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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.*

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Appellant's Reply Brief

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## I INTRODUCTION / SUMMARY

The State's argument on notice basically amounts to a contention that if you throw enough raw data at the client, he'll find notice in there somewhere. But just as provision of an unabridged dictionary would not be adequate notice even though it contains all of the words necessary to form adequate notice, (and their definitions); provision of a lot of raw data without any way to translate it into "[detailed] reasons for a proposed termination" of benefits (*Goldberg v. Kelly*, 397 U.S. 254, at 267- 268, 90 S. Ct. 1011 (1970)) does not provide any better notice.

We identified and listed in our opening brief the well-established and settled reasons for, and properties of, constitutionally adequate notice. The state chose to ignore all of those reasons and characteristics and instead proclaim that all of the raw data of the 3-6 hours of questions and answers provided in the assessment interviews was adequate notice. Until the state can explain to this court how this form of "notice" performs the following functions, the State cannot claim that it provided constitutional notice:

1. Apprises 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); and

2. “clarif[ies] the issues to be considered” by the reviewing tribunal. *In re Gault*, 387 U.S. 1, 34, fn. 54, 87 S.Ct. 1428 (1967); and
3. “afford[s] [assistance recipient] 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); and see, *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976).

At best, what the State provides is a form of notice that is calculated to lead to ineffectual challenges by allowing an appellant to “marshal facts in defense” of issues that don’t matter, while hiding the issues that do. That is precisely what happened in the early stages in this case. Appellant was forced “to shoot in the dark” in the appeal until he could to hire an attorney, who had a meeting and several phone calls with department staff before the actual reason *and only reason*, for a reduction in services was disclosed.

We raised a number of specific challenges in the our opening brief on the issue of clinical complexity which were mostly unanswered by Respondents, or were answered by editing of the actual language of the WAC section at issue. The core problem with the State's application of the that section (WAC 188-106-0095) is that reading it as the state does: that a symptom (rather than the underlying condition, as we read it) has to be present at the once-per-year assessment is facially and obviously arbitrary and capricious when thousands of dollars and hundreds of hours of care are at stake. It is so clearly arbitrary that the State is forced to engraft an even more arbitrary 7-day period (which was completely unsupported by the text of the regulation) on to the "be visually present" interpretation to rescue it from the realm of complete nonsense. Doing so violates every canon of statutory construction. This includes the canon that states that when the code specifically defines where and how the "seven day look-back" provision is to be employed, you cannot then use it in some context outside those defined situations.

And because the very same code section (WAC 388-106-0095) explicitly states when a need or behavior must be actually present within the 7- day window of the assessment, it seems clear that the Department cannot

apply such parameters when it is not explicit, and their interpretation is entirely unsupportable. *State of Washington v. Dydasco*, 85 Wn.App. 535, 933 P.2d 441 (1997)

In its quotation of the relevant portions of the actual regulation, the state takes to editing out, with ellipsis, those portions of the text that do not support their strained interpretation.

The issue here really is the extent to which an agency can stretch logic and language before it no longer is given deference in its interpretation of a regulation. This issue is an important one generally and not just in this case.

## II ARGUMENT

### A) NOTICE

#### 1. Documents Allegedly Constituting Notice

On page 26 of respondents' brief they set out the documents that furnished what they consider to have comprised constitutional notice when taken together. They are the Planned Action Notice, (AR 557 to 562) the New Service Summary (AR 294-299) and assessment details (AR 300 - 332). Respondents admit that these are the only documents provided as notice and were the only documents upon which a timely appeal could be based. Other documents were provided some months later after and appeal had been filed

and counsel retained. We are confident the court will take the time to review these “notice” documents but it is important to point out what they are and are not.

a) Planned Action Notice (PAN, hereafter) (AR 557 to 562)

The Planned Action Notice consists of two parts: The first part announces the reduction in services and contains a series of check boxes that list the ostensible “reasons” for the reduction in service. For Mr. Kuehl, the “reason” checked was “It has been determined you do not have an assessed need for the amount of service you requested or previously had.” AR 557.

