nix has been diagnosed by multiple professionals as suffering from life-long mild mental retardation, and has previously been determined by the Department to have a DDD-qualifying "other condition," the Department has adopted a new and novel interpretation of its "other condition" eligibility rules to terminate Mr. Nix's DDD eligibility.

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<sup>1</sup> The statute defining DDD-qualifying diagnoses and conditions, RCW 71A.10.020(3), was amended in the 2010 legislative session subsequent to the filing of this appeal. The amendment replaced the statutory term "mental retardation" with the term "intellectual disability" Act of Mar. 17, 2010, 2010 Legis. Serv. Ch 94 sec. 21, RCW 71A.10.202 (1998). Because this change in terminology was explicitly not intended "to expand or contract the scope or application" of the statute, *id* at § 1, and was enacted subsequent to the initiation of this appeal, it will not be addressed in this brief.

The Department claims in Mr. Nix's case that it no longer will consider mild mental retardation as an "other condition" that is "closely related" to "mental retardation" (as the Department has chosen to define that term). This newly-claimed DDD eligibility restriction affects all similarly situated mildly-mentally retarded individuals. In Mr. Nix's case, it prevents him from re-enrolling in the specialized Medicaid-funded "community protection" services that the Department has determined he requires, but that are available only to DDD clients.

As discussed in detail below, the Department's refusal to assess whether Mr. Nix's mild mental retardation is a DDD-qualifying "other condition," deviates from its practice in previous eligibility reviews in his case, and directly contradicts its explicit claims when it promulgated its current DDD eligibility regulations in 2005. The Department's newly-claimed interpretation and application of its DDD eligibility regulations in Mr. Nix's case is arbitrary and capricious, constitutes unlawful rule-making, and is contrary to the statutory scheme for DDD eligibility in place since 1998.

In addition, the Department's re-interpretation of its "other condition" eligibility rules to deny mildly mentally retarded applicants access to DDD services, while providing those same Medicaid-funded services to similarly situated applicants with different diagnoses but the

same functional and intellectual disabilities, violates federal Medicaid law, and the state and federal constitutional guarantee of equal protection.

The Court should set aside the termination of Appellant Raymond Nix's DDD eligibility, and should invalidate the Department's newly-claimed interpretation and application of its DDD eligibility regulations that prevents Mr. Nix, and all other similarly-situated mildly mentally retarded individuals, from accessing critically needed DDD benefits and services.

The Court should award Mr. Nix costs and fees, including reasonable attorneys' fees, on appeal.

## **II. ASSIGNMENTS OF ERROR**

1. Conclusions of Law Nos. 10, 11, and 12 contained in the DSHS Board of Appeals Review Decision and Final Order issued in this matter are erroneous.
2. The Decision and Order contained in the DSHS Board of Appeals Review Decision and Final Order issued in this matter is erroneous.
3. Conclusion of Law No. 6 in the Trial Court's Order dated April 13, 2010, CP 151, is in error. The Department's determination that Mr. Nix's mild mental retardation may not be considered a DDD-

qualifying “other condition similar to mental retardation” is erroneous.

4. Conclusion of Law No. 7 in the Trial Court’s Order dated April 13, 2010, CP 151, is in error. The Department’s termination of Mr. Nix’s DDD eligibility is erroneous because Mr. Nix’s mild mental retardation continues to meet every listed criterion for DDD eligibility contained in the Department’s regulations defining “other conditions similar to mental retardation.”
5. Conclusion of Law No. 8 in the Trial Court’s Order dated April 13, 2010, CP 152, is in error. Mr. Nix is entitled to an order setting aside the Department’s termination of his DDD eligibility, and invalidating, as applied, the DDD eligibility regulations that the Department claims prevent it from assessing Mr. Nix’s mild mental retardation as an “other condition similar to mental retardation.”
6. The Trial Court’s Order dated April 13, 2010, CP 152, affirming the termination of Mr. Nix’ DDD eligibility is in error.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Does the Department’s claim that a diagnosis of mild mental retardation cannot establish DDD eligibility as an “other

condition” that is “closely related” to “mental retardation” (as the Department has chosen to define that term) violate the plain meaning and clear intent of the governing Washington Developmental Disabilities Act?

2. Is it arbitrary and capricious for the Department to claim a new and restrictive interpretation of its DDD eligibility regulations to terminate a client who has previously been determined DDD-eligible where the Department has not engaged in formal rule-making to restrict or limit DDD eligibility, and its newly claimed restriction on DDD eligibility directly contradicts explicit assurances made by the Department when it promulgated its current DDD eligibility regulations?
3. Is the Department’s claim that mild mental retardation may no longer be considered a DDD-qualifying “other condition closely similar to mental retardation” a new and substantive restriction on DDD eligibility adopted without compliance with statutory rule-making procedures required by the Administrative Procedures Act and therefore invalid?
4. Does the Department’s claim that it may refuse mildly mentally retarded applicants access to DDD benefits and services, while providing those same Medicaid-funded benefits and services to

other similarly-situated applicants with different diagnoses but exactly the same functional and intellectual disabilities, violate the federal Medicaid Act's diagnosis discrimination prohibition?

5. Does the Department's claim that it may refuse mildly mentally retarded applicants access to DDD benefits and services while providing those same benefits and services to other similarly-situated applicants with different diagnoses but exactly the same functional and intellectual disabilities violate the state and federal constitutional guarantee of equal protection?
6. Is Appellant Raymond Nix entitled to attorneys' fees and costs on appeal in this matter pursuant to RAP 18.1 and Washington's Equal Access to Justice Act, RCW 4.84.340-360, where the Department has refused to re-determine his DDD eligibility on a previously established basis, and the refusal is based on an interpretation of its DDD eligibility regulations that is directly contrary to explicit claims it made when it promulgated the regulations at issue?

#### **IV. STATEMENT OF THE CASE**

- 1. The clinical definition of mental retardation versus DDD's eligibility criteria for "mental retardation."**

Mental retardation is a developmental disability with an onset in childhood that is characterized by life-long significantly sub-average intellectual functioning, accompanied by associated significant limitations in adaptive functioning. AR 25,<sup>2</sup> 196.<sup>3</sup>

The DSM-IV manual containing the clinical criteria for a diagnosis of mental retardation defines “significantly sub-average general intellectual functioning” as an “IQ of approximately 70 or below.” AR 196-197.<sup>4</sup> The cut-off IQ score for a clinical diagnosis of mental retardation is approximate because, according to the diagnostic manual, all standardized IQ testing “involves a measurement error of approximately 5 points.” *Id.* Therefore, all IQ scores are approximate. *Id.* Thus, according to the diagnostic manual, an individual with IQ scores slightly above 70, between 71 and 75, may be properly diagnosed with mild mental

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<sup>2</sup> Citations in this brief are to the agency’s certified administrative record (AR) and the transcript of proceedings (TP) for *In Re Raymond Nix, Jr.*, DSHS BOA Docket No. 05-2008-A-1283; to the clerk’s papers in Superior Court designated for transmittal to the Court of Appeals (CP); and to the Rule Making File for WAC Chapter 388-823 (RMF).

<sup>3</sup> The generally accepted clinical definition and diagnostic criteria for mental retardation is contained in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, (“DSM-IV”). AR 194-203; AR 70; TP 76-77. “Adaptive functioning” refers to “how effectively individuals cope with common life demands and how well they meet the standards of independence expected of someone in their particular age group, socioeconomic background, and community setting.” AR 197.

<sup>4</sup> Per the DSM-IV, a full scale IQ score (“FSIQ”) of “50-55 to approximately 70” falls in the “mild mental retardation” range. At lower levels of intelligence, mental retardation is considered either “moderate” (IQ level 35-40 to 55-55), “severe” (IQ level 20-25 to 35-40), or “profound” (IQ level below 20-25). AR 197.

retardation if he/she also demonstrates the significant deficits in adaptive functioning that meet the criteria for mental retardation. *Id.*; AR 202.

The Department's regulations that define DDD eligibility criteria for the condition "mental retardation" deviate from the clinical definition of mental retardation described above. The Department's regulations explicitly do not "take into consideration" the approximate five-point measurement error in all standardized IQ testing. WAC 388-823-0010 ("FSIQ" definition). The rules require a recorded IQ below 70, or 68, depending on the test used. WAC 388-823-0215. For individuals who have had more than one intelligence test, the Department's mental retardation rules allow consideration of only the IQ score achieved closest to age 18. WAC 388-823-0230(1)(a).

An individual like Raymond Nix may therefore be correctly diagnosed as meeting the generally accepted clinical definition of mental retardation, yet not meet the more restrictive definition of "mental retardation" contained in the Department's DDD eligibility regulations.

