

41076-1-II
NO. 84128-4

SUPREME COURT OF THE STATE OF WASHINGTON

DYLAN KUEHL,

Appellant

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

RESPONSE BRIEF

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I. INTRODUCTION

Under the federal Medicaid program, in-home caregivers are provided to disabled individuals who require assistance with personal care tasks such as eating, bathing, and personal hygiene. The Department of Social and Health Services completes an annual comprehensive assessment to evaluate the level of functional disability of persons eligible for services. The assessment is used to allocate services statewide in a uniform manner.

In 2007, Dylan Kuehl received an updated assessment. Based on a number of changes in his condition, the Department determined that Mr. Kuehl was eligible for fewer hours of personal care services per month than he had previously received. Mr. Kuehl was provided with notice of the change, as well as a full copy of the Department's findings supporting the new level of services. The notice was more than adequate to allow Mr. Kuehl an opportunity to contest the Department's decision.

Mr. Kuehl argues on judicial review that his skin care needs at the time of the assessment should have resulted in a finding that he is "clinically complex" under WAC 388-106-0095. The Department properly refrained from providing funding for care of non-existent sores. However, even if the Department assumed that sores would occur in the

future, that single factor would not change the outcome of the comprehensive assessment. Given the changes in Mr. Kuehl's overall condition, he has not shown that he suffered prejudice from the Department's determination that he is not clinically complex. He therefore has no standing, nor any available remedy under the Administrative Procedure Act.

II. COUNTER-STATEMENT OF ISSUES

1. Did DSHS provide Mr. Kuehl with constitutionally adequate pre-deprivation notice of a change to his public benefits by providing written notice of the new benefit level, the factual findings that support the new benefit level, copies of the relevant administrative rules, and charts demonstrating how those rules apply? (Appellant's Issues A-B.)

2. Under WAC 388-106-0095, a person is "clinically complex" if he has open skin lesions and requires assistance with skin care. Did the Department correctly apply the plain language of the rule in finding that Mr. Kuehl did not "have . . . open lesions" because he had no open lesions at the time of the assessment or within the prior seven days, and only required assistance with skin care to help prevent open lesions from forming? (Appellant's Issues C-E.)

3. Did DSHS reasonably apply WAC 388-106-0095 to include only open skin lesions present within seven days of the CARE assessment date, including the day of the assessment; given that a seven day look-back period is part of the definition of skin condition in the clinical studies and federal instrument upon which the rule is based, and given that the CARE assessment generally uses a definition of “current” that includes the previous seven days? (Appellant’s Issues F-I.)

4. RCW 34.05.530 provides that there is no standing to obtain judicial review of agency action unless the action prejudiced the petitioner and judgment in favor of the petitioner would eliminate or redress the prejudice caused by the action. Does Mr. Kuehl have standing to bring this judicial review petition, where he has alleged no injury and requests no remedy?

III. COUNTER-STATEMENT OF THE CASE ¹

A. The CARE Assessment, Generally

Disabled individuals who live in the community may be eligible for a number of services funded by the state and federal governments, including Medicaid. “Personal care services” is one of the 28 categories

¹ References are to clerk’s papers (CP); the agency adjudicative record (AR); the Verbatim Report of Proceedings for the portion of the administrative hearing held on May 5, 2008 (May VRP); and the Verbatim Report of Proceedings for the portion of the administrative hearing held on June 16, 2008 (June VRP).

of medical assistance available under Medicaid. 42 U.S.C. § 1396d(a)(24). The state Department of Social and Health Services (DSHS) defines personal care services as providing “physical or verbal assistance with activities of daily living (ADL) and instrumental activities of daily living (IADL) due to [a client’s] functional limitations.” WAC 388-106-0010. State regulations define twelve separate activities of daily living (eating, toilet use, bathing, body care, personal hygiene, dressing, medication management, and five different types of mobility) and seven instrumental activities (meal preparation, housework, essential shopping, travel to medical services, managing finances, telephone use, and sourcing firewood for homes with only wood heat). *Id.* Personal care services thus assist disabled persons with basic tasks of hygiene and living that non-disabled adults perform for themselves.

DSHS is required to “design and implement a means to assess the level of functional disability of persons eligible for personal care services” in order to ensure that services are directed toward those with the highest levels of need. RCW 74.09.520(4). In response to legislative reform of long-term care services in 1995, DSHS developed a “uniform system for comprehensively assessing functional disability” as required by RCW 74.39.005(2). May VRP at 51; Laws of 1995, ch. 18. The result was an assessment instrument called the Comprehensive Assessment

Reporting Evaluation (CARE), which is a detailed questionnaire used by the Department to evaluate a client's eligibility for long-term care services and develop an individual care plan. *See generally* chapter 388-106 WAC.²

The CARE assessment is based on a widely-used assessment instrument called the Minimum Data Set. CP at 139. The data set was originally developed in the 1980s for the U.S. Department of Health and Human Services as part of an assessment instrument for use in nursing homes. May VRP at 51; CP at 139, 146-47. Since that time, the data set has been updated and expanded for use in other care settings, including for individuals who live in the community. May VRP at 51. The federal data set "has been proven to be a reliable indicator of a client's need for personal care." CP at 139; *see* May VRP at 51-52.

To administer the CARE assessment, a DSHS case manager meets with the client and the client's caregiver or representative to enter detailed facts about the client's functional abilities into a CARE computer database. *See* CP at 361-527 (CARE data entry screens and "help screen"

² Developmentally disabled clients of DSHS are also assessed under chapter 388-823 WAC.

information). The assessment process takes about three hours or longer. June VRP at 61, 205. CARE includes questions measuring the client's ability to self-perform all 19 activities of daily living and instrumental activities, and the type of assistance needed if any. WAC 388-106-0105. CARE also includes questions to measure the client's cognitive performance, clinical complexity, and mood and behaviors. WAC 388-106-0085. The answers are scored according to the definitions and algorithms in WAC 388-106-0050 through -0145.

Based on the scores generated by the CARE assessment, each client is assigned to one of 17 classification groups with other individuals who have comparable personal care needs. WAC 388-106-0080. A client is assigned to a classification group based on his or her scores in four broad areas of the CARE assessment:

- (1) Cognitive performance.
- (2) Clinical complexity.
- (3) Mood/behaviors symptoms.
- (4) Activities of daily living (ADLs).

WAC 388-106-0085. Each classification group is associated with a number of in-home personal care hours, which at the relevant times ranged from 29 to 420 hours per month. Wash. St. Reg. 07-18-057 (hereinafter

WAC 388-106-0125) (attached as Appendix A).³ A client may receive more or fewer hours than other members of the classification group based on certain individual circumstances. WAC 388-106-0130.

B. Mr. Kuehl's CARE Assessment

Dylan Kuehl is a twenty-six year old client of the Department. AR at 5, 300. He is eligible for services from the Division of Developmental Disabilities based on his diagnosis of Down Syndrome. AR at 196. Mr. Kuehl was described by case worker Nancy Stewart as the most accomplished of any of her seventy-two developmentally disabled clients. June VRP at 26-27. Mr. Kuehl, who testified at the administrative hearing in this matter, describes himself as "self-employed" selling his own artwork, June VRP at 90-91; he receives extensive vocational support for that business. June VRP at 182. He also volunteers on a weekly basis with the Olympia Food Co-op. June VRP at 182. He runs a dance

³ Wash. St. Reg. 07-18-057 (effective September 1, 2007) was an emergency amendment to former WAC 388-106-0125 (2007). The emergency rule was further amended to change the formatting, though not the substance, by emergency rule Wash. St. Reg. 08-02-056 (effective December 28, 2007). The rule was made permanent in Wash. St. Reg. 08-10-022 (effective May 26, 2008). The print volume of WAC 388-106-0125 (2009) thus accurately reflects the classifications and base hours in effect at the time of Mr. Kuehl's CARE assessment and subsequent administrative proceedings.

The rule has been further amended since that time. In the 2009-2010 state operating budget, the legislature directed DSHS to implement modest reductions to in-home personal care benefits for all recipients, with reductions to be scaled based on acuity levels. Laws of 2009, ch. 564, § 206(5). By an emergency amendment to WAC 388-106-0125, DSHS accordingly reduced the base hours of all classification groups. Wash. St. Reg. 09-14-046 (effective July 1, 2009). The base hours under WAC 388-106-0125 now range from 26 to 416 hours of personal care per month for adults. Wash. St. Reg. 10-05-068.

company; speaks on television and at conferences regarding his disabilities and accomplishments; and participates in Special Olympics and other recreational activities. June VRP at 30, 90-92, 182-83. Mr. Kuehl lives in an apartment above the garage on his mother's property. June VRP at 178.

Mr. Kuehl has a number of medical and hygiene needs, including a long-standing history of sebaceous cysts—small bumps under the skin that form when a skin gland becomes plugged and filled with sebum. May VRP at 104. The seriousness of sebaceous cysts ranges from superficial sores to larger sores that may become infected. May VRP at 38. Mr. Kuehl's vulnerability to sebaceous cysts requires that he bathe daily, have his skin checked for sores, and wear clean clothing. AR at 593; May VRP at 99. Any open sores are treated with a topical antibiotic such as Neosporin and, if the sore is larger and draining, covered with an adhesive band-aid. AR at 593. If pimples or cysts appear on his face, Mr. Kuehl is sometimes able to apply ointment to the sores on his own, but he requires assistance for sores that appear elsewhere on his body. AR at 584. Aside from those in-home personal care tasks, his cysts may sometimes require medical intervention such as draining or removal. May VRP at 98-99, 101-102.

Because he lives in a community setting, Mr. Kuehl's functional abilities are assessed at least annually to determine the public services for which he qualifies. WAC 388-106-0050(1). One service for which Mr. Kuehl is eligible is personal care services. AR at 6. Mr. Kuehl's mother, Teresa Rose, is paid by DSHS to provide him with personal care services in his home. AR at 331; June VRP at 179. Prior to November 2007, Mr. Kuehl was eligible to receive 145 hours of paid personal care services each month based on the results of a May 2007 CARE assessment. AR at 6. On September 10, 2007, Mr. Kuehl's case worker met with Ms. Rose to conduct a CARE assessment. AR at 6. The Department's findings from the CARE assessment were used to determine Mr. Kuehl's appropriate level of paid personal care services based on Chapter 388-106 WAC. AR at 6.

The September 2007 CARE assessment included several changes from Mr. Kuehl's prior assessment. Most importantly, Mr. Kuehl's ability to communicate with others was upgraded from "sometimes understood" to "usually understood." AR at 17; *compare* AR at 274 (prior CARE assessment) *with* AR at 339 (September 2007 CARE assessment). He was also found to require extensive assistance with personal hygiene, as opposed to limited assistance in the prior assessment. *Compare* AR at 270 *with* AR at 335. He was newly found to need mental health therapy.

Compare AR at 278 *with* AR at 343. His prior behavioral issues with spitting and wandering were found to no longer require interventions. *Compare* AR at 278 *with* AR at 343.

The assessment also determined that Mr. Kuehl had no open lesions on his body at the time of the assessment or within the seven days prior to the assessment. AR at 7. On that basis, the Department determined that Mr. Kuehl did not qualify under the WAC 388-106-0095 criteria for clinically complex skin conditions. AR at 14-16.

Based on the total of its findings, DSHS determined Mr. Kuehl to have an activities score of six, AR at 14, 333-37; a cognitive score of three, AR at 17, 339; a behavioral score of nine, AR at 8-9, 344-45;⁴ and mood-behavior qualification, AR at 17, 342-43. By operation of WAC 388-106-0125, Mr. Kuehl thus qualified for 110 personal care hours per month. AR at 557. The DSHS caseworker sent three documents to Mr. Kuehl and his designated representative: a Planned Action Notice, AR at 557-562 (attached as Appendix B); Assessment Details, AR at 300-332 (attached as Appendix C); and Service Summary, AR at 294-299. WAC 388-106-0050(3); *see* AR at 566 (email stating that the notice and

⁴ While the Final Order does not explicitly state the behavior points score, the Board of Appeals made the same findings regarding Mr. Kuehl's behaviors as did the ALJ. *Compare* AR at 8-9 *with* AR at 88-89. Those findings applied to WAC 388-106-0100 render a behavior point score of 9, as the ALJ found in the Initial Order. AR at 88-89. The Board of Review adopted and incorporated those conclusions. AR at 19.

assessment were being mailed). The notice stated that Mr. Kuehl's monthly personal care benefits would be reduced from 145 to 110 hours starting November 1, 2007. AR at 557.

Mr. Kuehl requested an administrative hearing to challenge the reduction in hours. AR at 151-53. Following two days of hearing at which Mr. Kuehl was represented by counsel, the administrative law judge affirmed the Department's determination in an initial order. AR at 70-94. Mr. Kuehl requested review from the DSHS Board of Appeals. AR at 33-35. The Board of Appeals adopted the ALJ's findings of fact, and again affirmed that Mr. Kuehl was eligible for 110 hours of personal care services per month. AR at 19.

Mr. Kuehl timely filed a petition for judicial review with Thurston County Superior Court. CP at 3-57. Following briefing and oral argument, Judge Paula Casey entered an order affirming the reduction in Mr. Kuehl's services on December 8, 2009. CP at 123-27. Mr. Kuehl timely appealed to Court of Appeals Division II and sought Direct Review from the Washington Supreme Court.

IV. ARGUMENT

Mr. Kuehl argues that DSHS incorrectly determined that he is not "clinically complex" under WAC 388-106-0095. The Department's

application of the present tense in WAC 388-106-0095 to include only the present plus the previous seven days is reasonable in light of the language of the rule, chapter 388-106 WAC as a whole, and the clinical studies relied upon in formulating those rules. Moreover, a designation of clinical complexity would not result in any change to Mr. Kuehl's services. Because he can show no injury-in-fact, Mr. Kuehl has no standing and his appeal must be dismissed for lack of jurisdiction under the Administrative Procedure Act.

Mr. Kuehl also argues that the initial notice he received regarding a reduction to his benefits was constitutionally inadequate. Mr. Kuehl has not identified any information that should have been, but was not, provided to him prior to reduction of his benefits. The Department's notice in this case included notice of the change, the reasons for the change, the facts supporting those reasons, the relevant agency rules, and how the facts apply to the rules in this particular case. Such notice was more than adequate to satisfy the requirements of due process. Even if the initial notice was inadequate, Mr. Kuehl suffered no substantial prejudice as a result and therefore has no available remedy under the Administrative Procedure Act.