Obviously taken alone, this phrase does not apprise anyone of anything.

The second part of the Planned Action Notice consists of a transcription of the WAC section containing part of the CARE assessment scoring parameters. It contains no information at all on Mr. Kuehl’s case and thus no information from which he could derive the reasons for his reduction in service. It also contains no information on how the base hours are derived, upon which the final hours are calculated. It will be immediately apparent to the court when reviewing this section of the PAN that this mathematical “algorithm” requires significant training to use it to reach a service level even

if the information on each of its sections were, in fact, provided (which they are not). It is only an outline of how in a given case (but not this specific one) the unexplained base hours can be adjusted up or down. AR 557.

b) New Service Summary.

The new service summary sets forth who Mr Kuehl's providers are and how they are paid. Respondents make no argument as to why this is relevant to "timely and adequate notice detailing the reasons for a proposed termination," *Goldberg v. Kelly*, 397 U.S. 254, at 267- 268, 90 S. Ct. 1011 (1970), and after reviewing this document, we can find of none.

c) Assessment Details

We first point out what this is *not*. It is not a scoring sheet and does not contain a scoring sheet, and no one, without specific outside knowledge -- and a separate scoring sheet -- could determine a level of service with just this information, *even when combined with the WAC section (388-106-0130) transcribed in the PAN*. It also contains little or no information on what has changed from the previous assessment. It does not follow the CARE assessment guide set forth in WAC 388-106-0130 and transcribed in the PAN in any coherent way. It contains no information on how the different questions and answers relate to the category scores in WAC 388-106-0130.

What it is: This is a detailed recording of the information in the questions asked and answers given or recorded by the caseworker during an assessment that lasted many, many hours. That is all it is.

It is interesting to point out that respondents *do in fact have a scoring sheet* that their workers, at least, are trained to use to make sense of all of the raw data contained in the assessment details provided. It is found at AR 333-346. Respondents, at page 27-28 of their brief, fully admit that they do not and did not provide it until months after an appeal had been lodged and an attorney retained who demanded to know the “reason for the termination.”

It is also important to note that even if they *had* provided this scoring sheet, it would not have availed Mr. Kuehl in informing him or the reason for withdrawal of his support without an analogous sheet from the previous assessment to show what had changed.

Respondents make much of the fact that the assessment details might have been deemed sufficient in *Baker v. Alaska*, 191 P.3rd 1005 (2008). (It is not clear whether just the details without some guidance as to how they were scored would have been sufficient. The *Baker* court simply said that the “reasons” given to the recipient in that case were constitutionally inadequate) Respondents neglect to point out the signal difference there, however. *Baker*

involved Alaska's *first use* of its equivalent of the CARE assessment so that there was no way the State could do more than show how the answers to the assessment questions were recorded, and how they were coded and scored to arrive at a final number – this they did not do

Mr. Kuehl, by contrast had gone through the assessment process at least three times previously. All the Department needed to do was compare the score sheet for Dylan that was finally produced with the previous one, see what had changed, and notify Mr. Kuehl of the “reason for the termination.”

## 2. Comparison of Notice Provided with Constitutional Requirements of Notice

We now compare the attributes of what was provided against the established criteria of constitutional notice. These are set out above (§ I, Summary) with citation and copied here without citation as follows:

- a. Apprises 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.
  - b. Clarifies the issues to be considered by the reviewing tribunal.
  - c. Affords assistance recipient a degree of protection from agency error and arbitrariness in the administration of benefits
- a) Apprises 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.

It seems to us self evident that unless one is told the actual reasons for the deprivation it is impossible to marshal any facts in one's defense.

The actual reason for the loss of hours of service was entirely the fact that Mr. Kuehl got one week's respite from open sores on his body. The department was clear on this matter at hearing. RPj 134, 138 et seq.