*See* RMF 317-318.<sup>5</sup>

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<sup>5</sup> The "RMF" citations herein are to the 363-page rule-making file for WAC Chapt. 388-823 ("RMF") that was transmitted to the Court by the Department pursuant to RCW 34.05.566(1), and is part of the agency record under review in this matter.

The Department recognized when it promulgated its current DDD eligibility rules in 2005 that its definition of “mental retardation” is more restrictive than the generally accepted clinical definition for that condition. *Id* at 318. The Department indicated in the rule-making file, however, that mildly mentally retarded individuals whose IQ score closest to age 18 was slightly too high to meet the Department’s definition of “mental retardation” would continue to have their DDD eligibility determined under the Department’s separate DDD eligibility rules governing “other conditions similar to mental retardation.” *Id*.

**2. Raymond Nix’s mild mental retardation.**

Raymond Nix is a 35-year-old King County resident who was first identified as mildly mentally retarded in early elementary school. AR 20. 183. Formal IQ and adaptive function testing conducted at age 12 confirmed that Mr. Nix’s functioning was “consistent with that of a mentally retarded student.” AR 21, 184.<sup>6</sup> School psychologists who re-evaluated Mr. Nix’s eligibility for special education services at age 14, 16, and 18 similarly concluded that Mr. Nix met the diagnostic criteria for mild mental retardation. AR 21-22.

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<sup>6</sup> Mr. Nix’s full scale IQ on the testing conducted at age 12 was 69. AR 169.

In 1991 and 1993, at ages 15 and 17, Mr. Nix was referred by his DSHS case manager for evaluations by clinical psychologist Dr. Robin Ladue, PhD. AR 140, 145. Dr. Ladue conducted IQ testing that recorded Mr. Nix's FSIQ as 74 at age 15, and 71 at age 17. AR 142, 147.<sup>7</sup>

In 2008, Mr. Nix was again evaluated by Dr. Ladue who reviewed the range of the multiple IQ scores contained in Mr. Nix's record over the years (1988 FSIQ 69; 1991 FSIQ 74; 1993 FSIQ 71; 2005 FSIQ 64), and conducted updated standardized adaptive function testing. 156-159. Dr. Ladue concluded that based on the results of her formal adaptive function testing on Mr. Nix, and on her review of the records of the IQ testing conducted on Mr. Nix from age 12 through 29, Mr. Nix meets the DSM-IV diagnostic criteria for a diagnosis of mild mental retardation. AR 26, 156-157. TP 75-76.

**3. The termination of Mr. Nix's DDD eligibility and the administrative proceedings below.**

Mr. Nix became a client of the Division of Developmental Disabilities at some point prior to 2005. *See* AR 160.<sup>8</sup> From 2005 through August 2007, Mr. Nix was enrolled in DDD's "Community

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<sup>7</sup> In 2005, prior to his placement in DDD's Community Protection Program, another evaluator conducted abbreviated IQ testing on Mr. Nix that recorded a FSIQ score of 64.

<sup>8</sup> Although the year that Mr. Nix was first determined to be DDD eligible is not apparent in the record in this matter, the report from a 2005 "Psychosexual Evaluation and Risk Assessment" completed by Natalie Novick Brown, PhD, indicates that the evaluation was requested by Mr. Nix's then DDD case resource manager. *Id.*

Protection Program,” where he received Medicaid-funded supervision and other support services, including 24-hour-a-day care, vocational supports, counseling, and intensive supported living services. AR 24.<sup>9</sup> In early 2008, approximately five months after leaving the Community Protection Program to “help out his mom and dad,” AR 17, Mr. Nix contacted his DDD case resource manager to request that he be re-enrolled in the Community Protection services he had previously received. *Id.* His request for re-enrollment in the Community Protection Program prompted the Department to review his DDD eligibility, TP 13-14.

The regional DDD staff person who reviewed Mr. Nix’s DDD eligibility in 2008 testified in the administrative hearing in this matter that she determined that he did not meet the Department’s eligibility criteria for DDD eligibility that are specific to the condition “mental retardation” because his recorded IQ score closest to age 18 was two points above the cut-off of 69. TP 20-21.

The worker testified that Mr. Nix had previously been determined by the Department to be DDD-eligible by meeting the Department’s separate eligibility criteria for an “other condition similar to mental

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<sup>9</sup> The Community Protection Program is one of four Medicaid-funded “Home and Community Based Services (HCBS) waivers” operated by DDD as an alternative to institutional care. WAC 388-845-0005; WAC 388-845-0015. The Community Protection waiver is reserved for DDD clients who have engaged in violent, sexually violent, or predatory behavior and have been determined to be at risk to re-offend. WAC 388-845-0105; *see also* RCW 71A.12.210.

retardation.” TP 43-44. However, her understanding of DDD’s current policy and practice is that if an individual is diagnosed with mental retardation, but cannot meet the requirements in DDD’s eligibility rules that are specific to “mental retardation” because their IQ score closest to age 18 is above 69, their DDD eligibility may no longer be assessed under the separate “other condition similar to mental retardation” rules. TP 47-48.

Mr. Nix timely appealed the termination of his DDD eligibility. AR 138. The Administrative Law Judge who heard Mr. Nix’s appeal concluded that the record established that Mr. Nix’s demonstrated cognitive and adaptive deficits are significant; are attributable to his mild mental retardation; are life-long; and are expected to continue indefinitely. AR 76.

The ALJ determined, however, that DDD had correctly determined that Mr. Nix’s diagnosed mild mental retardation “does not meet the legal definition” of mental retardation contained in DDD’s eligibility rules because his recorded IQ score closest to age 18 was two points too high. AR 74-75.

The ALJ concluded that Mr. Nix’s mild mental retardation meets all of the functional requirements contained in the Department’s rules for

an “other condition similar to mental retardation,” AR 75-76.<sup>10</sup> However, she determined that Mr. Nix does not have a diagnosis “that by definition results in both intellectual and adaptive deficits,” other than mild mental retardation, that is required for DDD eligibility based on its current rules defining “other conditions similar to mental retardation.” AR 77.

Mr. Nix submitted a request for review of the ALJ’s *Initial Order* to the DSHS Board of Appeals. AR 51-61. A BOA Review Judge issued the Board’s *Review Decision and Final Order* in April 2009. AR 8.

The Review Judge did not modify any of the ALJ’s findings of fact. *See* AR 19-27. He concluded, as the ALJ did, that DDD’s eligibility rules for the condition “mental retardation” allow consideration of only the applicant’s IQ score closest to age 18, and that Mr. Nix’s recorded IQ scores of 71 at age 17 “disqualifies him from being found eligible for DDD services under the category of mental retardation.” AR 29.

The Review Judge determined that the Department correctly refused to assess Mr. Nix’s DDD eligibility under the alternate “other condition similar to mental retardation” rules. The Review Judge concluded that accepting Mr. Nix’s mild mental retardation as a diagnosis

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<sup>10</sup> The ALJ concluded specifically that Mr. Nix’s recorded IQ scores and adaptive function test scores “established that he meets the definition of ‘substantial limitations’ [contained in the Department’s eligibility rules] for an ‘other condition similar to mental retardation.’” *Id.* at 76 (*citing* WAC 388-823-0700 and WAC 388-823-0710).

that would qualify as “other condition similar to mental retardation” would violate the Department’s DDD eligibility regulations by “rendering [the WAC listing the required FSIQ scores for DDD eligibility based on mental retardation] meaningless.” *Id.*

#### **IV. ARGUMENT**

##### **1. Standard of Review**

In judicial review proceedings under the state Administrative Procedure Act, RCW 34.05 *et seq.*, an individual who is substantially prejudiced by a final state agency adjudicative order may seek judicial review to both set aside the individual order in his case, and invalidate, on their face or as applied, the agency regulations on which the order was based. RCW 34.05.570(3); RCW 34.05.570(1)(d); RCW 34.05.530; RCW 34.05.570(2)(a); RCW 34.05.574(1).

The reviewing court may set aside a final agency adjudicative order where the order violates constitutional provisions; is outside the agency’s statutory authority; is arbitrary or capricious; is not supported by substantial evidence; or the agency has erroneously interpreted or applied the law. RCW 34.05.570(3); RCW 34.05.574(1).

The court may declare the agency regulations on which the offending order was based invalid, on their face or as applied, on a showing that: the rules at issue violate constitutional provisions; are

outside the statutory authority of the agency; were adopted without compliance with statutory rule-making procedures, or are arbitrary and capricious. RCW 34.05.570(2)(c).

An appellate court applies the standards in RCW 34.05.570 “directly to the record before the agency, sitting in the same position as the superior court.” *Utter v. State, Dept. of Social and Health Services*, 140 Wn.App. 293, 299, 165 P.3d 399 (Div II, 2007)(quoting *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998)).