A. Standard Of Review

The Administrative Procedure Act (APA), chapter 34.05 RCW, governs this judicial review case. The reviewing court applies the APA standards directly to the agency final order, sitting in the same position as the trial court, which was sitting in its appellate capacity. *Verizon Nw., Inc. v. Employment Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008).

The standard of review of agency orders in adjudicative proceedings is set forth in RCW 34.05.570(3). The statute provides nine grounds for determining whether the agency decision should be reversed. Only three appear to be raised here: (1) whether the agency's final order is inconsistent with an agency rule; (2) whether the agency has engaged in unlawful procedure or has failed to follow a prescribed procedure; or (3) whether the agency has not decided all issues requiring resolution.⁵

Under the APA the final agency decision is considered *prima facie* correct and the "burden of demonstrating the invalidity of agency action is on the party asserting invalidity." RCW 34.05.570(1)(a). The party seeking relief must also show he has been "substantially prejudiced" by

⁵ Mr. Kuehl claims that DSHS made an unsupported finding "that [he] does not have an ongoing certainty of developing open lesions". Op. Br. at 9. As discussed *infra* at 16, DSHS made no such finding. Therefore his claim that DSHS should have found him to have an "ongoing certainty" of lesions falls under RCW 34.05.570(3)(f) (failure to decide all issues requiring resolution), rather than (3)(e) (order not supported by substantial evidence).

the agency action. RCW 34.05.570(1)(d); *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 226, 173 P.3d 885 (2007).

In reviewing an administrative action, the courts review findings of fact for substantial evidence in light of the whole record. RCW 34.05.570(3)(e). Questions of law are reviewed de novo. *Ames v. Dep't of Health*, 166 Wn.2d 255, 260-61, 208 P.3d 549 (2009). However, the court must accord “substantial weight to an agency’s interpretation of a statute within its expertise, and to an agency’s interpretation of rules that the agency promulgated.” *Verizon Nw.*, 164 Wn.2d at 915 (internal citations omitted). In this case, DSHS promulgated the relevant rules and has considerable expertise in the statutes and subject matter—including a specific mandate to design a means to assess the functional disabilities of its clients in order to award personal care hours, and the authority to make rules related to public assistance in order to ensure that services are administered uniformly across the state. RCW 74.09.520(4); RCW 74.08.090.

B. The Department Correctly Determined That Mr. Kuehl Is Not Clinically Complex

Under WAC 388-106-0095, a person is considered “clinically complex” if he has open lesions and requires wound or skin care. In its Final Order, DSHS found that “Mr. Kuehl has a history of skin problems

including ‘open lesions,’” and that he “and his care giver conduct an extensive daily regimen to prevent, identify, and treat any skin disease.” AR at 7, 11. However, DSHS determined that “Mr. Kuehl did not have any open lesions at the time of the assessment or during the seven day look-back period.” AR at 7 (emphasis removed). Those findings are well-supported by the record, and Mr. Kuehl does not challenge them.

Mr. Kuehl claims that he should have been found to be clinically complex under WAC 388-106-0095 on the basis of his skin condition, notwithstanding that he had no open lesions during the relevant time period. First, he claims that WAC 388-106-0095 requires that a client be found clinically complex on the basis of chronic open lesions rather than current open lesions. Op. Br. at 38-41. Second, he claims that the Department’s application of WAC 388-106-0095 using the time of the assessment and the seven prior days (the “seven day look-back”) is erroneous, arbitrary, unlawful, and unconstitutional. Op. Br. at 33-38, 41-48. The Department’s application of WAC 388-106-0095 is reasonable, entitled to deference, and amply supported by both the text of chapter 388-106 WAC and the record in this case.⁶

⁶ Notably, Mr. Kuehl’s petition for judicial review argues only that the Department’s final order in this case was erroneous—not that WAC 388-106-0095 itself is invalid under the Department’s interpretation. CP at 5-6.

1. Whether Mr. Kuehl has an “ongoing certainty” of lesions was not an issue requiring resolution by DSHS.

Mr. Kuehl claims that DSHS improperly “found . . . that proper treatment could prevent [Mr. Kuehl’s] lesions from opening entirely”. Op. Br. at 31; at 8 (assignments of error). The Department made no such finding. Mr. Kuehl cites to “AR 3” as the place in the Final Order where DSHS made such a finding. Op. Br. at 41. He misreads the order. The text on pages three through five of the DSHS Final Order is a block quote setting out verbatim the entire response brief filed by the Department before the Board of Appeals. AR at 3-5; *see* AR at 26-29 (Department’s brief). It no more constitutes a finding of fact than does the contrary statement made in Mr. Kuehl’s petition for review, and also quoted verbatim in the Final Order. AR at 2.

Mr. Kuehl did request that the Department make a finding that he was “subject to the ongoing certainty of the development of open lesions”. AR at 33. That request was not granted. *See* AR at 7. Mr. Kuehl does not argue that DSHS was legally required to make such a finding. In any case, no statute or DSHS rule requires the Department to make a finding regarding the probability that a client who formerly had open skin lesions will again have such lesions in the future, as discussed at length below.

2. A designation of clinical complexity is given based on specific medical conditions that are associated with extra caregiver time.

Generally, the CARE tool operates by identifying personal care tasks with which an individual needs assistance. In contrast, the clinical complexity rule (WAC 388-106-0095) is a discrete list of medical conditions which tend to indicate that personal care tasks will take longer than normally expected. CP at 139; May VRP at 52, 54-55. The clinical complexity component of CARE was adopted by DSHS after conducting a study that indicated certain medical conditions were “statistically reliable indicators of resource use”—that is, of personal care services. CP at 139.⁷

To qualify as clinically complex, a person must have a listed medical condition as well as a certain level of disability: “The CARE tool places [a client] in the clinically complex classification group only when [the client meets] one or more” of various “criteria and corresponding [activities] scores”. WAC 388-106-0095. Relevant to this case are the criteria related to complex skin conditions. A client with an activities score of at least 2 will be considered clinically complex if:

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;

⁷ Notably, the study specifically showed that “a diagnosis of Downs [syndrome] alone is not a reliable indicator of resource use”. CP at 140.

- **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.**

Id. (emphasis added). While the basis for this rule is the known complexity of care for individuals with pressure ulcers (that is, bed sores), May VRP at 54-55, open sores of other types may also fall within the scope of the rule.

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. He is mistaken. A person who requires skin care, but has no open lesions at the time of the CARE assessment, does not fall within the scope of the phrase: “You have . . . Open lesions . . . AND You require . . . Application of dressing; or, Wound/skin care.”

3. Clinical complexity for a skin condition requires both a listed skin problem and a need for assistance.

WAC 388-106-0095 is clear that ongoing skin care is not by itself enough to classify a client as clinically complex; both the clinically

complex condition (*i.e.*, open lesions) and the relevant assistance (*i.e.*, wound/skin care) must be present at the time of the assessment. Merely requiring skin care is clearly inadequate to qualify a client as clinically complex.

Such a limitation is not arbitrary. An open lesion is a wound that requires careful treatment over a relatively lengthy period. In the case of sebaceous cysts, once the infection becomes an open sore or lesion “it is stubborn and difficult to treat and may take weeks to heal.” AR at 588. The care required to treat such a stubborn wound (application of ointments, antibiotics, medical attention) is different in kind from the care required to prevent such a wound (bathing, wearing clean clothing). AR at 593. The Department does not act arbitrarily when it treats different medical conditions differently. Moreover, a client without open lesions or wounds continues to receive personal care related to skin hygiene needs, such as laundry, bathing, and management of medications. May VRP at 59-60.

4. A person with skin care needs is clinically complex only on the basis of a present skin problem, not past or future skin problems.

Mr. Kuehl also argues that a client with a chronic condition that results in recurring skin lesions is included in the language of WAC 388-106-0095. However, the rule does not say that a person is clinically

complex if he has a condition with the formation of lesions as one of the symptoms. The rule looks not to a client's diagnoses, but directly to the client's current condition and needs. Neither a history of, nor a future propensity toward open lesions can support a finding of clinical complexity.

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" (emphases added). By the plain language of the rule, the client must have open lesions in the present. Mr. Kuehl can point to no language in the rule that requires a person with a past history or future probability of open lesions to be considered for a clinical complexity designation.

Mr. Kuehl protests that "Every item on the list of diagnosed conditions constituting clinical complexity . . . is chronic and ongoing" and that the open lesions criteria should be read to be consistent with that trend. Op. Br. at 43-44. He is mistaken that every item on the list of clinically complex conditions is "chronic and ongoing." Clinically complex conditions include a number of permanent, ongoing medical problems (e.g., quadriplegia, Parkinson disease, cerebral palsy); a number of chronic medical services that recur along different lengths of time (e.g., tracheostomy care, radiation therapy, dialysis); and a number of medical

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conditions that are generally acute but temporary (e.g., burns, pressure ulcers, open lesions). *See* WAC 388-106-0095. Bed sores and burns are not normally “chronic” or “ongoing”; with proper treatment they heal permanently. The plain language of the rule supports the Department’s conclusion that a person cannot be clinically complex based merely on a history or propensity toward open sores.

5. Mr. Kuehl may request a new CARE assessment if his needs change significantly.

Mr. Kuehl objects that, by constraining the CARE assessment to a person’s present conditions, a client’s services will fluctuate as his conditions and circumstances change. Op. Br. at 41-42. Such flexibility is a feature, not a flaw. The CARE tool is meant to capture each client’s current disabilities as accurately as possible, without guesswork about future probabilities. If a client’s situation changes over time, the annual CARE assessment will capture the changes. WAC 388-106-0050(1). If a client’s condition changes significantly between annual assessments, a new assessment may be requested by the client whenever “there are significant changes in your functional or financial circumstances.” WAC 388-106-0220; *see also* 388-106-0050(1). A reassessment “must occur . . . [w]hen a significant change is reported that may affect your need for support. (E.g., changes in your medical condition, caregiver

status, behavior, living situation, employment status.)” WAC 388-828-1500.

An assessment that looks only to a person’s present medical condition, with a new assessment after any significant change or at least once a year, is not “the logical equivalent” of a rule varying benefits based on what day of the week an assessment falls upon. Op. Br. at 42. Rather, such an assessment reasonably tracks the actual and demonstrable functional disabilities and medical complexities of clients.

6. An application of the present tense in WAC 388-106-0095 to include a seven day look-back period is not arbitrary or capricious.

WAC 388-106-0095 cannot reasonably be read to support Mr. Kuehl’s argument that a person has open lesions if he had such sores in the past because the present tense (“has”) can only reasonably apply to the person’s present condition at the time of assessment. However, it is Department policy when determining clinical complexity based on a client’s skin condition that “the time of assessment” includes the seven days prior to the date of the assessment interview. June VRP at 66-67; AR at 468. Such a definition is a reasonable application of the rule’s language.

Other than using the present tense, WAC 388-106-0095 does not specify the time frame during which open skin lesions must be present for

a client to be considered clinically complex. Mr. Kuehl argues that the rule can only reasonably be interpreted to include the day of the assessment, or else not be bounded by time at all. Op. Br. at 38. Because the rule does not clearly specify the time period to which the present tense refers, it is subject to interpretation by DSHS, within reason. The interpretation given to a rule by the promulgating agency “is entitled to great weight.” *Federated Am. Ins. Co. v. Marquardt*, 108 Wn.2d 651, 656, 741 P.2d 18 (1987); *see also Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004). Employing a seven day look-back is consistent with the use of the present tense elsewhere in the CARE assessment. WAC 388-106-0010 (definition of “current” includes behaviors during prior seven days; definition of “self performance” includes activities during prior seven days).

There are a number of considerations that DSHS must make in applying the present tense for the purpose of determining clinical complexity. If the relevant time period is too long, DSHS risks providing services to people who no longer need them; grapples with the failing memories of the reporter; and loses the ability to independently verify, for instance, signs of a currently-open or recently-closed lesion. On the other hand, if the relevant time period is too short, the assessment has an increased possibility of missing a condition that results in actual personal

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care needs. DSHS is entitled to substantial deference in formulating policy based on such factors, and Mr. Kuehl has not met his burden in showing that a seven day look-back definition is arbitrary or capricious.

7. DSHS reasonably adopted a valid and reliable federal definition of open lesions that includes a seven day look-back period.

DSHS did not choose the seven day look-back period in a vacuum. The definition is borrowed from the existing industry standard for measuring skin conditions. The CARE assessment is based in part on the decades-old Minimum Data Set created by the federal Department of Health and Human Services. CP at 139, 146-47; May VRP at 51. The federal data set's approach of measuring a client's current conditions (rather than past or probable future conditions) has proven a "valid and reliable method for determining what the current level [of personal care services] should be." May VRP at 54. The data set provides clear, well-tested definitions of various terms, including ulcers, other skin problems or lesions, and skin treatments. CP at 149-59. The definition of skin lesions requires "evidence of such problems in the last seven days." CP at 155, 157. The definition of skin treatment similarly requires a seven day look-back period. CP 157-58.

Because the entire CARE assessment was built on the clinically-tested model and definitions of the federal data set, it was reasonable for

DSHS to apply terms in the CARE rules consistently with the data set's definitions.⁸ In fact, the validity of the CARE tool relies largely on applying the rules in that way, since those definitions were used in formulating and testing the CARE system. The Department's application of the present tense in WAC 388-106-0095 as adopting the data set definition of skin conditions to include a seven day look-back period is reasonable and should not be disturbed.

C. Mr. Kuehl Received Constitutionally Adequate Notice

The U.S. Constitution provides that no State shall “deprive any person of life, liberty, or property, without due process of law. . . .” U.S. Const. amend. XIV, § 1. Because the receipt of public benefits such as Medicaid services constitutes a property interest, a recipient must “have timely and adequate notice detailing the reasons for a proposed termination” or reduction, and a chance to challenge the termination or reduction. *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970). “[T]he notice of proposed action cannot be adequate if it does not include the reasons or grounds for the action.” *Vargas v. Trainor*, 508 F.2d 485 (7th Cir. 1974), *cert. denied*, 420 U.S. 1008 (1975).

⁸ Mr. Kuehl argues, without citation, that DSHS has “misused” the data set and that it is not a valid model for annual assessments assigning personal care services. Op. Br. at 47. He forgets that the burden of proof lies with him. RCW 34.05.570(1)(a). In fact, the only relevant evidence in the record supports the reliability of DSHS's assessment for use in the community. CP at 139; May VRP at 51-52. And in any case, Mr. Kuehl has not challenged the validity of the DSHS CARE rules.

