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STATE OF WASHINGTON

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41076-1-II
No. 84128-4

THE SUPREME COURT
OF THE STATE OF WASHINGTON

DYLAN KUEHL

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondents.

Appellant's Opening Brief

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I FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Dylan Kuehl is a 25 year old man born with Down Syndrome. AR 196. Down Syndrome is a genetic abnormality caused by faulty replication of a single chromosome during conception. Brandt Declaration AR 587. Because an entire chromosome in every cell is defective, the negative health effects can be wide ranging, and affect many organs and organ systems. Brandt Declaration, AR 587. The signal challenge faced by individuals with Down Syndrome is some degree of developmental disability which in almost every case requires some home or institutional care in many aspects of life. This care may be and usually is more significant in Down Syndrome than with those individuals with many other forms of developmental disability because the genetic abnormality in Down Syndrome has wide ranging health effects besides the developmental ones, effects that the individual is generally unable to manage without significant assistance. See, e.g. Nurse's notes, AR 593.

Dylan faces these challenges and his continuing need for services is undisputed. His right to such services is established under the CORE waiver. WAC 388-845-0100. He has been approved to receive the services set forth in WAC 388-845-0215. He does not have to requalify for services and is

entitled to full funding of the needs he can demonstrate.

Dylan's medical history includes the following undisputed diagnoses: Down Syndrome including concomitant developmental delay and disability, Irritable Bowel Syndrome, chronic depressed immune system, cardiac irregularities including aortic insufficiency, sebaceous cysts, acne, and Blepharitis (a chronic recurring eye infection common in Down Syndrome sufferers). AR 7, 593.

In order to assess Dylan's needs, the Department has developed what it calls a CARE (Comprehensive Assessment Reporting Evaluation) assessment, in which a caseworker, with input from the care recipient and the care giver, rates the capabilities and needs of the recipient. The ratings and categorization of these needs and abilities are plugged into a mathematical model or "algorithm." Chapter 388-106 WAC.

As a result of his November 2007 assessment, Dylan had his hours reduced by nearly a quarter. In December he received a written "Planned Action Notice," AR 557 et seq., which informed him of his reduction and his right to appeal. It did not, however, provide him with any reason for the reduction other than it was as a result of the application of the CARE tool algorithm and a recitation of the entire WAC chapter that sets out the

algorithm.

The Department claims that it also sent at the same time of the Planned Notice, the detailed CARE assessment report AR 300-332, and although there is some question as to whether this is accurate, we will assume for the purposes of this appeal that it did.¹ An examination of this record is shows that it includes the caseworker's detailed report of the results of the assessment process, including her responses to all the questions, comments thereon by the interviewees and no comparison with previous assessments or other information on why hours were being reduced. It is interesting to note that the Administrative hearing judge, Judge Haenle, assumed that this material had *not* been provided but found that if it had been, it would not provide any better notice than the bare planned action notice that was provided. AR 91.

An email from the caseworker, Nancy Stewart, sent to Theresa Rose, Dylan's mother and care provider, the day before the Planned Action Notice (AR 566) stated that she had upgraded her evaluation of Dylan's decision making ability under the direction of her supervisor and opined that this was

¹

The scoring key for Mr. Kuehl's assessment, AR 333 et seq., was *not* provided at the time of the notice, nor was it alleged to have been provided, nor did the court or any administrative tribunal find that it was provided.

the reason his hours would be reduced. This was incorrect.

After filing an appeal, and after counsel requested more specificity as to the reasons for the reduction, the Department's representative, Michele Starkey in early February determined that the decision making upgrade was not the reason for the reduction in hours, but was herself unable to determine the actual reason. RPj 138 et seq. Not until February 22, 2008, did Ms Starkey inform counsel that the reason for the reduction was that Dylan did not have any open sores at the time of the assessment and had not had any such sores in the 7 days prior to assessment. See AR 568 et seq. (time signature on fax of rerun algorithm stating reason). Counsel was then informally advised that this single fact resulted in the entire reduction. RPj 99. See WAC 388-106-0095.

For the first time at Superior Court hearing, the state made the argument that the 33 page CARE result form which details the questions and answers as recorded by the case worker provided notice that complied with due process.

Dylan's chronic skin lesions, which are a known side effect of his condition and have always been present during past assessments, RPj 99, and see, e.g. AR 212 (2004 assessment). The fact that he was momentarily free

of open skin lesions during the November 2007 assessment meant he failed for the first time to be classified as clinically complex. His monthly hours of care were therefore reduced from 145 to 110. RPj 134.

After hearing, Hon. Alice Haenle, ALJ, ruled on the notice issue that the notice may have been inadequate but to provide the full CARE result (as the Department now claims it did) **would not have provided better notice** and, further, that adequate constitutional notice would be too cumbersome. AR 91.

On the issue of the arbitrariness of the Department's interpretation of WAC 388-106-0095 as to open lesions, the ALJ ruled that the department's use of the 7-day "look back," though not applicable to WAC 388-106-0095 on its face, was a reasonable attempt to harmonize this section with other areas where the look back period was explicitly applicable. Further, she concluded that if Mr. Kuehl's interpretation were correct, anyone with any history of a listed condition would qualify. AR 85. ²

Petitioner appealed to the Board of Appeals which disagreed, per

2

Appellant has contested this notion at every level of challenge and appeal as clearly erroneous. See, CP 113-114 and §§ C(2)(c-e) *infra*. In fact a strict application of the Department's interpretation *requires* a year's worth of support to any transitory symptom on the list that is being treated at the time of assessment. No tribunal has ever addressed this obvious problem with the Department's analysis.

Judge Sturgis, with the hearing judge that the difficulties in providing adequate constitutional notice excuses such notice, AR 18-19. but found the notice likely sufficient and held that, in any case, later supplied notice, after the appeal was filed, cured any initial deficiency. *Id.*

On the issue of the arbitrariness of the WAC 388-106-0095 on clinical complexity as applied to Mr. Kuehl, the Board judge found as fact that the record showed that adequate care could prevent petitioner's open lesions so that the application was not arbitrary in this case. This finding was not based on any citation to the record and there is nothing in the record that supports it. Everything in the record was in fact contrary to this finding. RPj 186-190, 211-215 AR 590, Pietrusiak AR 583-84, Dr. Brandt AR 588-89, and Nurse Weinacht, AR 593. The only expert testimony in this case states this unequivocally (Dr. Brandt. AR 588, ¶9) and the Department's witness, Nurse Weinacht, concurred. AR 593.

The Superior Court without explanation simply found that "The review decision and final order is supported by substantial evidence in the record." Conclusion # 5, CP 125. The court pointed to nothing in the record that supported this particular finding by the "review decision" nor why the multiple citations contradicting this finding were not conclusive.

The court went on to find the use of the unpublished 7 day look back period reasonable and the application to petitioner as neither arbitrary and capricious nor violative of due process. Conclusions ## 8 and 9, CP 126.