In the present case, as discussed in detail below, the Department’s order terminating Mr. Nix’s DDD eligibility should be set aside by the Court, pursuant to RCW 34.05.570(3), because the Department’s determination that Mr. Nix’s mild mental retardation may not be considered a DDD-qualifying “condition similar to mental retardation” is arbitrary and capricious; and violates the state Developmental Disabilities Act, the Medicaid Act’s disability discrimination prohibitions, and state and federal constitutional equal protection requirements.

The Court should also issue a declaratory judgment pursuant to RCW 34.05.570(2) invalidating both the un-promulgated substantive restriction on DDD eligibility announced in Mr. Nix’s case, and the Department’s interpretation and application of its promulgated DDD

eligibility regulations that the Department claims prevent Mr. Nix's mild mental retardation from consideration as a DDD-qualifying "other condition similar to mental retardation." As discussed in detail below, the Department's interpretation and application of its own DDD eligibility regulations to terminate Mr. Nix's DDD eligibility is erroneous, arbitrary and capricious, relies on an un-promulgated "rule," and unlawfully discriminates against Mr. Nix, and other similarly situated, mildly mentally retarded DDD applicants.

**2. The Department's claim that Mr. Nix's mild mental retardation cannot be a qualifying condition for DDD eligibility under its "other condition similar to mental retardation" rules violates the clear intent and plain meaning of governing Developmental Disabilities Act.**

The meaning and intent of DDD's statutory mandate is a question of law that an appellate court reviews de novo. *Campbell v. DSHS*, 150 Wn.2d 881, 894, 83 P.3d 999(2004)(citing *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001)).

In determining what the statute requires, the Court considers the "ordinary meaning of words, basic rules of grammar, and the statutory context," *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 838-39, 215 P.3d 166 (2009), and must "interpret and construe the statute "so that all the language used is given effect, with no portion rendered meaningless or superfluous." *State v. Hirschfelder*, 148

Wn.App. 328, 336, 199 P.3d 1017 (Div. II, 2009)(quoting *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005)).

The statutory mandate at issue in the present case, contained in the Developmental Disabilities Act, RCW Title 71A, requires that the Department make DDD benefits and services available to all those who have conditions determined to meet the statutory definition of “developmental disability.” RCW 71A.16.020(1). The former statute defined “developmental disability” as:

..a disability attributable to *mental retardation*, cerebral palsy, epilepsy, autism, or another neurological *or other condition* of an individual found by the secretary to be *closely related to mental retardation* or to require treatment similar to that required for individuals with mental retardation, which disability originates before the individual attains age eighteen, which has continued or can be expected to continue indefinitely, and which constitutes a substantial handicap to the individual.

RCW 71A.10.020(3)(1998).<sup>11</sup> The statute directs the Department to promulgate rules “further defining and implementing” six DDD-qualifying diagnoses and conditions identified in the statute. RCW 71A.16.020(2).<sup>12</sup>

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<sup>11</sup> The legislature replaced the term “mental retardation” in RCW 71A.10.020(3), and throughout the Revised Code of Washington, with the term “intellectual disability” subsequent to the filing of this appeal. Act of Mar. 17, 2010, 2010 Legis. Serv. Ch 94 sec. 21, RCW 71A.10.202 (1998). *See supra*, at Note 1.

<sup>12</sup> Those are: Mental Retardation (further defined by the Department in WAC 388-823-0200 to WAC 388-823-0230); Cerebral Palsy (defined in WAC 388-823-0300 to WAC 388-823-0330); Epilepsy (defined in WAC 388-823-0400 to 0420); Autism (defined WAC 388-823-0500 to WAC 388-823-0515); “Another Neurological Condition,”

Regarding the Department's regulations defining a DDD-qualifying "neurological or other condition closely related to mental retardation," the statute directs the Department to:

promulgate rules which define neurological or other conditions in a way that is not limited to intelligence quotient scores as the sole determinant of these conditions.

RCW 71A.10.020(3).

Nothing in the plain language of the statute indicates that the legislature intended to allow the Department to prevent individuals with mild mental retardation, or any of the other specifically identified diagnoses listed in the statute, from establishing their DDD eligibility via the alternate "other condition" category identified in the statute. *See Campbell*, 150 Wn.2d at 894 (commenting that the extent of the Department's authority to set DDD eligibility criteria "depends upon the meaning of language in RCW 71A.10.020(3)").

The clear intent of the statute is that while Department regulations may "further define" the statutory term "mental retardation" to exclude mildly mentally retarded individuals with slightly too high IQ scores like

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(defined in WAC 388-823-0600 to WAC 388-823-0615); and "Other Condition Similar to Mental Retardation," (defined in WAC 388-823-0700 to WAC 388-823-0710). WAC Chapter 388.823.

Mr. Nix, all individuals with “other conditions” that are “closely related” to “mental retardation,” as so defined, may still be considered for DDD eligibility under the alternate “other condition” category.

The Department has not claimed in previous cases analyzing the scope of the “other condition” eligibility category in RCW 71A.10.020(3) that a specifically identified diagnosis listed in the statute and further defined in the Department’s regulations cannot also be a DDD-qualifying “other condition.” *See Pitts v. DSHS*, 129 Wn.App. 513, 119 P.3d 896 (Div. II, 2005)

In *Pitts*, the appellant suffered from epilepsy, a diagnosis that, like mental retardation, is specifically listed in RCW 71A.10.020(3) and that the Department has further defined in its eligibility regulations WAC 388-823-0400 to 0420. Although the *Pitts* Court determined that the appellant did not meet either the eligibility criteria in the Department’s regulations defining “epilepsy” or those defining the alternate “other condition” category, neither the Court nor the Department questioned that the appellant’s DDD eligibility could be determined on both bases.

Similarly, in the present case, the Court should conclude that according to the plain language and clear intent of the statutory definition of “developmental disability” in RCW 71A.10.020(3), a diagnosis of mild mental retardation that does not meet DDD’s definition of “mental

retardation” may still establish DDD eligibility as an “other condition . . . .  
. . . closely related to mental retardation.”

In Mr. Nix’s case, since the administrative record below establishes that his mild mental retardation meets all of the listed functional criteria for DDD eligibility in the Department’s “other condition” eligibility rules, AR 75-76, the termination of Mr. Nix’s DDD eligibility should be set aside.

The Court should also invalidate the Department’s interpretation and application of its DDD eligibility regulations by which it refuses to assess mildly mentally retarded DDD applicants under its rules governing “other conditions.” The interpretation and application of the Department’s DDD eligibility regulations announced in Mr. Nix’s case is an invalid restriction on DDD eligibility that is not authorized by the governing Developmental Disabilities Act, RCW 71A.10.202(3).

- 3. The Department’s claim that Mr. Nix’s mild mental retardation may not be a qualifying diagnosis for DDD eligibility under its “other condition similar to mental retardation” rules contradicts its own official statements and the plain language of its rules, and is therefore arbitrary and capricious.**

An agency action is arbitrary and capricious if it is "willful and unreasoning and taken without regard to the attending facts or circumstances." *Washington Independent Telephone Ass'n v. Washington*

*Utilities and Transp. Com'n*, 148 Wn.2d 887, 904, 64 P.3d 606

(2003)(citing *Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 501, 39

P.3d 961 (2002). Where the agency claims that its action is mandated by governing regulations, the reviewing court:

must consider the relevant portions of the rule-making file and the agency's explanations for adopting the rule as part of its review in order to determine whether the agency's action was willful and unreasoning, and taken without regard to the attending facts or circumstances.

*Washington Independent Telephone Ass'n*, 148 Wn.2d at 906.

In the proceedings below in Mr. Nix's case, the Department claimed that its termination of Mr. Nix's DDD eligibility is required because its regulations contained in WAC Chapter 388-823 prevent consideration of mild mental retardation as a DDD-qualifying diagnosis under its "other condition similar to mental retardation" rules. CP 93. This claim directly conflicts with the reasoning and explanation provided when the Department adopted its current rules.

The 2005 rule-making file for the WAC Chapter 388-823 is part of the agency record under review in this matter. *See* RMF 1-363. The Department's stated purpose for the 2005 DDD eligibility rules revisions was to "clarify DDD's eligibility determination process," not to substantively change DDD eligibility criteria. *Id.*

The rule-making file contains extensive written comments on the then-proposed rules, including detailed complaints that the rules defining “mental retardation” are more restrictive than the generally accepted clinical definition of “mental retardation” contained in the DSM-IV, and would prevent individuals who are correctly diagnosed with mild mental retardation from establishing their DDD eligibility. RMF 79-81; 317-320.