No reasonable examination of the documents listed above constituting "notice" could lead to a conclusion that Mr. Kuehl or his mother could have derived this actual reason from them. His sores are *chronic* and even the case worker noted this fact in the assessment details. AR 311-12, 325. Nothing in the PAN and associated documents told appellant that the fact that no sores were actually open and weeping at the precise time of the assessment would make any difference. He had no way to lodge an appeal with any specificity on the real reason for the service withdrawal.

What this notice does, combined with the opinions of the caseworkers and the few areas noted in the assessment details with which Mr. Kuehl clearly disagreed, is to lead them to file a completely ineffectual appeal, that is, to appeal based on issues that had no effect on the loss of service.

They had no ability to "marshal facts" from that notice that would have

been availing in their defense because one item that did make a difference and caused the entire planned loss of service was not disclosed, even by inference, in the proffered “notice.” Furthermore, they had been given positive misinformation on the reason for the loss. AR 566.

Respondents explain that the theory of the CARE assessment tool is that many factors combine together to form a level of service score which translates into hours of service. They get from this theory to an argument that the caseworker’s assessment details are the best notice that could be provided. They make much, for example of the fact that Mr. Kuehl’s coding for “ability to communicate” was changed from “sometimes understood” to “usually understood.”<sup>1</sup> The problem with this argument is two fold:

First, In theory this may true; in practice, however, many small changes in scoring of different parts of the assessment may have no effect on the outcome; and conversely, one change, independent of all of the others can have a great influence on the outcome. That was the case here. The case worker was aware of small changes in coding in certain areas, which she

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This change did not result from any improvement in Mr. Kuehl’s ability to communicate, but rather a change in coding to what Ms. Stewart’s supervisor considered to be more accurate, i.e. the belief that previous coding has been inaccurate. AR 566.

opined might have been reason for the drop services, when in fact they had no effect on the service level AR566. This included the change in coding for Mr. Kuehl's level of understanding. It had *no effect* on his service level. This caused appellant to waste time and energy appealing matters that made no difference, while being kept ignorant of the one thing that did make a difference.

Second, were the theory entirely true in this case, actual notice of the "reasons" still could have been provided by pointing to all the parts of the assessment score that changed, and why.

The first and most important requirement of notice is certainly not met: The documents constituting "notice" provided no reason for the deprivation in a manner that would allow Plaintiff any ability to marshal facts in his defense.

b. Clarifies the Issues to Be Considered by the Reviewing Tribunal.

No one, including the state's agents, had any idea of what the issues were until the 3<sup>rd</sup> prehearing conference, because no one knew the actual reason for the deprivation of services announced. The appeal did not get to the real issue until then because appellants were unaware of it. Even the State did

not know until late February when Ms. Starkey was able to analyze the scoring of the assessment, after first being unable to determine the reason. RPj 139.

The second purpose of notice is not met: the only dispositive issue to be considered by the reviewing tribunal could not be determined from this alleged “notice.”

c. Affords Assistance Recipient a Degree of Protection from Agency Error and Arbitrariness in the Administration of Those Benefits

As we pointed out in our opening brief, the type of notice received by Mr. Kuehl was calculated to ensure that Department error or arbitrariness would go unchallenged because there was no way, from this notice, to “check the work” for even mathematical errors, let alone errors in coding of CARE results or any other error or arbitrariness. Thus, the material error eventually alleged in this case, arbitrary and capricious application of WAC 388-106-0095, would never have been detected based on the State’s version of notice without appeal and repeated inquiries.

Again we emphasize, as in the opening brief, that the Department personnel themselves *did not know the reason for the reduction* at the time the PAN went out. AR 566, RPj 138-139. They had not even checked their own work, and gave Mr. Kuehl no tools or ability to check it in the PAN or associated documents.

Respondents claim that Mr. Kuehl was able eventually to get all the answers after the appeal was filed but before actual deprivation of services.