II ASSIGNMENTS OF ERROR

A) The Department's Actions Upheld by the Court Were Arbitrary and Capricious:

The Court was clearly erroneous in upholding the Department's interpretation of WAC 388-106-0095 concerning clinical complexity with respect to a chronic immuno-deficient bacterial skin condition that includes open lesions, which was arbitrary, capricious, and irrational and its application was a violation of due process in this case.

B) The Superior Court Erred by Permitting the Department to Engraft Language into WAC 388-106-0095 Which Language by Definition Does Not Apply

WAC 388-106-0010 defines when a 7-day "look back" period is to be applied, and the Court's permitting its application to WAC 388-106-0095, which does not fit the regulatory definition, in order to make rational the Department's irrational interpretation of the rule, was clearly erroneous; any interpretation that "reads" a 7-day look back period into the rule is improper.

C) **The Court's Determination That the Department's Findings Were by Substantial Evidence Is Clearly Erroneous:**

The Department found that Dylan did not have an ongoing certainty of developing open sores because of a chronic medical condition secondary to Down Syndrome. This finding was not supported by the record and was in fact directly contrary to all expert and lay testimony including the Department's own medical witness. The court erroneously upheld all findings as supported by substantial evidence.

D) **The Court Erred in Finding Notice in this Case Constitutional:**

The Superior Court clearly erred Planned Action Notice even with alleged accompanying material met the notice requirements inherent in due process under the 5th and 14th amendments to the U.S. constitution and set forth in *Goldberg v. Kelly*, 397 U.S. 254, at 267- 268 (1970) and required by WAC 388-458-0025(2)(c)

III ISSUES ON APPEAL

A) Did the Planned Action Notice, DSHS Form 14-472, even if followed immediately by the assessment material found in AR300-333, fail to provide adequate reasons for the reduction of support for Dylan Kuehl, in violation of the Dylan's Constitutional right to due

process?

- B) Did the Planned Action Notice, DSHS Form 14-472 even if followed immediately by the assessment material found in AR300-333, fail to provide adequate reasons for the reduction of support for Dylan Kuehl, in violation of WAC 388-458-0025(2)(c) and 42 C.F.R. §431.206(b), which both require that any Department notice that changes benefits provide “the reason for the change?”
- C) Was the Order’s finding that Dylan Kuehl was not clinically complex, even though he has chronic open lesions and is subject to a detailed and intense daily wound/skin care regime as part of a recognized medical condition, arbitrary and capricious under WAC 388-106-0095?
- D) Was the Order’s finding that Dylan Kuehl was not clinically complex, even though he has chronic open lesions and is subject to a detailed and intense daily wound/skin care regime as part of a recognized medical condition, a clearly erroneous interpretation of WAC 388-106-0095?
- E) Was the finding that Dylan does not have an ongoing certainty of developing open lesions as a part of a chronic and well recognized

medical condition, unsupported by substantial evidence, rendering the Order erroneous?

- F) Did the Order's reliance on the 7-day look back period constitute an unlawful procedure or decision making process?
- G) Was the Order's reliance on the 7-day look back period arbitrary and capricious?
- H) Did the Order's reliance on the 7-day look back period violate the due process clauses of the U.S. Constitution?
- I) Was the Order's reliance on the 7-day look back a clearly erroneous interpretation of WAC 388-106-0095?

IV INTRODUCTION TO ARGUMENT

There is a disturbing institutional approach represented by this case that has never received comment in this case history. The administration of the system that the Agency uses to determine level of service, the CARE assessment tool, and the method it uses to inform its clients of how it is administered, appears at least to encourage arbitrariness and overreaching by the Department in wielding its authority. The Agency can and does use this mode of administration to what institutionally may appear a laudable goal:

saving the taxpayers' money -- at least in the short term. The problem with excessive elevation of such a goal is that, while appropriate as a bureaucratic objective, it is not appropriate as a Department purpose. The purpose, at least in its administration of the medicaid personal care and waiver programs, is to serve its clients; those citizens of the State of Washington who have physical, intellectual, and psychological disabilities that make them unable to care for themselves. RCW 43.20A.010. Once its primary goal strays from serving its clients, the Department becomes a positive danger to its clients, to their health, and to their liberty.

This case is emblematic in every particular of the problem.

Persons with Down Syndrome, and any number of genetic or degenerative or progressive conditions that the Agency serves, do not "get better." A 22-year-old man with Down Syndrome who cannot cook for himself without supervision, and who poses a danger of burning himself up or his home down without close supervision, will not suddenly become able safely to do so. Most of his limits are built into his genetic code. AR 587.

Thus both administrators and caseworkers in a rational system whose goal it is to serve persons with such conditions would regard an assessment that resulted in a significantly lowered need for services or care from all

previous ones with skepticism or at least curiosity, and would seek to know the reason. If the abilities cannot improve with time for genetic or other immutable physical reasons, an assessment that says they have improved (by an extraordinary 25%) by sheer force of logic, was either administered improperly before or is being improperly administered now. A rationally run agency with the goal of serving its clients would *want* to know which.

In Washington, the Agency appears, by the evidence in this case, to have no interest at all in troubleshooting the administration of the assessment tool. It sends notices out that contain no reason for the reduction in services other than that the assessment says so AR 571 et seq. Nothing on the ground had changed about Mr Kuehl's actual care or needs. In this case it took a legal challenge and three months before the Department could even figure out for *itself* what happened.

And when it turned out that the total reason for a reduction in one fourth of his support was that Mr. Kuehl 's constant and chronic skin sores, that are an incontrovertible result of his genetic condition, failed to open and bleed or ooze for a week, the Agency's reaction was not to correct it as an error in coding but to defend the decision as an appropriate result. The random "good" fortune of a week's relief *not from sores*, but from sores that

actually ooze resulted in an Agency's automatic determination that a year's worth of necessary care should be reduced by almost one fourth.

The fact that the Department hypothesized an incorrect reason for the reduction initially, and then took four months to determine the actual reason for the reduction, says almost everything necessary to prove our point. Clearly no one at the Agency would have bothered to discover the actual reason without a challenge, even if there had been a clerical error in coding or processing the CARE data, which raises this central question:

How many such errors have gone undetected because their victims did not have the wherewithal or the ability to challenge them?

In Washington, the Department and its regulations give lip service to the ability to appeal a reduction in service and then throw up roadblocks to one who seeks to actually pursue such an appeal. The first step is to obscure the reason for the reduction so that there is no way for the victim of the reduction to properly frame an appeal.

V ARGUMENT

A) STANDARD OF REVIEW

This is an appeal of a superior court review of a final agency action. As such it is heard *de novo* on the record created in the agency.