The Department’s Concise Explanatory Statement<sup>13</sup> in response was as follows:

An individual may be diagnosed with mild mental retardation under DSM IV criteria but not meet the eligibility criteria under this condition [contained in WAC Chapt. 388-823]. *However, that individual could still be eligible under “other condition” which by statute does not use IQ as the sole determinant.*

RMF 318 (emphasis added).

Nothing in the plain language of the resulting rules contradicts this explicit promise in the rule-making file for WAC Chapter 388-823 that mild mental retardation which does not meet the Department’s regulatory definition of “mental retardation” may be a qualifying diagnosis for a

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<sup>13</sup> The purpose of the required “Concise Explanatory Statement” in an agency’s rule-making file is specifically to facilitate judicial review by providing an explanation of the agency’s rationale for its rules. *Anderson, Leech & Morse, Inc. v. Washington State Liquor Control Bd*, 89 Wn.2d 688, 693, 575 P.2d 221 (1978); *See also, Gasper v. Department of Social and Health Services*, 132 Wn.App. 42, 50 129 P.3d 849 (Div. II, 2006.) (holding that the agency’s rule-making file may be presumed to contain all supporting information and explanation for resulting rule).

determination of DDD eligibility under the alternate “other condition similar to mental retardation” rules.<sup>14</sup>

The Department’s newly-announced claim in Mr. Nix’s case that it may both define “mental retardation” to exclude mildly mentally retarded individuals like Mr. Nix, and refuse to accept mild mental retardation as a qualifying diagnosis to establish his DDD eligibility as an “other condition similar to mental retardation” rules is arbitrary and capricious.

The Department’s direct contradiction of explicit assurances made in its rule-making process is clearly willful and unreasonable. The Court should conclude that the Department’s new interpretation and application of these rules in Mr. Nix’s case is arbitrary and capricious.

**4. The Department’s newly-announced claim that mild mental retardation may not be a DDD-qualifying “condition similar to mental retardation” is an invalid, un-promulgated, substantive restriction on DDD eligibility.**

If an agency takes action meeting the definition of a “rule” but fails to employ the requisite rule-making processes, the action is invalid. RCW 34.05.570(2)(c); *Simpson Tacoma Kraft Co. v. Dep’t of Ecology*, 119

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<sup>14</sup> The regulations defining a qualifying “other condition” require only that it be a “condition or disorder that by definition results in both intellectual and adaptive skills deficits.” WAC 388-823-0700(1). Mild mental retardation is clearly that. AR 196.

Wn.2d 640, 835 P.2d 1030 (1992); *State v. Kerry*, 34 Wn. App. 674, 663 P.2d 500 (1983).<sup>15</sup>

The Administrative Procedure Act, RCW Chapter 34.05, defines a "Rule," in part, as any agency order, directive, or regulation of general applicability:

which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law.

RCW 34.05.010(16)(c).

The Department's determination announced in Mr. Nix's case that mild mental retardation is no longer a condition that may establish DDD eligibility as an "other condition similar to mental retardation" is clearly a new and generally applicable limitation on DDD eligibility that has been implemented by the Department without use of required formal rule-making procedures in RCW Chapter 34.05. It should be invalidated by the Court on this basis pursuant to RCW 34.05.570(2)(c) and RCW 74.08.090.

- 5. The Department's claim that Mr. Nix's mild mental retardation cannot be a qualifying condition for DDD eligibility under its "other condition similar to mental retardation" rules violates the federal Medicaid diagnosis discrimination prohibition.**

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<sup>15</sup> See also RCW 74.08.090 (requiring that DSHS rules and regulations "be filed in accordance with the Administrative Procedure Act.").

Medicaid law explicitly prohibits states from discriminating in the provision of Medicaid benefits and services against an otherwise eligible person on the basis of that person's diagnosis, type of illness, or condition. 42 C.F.R. § 440.230(c). Prohibited discrimination includes denying or reducing the amount, duration, or scope of a Medicaid-funded service or benefit "to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition." *Id.* Courts have specifically held that this prohibition prevents a state from denying access to a Medicaid-funded benefit based solely on diagnosis. *See e.g., White v. Beal*, 555 F.2d 1146 (3<sup>rd</sup> Cir. 1977).

In *White*, the court struck down a state agency rule that authorized Medicaid coverage for prescription eye glasses only for certain eye diseases, but not for others which caused identical vision impairments. *Id.* at 1152. The court wrote:

... the state's classification, based on diagnosis, is little more relevant to health care needs than one based on the color of eyes. *We find nothing in the federal statute that permits discrimination based upon etiology rather than need for the service.*

*Id.* at 1151 (emphasis added); *See also Jeneski v. Myers*, 163 Cal.App.3d 18, 33, 209 Cal.Rptr. 178 (1984) (commenting that federal Medicaid law permits a state to discriminate when providing Medicaid benefits "based

on the degree of the person's medical necessity but not based on the medical disorder from which the person suffers.”).

In the present case, the termination of Mr. Nix's DDD eligibility has denied him access to Medicaid-funded Community Protection services that the Department has determined he requires but that are available only to DDD clients. The record establishes that Mr. Nix's mild mental retardation meets every listed functional requirement for DDD eligibility as an “other condition similar to mental retardation” contained in WAC 388-823-0700 and WAC 388-823-0710. *See* AR 75-76. The sole basis for the termination is that mild mental retardation is no longer an acceptable diagnosis for consideration as a DDD-qualifying “other condition.”

As in the *White* case, the Department is denying Medicaid-funded services solely based on the etiology of Mr. Nix's developmental disability, while providing those services to other similarly-situated applicants with different diagnoses but exactly the same functional and intellectual disabilities. As in the *White* case, the Department's denial of a Medicaid-funded benefit based solely on Mr. Nix's diagnosis violates the Medicaid Act.

6. **The Department's claim that Mr. Nix's mild mental retardation may not be a qualifying condition for DDD eligibility under the “other condition similar to mental**

**retardation” rules violates Mr. Nix’s constitutional right to equal protection.**

The Fourteenth Amendment to the United States Constitution dictates that a state may not “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. Amend. XIV. The Washington State Constitution Article I § 12 prohibits “granting to any ... .. class of citizens... .. privileges or immunities which upon the same terms shall not equally belong to all citizens.” Wa. Const. Art. 1, §12.

These state and federal constitutional equal protection guarantees are “essentially a direction that all persons similarly situated should be treated alike.” *Kolbeson v. State, Dept. of Social and Health Services*, 129 Wash.App. 194, 207, 118 P.3d 901 (Div. II. 2005).<sup>16</sup> State action violates equal protection if the classification at issue is not rationally related to a legitimate state interest. *City of Cleburne*, 473 U.S. at 440 (*citing Schweiker v. Wilson*, 450 U.S. 221, 230, 101 S.Ct. 1074, 1080, 67 L.Ed.2d 186 (1981)).

In the present case, there is no rational basis for the Department’s termination of Mr. Nix’s DDD eligibility, and no legitimate state interest in denying mildly mentally retarded applicants access to DDD services,

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<sup>16</sup> (*quoting City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985))(*quoting Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982)).

while providing those same services to other similarly situated applicants with different diagnoses but exactly the same functional and intellectual disabilities. The Court should conclude that the Department's claims that Mr. Nix's mild mental retardation may not be a DDD-qualifying "other condition similar to mental retardation" violates the state and federal constitutional guarantee of equal protection.

**7. The Court should authorize an award of reasonable attorneys' fees on appeal to Appellant Raymond Nix pursuant to RAP 18.1 and RCW 4.84.350.**

Attorneys' fees are available to the prevailing party where authorized by "contract, statute, or a recognized ground in equity."

*Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wash.2d 292, 296-297, 149 P.3d 666 (2006). In the present case, Mr. Nix is entitled to recover his attorneys' fees under Washington's Equal Access to Justice Act ("EAJA"), RCW 4.84.340-360, which provides, in pertinent part:

Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

RCW 4.84.350(1).

Here, Mr. Nix is a “qualified party,”<sup>17</sup> and will have prevailed if the Court reverses the Department’s action terminating his DDD eligibility.

Upon establishing that Mr. Nix is a “qualified prevailing party,” the Department can avoid an attorneys’ fees award only by convincing the Court that its action terminating Mr. Nix’s DDD eligibility and services was “substantially justified.” See *The Language Connection, LLC v. Employment Security Dept.*, 149 Wn.App. 575, 586, 205 P.3d 924 (Div. I, 2009). To meet this burden, the Department would have to demonstrate that its termination of Mr. Nix’s DDD eligibility “had a reasonable basis in law and fact.” *Id.*

It cannot do so. It is clearly established in this case that the Department refused to re-determine Mr. Nix’s DDD eligibility on a statutorily-required basis, despite having previously determined his DDD on that basis, and despite its explicit promises when it promulgated its current DDD eligibility regulations in 2005 that it would continue to do so.