Mr. Kuehl claims that the Department failed to give constitutionally adequate notice of the reduction to his benefits. Mr. Kuehl first claims that the Department's use of Form 14-472, the Planned Action Notice (AR at 557-562; Appendix B), is a "per se" due process violation. Op. Br. at 18-22. To the extent his argument is that a person is given inadequate notice if he receives that form and nothing more, he does not have standing on which to proceed, since that did not occur in this case. *See* discussion *infra* at 42. To the extent he means to challenge the actual notice he received in this case, Mr. Kuehl does not show any constitutional violation.

A DSHS client whose personal care services are modified receives three specific documents:

When the department modifies your current assessment, it will notify you using a Planned Action Notice of the modification regardless of whether the modification results in a change to your benefits. You will also receive a new service summary and assessment details.

WAC 388-106-0050(3). In this case, DSHS in accordance with its own rules sent all three documents to Mr. Kuehl and his representative Ms. Rose following the November 2007 CARE assessment: the Planned Action Notice, AR at 557-562 (Appendix B); Service Summary, AR at 294-299; and Assessment Details, AR at 300-332 (Appendix C). Mr. Kuehl has not challenged the Department's compliance with

WAC 388-106-0050(3). Op. Br. at 3. And in fact the record supports that the three required documents were sent and received at the same time. *See* AR at 566 (email from caseworker to Mr. Kuehl’s representative noting that the Planned Action Notice will accompany the “assessment”); June VRP at 67 (questions from Mr. Kuehl’s counsel regarding the actions Mr. Kuehl’s representative took “after receiving the assessment”); AR at 152-153, 157-159 (letters from Mr. Kuehl and his representative articulating objections to the findings contained in those documents). As explained at length below, those three documents notified Mr. Kuehl of the reduction in his personal care hours from 145 to 110 hours per month; explained that the change in Mr. Kuehl’s services was due to the Department’s CARE assessment; gave a full list of the assessed facts upon which that determination was based; provided the crucial administrative rules that control the allocation of personal care hours based on the facts determined in the CARE assessment; and explained Mr. Kuehl’s appeal rights.

Later, in response to a request for more information from Mr. Kuehl’s attorney—but still prior to any reduction in benefits and over two months prior to hearing—the Department provided Mr. Kuehl with two documents detailing how the facts of his case fit into the CARE algorithm. AR at 333-46 (CARE Results), 347-60 (in-home algorithm

exhibit); *see* AR at 568 (documents faxed February 22, 2008). Like civil pleadings, the notice in administrative adjudications may be amended prior to hearing, or even be deemed amended to conform to evidence introduced at hearing. *Citizens State Bank of Marshfield, Mo. v. FDIC*, 751 F.2d 209, 213 (8th Cir. 1984) (*citing Kuhn v. Civil Aeronautics Bd.*, 183 F.2d 839, 841-42 (D.C. Cir. 1950)). DSHS rules allow the Department to amend its notice prior to or at the hearing. WAC 388-02-0260; AR at 18-19. Taken together, the information provided to Mr. Kuehl prior to hearing far exceeded the minimum requirements of due process.

1. The Planned Action Notice alone provided adequate reason for the reduction to Mr. Kuehl's personal care services.

The Planned Action Notice (Appendix B) explains simply that Mr. Kuehl's personal care services will be reduced "From: 145 To: 110" because "[i]t has been determined you do not have an assessed need for the amount of service you requested or previously had." AR at 557. The Planned Action Notice goes on to explain, through WAC 388-106-0130, that "[t]he department assigns a base number of hours to each classification group as described in WAC 388-106-0125," AR at 557, and then adjusts those base hours according to the client's individual circumstances. AR at 557-560. That description provides the essential

reason for the reduction to Mr. Kuehl's personal care services. That is, the reduction is a consequence of the administration of the CARE assessment, which determined that the Appellant would be authorized 110 hours per month of personal care services. That determination was a function of taking the large number of facts collected during the CARE assessment, and applying those facts to the DSHS rules cited in the Planned Action Notice.

The CARE assessment is meant to create a global picture of a person's functional disabilities in comparison to other personal care recipients. Mr. Kuehl was found to require 110 hours of paid personal care in part because he had no open lesions, and in part because he was found to be "usually understood" in his communication with others—but also for hundreds of other reasons. The DSHS caseworker made hundreds of findings in the course of Mr. Kuehl's CARE assessment, no one of which was solely responsible for the final result. The final CARE classification depends on all of those facts together, and a change to any one of the CARE findings can result in more or fewer benefits. *See* WAC 388-106-0125. The Department provided Mr. Kuehl with the factual reasons for his authorized level of personal care services. But it had no way of telling which of the CARE findings Mr. Kuehl would dispute, and was not required to guess.

The approach that makes the CARE tool reliable, valid and fair—complex classifications based on detailed information—make it impossible to explain in a single statement of causation beyond precisely what was provided: that DSHS assessed Mr. Kuehl’s disabilities, and 110 hours is the amount of personal care authorized for individuals with Mr. Kuehl’s level of disabilities. As explained below, Mr. Kuehl could review the CARE Assessment Details provided to him and challenge any of the underlying facts found by DSHS. The explanation in the Planned Action Notice properly complied with WAC 388-458-0025(2)(c).

2. The Assessment Details supplemented the Planned Action Notice with every fact relied upon by the Department.

Not only was the Planned Action Notice alone adequate to explain the reason for the number of hours Mr. Kuehl was awarded, but the attached Assessment Details document (Appendix C) provided far greater detail. AR at 300-332. The Assessment Details document lists every finding of fact relied upon by DSHS in calculating Mr. Kuehl’s level of personal care services. It states that Mr. Kuehl needed no support with dressing open wounds. AR at 308. It illustrates the skin problems reported during the assessment and seven day look-back period—which included raw areas, fungal infections and a rash, but no open lesions.

AR at 325. It shows that Mr. Kuehl's ability to make himself understood to others was coded as "usually understood." AR at 310.

Mr. Kuehl had ample opportunity to identify findings with which he disagreed. Mr. Kuehl and his representative understood the Assessment Details document well enough to explain, in two letters to the Department, lists of their disagreements with the assessment coding and comments. AR at 152-153 (disagreeing with assessment of decision-making and communication); 157-159 (disagreeing with assessment of behaviors, toileting, and eating). In his pre-hearing briefing to the administrative law judge, Mr. Kuehl challenged the Department's assessment of his skin condition (which had changed since the prior assessment) and his ability to self-perform tasks related to toileting and eating (which had not). AR at 136-137. He went on to challenge those findings at hearing, including presenting an expert witness on the issue of skin care; presented post-hearing briefing; and sought a second level of administrative review. "When parties fully litigate an issue they obviously have notice of the issue and have been given an opportunity to respond. This satisfies the requirement of administrative due process." *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 358 (6th Cir. 1992); see also *Nat'l Steel & Shipbuilding Co. v. Director, Office of Workers' Compensation Programs*, 616 F.2d 420, 421 (9th Cir. 1980) ("Defects in

notice in administrative hearings may be cured if the actual conduct of the proceedings provides notice to the participants.”); *Int’l Ass’n of Firefighters, Local 469 v. Public Empl. Relations Comm’n*, 38 Wn. App. 572, 579, 686 P.2d 1122, *review denied*, 102 Wn.2d 1021 (1984).

A change in personal care hours relates to the whole CARE assessment process, and to the Department’s detailed findings. In this case, those findings were evident in the CARE Assessment Details. If the Planned Action Notice itself did not provide enough detail to DSHS’s reasoning, the Assessment Details and other documents provided to Mr. Kuehl plainly cured any deficiency.

3. The pre-deprivation notice provided to Mr. Kuehl far exceeds that provided in any of the cases on which he relies.

Mr. Kuehl cites primarily to *Baker v. Alaska*, 191 P.3d 1005 (2008), and to *Corella v. Chen*, 985 F. Supp. 1189 (D. Ariz. 1996), as cases involving notice similar to that given in this case. Op. Br. at 18-22. In neither case did the state agency provide the recipient with the kind of detailed information given by DSHS to Mr. Kuehl.

In *Baker*, the State of Alaska implemented a personal needs assessment system that, like Washington’s CARE assessment, involves

many individual questions that result in a final authorization of services.⁹ *Baker*, 191 P.3d at 1008. A state contractor met with each client to conduct the assessment. *Id.* The award letters that issued to each client stated that the benefit amount was the “result of the needs identified in the [assessment] and . . . review of other supportive documentation”. *Id.* A description of the client’s service plan was attached, *id.*, but the details of the assessment itself were not. *Id.* at 1112. The court required the state agency to provide each recipient with the 15-page worksheet containing the “information that [the agency] used to determine the numbers on the service plan,” *id.* at 1009, specifically “what the assessor understood of the individual's abilities and disabilities.” *Id.* at 1008. This is the same kind of information provided by DSHS to personal care recipients through the 33-page CARE Assessment Details document.

Corella involved the termination of medical benefits based on the recipients’ household income, rather than the kind of complex assessment of functional abilities involved in *Baker* and in this case. The agency in *Corella* terminated benefits and notified the recipients that they had “household excess income” and that “net income exceeds maximum allowable.” *Corella*, 985 F. Supp. at 1194. The agency did not provide its

⁹ Unlike Alaska’s assessment, *Baker*, 191 P.3d at 1107, Washington’s assessment is not built upon time estimates per activity, but instead upon assigning each client to a classification group.

determination of the amount of the families' household income, and did not describe the applicable regulatory income limits. *Id.* The court required the agency to provide the agency's actual findings and calculations to allow recipients to "conduct[] an initial evaluation as to the accuracy of the figures used by [the agency.]" *Id.* at 1194-95.

The courts in *Baker* and *Corella* were reviewing agency actions in which far less explanation was provided than DSHS provided to Mr. Kuehl. As discussed at length above, the 33-page Assessment Details that Mr. Kuehl received with his Planned Action Notice provided him with the Department's findings on which its determination was based. The Assessment Details, like the 15-page worksheet in *Baker*, contains the information used to determine Mr. Kuehl's individual service plan and the amount of personal care services he was authorized.

Mr. Kuehl cannot cite to any case in which notice of reduction in public benefits, accompanied by the factual findings on which the reduction was based and the relevant regulations, was found inadequate. *See, e.g., Vargas*, 508 F.2d at 487 (notice stated that basis for agency action was "changes in your needs or living arrangement", but failed to provide findings regarding the recipient's current needs or living arrangement); *Dilda v. Quern*, 612 F.2d 1055 (7th Cir. 1980) (notice stated total amount of income deductions, but failed to provide findings of

which deductions were allowed in which amounts); *Ortiz v. Eichler*, 616 F. Supp. 1046, 1061 (D. Del. 1985), *aff'd*, 794 F.2d 889 (3d Cir. 1986) (notice stated that income was “over the gross income eligibility limit,” but failed to provide findings of income amount or the calculations used); *Schroeder v. Hegstrom*, 590 F. Supp. 121, 127 (D. Or. 1984) (notice stated that benefit amount was based on the recipient’s reported income, but failed to provide findings of income amount or the calculations used); *Tripp v. Coler*, 640 F. Supp. 848, 858 (N.D. Ill. 1986) (notice stated that basis for agency action was “potential misutilization” of medical care by unnamed “family members,” but failed to provide findings supporting that allegation); *Moffitt v. Austin*, 600 F. Supp. 295, 298 (W.D. Ky. 1984) (notice stated that basis for agency action was “due consideration of the medical data,” but failed to provide findings of what that data was or cite to relevant regulations). Nor has he cited to any case to support his suggestion that an agency, when awarding fewer benefits than before, must explain both its current decision and how it differs from any previous decision. Op. Br. at 29-30 (citing to “*Goldberg, loc cit.*”). Mr. Kuehl’s authorization of personal care services was based on his conditions and functional abilities as of September 10, 2007, not at some prior time.

The Alaska Supreme Court in *Baker* required the agency to provide its findings and the rules by which the agency calculated the recipient's need. DSHS has done just that. At the time of the initial notice Mr. Kuehl was given the ultimate reason behind the award of personal care benefits, AR at 557; the underlying factual reasons, AR at 300-332; and the regulations that connect the two (WAC 388-106-0125 and -0130). AR at 557-58. Later, but still prior to any reduction in benefits, he was provided the same information in a format clearly illustrating how the facts of his case fit into the CARE rules. AR at 333-46 ("CARE Details"); 347-60 ("CARE Algorithm Exhibit"). By describing "what the assessor understood of the individual's abilities and disabilities," as the court required in *Baker*, 191 P.3d at 1008, as well as the relevant regulations and how the facts and the law fit together, DSHS provided the necessary detail to allow Mr. Kuehl to make an "initial evaluation as to the accuracy" of the Department's decision. *Corella*, 985 F. Supp. at 1194-95. The notice supplied to Mr. Kuehl was more than adequate to inform him of the reasons for the modification to his benefits.

4. The administrative burden of additional notice would outweigh the probable value of such additional safeguards.

When considering how much detail a government agency must provide to constitute adequate notice, courts balance three considerations:

first, the private interest affected; second, the risk of error and the value of additional safeguards; and third, the burdens of imposing additional procedural requirements. *Matthews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *see Gray Panthers v. Schweiker*, 652 F.2d 146, 158 (D.C. Cir. 1980) (applying the *Matthews* test to the question of adequacy of notice). A recipient's interest in public benefits is undoubtedly substantial. *See Goldberg*, 397 U.S. at 261. However, in this case, any marginal value of additional notice describing the CARE tool's operation is greatly outweighed by the substantial burden that such a requirement would place on the state.

The value to DSHS clients of additional notice would be limited. The Planned Action Notice already explains that the benefit award is based on an assessment of the client's functional abilities. The Assessment Details explain what DSHS believes those abilities to be. Each of the findings in the CARE assessment is potentially a "but for" reason for the ultimate level of benefits. By looking at the Assessment Details, a client can identify those findings with which he disagrees. If those facts are inaccurate, the final award amount may be incorrect; by providing the Assessment Details DSHS allows a client to make that determination. If all of the facts are correct, there is little chance that the amount of services authorized is wrong. Because the personal care hours

are calculated by a computer program running the CARE algorithm, applying the very facts that the Assessment Details display to the very rules that the Planned Action Notice identifies, there is no opportunity for error in the individual case other than in factual determinations.