B) NOTICE OF REDUCTION IN SERVICES TO PLAINTIFF KUEHL WAS INSUFFICIENT AS A MATTER OF LAW

1) Goldberg and Mathews Standards Were Not Met

When government reduces public assistance for which a person is or may be legally entitled, the United States Supreme Court has set a basic level of due process it must provide. That basic level was described in *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011 (1970):

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). In the present context these principles require that a recipient have ***timely and adequate notice detailing the reasons for a proposed termination***, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

Goldberg v. Kelly, 397 U.S. 254, at 267- 268, 90 S. Ct. 1011 (1970). (***Emphasis added***).

The operative word here is "detailing." The Supreme Court has instructed that some level of "detail" must be included in the notice provided.

The reasons are several fold:

First, notice, for constitutional purposes, must reasonably apprise the person to be deprived of liberty or property of the reasons for the deprivation in such a manner as to "give the charged party a chance to marshal the facts in his defense." *Landon v. Plasencia*, 459 U.S. 21, 39,103 S. Ct. 321 (1982)

(Marshall, J. concurring and dissenting), quoting *Wolff v. McDonnell*, 418 U.S. 539, at 563, 564, 94 S.Ct. 2963 (1974). A notice that states that Dylan's personal care is being reduced by 25% because, "it has been determined you do not have an assessed need for the amount of service you requested or previously had," provides him with no ability to marshal facts in his defense. It provides him with no useful information whatsoever.

A second purpose of notice is "to clarify the issues to be considered" by the reviewing tribunal. *In re Gault*, 387 U.S. 1, 34, fn. 54, 87 S.Ct. 1428 (1967). Not until after the second prehearing conference did any of the parties or even the judge know what the actual "issues to be considered" were, because no one, not even the Department, knew the actual reason for the support reduction.

Another related purpose of adequate notice, especially in the context of provision of care needed for daily living "is that recipients of public assistance benefits should be afforded a degree of protection from agency error and arbitrariness in the administration of those benefits" *Baker v. Alaska*, 191 P.3d 1005, 1009 (2008), citing *Banks v. Trainor*, 525 F.2d 837, 842 (7th Cir. 1975). The facts in this case show that even the agency itself was unable to initially explain why Dylan's support was reduced. Clearly the

possibility of error was quite large.

This last reason – that specificity in the notice is necessary to check the risk of error or arbitrariness – is central to the rulings of the Supreme Court.

The foundation case in the adequacy of notice is *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976). *Mathews* provides three considerations that a reviewing court should use to measure the adequacy of a particular notice: (1) the private interest affected by the official action; (2) ***the risk of an erroneous deprivation of such an interest through the procedures used***, and the value of additional safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

Many courts have determined that the interest involved (*Mathews* factor #1, *supra*) in providing medicaid care services for those with significant disabilities is among the highest in the law. In *Baker v. Alaska* 191 P.3rd 1005 (2008) the supreme court of Alaska described personal care services as a “brutal need” requiring the highest standard of notice of reasons for reduction:

Where the recipient has a "brutal need" for the benefit at issue, as in the case of welfare recipients, courts have traditionally required that agencies go to greater lengths - incurring higher costs and accepting inconveniences - to reduce the risk of error. Recipients of PCA [medicaid personal care assistance] services are arguably as dependent on their benefits as are welfare recipients; without them, they may be unable to do things as basic as bathing, preparing a meal, or using the toilet. ***An error in the agency's determination to reduce PCA services could result in serious harm to the service recipient. It follows that the agency should be required to make every reasonable effort to reduce the risk of erroneously depriving PCA services recipients of their benefits.*** *fn 24

*fn24 See *Goldberg [v. Kelly, supra]*, 397 U.S. at 261 (holding that "extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss" and noting recipient's "brutal need" for the services at issue); *Ford v. Shalala*, 87 F. Supp. 2d 163, 182 (E.D.N.Y. 1999) (holding that even "substantial governmental burden" - expensive information gathering and processing system overhaul and computer reprogramming that would take up to two years to implement - must be met in order to provide specific reasons where government proposed terminating or reducing recipient's SSI benefits). See also *Vargas [v. Trainor, infra]*, 508 F.2d 485 (holding notice inviting benefits recipients to seek additional information insufficient where recipients were often unable, by virtue of physical or mental handicaps, to take necessary affirmative action).

Baker v. Alaska 191 P.3rd 1005, 1010, (2008). (Footnote 24 included, other footnotes omitted; ***emphasis added***)

At the end of the day, in order to meet all these purposes that gather under the heading of due process, the reason stated in the notice has to be in a form that an ordinary person of average intelligence can understand and

stated with enough specificity that the object of the notice can coherently either agree or disagree with it. “Because the process said so,” cannot meet these basic criteria. Not even, “the process said so and here is how the caseworker recorded the raw data for the process” comes close to meeting these basic criteria.

2) Both the DSHS Board of Appeals and the Superior Court Were Clearly Erroneous That the Notice Form Was Sufficient Even If the Defendants Did Supply the Raw Caseworker CARE Assessment Notes

The Department review board concluded that the form with a box checked off stating “it has been determined you do not have an assessed need for the amount of service you requested or previously had,” meets the legal requirements of notice, but if it did not, material supplied after appeal did meet it. AR 18-19. At Superior Court, the Department argued and the court agreed that the supplying of the care process details according to WAC 388-106-0050(3), furnished sufficient notice. Close examination of these notions shows that neither is legally or logically tenable.

a) DSHS Form 14-472 (AR 557 et seq.) Is a *per Se* Violation of Due Process.

The only information contained in the form are a series of “check boxes” in front of brief phrases that are entitled, “Reason for Denial, Reduction or Termination of Service.” Ms. Stewart, the caseworker, checked the fourth box on the notice she sent Dylan, which states: “It has been determined you do not have an assessed need for the amount of service you requested or previously had.” The form itself, with this meaningless tautology, violates due process. No one could figure out, from this reason alone, *why* Dylan’s services were reduced from 145 hours to 110 hours per month.

The form does not require any individualized or detailed explanation. In fact, the design of the form will not permit an individualized or detailed explanation to be written. There is no place on the form for a case manager to provide such an explanation.

“Adequate” notice of reasons for termination of benefits is uniformly held to be written notice. *Corella v. Chen*, 985 F. Supp. 1189 (1996). The Washington Administrative Code provides that the Department must send notice when it changes a recipient’s benefits.

- (1) We send you a change letter if the amount of benefits you are getting is changing.
- (2) On the letter, we tell you:

- (a) What your benefits are changing to;
- (b) When the change is going to happen;
- (c) **The reason for the change;**
- (d) The rules that support our decision; and
- (e) Your right to have your case reviewed or ask for a fair hearing.

WAC 388-458-0025. (**Emphasis added**)

Form 14-472, sent to Dylan, failed to explain the reason for the change as the word “reason” is commonly understood in either a due process or public assistance context. The “reason” DSHS gave him, “it has been determined that you do not have an assessed need for the amount of service you requested or previously had.” essentially says “we reduced your support because we decided that you don’t need as much support.” Neither the Administrative Law Judge nor the Board of Appeals Review Judge provided any coherent justification as to how this can constitute adequate notice. The ALJ opined that it would be too cumbersome for the Department to give adequate notice, AR 91, and the Board of Appeals Review Judge stated this notice was adequate, but even if not, the fact that the Department provided the actual reason for the reduction later satisfied due process. AR 18-19.