All of the requirements in the EAJA for authorizing an award of reasonable attorneys’ fees to Mr. Nix are met in this case. The Court

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<sup>17</sup> A “qualified party” for purposes of an EAJA award is defined as “an individual whose net worth did not exceed one million dollars at the time the initial petition for judicial review was filed...” RCW 4.84.340(5). Mr. Nix’s affidavit of financial need confirming his financial eligibility for an EAJA award will be separately filed and served no later than 10 days prior to oral argument in this matter as required by RAP 18.1(c).

should authorize an award of fees and costs, including reasonable attorneys' fees pursuant to RAP 18.1 and RCW 4.84.350.

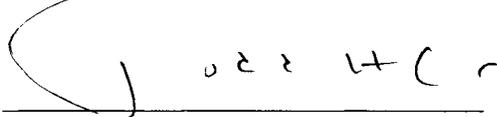
## VI. CONCLUSION

The Court should conclude that the Department's recent re-interpretation of its DDD eligibility rules governing "other conditions similar to mental retardation" is arbitrary and capricious, and unlawfully denies Appellant Raymond Nix, and other similarly situated individuals with mild mental retardation, access to DDD benefits and services.

The Court should order the termination of Mr. Nix's DDD eligibility set aside, and should invalidate the interpretation and application of its DDD eligibility rules used by the Department to terminate Mr. Nix's DDD eligibility. The Court should authorize an award of reasonable attorneys' fees and costs to Mr. Nix.

**RESPECTFULLY SUBMITTED** this 26<sup>th</sup> day of July, 2010.

NORTHWEST JUSTICE PROJECT



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**CERTIFICATE OF SERVICE**

I certify that today, the 26<sup>th</sup> day of July, 2010, a true and accurate copy of the foregoing **Opening Brief of Appellant** in the above-entitled matter was, by agreement, sent by both first-class mail and e-mail to the attorney for Respondent in this matter; Jonathon Bashford, Assistant Attorney General, Attorney for the State of Washington Department of Social and Health Services, P.O. Box 40124, 7141 Cleanwater Dr. S.W., Olympia, WA 98504-0124. E-mail: jonb@ATG.WA.GOV.

**DATED** this 26<sup>th</sup> day of July, 2010.

*Todd H. Carlisle*

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Attorneys for Appellant

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# **APPENDIX**

## RCW 71A.10.020

### Definitions

As used in this title, the following terms have the meanings indicated unless the context clearly requires otherwise.

... ..

(3) "Developmental disability" means a disability attributable to intellectual disability, cerebral palsy, epilepsy, autism, or another neurological or other condition of an individual found by the secretary to be closely related to an intellectual disability or to require treatment similar to that required for individuals with intellectual disabilities, which disability originates before the individual attains age eighteen, which has continued or can be expected to continue indefinitely, and which constitutes a substantial limitation to the individual. By January 1, 1989, the department shall promulgate rules which define neurological or other conditions in a way that is not limited to intelligence quotient scores as the sole determinant of these conditions, and notify the legislature of this action.

.....

## **Former RCW 71A.10.020 (1998)**

### **Definitions**

As used in this title, the following terms have the meanings indicated unless the context clearly requires otherwise.

.....

(3) "Developmental disability" means a disability attributable to mental retardation, cerebral palsy, epilepsy, autism, or another neurological or other condition of an individual found by the secretary to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, which disability originates before the individual attains age eighteen, which has continued or can be expected to continue indefinitely, and which constitutes a substantial handicap to the individual. By January 1, 1989, the department shall promulgate rules which define neurological or other conditions in a way that is not limited to intelligence quotient scores as the sole determinant of these conditions, and notify the legislature of this action.

.....



STATE OF WASHINGTON  
DEPARTMENT OF SOCIAL AND HEALTH SERVICES  
Olympia WA 98504-5000

April 26, 2005

TO: Interested Persons

FROM: Steve Brink, Program Manager  
Division of Developmental Disabilities

SUBJECT: CONCISE EXPLANATORY STATEMENT (RCW 34.05.325)

For Rules Proposed as WSR 05-04-057

WAC(s): New Chapter 388-823

REASON FOR ADOPTION:

The purpose of these rules is to clarify the entire application and eligibility determination process used by the Division of Developmental Disabilities (DDD). This new chapter:

- Describes how to apply for a determination of a developmental disability;
- Defines the conditions required to be considered a person with a developmental disability, defines how these conditions may meet substantial limitations to adaptive functioning and defines the evidence required to substantiate adaptive functioning limitations;
- Defines how the age of an individual affects the eligibility determination process;
- Describes the Inventory for Client and Agency Planning (ICAP);
- Defines the expiration of eligibility, reviews and reapplication; and
- Describes an individual's rights as a client of DDD.

WERE CHANGES MADE SINCE THE RULE WAS PROPOSED? (check one)

- The text being adopted does not differ from the text of the proposed rule.
- The text being adopted contains only editorial changes from the proposed rule. These changes are identified in the actions taken in response to the comments, listed below.
- The text of the adopted rule varies from the text of the proposed rule. The changes (other than editing changes) follow: WAC 388-823-0420(1)(d), in the table under "Qualifying Score," a cross reference to WAC 388-823-0900. Other changes are editing only.  
The changes were made because: To clarify the rules.

SUMMARY OF COMMENTS RECEIVED

THE DEPARTMENT CONSIDERED ALL THE COMMENTS. THE ACTIONS TAKEN IN RESPONSE TO THE COMMENTS, OR THE REASONS NO ACTIONS WERE TAKEN, FOLLOW.

<p><b>WAC 388-823-0400.</b> Subsection (1) accurately sets forth the statutory provisions for defining a developmental disability at RCW 71A.10.020. Subsection (2) provides that in addition to showing that client or applicant meets the conditions set forth in the statutory definition, s/he must meet the “other conditions contained in this chapter.” We believe this subsection is unnecessary and even confusing because it implies that there are additional factors required to meet the DD definition other than what is in the statute. Instead, the various rule sections clarify what constitute the various conditions that appear in the DD definition, such as mental retardation or autism, but these should be treated as explanations or clarification of the definition and not as additional parts of it. We recommend removing Subsection (2) from the proposed rule.</p>	<p><b>WAC 388-823-0040.</b> [Note: the comment refers to “WAC 388-823-0400”, but that is apparently a transposition of numbers.] RCW 71A.16.020(2) provides that “The secretary may adopt rules further defining and implementing the criteria in the definition of ‘developmental disability’ under RCW 71A.10.020(3).” Thus, there is statutory authority for subsection (2). The term “conditions” in this subsection will be changed to “requirements” to avoid confusion.</p>
<p><b>WAC 388-823-0900.</b> We believe this proposed rule raises a couple of problems. First of all, subsection (1) gives the department 30 days from the receipt of the final piece of documentation. How is it determined whether a document is the final piece? Later subsections refer to requested documentation, so perhaps what is intended here is that the time should start running once all the requested documentation is received. If that is the case, the rule should clearly state that. In any case, there should be a clear standard for the start of the 30 day decision-making period, which this wording does not do. Moreover, subsection (2) provides that if the requested documentation is not sufficient to establish eligibility, the application will be denied. This ignores the very real possibility that there may be other documentation that would establish eligibility, and to limit consideration to what the department requests creates the very real possibility that someone could be denied without a full consideration of the evidence. Moreover, state and federal law places an affirmative obligation on DDD to assist applicants in gathering and submitting evidence of their eligibility. Since many if not most applicants for DDD services will necessarily have conditions which compromise their ability to obtain and submit evidence supporting their applications, it is imperative that DDD exercise the utmost care in ensuring all potential documentation is submitted and considered.</p>	<p><b>WAC 388-823-0090.</b> [Note: the comment refers to “WAC 388-823-0900”, but that is apparently a transposition of numbers.] Subsection (1) only refers to sufficient information to determine a client eligible. When DDD has enough information to find that a client is eligible, it needs no further information, and it will finalize the determination within thirty days. Although receipt of all requested documentation may result in a determination of ineligibility based on that documentation, nothing prevents an applicant from submitting further documentation later. Eligibility will be reassessed if new documentation is submitted, even if a determination of ineligibility has already occurred. It is not expected that applicants for DDD services obtain documentation on their own.</p>
<p><b>WAC 388-823-0110.</b> Subsection (1) provides that DDD will assist in obtaining documentation but that purchase of diagnostic assessments and IQ testing is the client’s responsibility. The logical conclusion to be drawn from this requirement is that because a diagnostic assessment and IQ testing is essential to establish eligibility for DDD services, a person who is otherwise eligible for services could be denied those services if s/he is unable to purchase the assessment and testing. This is unconscionable. The state may not deny essential services to otherwise eligible persons, or deny them the opportunity to show they meet the criteria for those services, solely due to their inability to pay for information establishing eligibility. This provision should be eliminated and the rule should instead provide that costs for diagnostic assessment and IQ testing will be met by the state for persons unable to pay the necessary costs.</p>	<p><b>WAC 388-823-0110.</b> This rule does not alter existing rules or policy. Chapter 71A.16 RCW provides the parameters of the department’s responsibilities regarding determination of eligibility. There is no indication in this chapter that the legislature intended that the Department spend resources on persons who may not ultimately be eligible for services. RCW 71A.16.010(5) specifically states that there is no entitlement to state services for persons with developmental disabilities.</p>
<p><b>The proposed standards for mental retardation (WAC 388-823-0200 through 0215).</b> We believe the proposed rules will have the effect of denying DDD services to persons who are in</p>	<p><b>WAC 388-823-0200-0215.</b> These rules clarify but do not materially alter current rules. The definition of the condition of mental retardation in rule is not the same as the DSM-IV</p>