When ordering additional notice of an agency's reasons for reducing or terminating benefits, courts generally require agencies to provide information that is already readily available. *See Baker*, 191 P.3d at 1008-09 (agency ordered to include 15-page worksheet containing personal care assessment observations); *Schroeder*, 590 F. Supp. at 128 (agency ordered to include its findings of the family's need, income, and allowable deductions); *Dilda*, 612 F.2d at 1056-57 (agency required to include worksheets showing amounts of deductions); *but see Ford v. Shalala*, 87 F.Supp.2d 163, 182 (E.D.N.Y. 1999) (requiring expensive information gathering and computer reprogramming that would take up to two years to implement to provide adequate notice of SSI benefit reductions or terminations). While Mr. Kuehl does not explain precisely what notice he should have received in this case, he has not identified any particular existing document or data that would satisfy him.

No amount of explanation will ever make a complex, qualitative regulatory structure like the CARE assessment as clear as the pure arithmetic that the court urged in *Corella*. *See* 985 F. Supp. at 1194

(demonstrating the clarity of addition and subtraction in calculating household income). The facts in the Assessment Details provide a large amount of information to a client in a form that is both useful for checking on the agency's accuracy and understandable to an average individual. Since the additional clarity to be potentially gained from any more detailed written explanation of the CARE assessment is limited—and since the potential costs of implementing a more detailed system are quite high—the Constitution does not require more notice than was already provided.

5. A personal conference provides additional safeguards not available through written notice.

Mr. Kuehl is quick to reject as irrelevant the Department's offer to go through the CARE assessment with Mr. Kuehl's representative in greater detail. Op. Br. at 22-24.¹⁰ He is correct that a verbal discussion is not a substitute for written notice. However, a personal conference with a public benefits recipient, in conjunction with a written letter of explanation, may sometimes be “the most effective method of communicating with recipients.” *Goldberg*, 397 U.S. at 268 (no “constitutional deficiency in the content or form of the notice” where the

¹⁰ Mr. Kuehl's claim that his mother legitimately feared meeting with Department staff, Op. Br. at 25-27, is both unsupported by the record and irrelevant. Mr. Kuehl's attorney did in fact meet with Department staff to discuss the CARE tool and its application to this case, prior to the administrative hearing.

state supplied “both a letter and a personal conference with a caseworker to inform a recipient of the precise questions raised about his continued eligibility”). A letter cannot answer questions, or clarify and rephrase an explanation of a complex agency determination. Where the method of calculating benefits is complex and based on hundreds of individual findings, a personal conference in which the recipient can seek clarification on every item is a suitable way to further explain to a recipient the reasons given by written notice.

D. The Court Lacks Jurisdiction To Hear Mr. Kuehl’s Claims

A party seeking court review of an agency action under the APA must meet that chapter’s statutory standing requirements. The APA provides standing only where a person “is aggrieved or adversely affected,” meaning that:

- (1) The agency action has prejudiced or is likely to prejudice that person;
- (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
- (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

RCW 34.05.530. These criteria are derived from and interpreted in light of federal law. RCW 34.05.001; *Allan v. Univ. of Wash.*, 140 Wn.2d 323,

327, 997 P.2d 360 (2000). Washington courts have rejected attempts to liberally interpret the APA standing criteria. *Allan*, 140 Wn.2d at 329 n.1.

There is no question that Mr. Kuehl meets the RCW 34.05.530(2) “zone of interests” criterion, since DSHS was required to consider Mr. Kuehl’s interests in determining the amount of his personal care benefits. But to meet the “injury in fact” criteria, a party must demonstrate both an actual or imminent injury and that a favorable judgment would substantially eliminate or redress that injury. RCW 34.05.530(1) and (3); *Allan*, 140 Wn.2d at 330-32 (a party cannot rest on speculative or imaginary injury, but must set forth a “factual showing of perceptible harm”) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

Mr. Kuehl raises two main issues: whether the initial notice form he received from DSHS was constitutionally adequate; and whether he should have been found to be “clinically complex” under WAC 388-106-0095. He fails to demonstrate that he has standing to raise either of those questions. Because Mr. Kuehl has suffered no injury on the basis of the agency actions he challenges, and because he seeks no redress beyond an advisory opinion from this Court, the Court lacks jurisdiction over those issues in this case.

1. Mr. Kuehl does not have standing to seek judicial review of the DSHS notice form because that form was not the only pre-deprivation notice he received.

Mr. Kuehl first argues that the initial notice form he received from DSHS announcing the reduction to his benefits was constitutionally inadequate. Op. Br. at 8-9, 14-30. He argues that the notice form used by DSHS is “a *per Se* [sic] Violation of Due Process.” Op. Br. at 18. In so doing, however, he seeks review of a situation not presented by his case. The standing doctrine generally prohibits a party from defending the rights of another person. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987), *dismissed*, 488 U.S. 805 (1988); *see Allan*, 140 Wn.2d at 329 (the alleged agency error must be “the one causing the asserted prejudice”). It is undisputed that Mr. Kuehl’s pre-deprivation notice consisted of much more than the Planned Action Notice: many pages of detailed notes, findings, explanatory diagrams, and other Department records, as well as a conference between his counsel and Department experts. Under RCW 34.05.530, Mr. Kuehl has no standing to litigate the question of whether a person who received only the initial notice in this case would have been denied due process of law.¹¹

¹¹ To the extent Mr. Kuehl challenges the constitutionality of the pre-deprivation notice he in fact received, we responded *supra* at 31-47.

The purpose of notice is that the affected person have “a chance . . . to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal.” *Goldberg v. Kelly*, 397 U.S. at 266. Mr. Kuehl had that opportunity. He has not suggested that he would have presented his case differently had the initial notice from DSHS been different in some way. As no additional redress is available, any judicial attention to the issue would be merely advisory, and the APA standing requirements disallow this Court from taking up such a case.

2. Mr. Kuehl does not have standing to seek judicial review of his designation as non-clinically complex because such designation caused him no injury.

Mr. Kuehl argues that DSHS should have designated him as “clinically complex” under a proper application of WAC 388-106-0095 to the facts in this case. However, he has not identified any actual harm caused by DSHS’s determination that he is not clinically complex. In some circumstances, an individual designated through the CARE assessment as “clinically complex” will receive additional personal care services as a result. *See generally* WAC 388-106-0125 (Appendix A). Mr. Kuehl does not present such a case. His assertion that the reduction in his personal care services was due solely to his skin condition at the time of the CARE assessment, *e.g.*, Op. Br. at 4, is simply wrong.

It is undisputed that DSHS properly found Mr. Kuehl to have an activities of daily living score of six, a cognitive performance scale score of three, a behavior point score of nine, and mood and behavior qualification. *Supra* at 10. Those unchallenged findings are verities in this appeal. *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993). As a matter of law, those unchallenged findings establish that Mr. Kuehl was eligible for no more than 110 hours of personal care services per month.

Mr. Kuehl presents a rare case in which the personal care services awarded on the basis of his relatively high behavior score eclipses the normal bonus associated with clinical complexity. A client with Mr. Kuehl's functional abilities—an activities score of 6, a cognitive score of 3, a behavioral score of 9, and mood-behavior qualification—will be placed into one of two classifications (either C-Low or B-Medium-High) based upon whether he is “clinically complex” under any one of the list of criteria in WAC 388-106-0095. WAC 388-106-0125 (Appendix A).¹² Based on the determination that Mr. Kuehl was not clinically complex, DSHS classified Mr. Kuehl in group B-Medium-High. AR at 18. Individuals in group B-Medium-High receive 110 base hours of personal

¹² Mr. Kuehl also meets the criteria for group B-Medium under WAC 388-106-0125(4)(b). Because group B-Medium-High is associated with more hours of personal care services, it trumps group B-Medium. WAC 388-106-0100(1).

care services per month. WAC 388-106-0125(5)(b). If Mr. Kuehl had instead been designated clinically complex, he would have been classified in group C-Low. WAC 388-106-0125(3)(d). That group is associated with only 95 hours per month. *Id.*

The resulting anomaly, that a designation of clinical complexity would potentially reduce Mr. Kuehl's benefits from 110 to 95 hours per month, is a known error in the drafting of the rules. *See* WAC 388-106-0125(4) and -0125(5) (client will not be classified as B group if he meets the criteria for C group); WAC 388-106-0100(1) (classifying a client based on which group B classification will result in the highest award of services, but not including group C). The Department's current solution for this anomaly is that those few clients who fall into the group C-Low "donut hole" are granted an Exception To Rule under WAC 388-440-0001 to receive 110 hours of personal care, as if they had been given a B-Medium-High classification. Whether or not Mr. Kuehl had any open sores at the time of his 2007 CARE assessment, he would have been awarded the 110 hours of personal care services that he in fact received.

Mr. Kuehl qualified for his previous level of services, 145 hours per month, on the basis of his classification in group D-Low. WAC 388-106-0125(2)(d). His failure to qualify for that group on the basis of his 2007 CARE assessment was the function of the interaction of his activities

score, cognitive score, behavioral score, and clinical complexity. In the end, whether or not Mr. Kuehl was clinically complex was irrelevant in light of the change to his cognitive performance score from 4 to 3. AR at 17. As Mr. Kuehl has not challenged the cognitive score on review, a change to his clinical complexity designation would have no effect on his personal care benefits.

Mr. Kuehl does not show how a successful appeal would result in the award of any additional personal care hours, or any other benefit. He neither identifies nor requests any available redress; his conclusion argues merely that DSHS's "interpretation" of the clinical complexity rules "must be overturned." Op. Br. at 48-49; *see* RAP 10.3(7) (requiring "short conclusion stating the precise relief sought"). While Mr. Kuehl would have standing to appeal an agency error that caused him some harm, he has no standing to put before the courts a purely theoretical question of law, the resolution of which would change nothing for him. His failure to allege any concrete injury as a result of the agency action at issue, as well as his failure to request any redress, mandates dismissal for lack of standing under RCW 34.05.530(1) and (3).

E. No Remedy Is Available Under The APA Because Mr. Kuehl Was Not Substantially Prejudiced By The Alleged Errors

Even if Mr. Kuehl has standing to raise the issues he has argued, this Court can grant no relief. In reviewing agency action under the APA, a court “shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.” RCW 34.05.570(1)(d); *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d at 226.

Because Washington courts have not addressed the definition of “substantial prejudice” in this context, we look to persuasive authority from here and elsewhere. RCW 34.05.001 (“the courts should interpret provisions of [the APA] consistently with decisions of other courts interpreting similar provisions of other states, the federal government, and model acts”). In the context of judicial review of agency action, other jurisdictions have held that “[a] party has been substantially prejudiced if the alleged error was not harmless.” *WWC Holding Co. v. Pub. Serv. Comm'n*, 44 P.3d 714, 718 (Utah 2002) (internal quotations omitted); *see also Lara-Torres v. Ashcroft*, 383 F.3d 968, 973 (9th Cir. 2004) (“substantial prejudice” in judicial review of federal immigration proceedings “is essentially a demonstration that the alleged violation affected the outcome of the proceedings”). That rule is in accord with Washington’s rule regarding when a trial court error is grounds for

reversal. *E.g., Brown v. Spokane Cy. Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983) (harmless evidentiary error not grounds for reversal). In order to be granted relief, Mr. Kuehl must show at a minimum that the outcome of the Department's decision would have, or at least could have, been different had the alleged errors not been committed.¹³

As detailed above, Mr. Kuehl has failed to show that the alleged errors in this case have caused him any prejudice whatsoever. Even if DSHS erred in not determining Mr. Kuehl to be clinically complex, his benefits were not reduced as a result. And even if the initial notice sent by DSHS was inadequate, Mr. Kuehl was provided with additional pre-deprivation notice that cured any initial inadequacy. Any error was harmless. Mr. Kuehl has failed to show that the alleged error of law in this case has substantially prejudiced him within the meaning of RCW 34.05.570(1)(d).

¹³ Additionally, a comparison of the "substantially prejudiced" provision with the APA standing requirement demonstrates that a party must show something more than being aggrieved to receive judicial relief. To avoid contravening basic principles of statutory construction, "substantial prejudice" under RCW 34.05.570 must be something more than the "prejudice" that one must demonstrate in order to obtain standing under RCW 34.05.530(1). *See, e.g., Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002) ("Statutes must be construed so that all the language is given effect and no portion is rendered meaningless or superfluous."); *United Parcel Service v. Dep't of Revenue*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984) (where the legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent).

V. CONCLUSION

The Department requests that the Court dismiss this case for lack of standing or lack of remedy. In the alternative, the Court should affirm the Department's Final Order.

RESPECTFULLY SUBMITTED this 3rd day of June, 2010.

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VI. APPENDIX

AMENDATORY SECTION (Amending WSR 05-11-082, filed 5/17/05, effective 6/17/05)

WAC 388-106-0110 How does the CARE tool evaluate me for the exceptional care classification of in-home care? CARE places you in the exceptional care classifications for the in-home setting when the following criteria are met in either diagram 1 or 2:

Diagram 1
((You have one of the following diagnoses:
■ Quadriplegia;
■ Paraplegia;
■ ALS (Amyotrophic Lateral Sclerosis);
■ Parkinson's Disease;
■ Multiple Sclerosis;
■ Comatose;
■ Muscular Dystrophy;
■ Cerebral Palsy;
■ Post Polio Syndrome; or
■ TBI (traumatic brain injury).))
((AND))
You have an ADL score of greater than or equal to 22.
AND
You need a Turning/repositioning program.
AND
You require at least one of the following:
■ External catheter;
■ Intermittent catheter;
■ Indwelling catheter care;
■ Bowel program; ((or))
■ Ostomy care; or
■ Total in Self Performance for Toilet Use.
AND
You need one of the following services provided by an individual provider, agency provider, a private duty nurse, or through self-directed care:
■ Active range of motion (AROM); or
■ Passive range of motion (PROM).
Diagram 2
You have an ADL score of greater than or equal to 22.
AND
You need a Turning/repositioning program.
AND
You need one of the following services provided by an individual provider, agency provider, a private duty nurse, or through self-directed care:
■ Active range of motion (AROM); or
■ Passive range of motion (PROM).
AND

All of the following apply:
■ You require IV nutrition support or tube feeding;
■ Your total calories received per IV or tube was greater than 50%; and
■ Your fluid intake by IV or tube is greater than 2 cups per day.
AND
You need assistance with one of the following, provided by an individual provider, agency provider, a private duty nurse, or through self-directed care:
■ Dialysis; or
■ Ventilator/respirator.