WAC 388-458-0025(2)(c) does not say that the notice the Department sends must specify an *adequate* reason, but the rule can not properly be read

to endorse the provision of an *inadequate* reason. Likewise, federal regulations require that notice contain “the reasons for the intended action” 42 C.F.R. §431.206(b), which cannot rationally be read to permit reasons that are inadequate to fulfill the basic requirements of due process.

Washington is not the first state to try to pass off circular and meaningless “reasons” as adequate notice in precisely the same context as in this case. Arizona tried it, and the federal court responded:

It is undisputed that written notice must be provided and that notice must be meaningful. Arizona's present system, however, is not meaningful because it does not allow the applicant to be fully informed of the case against him or her in order that the unfavorable decision can be adequately contested. Without adequate preparation, a deserving applicant's chances for success are severely diminished.

Corella v. Chen, 985 F. Supp. 1189 at 1193-1194 (1996). (citations omitted)

The court also rejected, as too vague, the reasons given by the state on its notice, finding that,

These reasons are so vague in as much as they fail to provide any basis upon which to test the accuracy of the decision. The purpose of notice is to “clarify what the charges are in a manner adequate to apprise the individual of the basis for the government's proposed action.” *Wolff v. McDonnell*, 418 U.S. 539, 564, 94 S.Ct. 2963, 2978, 41 L.Ed.2d 935 (1974). Even under a generous construction, these “reasons” in their present state do not apprise the AHCCCS [Arizona Health Care Cost Containment System] applicant of the basis for the government's proposed action.

Id.

The kind of content-less, check-box notice that the Department provides here was rejected by the federal courts in the public benefits context 25 years ago and has never been approved by any court since. *Ortiz v. Eichler*, 616 F. Supp. 1046 (D. Del. 1985), *affirmed*, 794 F.2d 889 (3rd Cir.1986). In fact, a “check box” pre-termination notice that contained considerably *more* information than form 14-472 has been rejected by federal courts as a denial of due process. See *Dilda v. Quern*, 612 F.2d 1055 (1980).

The Department suggested at hearing that because the caseworker and her supervisor offered to meet with Ms. Rose, Mr. Kuehl’s mother and caretaker, to provide a more detailed verbal explanation of the “reasons” for the reduction, due process was not violated. RPj 48 (Stewart Testimony); RPj 155-156 (Starkey Testimony). Such a meeting is neither legally nor practically a substitute for a *detailed* written notice of reasons.

b) Informal Meeting Is Not a Substitute For Actual Written Notice “Detailing The Reasons For Reduction”

The offer of a review with the caseworker and/or her supervisor is not a sufficient substitute for adequate notice “detailing the reasons for

termination.”

In *Schroeder v. Hegstrom*, 590 F.Supp. 121, 128-129, (D.C. Or. 1984)

the court found that:

The fact that recipients may ask for assistance from welfare caseworkers in understanding why the reduction or termination occurred does not remedy the shortcomings of an inadequate notice. As one court explained, "It is true that defendant's notice invites the recipient to inquire further or to request a hearing, but this improperly places on the recipient the burden of acquiring notice whereas due process directs defendants to supply it" *Philadelphia Welfare Rights Organization v. O'Bannon*, 525 F.Supp. at 1061, quoting *Malanson v. Wilson*, No. 79-116 (D.Vt. Aug. 12, 1980).

See also, *Baker v. Alaska*, *supra*; and *Corella v. Chen*, 985 F. Supp. 1189, 1195 (D. Az. 1996) where the court held that providing the phone number of a case worker to answer a recipient's question was commendable, but that "phone numbers cannot, however, be a substitute for the required written reasons." *Id.* In fact, for over three decades, it has been axiomatic that written notice that needs supplementation through action by a recipient does not satisfy due process. *Vargas v. Trainor*, 508 F.2d 485, 489-90 (7th cir. 1974), cert. denied, 420 U.S. 1008, 43 L. Ed. 2d 767, 95 S. Ct. 1454 (1975). Thus, the Board of Appeals reliance on later provided information as

providing adequate notice, AR 18-19, has no support in law.

But there are further reasons in this case where an informal meeting is inadequate:

c) A Written Notice “*Detailing Reasons*” Provides Legal Protection for All Parties That an Informal Verbal Discussion Can Not

Accurate interpretation of the CARE tool and application of the CARE algorithm requires significant expertise and experience both because of its complexity and because small errors in arithmetic or application of subjective categorizations can have significant consequences. The results of an interpretation at an informal discussion can easily be erroneous. This case demonstrates that principle: Nancy Stewart, Dylan’s case manager, and her supervisor, Ms. Pederson, erroneously believed that the reason for the reduction in hours resulted from a change in the classification regarding the client’s level of understanding and that is what they communicated to Dylan’s mother. AR 566, RPj 47- 48. Michele Starkey, the Department’s designated representative, was unable initially to determine the cause of the reduction of hours at the first meeting with counsel. RPj138-139.

Given these facts, a client might be given an erroneous interpretation

of the reasons for the reduction at an informal meeting, and then be faced with a different reason at hearing for which he is totally unprepared. If the “details” of the reasons for reduction are set forth verbally only, the recipient has no protection against such an accidental or intentional “bait and switch” by the Department. That is why legal notices are universally required to be in writing.

To comply with state and federal rules and with due process, the Department must be required to do the appropriate analysis and adequately explain its reasons in writing *before* deciding to reduce services, rather than sending the notice and doing the analysis only if there is an appeal, as is their current practice demonstrated here. Doing so prevents two evils: 1) Wasted judicial time, See *In re Gault, loc. cit., supra*, and, 2) Errors and arbitrariness in reductions in services to those who do not have the ability, or the wherewithal to appeal. *Mathews v. Eldridge*, 424 U.S. at 334-335, *Vargas v. Trainor, supra*, at 490; and see, *Banks v. Trainor*, 525 F.2d 837, 842 (7th Cir. 1975).

d) The Recipient’s Representative, Terri Rose, Legitimately Feared an Informal Meeting with Those Who Had Taken Adversarial Positions with Her.