It is elemental that notice that requires lodging an appeal, hiring counsel, and three months delay before sufficient facts are divulged to discover the reason for the deprivation is not notice sufficient under *Goldberg*. See *Vargas v. Trainor*, 508 F.2d 485, 489-90 (7<sup>th</sup> cir. 1974), cert. denied, 420 U.S. 1008, 43 L. Ed. 2d 767, 95 S. Ct. 1454 (1975). We explain this again because the Department's defense demonstrates that it has misunderstood this requirement of constitutional notice.

The attributes of notice that are required as a check against error and arbitrariness are so required because most individuals receiving assistance, by definition, rarely have ability or wherewithal themselves to file and carry through an appeal or obtain counsel to assist them. The notice itself is supposed to make enough clear to the recipient that he can spot what he believes is error and ask the agency to correct it.

In a case where the plaintiff had exactly the same appeal rights as here (a ten day window for appeal without benefit loss ( AR 561), the 7<sup>th</sup> circuit in *Vargas v. Trainor*, 508 F.2d 485 (7<sup>th</sup> cir. 1974), cert. denied, 420 U.S. 1008, 43 L. Ed. 2d 767, 95 S. Ct. 1454 (1975) held,

The notice is addressed to persons who are aged, blind, or disabled, many of whom, defendant could have anticipated, would be unable or disinclined, because of physical handicaps and, in the case of the aged, mental handicaps as well, to take the necessary affirmative action. Within what was left of the ten days after they received the notice, they were required either to manage to meet with their caseworkers and learn the reasons for the proposed action and then decide whether to appeal, or to appeal without knowing whether an appeal might have merit. If they failed to do either, their benefits were reduced or terminated without their being advised why. Under such a procedure only the aggressive receive their due process right to be advised of the reasons for the proposed action. The meek and submissive remain in the dark and suffer their benefits to be reduced or terminated without knowing why the Department is taking that action.

This is of course the exact same situation Plaintiff found himself in here. The *Vargas* court then continued as follows:

Government agencies do make mistakes. Yet there is a human tendency, even among those who are more experienced and knowledgeable in the ways of bureaucracies than the aged, blind, and disabled persons before us in this case, to assume that an action taken by a government agency in a pecuniary transaction is correct. Unless the welfare recipients are told why their benefits are being reduced or terminated, many of the mistakes that will inevitably be made will stand uncorrected, and many recipients will be unjustly deprived of the means to obtain the necessities of life.

*Vargas* at 489-90

The third purpose of notice is not met: The alleged “notice” documents were clearly insufficient to provide a check against error or arbitrary action. The fact that the Department itself did not know the actual reason for the reduction (and thus did not know institutionally if an error had been made)

before it sent out the notice seems to us logically conclusive that the notice could not have provided a check on government error to its recipient

B) CLINICAL COMPLEXITY

The facts as are set forth in the record and the regulation *as written* lead to the inevitable conclusion that Mr. Kuehl is clinically complex Under WAC 388-106-0095. The Respondents therefore have subtly changed the facts and not so subtly edited the regulation more to their liking in their reply brief.

Such editing puts into initial question any deference the court owes to the Agency.

1. Deference to Administrative Interpretation of Regulations

“Although a high level of deference is accorded to an agency's determination under the Administrative Procedure Act, such deference will not lie where an agency's decision is based on an implausible interpretation of its regulations.” *Overlake Hospital Association v. Dep't of Health*, 148 Wn.App. 1, 200 P.3d 248 (2008). Interpretation of regulations is purely a question of law, *St. Francis Extended Health Care v. Department of Soc. & Health Servs*, 115 Wn.2d 690, 695, 801 P.2d 212 (1990), and the deference accorded to the agency does not place the reviewing court “in the role of a mere rubber stamp,

acquiescing in blind, rigid obeisance to the omnipotent expertise of the particular administrative agency involved.” *Farm Supply Distributors Inc. v. Washington Utilities and Transportation Commission*, 8 Wn. App. 448, 451, 506 P.2d 1306 (1973).