AMENDATORY SECTION (Amending WSR 05-11-082, filed 5/17/05, effective 6/17/05)

WAC 388-106-0125 How does CARE use the criteria of cognitive performance as determined under WAC 388-106-0090, clinical complexity as determined under WAC 388-106-0095, mood/behaviors as determined under WAC 388-106-0100, ADLs as determined under WAC 388-106-0105, and exceptional care as determined under WAC 388-106-0110, to place me in a classification group for in-home care? CARE uses the criteria of cognitive performance as determined under WAC 388-106-0090, clinical complexity as determined under WAC 388-106-0095, mood/behavior as determined under WAC 388-106-0100, ADLs as determined under WAC 388-106-0105, and exceptional care as determined under WAC 388-106-0110 to place you into one of the following ((fourteen)) seventeen in-home groups.

EMERGENCY

EMERGENCY

Classification	ADL or Behavior Point Score	Group	Base Hours of Group
Group E Exceptional care = yes and Mood and behavior = yes or no and Cognitive performance score = 0-6	ADL Score 26-28	E High (((14)))	420
	ADL Score 22-25	E Med (((13)))	350
Group D Cognitive performance score = 4-6 and Clinically complex = yes and Mood and behavior = yes or no OR Cognitive performance score = 5-6 and Clinically complex = no and Mood and behavior = yes or no	ADL Score ((+8)) 25-28	D High (((12)))	((240)) 280
	ADL Score 18-24	D Med-High	240
	ADL Score 13-17	D Med (((11)))	190
	ADL Score 2-12	D Low (((10)))	145
Group C Cognitive performance score = 0-3 and Clinically complex = yes and Mood and behavior = yes or no	ADL Score 25-28	C High	200
	ADL Score 18-((28))24	C Med-High (((9)))	180
	ADL Score 9-17	C Med (((8)))	140
	ADL Score 2-8	C Low (((7)))	((83)) 95
Group B Mood and behavior = yes and Clinically complex = no and Cognitive performance score = 0-4 OR Cognitive Performance score >2 and Behavior score >1 and ADL score >1 OR Cognitive performance score >2 And ADL score >1	ADL Score 15-28	B High (((6)))	155
	ADL Score 5-14	B Med (((5)))	90
	ADL Score 0-4	B Low (((4)))	52
	Behavior Points 12 or higher	B High	155
	Behavior Points 7-11	B Med-High	110
	Behavior Points 5-6	B Med	90
	Behavior Points 1-4	B Low	52
Group A Mood and behavior = no and Clinically complex = no and Cognitive performance score = 0-4	ADL Score 10-28	A High (((3)))	78
	ADL Score 5-9	A Med (((2)))	62
	ADL Score 0-4	A Low (((1)))	29

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DIVISION OF DEVELOPMENTAL DISABILITIES

**Planned Action Notice
Service Decisions**

10/19/07

CLIENT NAME AND ADDRESS

Dylan Kuehl
1010 Rogers St. NW
Olympia, WA. 98512

CLIENT REPRESENTATIVE NAME AND ADDRESS

Terri Rose
1010 Rogers St. NW
Olympia, WA. 98512

DDD has made the following decision(s) regarding your services or request for services.

This decision is effective 11/01/2007

SERVICE DECISION AMOUNT		
SERVICE	DECISION	AMOUNT
personal care	<input type="checkbox"/> Approved	
	<input type="checkbox"/> Increased	From: 145
	<input checked="" type="checkbox"/> Reduced	To: 110
	<input type="checkbox"/> Denied	
	<input type="checkbox"/> Terminated	

REASON FOR DENIAL, REDUCTION OR TERMINATION OF SERVICE

- You are not eligible for this service or program.
- You do not have an assessed need for this service.
- You cannot receive or use this service in the manner you requested.
- It has been determined you do not have an assessed need for the amount of service you requested or previously had.
- The service is available through other resources.
- You or your representative requested this decision.
- There is no funding available for this state-only funded service.
- The service or the previous amount of service is determined as not necessary for your health and welfare.
- The service is not available in your waiver or is not a waiver service.
- Your service request exceeds waiver budget.
- Other:

WAC

WAC 388-106-0130

How does the department determine the number of hours I may receive for in-home care?

(1) The department assigns a base number of hours to each classification group as described in WAC 388-106-0125.

(2) The department will deduct from the base hours to account for your informal supports, as defined in WAC 388-106-0010, as follows:

(a) The CARE tool determines the adjustment for informal supports by determining the amount of assistance available to meet your needs, assigns it a numeric percentage, and reduces the base hours assigned to the classification group by the numeric percentage. The department has assigned the following numeric values for the amount of assistance available for each ADL and IADL:

Meds Self Performance Status Assistance Available Value

000557

Percentage

Self administration of medications Rules for all codes apply except independent is not counted Unmet N/A1

Met N/A0

Decline N/A0

Partially met <1/4 time .9

1/4 to 1/2 time .7
1/2 to 3/4 time .5
>3/4 time .3

Unscheduled ADLs Self Performance Status Assistance Available Value

Percentage

Bed mobility, transfer, walk in room, eating, toilet use Rules apply for all codes except: Did not occur/client not able and Did not occur/no provider = 1;

Did not occur/client declined and independent are not counted. Unmet N/A1

MetN/A0

DeclineN/A0

Partially met <1/4 time .9

1/4 to 1/2 time .7

1/2 to 3/4 time .5

>3/4 time .3

Scheduled ADLs Self Performance Status Assistance Available Value

Percentage

Dressing,

personal hygiene,

bathing Rules apply for all codes except: Did not occur/client not able and Did not occur/no provider = 1;

Did not occur/client declined and independent are not counted. Unmet N/A1

MetN/A0

DeclineN/A0

Partially met <1/4 time .75

1/4 to 1/2 time .55

1/2 to 3/4 time .35

>3/4 time .15

IADLs Self Performance Status Assistance Available Value

Percentage

Meal preparation,

Ordinary housework,

Essential shopping* Rules for all codes apply except independent is not counted. Unmet N/A1

MetN/A0

DeclineN/A0

Partially met <1/4 time .3

1/4 to 1/2 time .2

1/2 to 3/4 time .1

>3/4 time .05

IADLs Self Performance Status Assistance Available Value

Percentage

Travel to medical Rules for all codes apply except independent is not counted. Unmet N/A1

MetN/A0

DeclineN/A0

Partially met <1/4 time .9

1/4 to 1/2 time .7

1/2 to 3/4 time .5

>3/4 time .3

Key:

> means greater than

< means less than

000558

*Results in 5% deduction for each IADL from the base hours. Remaining hours may be used for completion of household and personal care tasks.

(b) To determine the amount of reduction for informal support, the value percentage is divided by the number of qualifying ADLs and IADLs needs. The result is value A. Value A is then subtracted from one. This is value B. Value B is divided by three. This is value C. Value A and Value C are summed. This is value D. Value D is multiplied by the "base hours" assigned to your classification group and the result is base in-home care hours reduced for informal supports.

(3) Also, the department will adjust in-home base hours for the following shared living circumstances:

(a) If there is more than one client living in the same household, the status under subsection (2)(a) of this section must be met or partially met for the following IADLs:

- (i) Meal preparation,
- (ii) Housekeeping,
- (iii) Shopping, and
- (iv) Wood supply.

(b) If you and your paid provider live in the same household, the status under subsection (2)(a) of this section must be met for the following IADLs:

- (i) Meal preparation,
- (ii) Housekeeping,
- (iii) Shopping, and
- (iv) Wood supply.

(c) When there is more than one client living in the same household and your paid provider lives in your household, the status under subsection (2)(a) of this section must be met for the following IADLs:

- (i) Meal preparation,
- (ii) Housekeeping,
- (iii) Shopping, and
- (iv) Wood supply.

(4) After deductions are made to your base hours, as described in subsections (2) and (3), the department may add on hours based on your living environment:

Condition Status Assistance Available Add On Hours

Offsite laundry facilities, which means the client does not have facilities in own home and the caregiver is not available to perform any other personal or household tasks while laundry is done. Unmet N/A8

Client is >45 minutes from essential services (which means he/she lives more than 45 minutes one-way from a full-service market). Unmet N/A5

MetN/A0

Partially met <1/4 time 5
between 1/4 to 1/2 time 4
between 1/2 to 3/4 time 2
>3/4 time 2

000559

Wood supply used as sole source of heat. Unmet N/A8

MetN/A0

Declines N/A0

Partially met <1/4 time 8
between 1/4 to 1/2 time 6
between 1/2 to 3/4 time 4
>3/4 time 2

(5) In the case of New Freedom consumer directed services (NFCDS), the department determines hours as described in WAC 388-106-1450.

(6) The result of actions under subsections (2), (3), and (4) is the maximum number of hours that can be used to develop your plan of care. The department must take into account cost effectiveness, client health and safety, and program limits in determining how hours can be used to meet your identified needs. In the case of New Freedom consumer directed services (NFCDS), a New Freedom spending plan (NFSP) is developed in place of a plan of care.

(7) You and your case manager will work to determine what services you choose to receive if you are eligible. The hours may be used to authorize:

(a) Personal care services from a home care agency provider and/or an individual provider.

(b) Home delivered meals (i.e. a half hour from the available hours for each meal authorized).

(c) Adult day care (i.e. a half hour from the available hours for each hour of day care authorized).

(d) A home health aide if you are eligible per WAC 388-106-0300 or 388-106-0500.

(e) A private duty nurse (PDN) if you are eligible per WAC 388-71-0910 and 388-71-0915 or WAC 388-551-3000 (i.e. one hour from the available hours for each hour of PDN authorized).

(f) The purchase of New Freedom consumer directed services (NFCDS).

[Statutory Authority: RCW 74.08.090, 74.09.520, 74.39A.030, 06-16-035, § 388-106-0130, filed 7/25/06, effective 8/25/06. Statutory Authority: RCW 74.08.090, 74.09.520, 74.39A.010 and 74.39A.020, 06-05-022, § 388-106-0130, filed 2/6/06, effective 3/9/06. Statutory Authority: RCW 74.08.090, 74.09.520, 05-11-082, § 388-106-0130, filed 5/17/05, effective 6/17/05.]

Glossary of Terms

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WAC 388-106-0135

What are the maximum hours that I can receive for in-home services?

The maximum hours that you may receive is the base hours assigned to your classification group and adjusted per WAC 388-106-0130. For chore program clients, the maximum personal care hours per month the department will pay is one hundred sixteen.

[Statutory Authority: RCW 74.08.090, 74.09.520, 05-11-082, § 388-106-0135, filed 5/17/05, effective 6/17/05.]

000560

YOUR APPEAL RIGHTS

You have ninety (90) days from receipt of this notice to request an administrative hearing to appeal this action.

- If you are currently receiving this paid service from DDD and want the service continued during your appeal, you must file your request for an administrative hearing by 11/01/07.
- If you choose to continue this paid service and the final decision upholds the department's action, you may be responsible to repay up to 60 days of paid services.
- If you do not want your paid services to continue, contact your case/resource manager.

You have the following rights:

1. To have another person represent you (DSHS does not pay for attorneys, but free or low cost legal assistance may be available in your community);
2. To request a copy of your file and all information reviewed by DDD to make its decision;
3. To submit documents into evidence;
4. To testify at the hearing and to present witnesses to testify on your behalf; and
5. To cross examine witnesses testifying for the department.

A form requesting an administrative hearing is enclosed.

WHO TO CALL FOR INFORMATION?

If you have questions about this decision or appeal process, please contact:

NAME	TELEPHONE NUMBER	E-MAIL ADDRESS
Nancy Stewart	(360) 725-4261	stewanr@dshs.wa.gov

000561



**DDD Planned Action Notice
Service Decisions
Request For Hearing**
Per Chapter 388-02 for DSHS hearing rules.

FOR AGENCY USE ONLY	
<input type="checkbox"/> Oral request taken by:	
NAME	TELEPHONE NUMBER
INVOLVED DIVISION/ORGANIZATION	

MAIL TO: OFFICE OF ADMINISTRATIVE HEARING (OAH), MAIL STOP: 42489
PO BOX 42489
OLYMPIA WA 98504-2489

FAX: 360-586-6563

I request a hearing because I disagree with the following service decision by the Division of Developmental Disabilities (DDD):

YOUR NAME (PLEASE PRINT)		DATE OF BIRTH	
ADDRESS OF PERSON REQUESTING HEARING		CLIENT ID NUMBER	
CITY	STATE	ZIP CODE	TELEPHONE NUMBER (INCLUDE AREA CODE) <input type="checkbox"/> MESSAGE PHONE
I was notified of the decision on: _____ by: _____		DATE DSHS OFFICE NAME AND LOCATION	
I want continued assistance, if I am eligible: <input type="checkbox"/> Yes <input type="checkbox"/> No Program: _____			
I am represented by (if you are going to represent yourself, do not fill in the next two lines):			
YOUR REPRESENTATIVE'S NAME		ORGANIZATION	TELEPHONE NUMBER
ADDRESS STREET		CITY	STATE ZIP CODE
<input type="checkbox"/> I authorize release of information about my hearing to my representative.			
YOUR SIGNATURE			DATE
Do you need an interpreter or other assistance or accommodation for the hearing? <input type="checkbox"/> Yes <input type="checkbox"/> No			
If yes, what language or what assistance? _____			000562
Administrative Law Judges (ALJ's) may hold some hearings by telephone. If you want to change to an in-person hearing. Follow the instructions in the Notice of Hearing that will be mailed to you by OAH.			

Individual Support Plan (ISP) Current Annual DDD Assessment Details

Overview

Overview

Assessment Date: 09/10/2007
Categorically Needy Program (CNP) eligible? No
Meet ICF/MR Level of Care: Yes

RECEIVED

MAY 01 REC'D
OAH - Olympia

Demographics/Client Information

Client Name: Kuehl, Dylan A

Address:

1010 and one half N. Rogers
Olympia WA 98502

Phone: (360)943-4171

Gender: Male

DOB: 06/25/1983

Primary Language: English

Assessed Age: 24

Interpreter Required: No

Speaks English: Yes

Client Representative (NSA)

Name: Rose, Terri

Relation to client: Parent

Phone: (360)701-9880

Address:

1010 Rogers St. NW
Olympia, Wa 98502

Worker Information

Primary Case Manager: Stewart, Nancy R (stewanr)

Office: DDD Region 6 FSO

Phone Number: (360)725-4261

E-mail: stewanr@dshs.wa.gov

Address:

6860 Capitol Blvd. SE, Bldg 2
PO Box 45315
Olympia WA 98501

Reason For Assessment

Young man with Down Syndrome in need of current assessment. Mom is payee and

Exhibit 36 Page 1

Client Name: Kuehl, Dylan A
Assessment Date: 09/10/2007

Date printed: 02/22/2008 01:14 PM
Page: 1

Individual Support Plan (ISP) Current Annual DDD Assessment Details

does not have guardianship at this time, but is posed to obtain it if necessary in an emergency situation.

