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I. NATURE OF THE CASE

In this litigation, appellant Gregory Lynn (“the appellant” or “Mr. Lynn”) challenges the termination of his eligibility to receive services from the Division of Developmental Disability of the Department of Social and Health Services (“the Department” or “DDD”). The termination was based upon the eligibility requirements for such services set forth in WAC 388-823-0420.¹ WAC 388-823-0420, on its face and as applied here, improperly discriminates against Mr. Lynn because he has mental or psychological disabilities, is inconsistent with governing state law and violates federal Medicaid law. The Thurston County Superior Court’s order upholding the Department’s termination of Mr. Lynn’s eligibility for DDD services should be reversed and Mr. Lynn’s eligibility to receive such services should be restored.

¹ W.A.C. 388-823-0420(2) states:

If DDD is unable to determine that your current adaptive functioning impairment is the result of your developmental disability because you have an unrelated injury or illness that is impairing your current adaptive functioning: (a) DDD will not accept the results of a VABS or SIB-R administered after that event and will not administer the ICAP; and (b) Your eligibility will have to be determined under a different condition that does not require evidence of adaptive functioning per a VABS, SIB-R or ICAP.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in affirming the Review Decision and Final Order issued by the Department on July 27, 2010.
2. The trial court erred in finding that the Department's eligibility rule for DDD services, set forth in WAC 388-823-0420, was consistent with the statutory definition of a "developmental disability" set forth in RCW 71A.10.020.
3. The trial court erred in finding that the Department's DDD eligibility rule, on its face and as applied to Mr. Lynn, set forth in WAC 388-823-0420, did not improperly discriminate against Mr. Lynn based upon his mental or psychological disabilities.
4. The trial court erred in finding that the Department's DDD eligibility rule, on its face and as applied to Mr. Lynn, set forth in WAC 388-823-0420, did not violate applicable federal Medicaid laws and regulations.

III. ISSUES PRESENTED

1. Whether WAC 388-823-0420 improperly discriminates against persons with mental or psychological disabilities. (Assignments of Error 1 & 3)
2. Whether WAC 388-823-0420 is inconsistent with governing state law. (Assignments of Error 1 & 2)

3. Whether WAC 388-823-0420 violates federal Medicaid laws and regulations on comparability. (Assignments of Error 1 & 4)
4. Whether WAC 388-823-0420 violates federal Medicaid laws and regulations that proscribe diagnosis discrimination. (Assignments of Error 1 & 4)
5. Whether the eligibility requirements of WAC 388-823-0420 are unreasonable and therefore inconsistent with Medicaid law. (Assignments of Error 1 & 4)

IV. STATEMENT OF CASE

Petitioner Gregory Lynn (“Mr. Lynn”), a Medicaid recipient, has multiple disabilities and severe adaptive functional deficits. The Department concedes that Mr. Lynn has autism, a qualifying developmental disability, and numerous mental health diagnoses.² The Department also admits that Mr. Lynn has significant adaptive functional deficits that would otherwise make him eligible to receive DDD services.³ However the Department terminated Mr. Lynn’s eligibility for DDD services because, it claims, it cannot determine whether Mr. Lynn’s

² The Department accepts “that Mr. Lynn has a diagnosis of ‘Autistic Disorder’ per W.A.C. 388-823-0500”. AR 217.

adaptive functional deficits arise are a product of his autism or his mental illnesses or both. The Department asserts that, according WAC 388-823-0420, it cannot and will not accept the results of any adaptive functional skill assessments or evaluations, or will not conduct any such assessments or evaluations, where a recipient of or applicant for DDD services has any other illness or injury that impairs their current adaptive functioning that is unrelated to their developmental disability. The Department thus excludes from eligibility for DDD services any person who, although they may have a developmental disability and have the requisite adaptive functioning deficits, has another illness or injury that affects their adaptive functional skills. The Department's eligibility scheme is inconsistent with the Legislature's broader definition of developmental disability set forth in R.C.W. 71A.10.020(3), discriminates against persons with disabilities based upon their diagnoses or the type or severity of their disabilities in violation of the Medicaid Act and discriminates against persons with disabilities in violation of federal and state laws that proscribe discrimination based upon disabilities. The eligibility scheme further violates the Medicaid Act by determining eligibility for Medicaid funded

(footnote continuation)

³ Testimony of Department employees Kay Stotesbery and Dr. Gene McConnachie at Tr. 69 & 114-15; Department Brief to ALJ at AR 117; Department Brief to BOA at AR 44-47.

services in an arbitrary and capricious fashion and in a manner that does not guarantee the provision of comparable services for similarly situated recipients.