Ms. Rose testified that she did not respond to the offer to informally review reasons for the reduction with Kris Pederson because she believed that Ms Pederson had taken an adversarial stance on the issues of support and was afraid to deal with her without counsel present. RPj 201-204 and see AR 566, wherein Ms. Stewart reported that her supervisor (Pederson) had persuaded Stewart to upgrade her classification of Dylan's abilities. These fears appear to be well-founded. At hearing, Ms. Pederson testified that she reviewed Ms. Stewart's case report and the classifications Ms. Stewart used, not only at the time of the report, but also just immediately prior to hearing. In doing so, she missed no opportunity to find alleged assessment mistakes that would reduce Mr. Kuehl's services. (Pederson Testimony, RPm 74 et seq.) Furthermore, she obliquely threatened Dylan *at hearing* with further reductions at the next assessment, even though such threats would have to be acted on in later assessments and were entirely irrelevant to the issues at hearing. Id. We point both to the Pederson testimony that she would in future be certain to consider the fact that she believed that his memory was better than reported by Ms. Stewart (Pederson Testimony, RPm 74 et seq., and see RPm 81-83), and in a statement that did not make the recording or transcript, that the informal support given to Dylan by Mr. Pietrusiak, Ms. Rose's life

partner, would likely result in a reduction in the future.

These threats could and we believe *would* have been made in any “informal” meeting as a tool of coercion regarding the appeal. Ms. Rose was thus wise to not attend such a meeting. Because the threats were made in open hearing, Dylan had the opportunity to guard against them – e.g. have Mr. Pietrusiak point out that he is only available in the home for a small fraction of the year since he is usually at sea as a merchant marine officer, that he also cares for his elderly parents in Chicago, and that even when he is in town his assistance to Dylan is minimal. RPj 170-173.

e) The Detailed Caseworker’s Raw Data and Responses Also Provides No Notice

The Department’s defense -- first raised at superior court -- for this lack of notice is that it provides by WAC 388-106-0050(3) the detailed CARE results, i.e. the case worker’s answers with interview details on six hours worth of questions. AR 300-332. It is not clear from the record that this information was actually provided, but even if it was, the problem with this material is that it really gets one no closer to the truth of why hours were cut. Indeed, Judge Haenle specifically found as fact that the full details of the CARE assessment provided no better answer to the question of why hours were cut than the bare form notice of action. AR 91

No key is provided to explain how to use this information to arrive at this year's results, let alone compare it with last year's results showing the reason for the change. (The Department actually can produce a scoring key (see AR 333 et seq.) but it is not provided unless until a challenge is lodged *and* it is specifically requested. It is not part of the notice or the raw data supposedly supplied with the notice.)

In the actual documentation that the Department is required to produce by WAC, whatever information might be useful or relevant is overlaid with multiple layers of detail about the specifics of the answers to the questions presented, and the detail of client's care and assessed abilities. Separating what out is important, how it changed from last year, and how it was scored the same or different from last year, and how a different scoring on any question would affect or not affect the outcome in terms of hours provided, would be virtually impossible for anyone without training to do, let alone one with significant developmental disabilities. See, *Vargas v. Trainor*, 508 F.2d 485, 490 (7th cir. 1974)).

This is a classic case where "effective notice is as much obscured by too much information as it is denied by too little information." *Oregon v. Kincaid*, 78 Or.App. 23, 30, 714 P.2d 624 (1986).

Let us emphasize again that for those with significant degenerative or progressive or genetic physical or cognitive disabilities who almost by definition do not “get better” after reaching adulthood, an assessment that shows such improvement as would require 20 or 30% fewer hours of care will almost always reflect an error in either the current or previous assessment. Thus, even if the Department has no interest in finding where the problem lies, the victim of the cuts in service will always have a clear interest in discovering the reason, and if the anomaly or error is in the current assessment rather than the previous one, he or she will have grounds for appeal.

In fact, without a score sheet for the previous year’s algorithm, which no one claims was supplied until hearing here, the raw data allegedly supplied in AR 300-332. (2008 assessment) is worthless for the purpose of determining the reason for the withdrawal of support. Even with this information, it took the Department three months to produce an answer and it took Michelle Starkey, the Department’s designated expert, two weeks to figure it out after a specific promise to review and provide such an answer promptly. RPj 138 et seq. How can the Department claim this is adequate

notice “detailing the reasons” for reduction of services? *Goldberg, loc cit.* ³

C) **CLINICAL COMPLEXITY**

1. The Department’s Analysis of Clinical Complexity in Regulation Is Not Rationally Supported by the Text of the WAC
-- Background

It was three months after the appeal was filed that the appellant had actual knowledge of the reason for the reduction. Not until Ms. Starkey reexamined the CARE results in detail, after she was initially unable to determine the reason from the CARE data, did Appellant learn through counsel that the sole reason for the reduction was the fact that Dylan did not have an open lesion at the time of the assessment or within the previous week. This was not until late February of 2008. RPj 138-139; AR 568 et seq. (see time signature on fax of rerun algorithm stating reason).

All of the testimony from all witnesses, including the Department’s, were unanimous that Dylan’s open skin lesions are chronic and no treatment

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Note that in the present case the CARE assessment had been in use for several years and method for determining a change in service hours provided would start (and usually end) with a comparison of the data inputs and scoring of the present with the previous years. This differs from cases such as *Baker v. Alaska, supra*, where the issue was notice in the *first application* of its new assessment tool, so there was no comparison that could be made with the previous year’s assessment. In such cases the details of the caseworker’s responses and the explanation of scoring are the *only* way of providing notice and that is what the court ordered.

will prevent them. This included Pietrusiak AR 584, Rose, RPj 186-190, 211-215, Dr. Brandt, AR 588 (¶ 9), and Lynn Weinacht, RN, a DSHS witness. RPm, 30-33; AR 593. Dr. Brandt testified to this explicitly. AR 588 (¶ 9) Although all agree that while constant daily vigilance and a strict treatment and hygiene regime might lessen the number and severity of these lesions, nothing will end them. Both Dr. Brandt, AR 587-88, and Nurse Weinacht AR 593, RPm 31-32 described the chronic course of these lesions (that always or nearly always end in an open draining sore which then scabs and scars) that are common side effect of immunologic deficiency experienced by many with Down Syndrome. AR 587-88.

Although the Board of Appeals Judge found that this was not the case and that proper treatment could prevent the lesions from opening entirely, the decision cited nothing in the record – and we have scoured the record and found nothing in it – to support such a finding. Moreover, the testimony, both medical and lay was also unanimous that the extensive skin care and hygiene regime was nearly identical whether the lesion was open and weeping, had closed and was healing, or had not yet opened, unless the sore was seriously infected. RPm 36-38.

2) The Department's Interpretation of WAC 388-106-0095 on Clinical Complexity Is Clearly Erroneous.

a) WAC 388-106-0095

WAC 388-106-0095 is the rule that explains clinical complexity. If a client is found to be clinically complex, that client will be awarded additional personal care hours. The rule is organized by first listing all of the chronic medical conditions that automatically constitute clinical complexity, provided the client is receiving a basic amount of daily living care. The next part of the section, provides as follows:

You have one or more of the following skin problems:

- Pressure ulcers, with areas of persistent skin redness;
- Pressure ulcers with partial loss of skin layers;
- Pressure ulcers, with a full thickness lost;
- Skin desensitized to pain/pressure;
- **Open lesions; and/or**
- Stasis ulcers.