Was client primary source of information: Yes

Other Sources of information:

Rose, Terri; Cody, Mari

Support Assessment

Support Assessment Scales

Category	Level
Activities of Daily Living (Adults)	Medium
Behavior	High
Caregiver Risk Level	Low
Interpersonal Support (Adults)	High
Medical	Low
Mobility (Adults)	None
Protective Supervision	High

Home Living

Activity	Frequency	Type Of Support
Using the toilet	At least once a week, but not once a day	Verbal/gestural prompting
Taking care of clothes (includes laundering)	At least once a week, but not once a day	Partial physical assistance
Preparing food	At least once a week, but not once a day	Partial physical assistance
Eating food	At least once a day, but not once an hour	Verbal/gestural prompting
Housekeeping and cleaning	At least once a week, but not once a day	Partial physical assistance

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Individual Support Plan (ISP) Current Annual DDD Assessment Details

Activity	Frequency	Type Of Support
Dressing	At least once a week, but not once a day	Verbal/gestural prompting
Bathing and taking care of personal hygiene and grooming needs	At least once a day, but not once an hour	Partial physical assistance
Operating home appliances	At least once a week, but not once a day	Partial physical assistance
Using currently prescribed equipment or treatment	None or less than monthly	None

#3: Dylan follows the Jenny Craig diet and receives prepared meals. However, Terri assists Dylan with supplementing meals with fresh veggies, fruit. #2: Minor repairs and insuring that clothes are washed, folded, put away. #4: Verbal cues and monitoring regarding portion control, choking. #5: Assistance with cleaning bathroom, dishes. #7: Assistance w/ nose care, nail care, flossing of teeth, and care of bottom when sores occur. Assistance needed also with obtaining a haircut.

Community Living

Activity	Frequency	Type Of Support
Getting from place to place throughout the community (transportation)	At least once a day, but not once an hour	Partial physical assistance
Participating in recreation/leisure activities in the community settings	At least once a week, but not once a day	Verbal/gestural prompting
Using public services in the community	At least once a month, but not once a week	Partial physical assistance
Going to visit friends and family	At least once a week, but not once a day	Partial physical assistance
Participating in preferred community activities (church volunteer, etc.)	At least once a week, but not once a day	Partial physical assistance
Shopping and purchasing goods and services	At least once a week, but not once a day	Partial physical assistance

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Exhibit 36 Page 3

Individual Support Plan (ISP) Current Annual DDD Assessment Details

Activity	Frequency	Type Of Support
Interacting with community members	At least once a week, but not once a day	Verbal/gestural prompting
Accessing public buildings and settings	At least once a month, but not once a week	Verbal/gestural prompting

#1: Dylan relies on Terri to transport him, but he also rides the bus. #2: Dylan needs encouragement to participate in activities in the community. #3: Dylan would need assistance with social security, food stamp issues, coordinating a meeting with his CM or others . . #6: Dylan would need assistance counting change, getting a refund, interviewing someone to purchase a service, and purchasing through a catalogue. #8: Dylan can access public buildings but would need reminders about rules in these settings.

Lifelong Learning Activities

Activity	Frequency	Type Of Support
Interacting with others in learning activities	At least once a week, but not once a day	Verbal/gestural prompting
Participating in training/educational decisions	At least once a week, but not once a day	Partial physical assistance
Learning and using problem solving strategies	At least once a day, but not once an hour	Partial physical assistance
Using technology for learning	At least once a week, but not once a day	Verbal/gestural prompting
Accessing training/educational settings	At least once a week, but not once a day	Partial physical assistance
Learning functional academics (reading signs, counting change, etc.)	At least once a week, but not once a day	Partial physical assistance
Learning health and physical education skills	At least once a day, but not once an hour	Partial physical assistance
Learning self-determination skills	At least once a week, but not once a day	Partial physical assistance

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Individual Support Plan (ISP) Current Annual DDD Assessment Details

Activity	Frequency	Type Of Support
Learning self-management strategies	At least once a week, but not once a day	Partial physical assistance

#2: Dylan earned a \$1,000 scholarship from the Nat'l Down Syndrome Conf. to pursue post-secondary classes in the community. #1: May need verbal cues from a teacher. Would depend of configuration of who was in the class. #2, #3: Dylan would be able to express desires regarding educ. decisions but would need help with choosing a course, schedule planning . . . #5, #6: Dylan would need assistance locating courses, paying tuition, and arranging transportation. Assistance with all academics needed.

Employment Activities

Activity	Frequency	Type Of Support
Accessing/ receiving job/ task accommodations	At least once a day, but not once an hour	Partial physical assistance
Learning and using specific job skills	At least once a day, but not once an hour	Partial physical assistance
Interacting with co-workers	At least once a day, but not once an hour	Partial physical assistance
Interacting with supervisors/ coaches	At least once a day, but not once an hour	Partial physical assistance
Completing work-related tasks with acceptable speed	At least once a day, but not once an hour	Partial physical assistance
Completing work-related tasks with acceptable quality	At least once a day, but not once an hour	Partial physical assistance
Changing job assignments	At least once a week, but not once a day	Partial physical assistance
Seeking information and assistance from an employer	At least once a week, but not once a day	Verbal/gestural prompting

#3,4: Dylan owns his own business, DK Arts. He has received funding through DVR (case now closed) and is seeking long-term support. His business encompasses many varied services from dance performances to commissioned pieces of art that Dylan produces.

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Individual Support Plan (ISP) Current Annual DDD Assessment Details

Dylan finds himself in a variety of venues interacting with many different people. He would need assistance in many of these interactions to insure that his communications are clear and appropriate and that he understands fully communications of others.

Health and Safety Activities

Activity	Frequency	Type Of Support
Taking medications	At least once a day, but not once an hour	Partial physical assistance
Avoiding health and safety hazards	At least once a week, but not once a day	Partial physical assistance
Obtaining health care services	At least once a month, but not once a week	Partial physical assistance
Ambulating and moving about	None or less than monthly	None
Learning how to access emergency services	At least once a week, but not once a day	Partial physical assistance
Maintaining a nutritious diet	At least once a day, but not once an hour	Partial physical assistance
Maintaining physical health and fitness	At least once a week, but not once a day	Verbal/gestural prompting
Maintaining emotional well-being	At least once a day, but not once an hour	Partial physical assistance

#2: A safety plan is being developed by the Disabilities Services Dept. at SPSCC to ensure Dylan is safe on campus. #1: Reminders on when to take and parent re-orders meds. #3: Terri make appts., coordinates health care, and insures crucial info. is conveyed. #6,7: Terri helps Dylan make healthy food choices to supplement Jenny Craig meals. Terri locates opportunities for physical activities for Dylan and helps him plan, make choices in this area.

Social Activities

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Individual Support Plan (ISP) Current Annual DDD Assessment Details

Activity	Frequency	Type Of Support
Socializing within the household	At least once a day, but not once an hour	Verbal/gestural prompting
Participating in recreation/leisure activities with others	At least once a week, but not once a day	Verbal/gestural prompting
Socializing outside the household	At least once a week, but not once a day	Verbal/gestural prompting
Making and keeping friends	At least once a week, but not once a day	Partial physical assistance
Communicating with others about personal needs	At least once a week, but not once a day	Partial physical assistance
Using appropriate social skills	At least once a week, but not once a day	Partial physical assistance
Engaging in loving and intimate relationships	At least once a week, but not once a day	Partial physical assistance
Engaging in volunteer work	At least once a month, but not once a week	Partial physical assistance

#6: Dylan has difficulty reading the body language/social cues of others so needs partial physical assistance in this area. Dylan may also exhibit socially inappropriate habits such as picking nose or speaking very loudly. #2: Verbal cuing needed for Dylan to be successful participating in leisure activities with others.

Protection and Advocacy Activities

Activity	Frequency	Type Of Support
Advocating for self	At least once a day, but not once an hour	Partial physical assistance
Managing money and personal finances	At least once a week, but not once a day	Full physical assistance
Protecting self from exploitation	At least once a month, but not once a week	Partial physical assistance

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Individual Support Plan (ISP) Current Annual DDD Assessment Details

Activity	Frequency	Type Of Support
Exercising legal responsibilities	At least once a month, but no once a week	Partial physical assistance
Belonging to and participating in self-advocacy/ support organizations	At least once a month, but no once a week	Partial physical assistance
Obtaining legal services	At least once a month, but no once a week	Full physical assistance
Making choices and decisions	At least once a day, but not once an hour	Partial physical assistance
Advocating for others	At least once a week, but not once a day	Partial physical assistance

#2,3: Dylan does not have alot of experience in this area and has been exploited in the past, ie: buying meals for others when they indicated they did not have money. #6: Terri speaking with an attorney daily due to pending litigation. #7: Terri indicates Dylan relies on her to make decisions specifically as it relates to #6. Due to mental health issues that Dylan has experienced, Terri indicates she must make more decisions and provides Dylan with less info. for his mental well-being.

Exceptional Medical Support Needs

Support Needed	Amount of Support
Inhalation or oxygen therapy	No Support Needed
Postural drainage	No Support Needed
Chest PT	No Support Needed
Suctioning	No Support Needed
Oral stimulation or jaw positioning	No Support Needed
Tube feeding (e.g. nasogastric)	No Support Needed
Parenteral feeding (e.g. IV)	No Support Needed

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Individual Support Plan (ISP) Current Annual DDD Assessment Details

Support Needed	Amount of Support
Turning or positioning	No Support Needed
Dressing of open wound(s)	No Support Needed
Protection from infectious diseases due to immune system impairment	No Support Needed
Seizure management	No Support Needed
Dialysis	No Support Needed
Ostomy care	No Support Needed
Lifting and/or transferring	No Support Needed
Therapy services	Extensive Support Needed
Diabetes management	No Support Needed
Other(s)-Specify	No Support Needed

Dylan is in good health and does not require exceptional medical care. Extensive assistance needed to support Dylan in maintaining therapy appts. and supporting Dylan in issues that his therapist works with him on. Nancy Murphy will be Dylan's new therapist starting 10/01/07.

Exceptional Behavior Support Needs

Support Needed	Amount of Support
Prevention of assaults or injuries to others	No Support Needed
Prevention of property destruction (e.g. fire setting, breaking furniture)	No Support Needed
Prevention of stealing	No Support Needed
Prevention of self-injury	No Support Needed

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Individual Support Plan (ISP)

Current Annual DDD Assessment Details

Support Needed	Amount of Support
Prevention of pica (ingestion of inedible substances)	No Support Needed
Prevention of suicide attempts	Extensive Support Needed
Prevention of sexual aggression	No Support Needed
Prevention of non-aggressive but inappropriate behavior (e.g. exposes self in	No Support Needed
Prevention of tantrums or emotional outbursts	Extensive Support Needed
Prevention of wandering	No Support Needed
Prevention of substance abuse	No Support Needed
Maintenance of mental health treatments	Extensive Support Needed
Managing attention-seeking behavior	No Support Needed
Managing uncooperative behavior	Some Support Needed
Managing agitated/over-reactive behavior	Extensive Support Needed
Managing obsessive/repetitive behavior	Extensive Support Needed
Prevention of other serious behavior problem(s)-Specify	Extensive Support Needed

#6,9,12: Dylan needs support to be successful in preventing suicide attempts (can become depressed easily), emotional outbursts, and maintenance of mental health treatments. Terri and Dylan's therapist monitor and intervene. #16: Dylan bites nails, chews on knuckles, picks nose, grinds teeth. #17: Dylan's dad has been mentally abusive to Dylan. Dylan does not have the ability to protect himself from this, so this relationship is monitored by Terri.

DDD Caregiver Status

Primary Caregiver: Rose, Terri

Other caregiving for persons who are disabled:, seriously ill or under 5:

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Individual Support Plan (ISP) Current Annual DDD Assessment Details

Client is the ONLY person who requires direct care

Under what conditions are the other caregiver available:

Upon request

Is client creating significant stressors on household:

Family/household is stable and healthy

How long continue to provide care: 2 or more years

Communication

Speech/Hearing

Making self understood expressing information content however able:

Usually Understood

Modes of expression:

Speech

Ability to understand others however able: Usually Understood

Progression Rate: No Change

Hearing Progression Rate: No Change

Hearing: Hears adequately-normal talk

Some hearing loss, but never diagnosed to be a problem. When he has physicals, shows hearing to be ok. Has a sharp startle reflex to sound.

Telephone Use

How telephone calls are made or received (with assistive devices such as large numbers on telephone, amplification as needed)

Client Needs:

Limited assistance, Some difficulty

Client Strengths:

Can dial phone

Client Limitations:

Cannot call 911

Caregiver Instructions:

Take messages for client

Provider

ROSE THERESA SUE

Puts calls out to friends, but does not take messages. Calls others but does not always identify himself. Mom does not know when he would call 911. Doesn't always leave

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Exhibit 36 Page 11

Individual Support Plan (ISP) Current Annual DDD Assessment Details

messages. Has a cell phone he uses to call mom. Doesn't always get name and number from people. Takes cell phone, but not that good at checking messages. Doesn't always hear and/or answer phone.

Vision

Ability to See: Adequate

Limitations:

None of these

Equipment:

Type	Status	Supplier
Glasses	Has, uses	

Blepharitis causes eye balls to be red. Eye lids generate bacteria that cause infection if not treated. Untreated would cause blindness. Eye lids must be cleansed daily and eye drops administered daily. Occuring more frequently so care needs have increased. More self-motivated to have glasses with him and use them in the last 4 months. Sight not as good anymore, has lost more depth perception. Prescription has changed slightly.

Mental/Physical Health

Permanent History

2006: Thyroid was tested at last appt. and was fine. Echocardiogram and EKG in about six months. Results were good on last one. Dylan returns every 18 months for this. Mom wants Dr. Son to do a hearing evaluation in near future. Dylan has had a dry throat (problems with laringitis) for the last month. Humidifier purchased and being used and this has helped. 2007: Univ. Hospital in Seattle: Tonsils removed and sinus reconstructive surgery. Within 2007 will have big toe nail removed on left foot. Topical medication and oral med are not working effectively to remedy this problem of fungus. 2007: Dylan attempted to jump from a bridge at SPSCC and was taken to the hospital and released that same day to the protective supervision of his mother. Follow-up occurred with Dylan's therapist, Jude Bergkamp. Four wisdom teeth pulled On 9/11/07. November 2006: Tonsillectomy and sinus reconstruction.