In *Clark v. City of Kent*, 136 Wn.App. 668, 150 P.3d 161 (2007), the court summed up the rules of statutory construction used to interpret regulations:

When interpreting an administrative regulation, we follow the general rules of statutory construction. Our primary goal is to determine and give effect to the agency's intent and the regulation's underlying policies. If the language of the regulation is clear, its plain meaning will reveal the agency's intent. As with statutes, a regulation is to be considered as a whole, giving meaning to all of its parts. Strained meanings and absurd results should be avoided. When interpreting statutes and regulations, courts are not required to abandon their common sense. If the language of the regulation is ambiguous in that it is subject to more than one reasonable interpretation, we may look to outside sources such as legislative history to determine the agency's intent.

136 Wn.App at 672 (multiple footnote citations omitted).

We believe that to acquiesce to the interpretation of the department in this case would be to adopt “strained meanings” and “absurd results,” and an abandonment of common sense. *Id.*

2. Changing the Facts.

Respondents state as a central basis of their argument the fact that

Mr. Kuehl argues that he should have been coded as clinically complex at the time of the assessment because he often has open lesions caused by sebaceous cysts and continues to require skin care even when he has no open lesions on his body.

Respondent brief at 18

Were this what Mr. Kuehl were actually arguing we would not be here.

In actual fact the converse construction is accurate: Mr. Kuehls sometimes gets brief relief from the open sores that are a recognized characteristic of an underlying chronic condition. The witnesses , expert and lay, plaintiff and defendant were completely unanimous on this point. The sores he gets are chronic, inevitable and ongoing, and are a well known characteristic of many who have Down Syndrome. No amount of care and treatment will prevent them because they are a characteristic of one of the genetic disorders that come with Mr. Kuehl's Down Syndrome. Declaration of Dr. Brandt (AR 584 et seq.); Testimony of State's witness, Lynn Weinacht, RN, (RPm 32-33); Weinacht case notes (AR 593); CARE assessment notes by DSHS caseworker Stewart, (AR 311-312, 325); Declaration of Pietrusiak, AR 583-584; Testimony of Terri Rose (RPj 186-190, 211-215).

If, in fact, it were true that Mr. Kuehl just sometimes or even "often" gets these lesions, and it weren't true that

"Dylan has a long standing history of sebaceous cysts, seborrheic

dermatitis, and recurrent folliculitis with resultant staph/bacteria/fungal cutaneous infections common to those with Down syndrome. At any one time [Dylan] will exhibit several lesions in various stages of healing/eruption.” (Case notes of Lynn Weinacht, RN, DSHS witness, AR593),

then even under our interpretation of the regulation in question, Mr. Kuehl would not be classified as clinically complex. But these *are* the facts, and in light of these facts, WAC 388-106-0095 cannot be rationally interpreted other than to find him clinically complex.

3. Editing the Law.

The next ploy Respondents use is to edit the actual regulation with ellipses to make their point. They write:

WAC 388-106-0095 is written in the present tense, such as you **have** one or more of the following criteria and corresponding [activities] scores” and “you **have** . . . open lesions.” (emphasis [and ellipsis] added [by respondent])

Respondent brief at 20.

But that is not what WAC 388-106-0095 actually says. Ellipses are to be used where nothing material is left out, not to take out significant phrases to change the meaning of the text. *Epley v. Department of Labor and Industries*, 191 Wash. 162, 177, 70 P.2d 1032 (1937) (Tolman, J. dissenting).

The actual text reads:

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

...

- Open lesions;

*(italic indicates text omitted by Respondents)*

That is quite different. There is no doubt that Mr. Kuehl suffers with the skin problem of open lesions. They are not occasional, they are constant and chronic and follow a pattern of formation, eruption and healing. RPj 176, Pietrusiak testimony; AR 593, Weinacht notes; and no amount of care will prevent this pattern from occurring. AR587-588 Brandt declaration.