AND

You require one of the following types of assistance:

- Ulcer care;
- Pressure relieving device;
- Turning/reposition program;
- Application of dressing; or
- **Wound/skin care.**

You have a burn(s) and you need one of the following:

- Application of dressing; or

- Wound/skin care

(Relevant sections in **bold**)

In the past, Mr. Kuehl has always qualified as clinically complex because he has always had open lesions at the time of the assessment or shortly before. RPj 99; and see, e.g. AR 212.

b) The 7-day “Look Back” Period as Applied to WAC 388-106-0095 Has No Support in Law or Regulation and Without it, the Department’s Interpretation is Irrational

The Department offers an interpretation of WAC 388-106-0095 in the form of CARE tool guidance. AR 468 et seq. This guidance *language* has **not** been adopted as a rule. (Starkey testimony RPj 143) This guidance states that the lesions must actually be open and draining within the seven days prior to the assessment. AR 468.

This seven day “look-back” period is derived from the definitions of “Current” and “Self performance activities of daily life (ADL’s)” both at WAC 388-106-0010, which provide, in pertinent part, as follows:

“Current” means a ***behavior*** occurred within seven days of the CARE assessment date, including the day of the assessment. Behaviors that the department designates as current must include information about:

(a) Whether the behavior is easily altered or not easily altered; and

(b) The frequency of the behavior.

. . . .

"**Self performance for ADLs**" means *what you actually did* in the last seven days before the assessment, not what you might be capable of doing. Coding is based on the level of performance that occurred three or more times in the seven-day period and does not include support provided as defined in WAC 388-106-0010. Your self performance level is scored as:

(a) Independent if you received no help or oversight, or if you needed help or oversight only once or twice; [**bold in original, bold italic emphasis added**]

Neither the words, "**Current**" nor "**Self performance for ADLs**" defined above are mentioned in WAC 388-106-0095, so they are not relevant to the interpretation of that section. Even if these terms did appear, however, both of these definitions apply only to behaviors and activities of the person assessed and nothing in them implies that they should or can be used as a guide to the existence of medical conditions.

Thus, the seven day look-back period for the presence of open lesions appears to be an interpretive construct of Department staff who developed the interpretive guide for use by the caseworker-assessor. It has no actual basis in statute or adopted regulation. It has no force of law.

Furthermore, because the code actually defines when a 7-day look back period *does* apply (when referring to behavior and the terms "current"

or “Self Performance for ADL’s” are used in the regulation), under the principle of *inclusio unius est exclusio alterius* it cannot be applied outside that definition. See *State of Washington v. Dydasco*, 85 Wn.App. 535, 933 P.2d 441 (1997) where the court held that the legislative intent expressed by insertion of a 3-day notice period in one part of an act was conclusive that it did not apply in another part of the same act where the legislature chose not to include it.

Although interpretations of regulations by professional Departmental staff may deserve some weight from a court in some circumstances, those that have no support in the published regulation do not deserve any significant weight. They are certainly not binding. See *Wyeth v. Levine*, 555 U.S. _____, 129 S.Ct. 1187, 1201, 173 L.Ed.2d 51 (2009), slip opinion at 20-21. The fact that mere “interpretive statements” are written down in a staff guidance program does not make them any more binding. This is because,

RCW 34.05.230(1) . . . grants agencies the authority to adopt interpretive statements, which are advisory only. The statute then says, 'To better inform and involve the public, an agency is encouraged to convert longstanding interpretive and policy statements into rules.' Id.

...

Only rules adopted through the rule making procedure can be published in the WAC. See RCW 34.05.210, .345, .390. . . . Again, interpretive statements cannot be published in the WAC without first surviving the rule making process

Association of Washington Business v. Department of Revenue, 155 Wn.2d 430, 442-443, 120 P.3d 46 (2005) (case denominated *AWB* hereafter; footnotes omitted).

AWB concerned the distinction in the courts between adopted “interpretive rules,” which interpret and explain a statute, and adopted “legislative rules,” which carry out the work of the statute. The case also expounded on whether interpretive rules could actually be formally adopted into the WAC at all, in the section of the case quoted above. (They can.) But more relevant here, *AWB* explained the deference the courts *and the public* owe to these different species of rules. *AWB*, at 444-451. On this point the court teaches:

. . . Legislative rules bind the court if they are within the agency's delegated authority, are reasonable, and were adopted using the proper procedure. See *Weyerhaeuser Co. v. Dep't of Ecology*, 86 Wn.2d 310, 314-15, 545 P.2d 5 (1976). Interpretive rules, however, are not binding on the courts at all: 'Reviewing courts are not required to give any deference whatsoever to the agencies' views on that subject {correctness and desirability of the agencies' interpretations}. Legislative rules therefore have greater finality than interpretive rules because courts are bound to give some deference to agency judgments embodied in the former, but they need not defer to agency judgments embodied in the latter.' [ARTHUR EARL] BONFIELD, [STATE ADMINISTRATIVE RULEMAKING § 6.9.1], *supra*, at 281-82. We have said as much. [footnote omitted]

Technically, interpretive rules are not binding on the public. They serve merely as advance notice of the agency's position should a dispute arise and the matter result in litigation. The public cannot be penalized or sanctioned for breaking them. They are not binding on the courts and are afforded no deference other than the power of

persuasion. Accuracy and logic are the only clout interpretive rules wield. If the public violates an interpretive rule that accurately reflects the underlying statute, the public may be sanctioned and punished, not by authority of the rule, but by authority of the statute. This is the nature of interpretive rules.

AWB at 446-447.

Under *AWB*, therefore, ***even interpretive rules formally adopted into the WAC are not binding***. It follows, *a fortiori*, that unadopted “interpretive statements” (*AWB* at 442, *supra*) – *that themselves interpret a rule and not even a statute* – have little force of law. Indeed it appears that such “interpretive statements” by agencies, (statements that have no basis in regulation or law), get minimal deference in the federal system as well, as the U.S. Supreme Court pointed out just last year. See *Wyeth v. Levine*, *supra*, *loc. cit.*

The requirement that an open lesion be actually present within seven days prior to the assessment (“look back period”) is clearly such an interpretive statement and is not an adopted “rule” at all. *AWB* at 443 citing RCW 34.05.210, .345, .390. (Testimony of Starkey, RPj 143)

We believe that the Department is *interpreting* and *applying* the rule illegally, irrationally, and unconstitutionally.

We have focused above on the seven day look-back period because without this invented construct, the Department’s interpretation – that clinical

complexity is entirely dependent on the fact of an open sore at the exact time of the assessment – is manifestly irrational. Attaching an artificial non adopted “guidance” rule on an irrational interpretation in order to try to give it credence is logically inexcusable and legally impermissible when a rational and logical interpretation is available.

c) Any Rational Interpretation of WAC 388-106-0095 Would Hold Dylan Kuehl To Be Clinically Complex

On its face, and without resort to the “guidance” of the seven day look-back period, WAC 388-106-0095 appears to have only two possible interpretations as applied to Dylan Kuehl:

A) He must both have “open lesions” *and* be the subject of wound/skin care regimen -- on the day of the assessment;

OR

B) He must be subject to an ongoing and chronic medical condition that includes the certainty of open lesions, *and* be the subject of an ongoing wound/skin care regimen when assessed.