fact mentally retarded, in violation of both state law and widely accepted professional standards. If the purpose behind the proposed rules is to simplify and clarify DDD eligibility criteria for individuals with mental retardation, they could simply restate the DSM-IV diagnostic criteria for mental retardation (as in proposed WAC 388-823-0500 for determining DDD eligibility based on autism). Thus, all individuals who have been diagnosed with mental retardation by a qualified professional pursuant to the DSM-IV criteria would be DDD eligible, regardless of other non-DDD qualifying conditions that the individual might have.

Our specific objections to the proposed rules setting the standards for mental retardation are as follows:

1. The interplay of proposed sections 0200 and 0230 set standards for mental retardation for DDD eligibility purposes more narrowly than does the DSM-IV. Although section 0200 provides as a pre-condition that there be a diagnosis of mental retardation by a licensed psychologist or a certified school psychologist, the section goes on to require three conditions to "substantiate" mental retardation. As suggested above, the diagnosis of mental retardation by a qualified mental health professional should be sufficient to substantiate eligibility for DDD services. If the psychologist uses the DSM-IV standards and provides the necessary testing to support the diagnosis that should be the end of the inquiry, since the statutory requirement will have been met. Instead, section 0200 calls for DDD intake worker to make an additional, redundant determination regarding mental retardation when DDD already has the necessary information with which to make a decision.
2. If redundancy were the only issue, section 0200 could be seen as wasteful of important resources. However, the subsections also pose conditions for substantiating mental retardation that are more rigorous than the statutory standards and accepted professional standards. Subsection (1), with its provision of a "lifelong" condition, may be seen as adding a requirement besides onset prior to age 18 – the reference to lifelong condition should be removed. Subsection (2) refers to "significantly below average cognitive and adaptive skills functioning" without providing any information as to how to substantiate that requirement. We are left to review subsection (3) and section 0210 to determine what that phrase means. Subsection (3) requires that the psychologist's evaluation of adaptive skills functioning include use of a "standardized adaptive behavior scale" showing that the client's adaptive functioning is at least two deviations below the mean in the two of the listed domains. By contrast, the DSM-IV provides that there be "concurrent deficits or impairments in present adaptive functioning" in two of the domains but it does not require the use of an adaptive behavior scale

definition, but state law does not require that the definitions match. RCW 71A.10.010(3) requires that the condition of mental retardation originate before age 18, be expected to continue indefinitely, and constitute a substantial handicap. The proposed rules meet this definition. The substantial handicap (termed "substantial limitation to adaptive functioning" in the proposed rules) under this condition is an IQ at least two standard deviations below the mean. An individual thus may be diagnosed with mild mental retardation under DSM-IV criteria, but not meet the eligibility criteria under this condition. However, that individual could still be eligible under "other condition", which by statute does not use IQ as the sole determinant.

nor include 0200(3)'s requirement of the two deviation below the mean standard.<sup>1</sup> Thus, while it may be useful in certain cases to factor in scores from testing instruments having adaptive behavior scales, making this a requirement not only amounts to unsound diagnostic practice, it ensures that persons meeting statutory and medical requirements for DDD eligibility will be denied services.

3. The problem of over-rigorous standards at 0200 is compounded by the fact that application of these standards will be made by a DDD intake worker who does not have the qualifications of a licensed or certified psychologist. Certainly, a DDD intake worker should review documentation supporting an application to be certain everything has been submitted and that it contains the basic requirements for establishing DDD eligibility. However, it is quite another matter to require a professional diagnosis of mental retardation but then set forth standards in the rule for an unqualified person to make a separate determination, which is what this proposed rule does. By making the DSM-IV guidelines the eligibility standard and by requiring simply that a professional diagnosis be submitted that incorporates those guidelines, a legally sound decision may be assured.
4. Section 0210 provides that, in addition to "meeting the definition of mental retardation" at section 0200, the client must also must have a FSIQ of more than two standard deviations below the mean, as set forth at section 0215. It is anomalous to state that someone has met a definition of mental retardation without any consideration of their FSIQ. Obviously, as a definition of mental retardation, the proposed section 0200 is incomplete. Thus, the language of section 0210 should be inserted at subsection (2) of section 0200 and the current subsection (2) should be removed, since its wording adds little to the process of determining whether mental retardation exists.
5. Section 0215 provides for FSIQ scores more rigorous than those called for by the DSM-IV. In no event may someone with a FSIQ more than 69 qualify for DDD services, and those persons measured by the Stanford-Binet instrument may not have more than 67. WAC 388-823-0215(5). By comparison, the DSM-IV standard for significantly sub average intellectual functioning is an IQ "of about 70 or below (approximately 2 standard deviations below the mean). DSM-IV, pg. 39 (emphasis added). The DSM-IV justifies this fluid approach to the IQ score by pointing out that persons may be diagnosed with mental retardation with an IQ between 70 and 75 if they

<sup>1</sup> While pointing out that several scales have been designed to measure adaptive behavior or functioning, the DSM-IV notes that some tests do not include scores for certain individual domains and that these scores "may vary considerably in reliability." It further cautions that suitability of a test may be influenced by factors such as sociocultural background, education, and associated handicaps, and that "the presence of significant handicaps invalidates many adaptive scale norms." *Diagnostic and Statistical Manual of Mental Disorders*, pg. 40 (4<sup>th</sup> Ed. 1994).

<p>“exhibit significant deficits in adaptive behavior”, while persons below 70 with no significant deficits might not be so diagnosed. Thus, requiring a hard and fast FSIQ standard, as with the requirement of a certain adaptive behavior scale score in all cases, goes against accepted professional standards in defining mental retardation and in so doing ensures that persons meeting statutory DDD standards will be denied services under these proposed rules.</p> <p>6. There is also a potential problem at WAC 388-823-0230(1) (b), where DDD staff would be permitted to determine which of several FSIQ scores is the appropriate one for use in an eligibility determination. This decision should require consultation with a qualified professional as to which score best represents circumstances at the time of application for services.</p>	
<p><b>WAC 388-823-0215(2).</b> This proposed rule appears to allow DDD intake staff to reverse or disregard the diagnosis of mental retardation by a qualified professional where it appears to the intake worker that the applicant’s IQ score and/or limitation in adaptive functioning is affected by mental illness or another non-qualifying condition. However, the proposed rule does not explain under what circumstances such a decision would be appropriate, or what criteria DDD intake staff should use for determining whether an individual’s FSIQ or demonstrated adaptive functioning limitations “are attributable to mental illness,” rendering the applicant ineligible. Determinations about whether a dually diagnosed individual’s mental retardation causes substantial limitations in their adaptive functioning (and thus a “substantial handicap”), or, alternatively, whether other non-DDD qualifying conditions like mental illness substantially contribute to or are the primary cause of the individual’s adaptive limitations should be left to licensed psychologists making the diagnoses, not DDD intake staff. As it does in many other contexts, the department’s rules should explicitly defer to treating or examining professionals’ adequately supported expert opinions on these issues.</p> <p>Only where there is clear and convincing evidence of a non-DDD qualifying condition that significantly contributes to the otherwise eligible individual’s impaired adaptive functioning and/or qualifying FSIQ score should consideration be given to disregarding the evaluating professional’s opinion. However, such a rigorous standard could not reasonably be met by the untrained opinion of a DDD intake worker but rather should require consultation with a qualified independent professional. Otherwise, the proposed rule would permit a DDD intake worker to overrule a professional diagnosis of mental retardation without any standards or expertise.</p>	<p>See comments directly above and below.</p>
<p><b>WAC 388-823-0420.</b> As with eligibility for dually diagnosed applicants based on mental retardation, the proposed rules governing DDD eligibility for individuals with neurological or other conditions closely related to mental retardation appear to create several impermissible barriers for this category of person. Section 0420(2) allows DDD intake staff to refuse to consider the results of existing testing of adaptive functioning and to conduct new necessary testing of adaptive functioning in cases where “DDD is unable to determine that your current adaptive functioning impairment is a result of your</p>	<p><b>WAC 388-823-0420.</b> RCW 71A.16.020(1) provides that the Department is authorized to make the determination of whether someone has a developmental disability.</p>