4. Application of the regulation, current or chronic?

Let us first recognize this fact: The assessment is generally run once per year. WAC 388-106-0050(1); not weekly, and not monthly. It determines the level of service for a year, not weekly or monthly.

With this fact in mind, the only reasonable interpretation of the regulation (WAC 388-106-0095) is that, except where the text makes a contrary interpretation explicit (as it does within this very section), all of the “problems” or other needs listed must be chronic and ongoing problems, not transitory symptoms or needs. Otherwise the obvious difficulty arises of granting a year’s windfall of support for a transitory condition or care need and denying a year’s support for a very real and ongoing condition or care need.

We have previously pointed out in our opening brief that there is a list of conditions and diseases at the beginning of the section (WAC 388-106-0095) that automatically constitute clinical complexity once personal care needs reach a certain level. Are all constant, chronic and ongoing. The remainder of the section includes conditions and care needs that are usually not specific to any particular disease or syndrome but can occur in many situations and as an adjunct to many diagnoses. It seems to us that they must be considered in *pari materia* with the original list, both as a matter of statutory construction and as a matter of common sense.

Consider the absurd results mandated by the State's interpretation:

- ◇ A mild to moderate burn that requires a dressing to avoid infection just at the time of the assessment mandates a large increase in support for a year.
- ◇ A change in medication causes transitory swelling in the clients hands and feet (edema) just at the time of the assessment. She gets 25% more support for a year even though the problem is diagnosed and successfully treated ten days later.
- ◇ An acute infection causes renal failure requiring kidney dialysis for a few weeks until the infection can be treated and kidney function

restored. This happens at the time of the assessment. The taxpayers are on the hook for a year's worth of unnecessary extra personal care costs.

- ◇ A young man has Down Syndrome and concomitant chronic skin infections and open sores that unaccountably give him an entire week when none of the lesions are actually open and weeping. Because this happens precisely at the time of the assessment. He loses the support for a year that has kept the skin problems to a manageable level for the previous four years.

The last example is no less absurd than the previous three. All are the results of the State's peculiar reading of this section.

5. A Close Reading of the Regulation (WAC 388-106-0095) as a Whole Shows That the Drafters Knew How to Make it Explicit *When a Symptom must Be Present Precisely at the Day of the Assessment or Within 7 Days Thereof and Chose Not to Do So in the Subsection Concerning Skin Problems.*

As we pointed out above, “as with statutes, a regulation is to be considered as a whole, giving meaning to all of its parts.” *Clark v. City of Kent*, supra, loc cit. As the court put it in *Aponte v. State, Dep't of Soc. & Health Servs.*, 92 Wn. App. 604, 617-618, 965 P.2d 626 (1998), “courts must give effect to every word, clause, and sentence [of the regulation] whenever

possible; no part should be deemed inoperative or superfluous unless the result of obvious mistake or error.”

In this regulation, indeed in this section of the regulation, the drafters made clear that they knew how to create a temporal limit on the manifestation of a problem or specific need.

Thus, when the drafters wanted to limit the clinical complexity finding to a manifestation that occurs every day they wrote: “You have pain daily,” and “You are <18 and you have pain related to your disability and you complain of pain or show evidence of pain daily.” WAC 388-106-0095.

**In fact, the drafters even showed that they knew how to limit the finding of complexity to a manifestation that occurs only at the day of the assessment specifically or within the previous seven day “look back” period. They did so. They wrote: “You have a *current* swallowing problem, and you are not independent in eating.” WAC 388-106-0095. (*Italic added*)**

We remind the court that the term “current” specifically means a behavior that occurs at the day of the assessment or within the previous seven days. WAC 388-106-0010, definition “current.” Opening brief at 33-34.