Diagnosis

1. Mental retardation

Suppressed Immune System; Aortic Insufficiency; Sebaceous cysts

2. Irritable bowel syndrome

3. ABUSE BY FATHER/STEPFATHER/BF

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Individual Support Plan (ISP) Current Annual DDD Assessment Details

Physical abuse as a child. Sexual abuse by neighbor.

4. STRABISMUS*

Down Syndrome; Blepharitis

5. Down Syndrome

6. ACNE NEC

7. BLEPHARITIS NOS

Indicators:

Short of breath/exertion

Is client comatose? No

Medications

This list of medications was obtained from medical record/client/caregiver on the date of this assessment. Do not use this list as the basis for assistance with or administration of medications.

1. Bactroban 2 percent ointment

Dose Qty:

Route: Topical

Frequency: TID (3xday)

Rx: Yes

2. Cephalexin

Dose Qty: 500.000 mg

Route: Oral

Frequency: PRN (as needed)

Rx: Yes

3. Fiber Caplets

Dose Qty:

Route: Oral

Frequency: QD (once daily)

Rx: NO

4. Fluorometholone

Dose Qty: 1 Drops

Route: Other

Frequency: QD (once daily)

Rx: Yes

5. Hyoscyamine

Dose Qty: 0.125 mg

Route: Oral

Frequency: PRN (as needed)

Rx: Yes

6. Ketoconazole Medicated Shampoo

Dose Qty:

Route: Topical

Frequency:

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Individual Support Plan (ISP) Current Annual DDD Assessment Details

Frequency: PRN (as needed) Rx: Yes

7. Minocycline

Dose Qty: 50.000 mg Route: Oral

Frequency: QD (once daily) Rx: Yes

8. Naftin 1 percent cream

Dose Qty: Route: Topical

Frequency: Weekly Rx: Yes

9. Ocusoft lid scrub

Dose Qty: Route: Topical

Frequency: QD (once daily) Rx: NO

10. Stridex pads

Dose Qty: Route: Topical

Frequency: QD (once daily) Rx: NO

Take one to two tabs per incident.

Medication Management

Self Administration: Assistance required

Frequency of need: Daily

Client Strengths:

Able to put medications in mouth, Single pharmacy, Able to open containers, Takes medications as prescribed

Client Limitations:

Chokes/gags, Forgets to take medications

Client Preferences:

Would like family to assist with task

Caregiver Instructions:

Remind client to take medications, Re-order medications

Provider

ROSE THERESA SUE

Needs to be reminded and directed what to take; does not know times on meds.

Pain

Pain Site:

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Individual Support Plan (ISP) Current Annual DDD Assessment Details

Pain Site	Score
Back pain	4
Arm	4

Frequency with which client complains or shows evidence of pain:

Pain less than daily

Pain Management: Treated, partial control

Impact:

Activity limited, Irritability

Arm (shoulder)

Indicators

Height: 5 feet 7 inches **Weight:** 170 pounds
Body Mass Index: 26.62286 Overweight
Weight loss: 5% or more in last 30 days; or 10% in last 180 days: No
Weight gain: 5% or more in last 30 days; or 10% in last 180 days: No
In general, how would you rate your health? : Fair

In the last 6 months or since last assessment (if less than 6 months ago)

Number of times visited emergency room without an overnight stay : 1
Date of last doctor visit: 08/01/2007

Allergy

Substance: Pencillin
Reaction:
 Hives/itching, Mouth/face/eyes swell or itch, Rash

Treatments/Programs/Therapies

Self Directed Care: Individuals who have a functional impairment may direct their Individual Provider to perform a health related task that they would normally be able to perform themselves if they did not have a functional impairment that prevents them from doing so.
Nurse Delegation: In private homes, Adult Family Homes, and in Boarding Homes a Registered Nurse may delegate specific health related tasks to a qualified provider. The tasks are performed as instructed and supervised by the delegating nurse.

Type: Treatments

Name: Wound/skin care

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Providers:

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Individual Support Plan (ISP) Current Annual DDD Assessment Details

Nighttime behavioral/anxiety issues: None

Wakes to toilet most nights? Yes

Can toilet self at night? Yes

Mental Health

Sudden and persistent change in thoughts:

Obsessions, Rumination (obsessive thoughts)

Sudden and persistent change in moods or anxiety level:

Aversion to specific places, Feeling tense/nervous/restless, Persistent worrying

Sudden and persistent change in eating, sleeping or toileting: Yes

Memory

Recent memory : Recent Memory Problem

Long Term memory: Long term memory problem

Assist Type:

Ask clear and simple questions, Give simple, one step directions, Simplify environment, Set up calendar

Preferences:

Like to have same daily routine, Prefers to have favorite music

Is individual oriented to person? Yes

Progression Rate: No Change

No sense of progression of time. Always comes down stairs late to start day even with reminders. Client did well on MMSE, but there are short term memory issues according to mom. Confusion with days, weeks, months. Passage of time to appts, obligations is difficult for Dylan to track. Sometimes willing to have a timer, but this can startle him. At other times verbal cues work better.

Decision Making

Rate how client makes decisions:

Poor decisions/unaware of consequences - Decisions are poor; requires reminders, cues, and supervision in planning, organizing daily routines.

Is client always able to supervise paid care provider? No

If no, is there someone who can supervise paid care provider? Yes

If yes, who: Pietrusiak, Rick

Behavior

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Exhibit 36 Page 11

Individual Support Plan (ISP) Current Annual DDD Assessment Details

Current Behaviors (occurred in the last 7 days)

Name: Crying, tearfulness

Frequency: 1 to 3 Days **Alterability:** Not easily altered

Encourage Dylan to talk. Mom prays over him. Not occurring quite as much. Counseling has helped. Going to the angry/frustrated rather than the sad/hopeless.

Name: Easily irritable/agitated

Frequency: 4 to 6 days **Alterability:** Not easily altered

Dylan encouraged to take time to cool down. Drums and dances to relieve stress. Talks with mom. Since school has restarted (seeing girlfriend) has increased as opposed to last two months when not in school. More gentle response around self-care when talking to mom.

Name: Inappropriate verbal noises

Frequency: 4 to 6 days **Alterability:** Not easily altered

Dylan will burp and fart without excusing self. Mom points out behavior to Dylan.

Name: Mood swings

Frequency: 1 to 3 Days **Alterability:** Not easily altered

Has to be given time to go through mood swings. Mom is more concerned when Dylan swings down to the deeper depression side. Mom will sit with Dylan and help him work through issues. Many concerns now that Dylan has with his girlfriend and wedding even though wedding is years away.

Name: Obsessive re health/body functions

Frequency: Daily **Alterability:** Not easily altered

Constantly licks lips. Mom has him put salve on and this decreases. Mom says, "dry face, hands" and this increases his awareness not to do.

Name: Repetitive complaints/questions

Frequency: 4 to 6 days **Alterability:** Not easily altered

Dylan cannot be told about events far in advance or will ruminate on those circumstances until it happens.

Name: Resistive to care

Frequency: 1 to 3 Days **Alterability:** Not easily altered

Dylan may be resistive to care. Eg: Mom may point out need for medicine on face and Dylan may yell at her. "Don't tell me that". Slight improvement in response. Humor is important in helping him cope and get off of subjects.

Name: Unrealistic fears or suspicions

Frequency: 1 to 3 Days **Alterability:** Not easily altered

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Individual Support Plan (ISP) Current Annual DDD Assessment Details

Unrealistic fears about past incidents that he feels may impact him. Worries about dad abusing him again. Comes up with safety plan and this helps. Obsession with involvement in the drama of others.

Name: Verbally abusive

Frequency: 1 to 3 Days **Alterability:** Not easily altered

Spirals on an issue and cannot self-sooth himself. Will take his issues to school and to Kung Fu class. Will posture against mom and will slam fist down on table. Will spiral down and get depressed. Jude is called when this is an issue. Agitation comes around food and restaurant issues and issues with dad.

Name: Yelling/screaming

Frequency: 1 to 3 Days **Alterability:** Not easily altered

Gets very forceful with voice, escalates in volume, but not exactly yelling. Cries when gets into prayer.

Past Behaviors (did not occur in the last 7 days)

Name: Hoarding/collecting

Intervention: Addressed with current intervention

Problems with taking food out of fridge (sneaking it) up to his room. Intervention: Mom puts food in portion controlled containers in fridge, but some need to be hidden to prevent Dylan from taking them. Will eat until he is sick if not monitored. 2007: Jenny Craig diet has helped.

Name: Assaultive

Intervention: Addressed with current intervention

Has hit caregiver (Evan) and has pushed mom in the past. Will slam fist on table and posture by clenching fists. After this CM left the home on a previous visit, received call the next day that Dylan had grabbed his mother's arm, twisted it behind her back and held a toy sword to her throat. Encouraged mom to call SSMH. She did and also is investigating private therapists. Clenches fists when posturing. Intervention: Dylan's therapist works with him on managing anger and preventing assaultiveness

Name: Intimidating/threatening

Intervention: Addressed with current intervention

Dylan may say, "Don't make me mad". "You know I'm just like my dad". Feels he stopped her behavior. Intervention: Jude Bergkamp (therapist) has helped Dylan greatly in this area.

Name: Spitting

Intervention: No interventions in place

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Individual Support Plan (ISP) Current Annual DDD Assessment Details

Name: Unsafe cooking

Intervention: Addressed with current intervention

All that Dylan is cooking upstairs now is pasta or pre-made meals, so no further problems have occurred. Intervention: Pre-made meals from Jenny Craig that are heated up.

Name: Delusions

Intervention: Addressed with current intervention

Talks about past events and may use multiple voices to represent various characters in these situations. Dylan is the hero/defender in all of these circumstances. Talks about himself in 3rd person. Occurs mostly at nighttime during "alone" time. Believes that people are talking about him when it is not happening. Intervention: Jude worked with Dylan in this area and it has helped.

Name: Breaks, throws items

Intervention: No interventions in place

Within the last three months, mom found a broken glass on the floor of Dylan's apt. This is the time third this has happened. It had not been cleaned up, and potentially, could have cut Dylan.

Depression

Mom responded on the depression scale in regards to Dylan.

Suicide

Responses on suicide screen indicate client has had suicidal thoughts during the 30 days prior to the assessment date.

Terri indicated that Dylan has made comments such as "I shouldn't be here". Terri answered this question panel for Dylan. Suicide attempt at SPSCC in recent months where Dylan was sitting on the campus bridge contemplating jumping off.

ADL

Stamina

Number of days individual went out of the house or building in which individual lives (no matter for how short a period): Daily

Overall self-sufficiency has changed significantly as compared to status of 90 days ago: No Change

Potential for improved function in ADL's and/or IADL's:
None of these

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Individual Support Plan (ISP) Current Annual DDD Assessment Details

Task segmentation ADL's: Yes

Task segmentation IADL's: Yes

Emotional meltdowns in last 30 days.

Universal Precautions

The formal and informal caregiver will use latex/plastic gloves when in contact with any secretions to prevent spread of infection. Thorough hand washing with soap will be done before and after gloving. Gloves will be put on and discarded at the end of each task. If the primary care provider orders these gloves they can be paid for through the medical coupon.

Walk in Room, Hallway, and Rest of Immediate Living Environment

Client Needs:

Independent, No setup or physical help

Locomotion in Room and Immediate Living Environment

How the individual moves to and returns from areas outside of their immediate living environment

Client Needs:

Independent, No setup or physical help

Locomotion outside of Immediate Living Environment to Include Outdoors

How the individual moves to and returns from areas outside of their immediate living environment

Client Needs:

Independent, No setup or physical help

Dylan has left home when angry ("ran away") and then called mom from his cell phone to come and get him.

Bed Mobility

How individual moves to and from lying position, turns side to side, and positions body while in bed

Client Needs:

Independent, No setup or physical help

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Individual Support Plan (ISP) Current Annual DDD Assessment Details

Falls

Site: Stairs outside

When: Past 31-180 days

Consequence:

Injury

Fell going up outside steps. Moving too fast. No serious injury.

Transfer

How client moves between surfaces, to/from bed, chair, wheelchair, standing position, (exclude to/from bath/toilet)

Client Needs:

Independent, No setup or physical help

Eating

How individual eats and drinks (regardless of skill). Includes intake of nourishment by other means (e.g., tube feeding, total parenteral nutrition)

Client Needs:

Supervision, Setup help only

Client Strengths:

Client has a good appetite

Caregiver Instructions:

Cut food into small pieces, Encourage liquids, Keep liquids available

Provider

ROSE THERESA SUE

Food cut up small enough so not a choking issue if home cooked meal. With Jenny Craig meals, this is not an issue. Moves very close to plate to put food in mouth. Can pour own drinks and use utensils. Reminders daily to drink water. Eats very fast. Restaurant eating is different. Much work on portion control at restaurants or if Jenny Craig meals not used. Mom assists in this area and watches cupboards/fridge to insure food is not sneaked by Dylan.

Toilet Use

How individual uses the toilet room (or commode, bed pan, urinal); transfers on/off toilet, cleanses, changes incontinence pads, manages ostomy or catheter, adjusts clothes

Client Needs:

Supervision, No setup or physical help

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Individual Support Plan (ISP) Current Annual DDD Assessment Details

Client Strengths:

Aware of need to use toilet

Provider

ROSE THERESA SUE

Does not wipe adequately at times after bowel movement. Cues to wash hands. Getting better at not getting angry when asked to wash hands. Not telling mom when running out of toilet paper and has been using bath towels.

Continence Issues

Bladder control (last 14 days): Continent

Change in bladder continence (last 90 days): No Change

Bowel control (last 14 days): Continent

Change in bowel continence (last 90 days): No Change

Bowel Pattern (last 14 days):

None of these

Appliances & Programs (last 14 days):

None of these

Individual management (last 14 days): Does not need or use

Cue to wash hands afterwards. Does not wipe adequately after bowel movement. Has tendency to put hands down pants at times. Will wait at times to use bathroom (urine) until it is urgent. Will then grab crotch area and run to bathroom. Lots of gas possibly associated with Irritable Bowel which could cause some incontinence. Reminders to drink water to help bowels. Citrucel has helped greatly with constipation and incontinence. No incontinence in last 2 weeks, but approximately 30 days ago-constipation.