<p>developmental disability because of an unrelated injury of illness..." The proposed rule includes no guidelines or criteria governing when or how DDD intake staff might make the determination that an individual's impaired adaptive functioning is not "a result of" his/her developmental disability. Instead, DDD intake staff are granted absolute discretion to refuse to determine DDD eligibility for potentially eligible applicants in violation of state law.</p>	
<p><b>WAC 388-823-0600.</b> This rule defines DDD eligibility criteria for applicants with "another neurological condition closely related to or requiring similar treatment to mental retardation." In order to qualify for DDD eligibility under this category, an individual must have a neurological condition that "results in <i>both physical disability and cognitive impairment.</i>" WAC 388-823-0600(3) (emphasis added). Nothing in DDD's authorizing statute, particularly the definition of developmental disability, requires or even permits the inclusion of a physical disability as an additional eligibility requirement for individuals who may potentially be DDD eligible under this category. Further, in the mental retardation rules there is no mention of a physical disability. The department should eliminate this unlawful, extraneous requirement from the proposed rule.</p>	<p><b>WAC 388-823-0600.</b> This rule is a clarification of WAC 388-825-030(6)(a). That rule required that an applicant need "direct physical assistance" in order to be eligible under "another neurological condition". If there is no physical disability, the applicant may be eligible under "other condition".</p>
<p><b>WAC 388-823-0710.</b> This proposed rule governs the use of results of standardized testing of adaptive functioning to determine DDD eligibility for individuals who do not have a formal diagnosis of mental retardation, but who have conditions closely related to or requiring similar treatment to mental retardation. The proposed WAC indicates that the department will consider a qualifying VABS, SIB-R, or ICAP test score as evidence of a substantial limitation in an applicant's adaptive functioning only if "there is no evidence of other conditions or impairments unrelated to the eligible condition currently affecting adaptive functioning." WAC 388-823-0710(1) (b). This limitation in the proposed rule appears to allow DDD intake staff to deny eligibility for an applicant whose developmental disability is the primary condition adversely affecting adaptive functioning but whose secondary, non-qualifying condition marginally affects adaptive functioning. As written, this proposed WAC would create an impermissible barrier to DDD eligibility for an identified category of applicants that the legislature intended DDD to serve, in a manner similar to the limiting language added to current WAC 388-825-030(6)(b)(iv) by the now expired emergency rules published in filing WSR 41-21-062 and WSR 04-23-086. The department should reconsider its efforts to re-codify the barrier to DDD eligibility and instead work with advocates and outside experts to revise this proposed rule in a way that would set forth acceptable and legally defensible criteria for determining DDD eligibility for individuals with conditions closely related to mental retardation and other, potentially non-qualifying conditions that might adversely affect their adaptive functioning.</p> <p>Additionally, there is an impermissible limitation on the evidence used to determine eligibility. While requiring VABS and SIB-R testing must be performed by licensed professionals, the rule permits ICAP score results when scores from the VABS or the SIB-R are not available but only when the ICAP is performed by DDD staff. <i>Id.</i> Such a limitation is not</p>	<p><b>WAC 388-823-0710.</b> If DDD cannot determine whether an individual's adaptive functioning is due to his/her eligible condition or some other condition, it cannot find the individual eligible for DDD services. However, the Department agrees that the wording of this rule could be improved. Sub-section (b) will be modified as follows: "<del>If there is no</del> <u>Unless there is</u> evidence of other conditions..."</p> <p>The requirement that only DDD staff administer the ICAP is in existing rule (WAC 388-825-035(7)). However, DDD may in some instances contract out the administration of the ICAP. Language has been added to reflect this.</p>

<p>permitted by statute and is not rationally related to the purpose of the rule, which is to determine whether someone qualifies for DDD services. That limitation should be removed so that ICAP results may be considered when the test is performed by a licensed professional not employed by DDD.</p>	
<p><b>WAC 388-823-0900.</b> Over the past two to three years there have been a number of administrative appeals directed at the manner in which DDD staff have administered the ICAP when considering whether to grant or continue DDD services. In a substantial number of these cases the ICAP results were successfully challenged due to determinations that the DDD worker inappropriately factored personal observation of the client into the decision. Nevertheless, the proposed rule provides that, as part of the process for administering the ICAP, the DDD worker will ask the client or applicant "to demonstrate some of the skills in order to evaluate what skills (the client or applicant is) able to perform." WAC 388-823-0900(3). Because the ICAP is a published standardized test, modifying published test protocol will jeopardize the validity of resulting ICAP scores, as was demonstrated repeatedly in the aforementioned administrative appeals. In particular, the published ICAP test protocol neither considers nor allows for required skills demonstrations as part of the ICAP test. The department should therefore abandon its efforts to codify an impermissible modification of the ICAP test protocol.</p>	<p><b>WAC 388-823-0900.</b> (Note: This comment seems to relate to WAC 388-823-0930.) DDD disagrees that it has modified the ICAP protocol or otherwise compromised the validity of the instrument. The ICAP manual allows for skills demonstrations, a fact repeatedly affirmed by Brad Hill, one of the authors of the ICAP and consultant to DDD on use of the ICAP.</p>
<p><b>WAC 388-823-1010.</b> This proposed rule provides that DDD will review a favorable eligibility determination if it becomes aware that the evidence supporting that determination "is insufficient, in error, or fraudulent." WAC 388-823-1010(4) (a). These standards are vague, particularly the insufficiency standard, and could be subject to broad interpretation. Without any standards to guide such review, one DDD staff person could believe evidence to be erroneous or insufficient while another could believe that it is sufficient to establish eligibility. At the very least there should be a presumption in favor of the validity of a decision granting or continuing eligibility for services. That way, a case review would be subject to an evidentiary standard being met, preferably clear and convincing evidence of error or fraud in a prior determination. We recommend against insufficiency being a standard because it is inherently arbitrary and prone to second-guessing.</p>	<p><b>WAC 388-823-1010.</b> This rule requires only that eligibility be <u>reviewed</u> if DDD discovers that the evidence used to make the previous determination of eligibility was insufficient (or in error, or fraudulent). It does not suggest that eligibility will automatically be terminated upon a discovery of insufficiency. A stronger evidentiary standard is unnecessary for this purpose.</p>
<p><b>WAC 388-823-1080.</b> This proposed section has the effect of barring re-applications for DDD services, after a decision has previously been made to deny or terminate eligibility based on a DDD decision that someone is not developmentally disabled, unless certain conditions are met, the primary one being that the applicant presents evidence that didn't exist or wasn't considered by DDD at the time of the prior decision. While we understand that the department wishes to avoid the re-hashing of prior decisions where no change has since occurred, invoking the principles of administrative finality and <i>res judicata</i> is the appropriate way of accomplishing that purpose rather than banning re-applications. Moreover, instead of favoring the state, the presumption regarding the legitimacy of an application should favor the applicant, whether or not there has been a negative prior eligibility decision. Either way, the department will have to evaluate evidence supporting an application to determine if any of it was not a factor in a prior eligibility decision, and considering that most if not all persons</p>	<p><b>WAC 388-823-1080.</b> It is unclear what process this comment refers to. If the proposal is that new applications only be rejected if there has been an unsuccessful appeal of a denial of eligibility, DDD believes that such a process would be an unnecessarily use of Department resources. A Department decision is final either if it arises from an administrative appeal or if no appeal is requested within the allocated time.</p> <p>If the proposal is that the Department needs to determine if new evidence has been presented, this rule does not contradict that.</p> <p>The time period of twenty-four (24) months was the required ICAP review timeline in WAC 388-825-030(6)(b). WAC 388-823-1080 reflects the same time period for the validity of the ICAP score. The appellant can appeal a denial based on ICAP results. If the ICAP results are not appealed or are upheld in appeal, the results are valid for 24 months and DDD is not required to take a new application when the ICAP results were</p>