The maxim of *inclusio unius est exclusio alterius* applies. *State of*

*Washington v. Dydasco*, 85 Wn.App. 535, 933 P.2d 441 (1997). It appears to us fairly conclusive that the open sores referred to earlier in the same section *must* be interpreted to mean a chronic manifestation of a problem that the client has but not necessarily open and weeping on the day of the assessment.

6. Federal Guidance Document

We pointed out in our opening brief that the federal guidance document relied on by Respondents refers to patients who are in long term care institutions and whose needs are reassessed constantly, not once per year. It has no relevance in this case where Mr Kuehl is generally assessed once per year, lives independently, and is cared for by his mother.

C) STANDING

Respondents argue that Mr Kuehl has no standing to pursue this appeal because the lost hours of service have been restored so he can not benefit even if he prevails. The claim ignores a number of issues.

a. Until the notice issue is resolved, Mr. Kuehl is still subject to yearly assessments and thus the possibility of loss of current levels of support without constitutional notice and the enormous expense that would entail going through this process again; and

b. The restored hours are due to recoding behavior criteria in a later

assessment which hours replaced the clinical complexity finding. Although recognition of clinical complexity now would not add to those hours, behavioral issues (in contrast to cognitive or medical issues) may be subject to alteration which may change his need for services for behavioral issues. His chronic skin lesions are never going away.

c. During the period from the time the appeal was lodged in this case until the time when Mr. Kuehl was reassessed, he was receiving paid care for the disputed hours. He is subject to reimbursement of a large portion of those hours unless he prevails on appeal. (See AR 561). Because Mr. Kuehl has limited independent resources, it would be difficult to collect on this debt, but he does earn a small number of dollars from his arts business that could be garnished if the state so chose. Although this is an insignificant sum to most people, it is hugely important to Mr. Kuehl's self-esteem and would be a devastating loss. Success would remove this cloud from his horizon.

Finally, Attorney fees in this case have not been inconsiderable. He stands, and through him those who have supported him in this endeavor stand to recoup a significant amount spent in his interest.<sup>2</sup>

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Attorney fees for seeking review in this case are statutory under RCW 74.08.080(3), and must be (and were (CP 6)) sought in the superior court which constituted the first level of appellate review. Thereafter the request need not be repeated

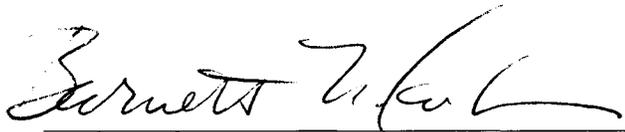
This case is not moot, and Appellant materially benefits in significant ways from prevailing.

### III CONCLUSION

The notice provided to Appellant was insufficient, and contained none of the attributes of constitutionally sufficient notice in this case. The Department's interpretation of the clinical complexity regulation is strained, implausible and leads to absurd results – it also violates major canons of statutory construction and must be stricken. Mr. Kuehl fits the complexity standard under the plain language of the regulation. Mr. Kuehl certainly has standing to pursue this appeal.

Respectfully submitted,  
July 23, 2010

KALIKOW LAW OFFICE



Barnett N. Kalikow, WSBA #16907  
Attorney for Appellant Kuehl

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at each subsequent level of review. RAP 18.1

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.*

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Certification of Service

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Barnett N. Kalikow  
Attorney for Dylan Kuehl

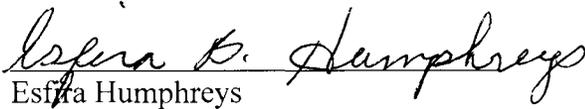
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CERTIFICATION

I hereby certify under penalty of perjury according to the laws of the state of Washington that am of legal age and competence and that on July 23, 2010, I placed in the US mail, postage pre paid, the APPELLANT'S REPLY BRIEF addressed to

Jonathon Bashford  
Assistant Attorney General  
P.O. Box 40124  
Olympia, WA 98504-0124

  
Estira Humphreys