As explained above, we believe that the “look-back” provision is an artifice when applied to section 388-106-0095 and the Department can show

no basis for its existence in any statute or published regulation and is thus void.

Interpretation # B above is the only one that comports with common sense, the underlying statute, rules of statutory construction, justice, and due process. This is true even if the “look-back” provision were not void.

There was no disagreement among any witnesses on a central core of facts:

a) Dylan Kuehl has, and for many years has had, a chronic skin condition (Declaration of Pietrusiak, AR 583-584, Rose RPj 186-190, 211-215, DSHS Nurse Lynn Weinacht RPm 32-33, AR 593) and Stewart case notes (AR 311-12, 325)); and

b) This condition is well known among many persons with Down Syndrome. Weinacht notes (AR 593); Declaration of Dr. Brandt (AR 584 et seq.), and is caused by immune system insufficiency (testimony and declaration of Dr. Brandt, (AR 584 et seq) and Stewart case notes (AR 311-312)); and

c) This condition in Dylan follows a regular progression on a more or less continuous basis from small red spot, to large pus-filled lesion, which will eventually open, drain, scab and often scar.

Mr. Kuehl's back, buttocks and legs are covered with such scars. (Testimony of Pietrusiak (AR 584) , Rose, RPj 186-190, Weinacht notes, AR 593); and

d) No treatment will prevent the appearance of the spots and progression to an open sore described in paragraph c above but adequate continuous skin treatment and strict attention to skin hygiene may lessen the number and severity of lesions (Testimony of Rose RPj 186-190, 211-215 AR 590, Pietrusiak AR 583-84, Dr. Brandt AR 588-89, and Nurse Weinacht, AR 593.); and untreated or inadequately treated lesions can result in severe illness and possibly even death, Brandt AR 588-589; and

e) Dylan is in fact subject to a daily and ongoing skin care regimen (Testimony of Rose (RPj186-190, 210-215, **and see** AR 590), Pietrusiak, AR 583-84, and Nurse Weinacht, AR 593, Kuehl (RPj 92 *et seq.*).

These facts are established. The Department's own witnesses affirm them. It is beyond debate that Dylan is subject of an ongoing, daily skin/wound care regimen which is set out in detail and unrebutted at AR 590. It is also beyond debate that he will develop open lesions as part of a chronic skin condition.

That the Judge Sturgis of the Board of Appeals found contrary to all of the evidence (AR 3) in this case is both mystifying and grounds for reversal. Judge Murphy's adoption of Judge Sturgis' findings as supported by substantial evidence without comment of how it could be so is equally mystifying. CP 125 (Conclusion #5). The Board of Appeal findings of facts are reviewed under the substantial evidence test. *Jefferson County v. Seattle Yacht Club*, 73 Wn.App. 576, 588, 870 P.2d 987 (1994) citing RCW 34.05.570(3)(e). To meet the substantial evidence standard, "there must be a sufficient quantity of evidence in the record to persuade a reasonable person that the declared premise is true." *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751-52, 49 P.3d 867 (2002); *Young v. Pierce County*, 120 Wn.App. 175, 84 P.3d 927 (2004). We can find *no* evidence that supports this finding.

d) The Department's Interpretation is Arbitrary and Capricious

Given these facts, the question of whether Dylan happens to have a lesion that is open and draining on the day of the assessment (or within the previous seven days) is a matter of complete chance. He has had them regularly in the past; he will continue to have them regularly in the future. Determining an award of benefits *for a year* by whether Dylan happens to have an open lesion on a particular day is the definition of arbitrary and capricious – i.e. unreasoning; controlled entirely by chance or whim without any adequate determining principle. *Blacks Law Dictionary*, 5th ed.

1984. “Arbitrary;” “Arbitrary and Capricious” p. 96. Given the undisputed facts, the Department’s interpretation of WAC 388-106-0095 as applied to Dylan Kuehl is the logical equivalent of a declaration that if Dylan is evaluated on a Thursday or Friday he will receive 25% fewer hours of support – for a year -- than if he is evaluated on Monday, Tuesday, or Wednesday.

Adopted regulations, no less than statutes, must be read to avoid an interpretation that results in absurd or strained consequences. *Lang v. State, Dep’t of Health*, 138 Wn.App. 235, 244, 156 P.3d 919 (2007), citing *Glaubach v. Regence Blue Shield*, 149 Wn.2d 827, 833, 74 P.3d 115 (2003).⁴

e) An Official Policy of Arbitrary and Capricious Action Is a Due Process Violation

An official policy of arbitrary and capricious action by a State actor in denying a government entitlement is a violation of the right of due process of law under the 5th and 14th Amendments to the U.S. Constitution, and is *per se* illegal under 42 USC §

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Moreover, if a client in Mr Kuehl’s position is sophisticated enough to understand the Department’s interpretation, he can schedule assessments for those times when he can be fairly certain that he will have open lesions (or at least have had one within the previous 7 days) given the approximate month-long window that he has for scheduling assessments. Testimony of Stewart, RPj 65-66. This perfectly lawful ability to “game the system” is precisely what the certainty and regularity of application of the CARE tool is designed to prevent. Moreover, such *regularity* of application to similarly situated persons is mandated by *Jenkins v. Washington State Dep’t of Social and Health Services*, 160 Wn.2d 287, 298-299 157 P.3d 388 (2007); and see 42 U.S.C. § 1396, and 42 CFR § 440.230.

1983. *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 125, 829 P.2d 746 (1992). While the state itself may be immune from a *damage* lawsuit under 42 USC § 1983 for such unlawful conduct, *Hontz v. State*, 105 Wn.2d 302, 309, 714 P.2d 1176 (1986), that does not make the conduct itself by individuals acting for the state any more lawful or constitutional. Such unconstitutional action is also grounds for reversal of the decisions below. RCW 34.05.570(3)(a).

And it is an ancient and fixed rule of statutory construction, which applies to any statute, rule, ordinance or other enactment, that if it is subject to an interpretation that comports with constitutional principles and an interpretation that does not, the former must be chosen. *In re Elliott*, 74 Wn.2d 600, 608, 446 P.2d 347 (1968)

f) The Department's Interpretation of WAC 388-106-0095 on Skin Lesions Is Inconsistent with the Remainder of That Section When Read as a Whole

Not only must adopted regulations be read both to be constitutional, *Id.*, and also to avoid an interpretation that results in absurd or strained consequences, *Lang, supra, loc. cit.*, they must also be interpreted as a whole, not based on the language of an isolated phrase or sentence. *Id.* When we examine WAC 388-106-0095 as a whole, the interpretation set forth as #B above emerges as the only logical interpretation.