<p>seeking DDD services have significant impairments, the presumption should be that an application is valid, with the burden being on the department to show that administrative finality or <i>res judicata</i> should bar consideration of a question that has already been effectively decided. Moreover, in no instance should an applicant be barred, as is proposed at subsections (4) and (5), from basing an application on a new ICAP, VABS or SIB-R test result when a prior negative eligibility decision made less than two years earlier was based solely on a previous test result. The fact that these tests are subject to multiple point margins of error underscores that the human beings administering these tests are fallible. Consequently, test scores should not be exempt from the overriding principle that new applications must be accepted after a prior negative eligibility decision if they present new or previously unconsidered evidence.</p>	<p>the sole reason for denial.</p> <p>However, DDD is willing to delete any time period for admission of new VABS or SIB-R scores (WAC 388-823-1080(5)). Since the new rules accept a VABS or SIB-R in lieu of an ICAP, this provides the applicant with an opportunity to reapply at any time. Sub-section (5) will be deleted.</p>
<p><b>WAC 388-823-0010.</b> The definition of "eligible" is problematic. the use of this term by ADSA/DDD includes Title XIX Medicaid programs. ADSA/DDD has no authority to build in a conflict between WAC and superior federal definitions</p>	<p>DSHS, not ADSA/DDD is the "single state agency" for Medicaid State Plan services.</p> <p>Eligibility for and receipt of Medicaid State Plan services such as Medicaid Personal Care is not contingent on DDD eligibility.</p> <ul style="list-style-type: none"> <li>▪ Children's Administration administers MPC for children who are not eligible DDD clients;</li> <li>▪ Home and Community Services administers MPC for adults who are not eligible DDD clients.</li> </ul>
<p><b>WAC 388-823-0030</b> Access to Title XIX entitlement services cannot legally "depend on" artificially assessed needs or on funding availability.</p>	<p>DDD agrees that Title XIX state plan or waiver services are not subject to funding availability. Language will be added to this WAC to clarify this.</p>
<p><b>WAC 388-823-0100.</b> The proposed WAC attempts to eliminate the retroactive nature of Medicaid eligibility.</p>	<p>WAC 388-823 is independent of Medicaid eligibility. Eligibility and receipt of Medicaid services is not contingent on being an eligible DDD client.</p> <p>Applicants for DDD eligibility are referred to other DSHS entities for receipt of state plan Medicaid services until DDD eligibility is determined.</p> <p>See above response to 388-823-0010.</p>
<p><b>WAC 388-823-0320 and 0330.</b> The placement of these two sections under a group of sections dealing only with Cerebral Palsy is troublesome. Are there different standards governing this topic that apply to other disability categories? If so, where are they located?</p>	<p>WAC 388-823-0320 and 0330 are referenced for two other eligibility conditions:</p> <ul style="list-style-type: none"> <li>▪ Epilepsy in WAC 388-823-0400(5), and</li> <li>Another neurological condition in WAC 388-23-0615(2).</li> </ul>
<p><b>WAC 388-823-1040</b> addresses, among other things, termination of Medicaid paid services. This section does not seem to be in comport with other WAC chapters that address this issue.</p>	<p>DDD policy and procedures require written reminder notices at one year and again at six months before expiration. A termination notice is sent ninety days before the expiration date.</p> <p>DD will assist with transitioning the authorization of Medicaid state plan services (MPC) to another DSHS entity to prevent disruption in Medicaid services.</p>
<p><b>WAC 388-823-1070</b> is too limited in scope. There should be a cross-reference to the specific appeal rights for agency decisions regarding Medicaid services.</p>	<p>WAC 388-823-1070 contains a cross reference to WAC 388-825-120 through 165.</p> <p>DDD eligibility is not a service. DDD can only pay for services for DDD eligible clients. DDD does not determine Medicaid eligibility.</p> <p>Medicaid eligible persons have access to Medicaid services through other DSHS entities.</p>

cc: DSHS Rules Coordinator

**WAC 388-823-0200. What evidence do I need to substantiate ‘mental retardation’ as an eligible condition?**

Evidence that you have an eligible condition under ‘mental retardation’ requires a diagnosis of mental retardation by a licensed psychologist, or a finding of mental retardation by a certified school psychologist or a diagnosis of Down syndrome by a licensed physician.

- (1) This diagnosis is based on documentation of a lifelong condition originating before age eighteen.
- (2) The condition results in significantly below average intellectual and adaptive skills functioning that will not improve with treatment, instruction or skill acquisition.
- (3) A diagnosis or finding of mental retardation by the examining psychologist must include an evaluation of adaptive functioning that includes the use of a standardized adaptive behavior scale indicating adaptive functioning that is more than two standard deviations below the mean, in at least two of the following areas: Communication, self care, home living, social/interpersonal skills, use of community resources, self direction, functional academic skills, work, leisure, health, and safety.

## **WAC 388-823-0215. What evidence do I need of my FSIQ?**

Evidence of a qualifying FSIQ to meet the definition of substantial limitations for the condition of mental retardation is a FSIQ derived from a Stanford-Binet, Wechsler intelligence scale (Wechsler), differential abilities scale (DAS), Kaufman assessment battery for children (K-ABC), or a Leiter international performance scale-revised (Leiter-R) if you have a significant hearing impairment or English is not your primary language.

- (1) The test must be administered by a licensed psychologist or certified school psychologist.
- (2) The FSIQ cannot be attributable to mental illness or other psychiatric condition occurring at any age; or other illness or injury occurring after age eighteen:
  - (a) If you are dually diagnosed with mental retardation and mental illness, other psychiatric condition, or other illness or injury, DDD must make its eligibility decision based solely on the diagnosis of mental retardation, excluding the effects of the mental illness, other psychiatric condition, illness or injury; or
  - (b) If DDD is unable to make this eligibility decision based solely on the diagnosis of mental retardation due to the existence of mental illness, other psychiatric condition or illness or injury, DDD will deny eligibility.
- (3) If you have a significant hearing impairment, the administering professional may estimate an FSIQ score using only the performance IQ score of the appropriate Wechsler or administer the Leiter-R.
- (4) If you have a vision impairment that prevents completion of the performance portion of the IQ test, the administering professional may estimate an FSIQ using only the verbal IQ score of the appropriate Wechsler.
- (5) The following table shows the standard deviation for each assessment and the qualifying score of more than two standard deviations below the mean.

ASSESSMENT	STANDARD DEVIATION	QUALIFYING SCORE
Stanford-Binet 4th edition	16	67 or less
Stanford-Binet 5th edition	15	69 or less
Wechsler Intelligence Scales (Wechsler)	15	69 or less
Differential Abilities Scale (DAS)	15	69 or less
Kaufman Assessment Battery for Children (K-ABC)	15	69 or less
Leiter International Performance Scale-Revised (Leiter-R)	15	69 or less

**WAC 388-823-0700. How do I meet the definition for an ‘other condition’ similar to mental retardation?**

You will need evidence in (1) or (2) below to substantiate that you have an ‘other condition’ similar to mental retardation.

(1) You have a diagnosis of a condition or disorder that by definition results in both intellectual and adaptive skills deficits; and

(a) The diagnosis must be made by a licensed physician or licensed psychologist;

(b) The diagnosis must be due to a neurological condition, central nervous system disorder involving the brain or spinal column, or chromosomal disorder;

(c) The diagnosis or condition is not attributable to or is itself a mental illness, or emotional, social or behavior disorder;

(d) The condition must have originated before age eighteen; and

(e) The condition must be expected to continue indefinitely.

(2) You are under the age of eighteen and are eligible for DSHS-paid in-home nursing through the medically intensive program, defined in WAC 388-551-3000.

**WAC 388-823-0710. What evidence do I need to meet the definition of substantial limitations for an ‘other condition’ similar to mental retardation?**

(1) Evidence of substantial limitation in both (a) and (b) below is required for an ‘other condition’ similar to mental retardation.

(a) Evidence of intellectual impairment requires documentation of either (i) or (ii) or (iii) below:

(i) An FSIQ of 1.5 or more standard deviations below the mean as described in WAC 388-823-0615(1) for another neurological condition; or

(ii) Significant academic delays resulting in delay of at least twenty-five percent below the chronological age or age equivalent academic functioning in at least two academic areas or grade placement; or

(iii) In the absence of school records to substantiate (ii) above, DDD may review other information about your academic progress sufficient to validate your cognitive deficits.

(b) Unless there is evidence of other conditions or impairments unrelated to the eligible condition currently affecting adaptive functioning, the following evidence will determine if the eligible condition or disorder results in a substantial limitation in adaptive functioning:

(i) A score of more than two standard deviations below the mean on a VABS or SIB-R current within the past three years, or in the absence of a VABS or SIB-R, an ICAP administered by DDD within the past twenty-four months.

(ii) The qualifying scores for these tests are listed in WAC 388-823-0420 (1)(d).