Dressing

How individual puts on, fastens, and takes off all items of street clothing, including donning/removing prosthesis

Client Needs:

Supervision; No setup or physical help

Client Strengths:

Can put on shoes and socks, Can button clothing, Dresses appropriately, Can select clothing

Client Preferences:

Likes to choose own clothes, Prefers same clothing daily

000322

Caregiver Instructions:

Cue to change clothes

Exhibit 36 Page 23

Individual Support Plan (ISP) Current Annual DDD Assessment Details

Provider

ROSE THERESA SUE

Can put on shoes and socks. Puts on very slow. Mom typically gets slip-ons for Dylan. Will tie shoes repeatedly and sometimes in knots. Tries to find right shoe pressure by re-tying shoes numerous times. Not changing underwear every day. Cues to change. Will wear clothes 3-4 days in a row if not prompted. Cueing to wear clothes appropriate for temperature.

Personal Hygiene

How individual maintains personal hygiene, including combing hair, brushing teeth, shaving, applying makeup, washing/drying face, hands, and perineum

Client Needs:

Extensive assistance, One person physical assist

Client Strengths:

Able to brush/comb hair, Can brush teeth

Client Limitations:

Unaware of grooming needs

Client Preferences:

Uses an electric razor

Caregiver Instructions:

Brush client's teeth daily, Cue client to change clothes, Shave client daily or as needed, Cue client to wash face and hands

Provider

ROSE THERESA SUE

May be aware of need to brush teeth for example, but functionality and timing of task may be off. Physical assist with flossing/brushing more than 3 tx wk. Cues on brushing with electric toothbrush. Thoroughness not good. 3 dental appointments a year due to Aortic Insufficiency. Mom will cue Dylan on shaving because thoroughness may be an issue. Needs cue to use soap when washing. Dylan trims fingernails and mom trims toe nails. Dylan will also bite nails and pick and eat boogers. Sucks thumb also.

Bathing

How individual takes full-body shower, sponge bath, and transfer in/out of Tub/Shower

Client Needs:

Supervision, No setup or physical help

000323

Client Strengths:

Can bathe self with cueing, Able to shampoo hair

Client Limitations:

Exhibit 36 Page 24

Individual Support Plan (ISP) Current Annual DDD Assessment Details

Unaware of need

Client Preferences:

Prefers to bathe in the morning, Would prefer to take a shower, Likes to use specific products

Caregiver Instructions:

Cue to bathe

Provider:

ROSE THERESA SUE

Much cueing needed to accomplish tasks. Cue to shower. May not use soap unless reminded to do so. Does not recognize specific circumstances when needs to bathe, ie exercising, dance. Ties bathing more to a specific daily routine. May not bathe on day attends college. Lack of awareness of daily need. Cue also to get a clean towel. Does not let mom know when runs out of personal hygiene supplies. Shower routine not stabilized.

Foot Care

Foot Issues:

Problem Type	Problem Status	Problem Site
Fungus	Non-healing	Both feet
Calluses	Non-healing	Both feet

Foot Care Needs:

Foot Care	Status
Application ointment/lotion	Received/Needs
Nails trimmed in last 90 days	Received/Needs
Orthotics	Received/Needs

Wears orthotics on both feet. Wears 50 % of the time. Is supposed to put deodorant on feet but does not do consistently. Struggles to let mom do it for him. Removal of two toe nails occurred. Has healed well.

Skin Care

Skin Care (Other than feet):

Skin Care	Status
Application ointments/lotions	Received/Needs

Pressure ulcers:

Skin intact over pressure points

Number of current pressure ulcers: 0

000324

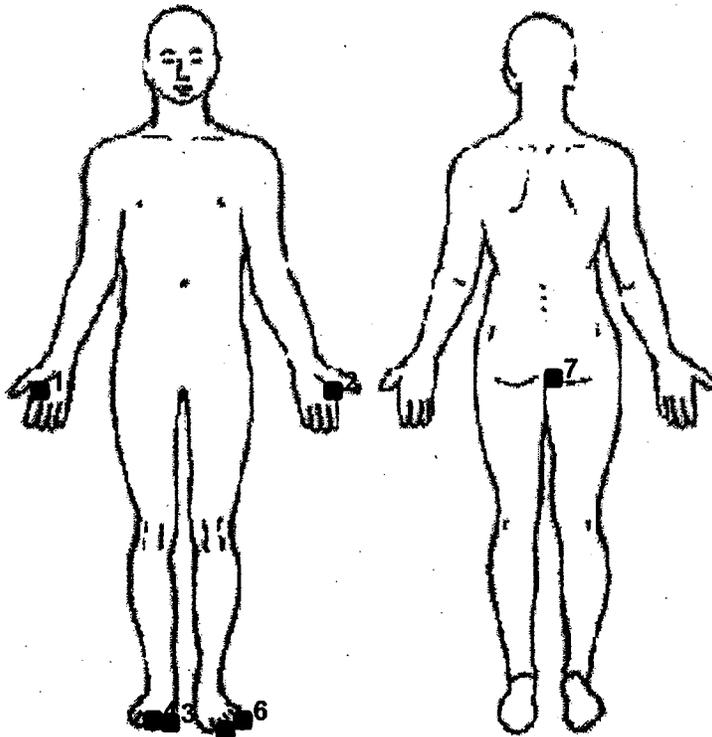
Exhibit 36 Page 25

Individual Support Plan (ISP) Current Annual DDD Assessment Details

Client had skin ulcer that was resolved or cured in the last year: No

Gets lesions caused by sebaceous cysts on buttocks, thighs (inside) shoulders and face. No current open lesions. Start out with Bactroban or anti-other antibiotic ointment, if doesn't work, go to antibiotics. Continually licks lips and sucks thumb. These contribute to skin breakdown and continued irritation. Dermatologist is watching moles on back and legs. Picks at nose and will get sores. Mole on back of left leg, back of leg, and lower back that mom watches.

Skin Observation



Skin Observation Detail:

- 1. raw area
- 2. raw area
- 3. fungus
- 4. fungus
- 5. fungus
- 6. fungus
- 7. rash

Raw areas on hands from sucking on them (mostly thumbs).

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Exhibit 36 Page 26

Individual Support Plan (ISP) Current Annual DDD Assessment Details

IADL

Meal Preparation

How meals are prepared (e.g., planning meals, cooking, assembling ingredients, setting out food and utensils)

Client Needs:

Limited assistance, Some difficulty

Client Strengths:

Can assist with meals , Client can prepare a simple breakfast, Client can prepare a simple lunch

Client Preferences:

Eats 3 meals/day, Fresh fruit and vegetables, Prefers home cooked meals

Caregiver Instructions:

Ask for client's choices, Encourage prescribed diet, Prepare meals for client to reheat, Throw out spoiled food

Provider
ROSE THERESA SUE

Cueing needed to clean-up kitchen and get food out of main living area. Would not recognize spoiled food in the refrigerator. Dylan greatly enjoys Chinese buffets. Meal prep currently consists of picking from Jenny Craig meals. Mom assists Dylan with supplementing meal with other foods to make it a balanced meal. 2,000 calorie diet a day.

Nutritional/Oral

Nutritional Problems:

Regular complaints of hunger

Oral hygiene and dental problems:

None of these

Nutritional Approaches:

Diet	Adhere To
Dietary supplement	

Name of dentist: Ingram, Lenore

Date of last dental visit: 09/05/2007

Prompts also needed to drink fluids. Selected diet including no ice cold products, caffeine, low sugar. Mom worked with dietician to promote Dylan drinking more water (including flavored waters) and staying away from fried foods. Dylan is participating in the Jenny Craig diet which is working well. Gums were red and bleeding at last dental appt. Mom will assist

000326

Exhibit 36 Page 27

Individual Support Plan (ISP) Current Annual DDD Assessment Details

Dylan more with brushing and flossing. Teeth cleaned every 4 months.

Ordinary Housework

How ordinary work around the house is performed (e.g., doing dishes, dusting, making bed, tidying up, laundry)

Client Needs:

Extensive assistance, Great difficulty

Client Strengths:

Can do housework with cueing

Caregiver Instructions:

Clean kitchen after each meal, Clean bathroom weekly

Provider

ROSE THERESA SUE

Managing Finances

How bills are paid, checkbook is balanced, household expenses are managed

Client Needs:

Total dependence, Great difficulty

Client Strengths:

Client has a payee

Provider

Rose, Terri

Parent is payee

Shopping

How shopping is performed for food and household items (e.g., selecting items, managing money). Limited to brief, occasional trips in the local area to shop for food, medical necessities, and household items required specifically for the health and maintenance of the client

Client Needs:

Extensive assistance, Some difficulty

Client Limitations:

Client cannot budget money

Caregiver Instructions:

Take client to store, Help client make grocery list, Pick up medications

000327

Exhibit 36 Page 28

Individual Support Plan (ISP) Current Annual DDD Assessment Details

Provider

ROSE THERESA SUE

Transportation

How client travels by vehicle for medical needs (e.g., gets to places beyond walking distance). Includes accompanying or transporting client to physician's office or clinic in the local area to obtain a diagnosis or treatment

Client Needs:

Extensive assistance, Great difficulty

Client Limitations:

Unable to arrange transportation

Client Preferences:

Private car

Caregiver Instructions:

Drive client to appointments, Accompany client to appointment

Provider

ROSE THERESA SUE

Mom makes all appts. for Dylan and accompanies him to them.

Wood Supply

How client gets wood for heat (this must be only source of heat)

Is wood only source of heat? No

Social

Client Interests

Interest/Activities:

Interest/Activity	Status	Preferred Time
Cards/games	Current	Varies
Dancing	Current	Anytime
Computers	Current	Anytime
Club/organization meetings	Current	Anytime
Gardening/plants	Current	Anytime

000328

Individual Support Plan (ISP) Current Annual DDD Assessment Details

Interest/Activity	Status	Preferred Time
Exercise	Current	Varies
Music	Current	Varies
Trips/shopping	Current	Varies

Average time involved in activities: More than 2/3 of the time

Relationships

Close relationship with family/friends? Yes

Openly expressed conflict/anger with family/friends/roommate/caregiver? Yes

Had a recent loss of close family/friend? No

Does adjust easily to change in routine? No

Dylan also volunteers at Food Coop. Dylan is also attending classes at SPSCC, Monday through Thursday. Dylan was going out to eat and sharing family dinners with his father. This is not occurring only with his dad, due to dad giving Dylan mixed messages about what he should be doing.

Employment

Employer: DK Arts

Phone: () -

Employee Status: Employed

Start Date: 00/00/0000

Job Type: Professional

Job Title:

Employment Support

Employment Goals:

Wants to work, Satisfied with current employment, Wants job training

Phase of Employment: At risk of losing employment

Time in Job Development (months): 0

Definitions

ADL Self-Performance Codes/Definitions

000329

Independent:

No help or oversight OR help/oversight only 1 or 2 times

Exhibit 36 Page 30

Individual Support Plan (ISP) Current Annual DDD Assessment Details

Supervision:

Oversight (monitoring, standby) encouragement or cueing provided 3 or more times OR supervision 3 or more times PLUS physical assistance provided only 1-2 times

Limited Assistance:

Client highly involved in activity; received physical help in guided maneuvering of limbs or other non-weight bearing assist 3 or more times OR more help provided only 1-2 times

Extensive Assistance:

While client performed part of activity, help of the following type(s) provided 3 or more times: Weight bearing or full Caregiver performance during part

Total:

Full Caregiver performance

Activity did not occur/No provider:

Activity did not occur in entire 7 days because there was no provider available to assist client with task.

Activity did not occur/Client not able:

Activity did not occur in entire 7 days because client is not capable of performing or participating in task.

Activity did not occur/Client declined:

Activity did not occur in entire 7 days because client declined assistance with task

IADL Self-Performance Codes Definitions

Independent:

No help, set-up, or supervision

Set-up help/arrangements only:

On some occasions the client did their own set-up/arrangement; at other times the client received help from another person.

Limited Assistance:

On some occasions the client did not need any assistance but at other times in the last 30 days the client required some assistance

Extensive Assistance:

Individual involved but required cueing/supervision or partial assistance at all times

Total dependence:

Activity occurred but with full performance by others.

Activity did not occur

000330

IADL Difficulty Codes Definitions

IADL difficulty code:

How difficult it is (or would be) for client to do activity on own, *Exhibit 36 Page 31*

Individual Support Plan (ISP) Current Annual DDD Assessment Details

No difficulty

Some difficulty:

The client needs some help, is very slow or fatigues easily

Great difficulty:

Little or no involvement in the activity is possible by the client.

Service Summary - Personal Care

Provider Information

Formal Providers

Provider: ROSE THERESA SUE

Agreed Upon Tasks:

Behavior Supports, Community Living, DDD Caregiver Status, Home Living, Health and Safety, Medical Supports, Protection and Advocacy, Social Activities: Application ointment/lotion, Application ointments/lotions, Bathing, Dressing, Eating, Essential Shopping, Housework, Meal Preparation, Med. Mgmt., Nails trimmed in last 90 days, Personal Hygiene, Telephone, Toilet Use, Transportation, Wound/skin care

Phone: (360)943-4171

Schedule:

Day	Time of Day	Start Time	End Time
Weekdays	Varies	00:00 AM	00:00 AM
Weekends	Varies	00:00 AM	00:00 AM

Service Summary - Therapy Behavioral Mgt & Consult

Provider Information

Formal Providers

Provider: MURPHY NANCY K

Agreed Upon Tasks:

Medical Supports: Mental health therapy/program

Phone: (360)357-6030

Service Summary - Respite Care (Waiver)

Provider Information

Formal Providers

Provider: THURSTON COUNTY PARKS

Agreed Upon Tasks:

000331
Exhibit 36 Page 32

Individual Support Plan (ISP) Current Annual DDD Assessment Details

Medical Supports: Respite care

Phone: (360)786-5595

Service Summary -- Person to Person

Provider Information

Formal Providers

Provider: MORNINGSIDE

Agreed Upon Tasks:

Employment

Phone: (360)943-0512

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Exhibit 36 Page 33

NO. 84128-4

**THE SUPREME COURT
STATE OF WASHINGTON**

DYLAN KUEHL,

Appellant,

v.

DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent.

DECLARATION OF
SERVICE

10 JUN -3 PM 4:13
BY RONALD H. HENDERSON
CLEER

I declare and state as follows:

That on June 3, 2010, I personally delivered a true and correct copy of the RESPONSE BRIEF on all parties or their counsel of record as follows:

Barnett N. Kalikow
1405 Harrison Ave NW, Ste. 207
Olympia, WA 98502

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 3rd day of June, 2010, at Tumwater, Washington.

Cheryl Chafin
Cheryl Chafin, Legal Assistant