Every item on the list of diagnosed conditions constituting clinical complexity

in this section is chronic and ongoing; and heightened treatment and/or care for the client is similarly ongoing. These include

ALS (Lou Gehrig's Disease), Aphasia (expressive and/or receptive), Cerebral Palsy, Diabetes Mellitus (insulin dependent), Diabetes Mellitus (noninsulin dependent), Emphysema & Shortness of Breath (at rest or exertion) or dizziness/vertigo, COPD & Shortness of Breath (at rest or exertion) or dizziness/vertigo, Explicit terminal prognosis, Hemiplegia, Multiple Sclerosis, Parkinson Disease, Pathological bone fracture, Quadriplegia, and Rheumatoid Arthritis.

Following this list of items we find as the next item:

“You have one or more of the following skin *problems*:

...

Open lesions;

...

AND

...

Wound/skin care . . . “

The language is not skin “symptoms,” but “problems” which when read in *pari materia* with the previous list as it must be (see, *Monroe v. Soliz*, 132 Wn.2d 414, 425, 939 P.2d 205 (1997); *King County v. Taxpayers of King County*, 104 Wn.2d 1, 9, 700 P.2d 1143 (1985)) must mean chronic skin problems, not acute symptoms occurring just at the time of the assessment. Indeed, if the only requirement is that the client had an open lesion and was receiving treatment in the form of a dressing for it just at the time of the assessment, many whose skin lesions were an isolated event would qualify for a windfall that could not be justified under any rational interpretation of this rule.

And those with chronic skin lesions who did not, by chance, have an open lesion on the day of the assessment (or in the previous seven days) would be deprived of the very medical and personal care necessary to minimize the effects of the chronic lesions, a result that irrationally subverts the purpose of the rule (and the statute).

That Interpretation #B is the correct interpretation is reinforced by the requirement that the skin “problem” must also be subject to ongoing care and treatment. As the list of qualifying conditions at the beginning of the regulation makes clear, clinical complexity derives from the ongoing and time consuming nature of treatment and ancillary client care, not the transitory presence of an isolated symptom.

The evident underlying purpose of WAC 388-106-0095 is served by this interpretation. The inherent structure of the CARE tool’s clinical complexity multiplier demonstrates that the reason an additional award of personal care services under that section is granted is not only because treatment for the actual condition might be time consuming but because other activities of daily life take longer. It is a multiplier above base hours for the increased complexity of care in all its forms. (Engels testimony Rpm 63-64). This is evident from the face of the rule by the inclusion of such items as aphasia, which manifests itself as an inability to speak and/or understand articulately. Although there may be therapies to treat different

forms of aphasia, they are the job of the professional therapist, not the personal care provider. The only logical reason for its inclusion in this section is that all of the basic requirements of care are assumed to take longer for the inarticulate client. The Department's witness appeared to confirm this. Engels testimony, *id.*

Thus, interpretation #B, when taken as a whole, is rational, logical, constitutional, and comports with the intent of the chapter, the underlying statute, and common sense. The Department's interpretation is none of these things. The decisions of the tribunals below constitute a basic and clear error of law and must be reversed on those grounds as well. RCW 34.05.570(3)(d)

g) Federal Guidance Documents

Before the Superior Court, the Department opined that the 7 day look back period for the appearance of lesions, which the department applies to WAC 388-106-0095 on clinical complexity, is based on federal guidelines. CP129 et seq. If the cited guidance document is, in fact, the derivation of the imposition of an un-adopted 7-day look back period to the adopted terms of WAC 388-106-0095, this court has even more reason to find it arbitrary and unlawful.

We first note that these federal guidelines were not part of the original case, and the parties stipulated to their admission after Petitioner's briefing was filed in superior court, but this is not the basis of our problem.

The problem is that the federal guidance documents are written for a completely different assessment process than the once yearly in-home needs assessment at issue in this case. They are therefore completely irrelevant to the discussion here.

This fact becomes obvious with a glance at the title and contents of the document. The title is,

Revised Long-Term Care Facility Resident Assessment Instrument User's Guide.

CP 141

This document was written for guidance in the evaluation of long term care facilities presumably with skilled nursing staffs who chart resident progress daily. The more formal assessment processes take place, according to the table of contents, at 5, 30, 60 and 90 day intervals. (Page ii CP 143). The authors would surely be surprised indeed to find that the this guidance *for use in long term care and skilled nursing facilities* was being misused in order to determine an entire year's care levels of ongoing and difficult to manage medical problems based on a single seven day snapshot once per year. That is not assessment, it is dice throwing.

And it is probably why the no snapshot even with look back period for medical complexity was adopted by rule in the CARE assessment code. Such a snapshot policy is so facially arbitrary that it could not have survived rule-making scrutiny.

The superior court ruled that it was not an unreasonable interpretation of the of the regulation. CP 125-126.

Thus, Judge Murphy, after conceding a certain arbitrariness in the effect of the regulation, went no further in deciding whether such arbitrariness as applied to Mr. Kuehl and others similarly situated, transgressed constitutional lines other than to recite that it did not CP 126. We believe the record in this case as set forth and argued above makes clear that the interpretation of the Department here transgresses that line, especially where there is an alternative interpretation that does no violence to constitutional principles.

3. Conclusion

The Department's interpretation that Dylan, someone who has chronic open lesions as part of a recognized medical condition is not clinically complex must be overturned under RCW 34.05.570(3)(a),(d) and (i) because it is based on an unconstitutional, and arbitrary and capricious application, and clearly erroneous interpretation of WAC 388-106-0095. As well, it must be overturned under RCW 34.05.570(3)(e) because it is based on a finding that is entirely unsupported by the record, specifically that Dylan does not have an ongoing certainty of developing open lesions as a part of a chronic and well recognized medical condition. Finally it must also be overturned under RCW 34.05.570(3)(c) because it is based on an unlawful

procedure or decision-making process, specifically, a void unadopted "rule" in its application of WAC 388-106-0095, which "rule" is necessary to its erroneous interpretation of WAC 388-106-0095.

Respectfully Submitted,

April 19, 2010

KALIKOW LAW OFFICE

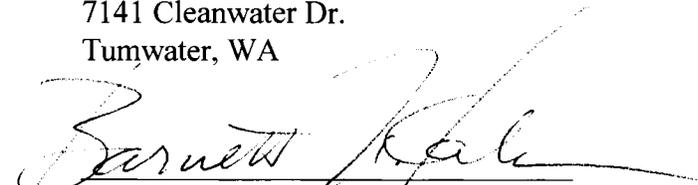


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CERTIFICATION

I hereby certify under penalty of perjury according to the laws of the state of Washington that I am the attorney in the above entitled cause and that on April 19, 2010, I personally delivered the APPELLANT'S OPENING BRIEF to which this certification is affixed to

Jonathon Bashford, AAG
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