The Initial Order

In his January 4, 2010 Initial Order the ALJ found that Mr. Lynn had been “a recipient of services from [DDD] since 2001” and that he had been “diagnosed with autism with an onset prior to the age of three years”.⁴ The ALJ also found that Mr. Lynn had “a long history of serious mental health problems” which included several institutionalizations at Western State Hospital.⁵ The ALJ also found that a certified clinical neuropsychologist, Dr. Wendy Marlowe, had performed a Vineland-II Behavioral Scales assessment of Mr. Lynn in July 2008 and had concluded that Mr. Lynn had substantial deficits in his adaptive functioning that met the requirements of DDD eligibility regulations.⁶

In his Conclusions of Law the ALJ stated:

[w]hile the Department concedes that if Dr. Marlowe’s Vineland results are deemed valid, DDD eligibility is established, it argues that no Vineland results can be considered at all, because [Mr. Lynn’s] mental illness is an unrelated illness that impairs current

⁴ Findings of Fact (“FOF”) 1; AR 70.

⁵ FOF 8 & 13; AR 72 & 74.

⁶ FOF 14; AR 74. The Vineland assessment is one of the adaptive functions assessments approved by DDD. W.A.C. 388-823-0420.

adaptive functioning, essentially making it impossible to determine whether and to what degree limitations of current adaptive functioning may be attributable to Autism on the one hand, or mental illness on the other.⁷

In upholding the Department's termination of Mr. Lynn's DDD eligibility the ALJ went on to hold that:

... it is the ultimate conclusion of the Tribunal that the January 6, 2009 termination of DDD benefits to [Mr. Lynn] was the result required by the application of the Department's regulations, which the undersigned Administrative Law Judge must apply as the first source of law. ... DDD has, and in the view of the Tribunal, correctly so, determined that [Mr. Lynn] has an unrelated illness which impairs both his current adaptive functioning in his adaptive functioning as it existed in 2005 in early 2006. Accordingly, Dr. Marlowe's Vineland results cannot be considered, much less accepted, by DDD. W.A.C. 388-823-0420(2)(a).⁸

Mr. Lynn filed a timely petition for review of the Initial Order on January 25, 2010.

The Review Decision and Final Order

In its July 27, 2010 Review Decision and Final Order the Board of Appeals affirmed the Initial Order and the Department's decision to terminate Mr. Lynn's eligibility to receive DDD services.⁹ The Board of Appeals found that Mr. Lynn had a "concededly valid diagnosis of autism" and that the "Autistic Disorder alone must be the cause of deficits in

⁷ Conclusions of Law ("COL") 5; AR 79.

⁸ *Id.*

adaptive functioning sufficient to qualify under the [Department's eligibility] rules".¹⁰ The Board of Appeals also found that: "[Mr. Lynn] has a long history of serious mental health problems" and that at the time of the hearing before the ALJ "[Mr. Lynn] was still diagnosed with Bipolar I with the most recent episode being manic with psychotic features".¹¹ The Board of Appeals further found that:

To get the diagnosis of Bipolar I [Mr. Lynn] had to have significant problems with adaptive functioning. It is not possible to have a diagnosis of Bipolar Disorder without having deficits in adaptive functioning. [Mr. Lynn] has Bipolar I disorder with psychotic features, which is the most severe form of bipolar disorder.¹²

The Board of Appeals held that, based upon the testimony of Dr. McConnachie, that: "[Mr. Lynn's] mental illness is the primary cause of his substantial functional deficits".¹³ The Board of Appeals then concluded that:

[i]n sum, [Mr. Lynn] has Bipolar I disorder and Attention Deficit Hyperactivity disorder, and did at the time of the adaptive functioning testing that [he] has offered. Those mental illnesses do (by definition and in fact) cause adaptive functioning deficits unrelated to [Mr. Lynn's] autism. [Mr. Lynn] has the burden of proving that he is eligible for DDD services under the "autism" category and he has failed to provide the requisite evidence of

(footnote continuation)

⁹ BOA Review Decision and Final Order ("BOA Order"), AR 1-38.

¹⁰ BOA Order FOF 22, AR 25.

¹¹ BOA Order FOF 23, AR 25-26.

¹² BOA Order FOF 38, AR 31.

¹³ BOA Order FOF 40, AR 31.

adaptive functioning limitations necessary to meet that burden. Nobody can determine what, if any, functional impairments [Mr. Lynn] has as a result of his autism alone; under W.A.C. 388-823-0420(2), the DDD is barred from attempting that impossible task. The Department correctly denied [Mr. Lynn's] request for DDD services.¹⁴

Mr. Lynn timely filed a petition for review of the July 27, 2010 Review Decision and Final Order the Board of Appeals in this Court on August 23, 2010.

The Superior Court Order

By Order dated July 22, 2011, the Thurston County Superior Court affirmed the Review Decision and Final Order of the Department. In doing so the Superior Court held that the Department's eligibility rules did not violate the requirements of federal Medicaid law and did not impermissibly discriminate against Mr. Lynn based upon his mental or psychological disabilities. Further, the Superior Court held that the Department's eligibility rules were consistent with the statutory definition of a "developmental disability" set forth in RCW 71A.10.020, were not arbitrary and capricious and were a valid exercise of the Department's rule-making authority.

¹⁴ BOA Order COL 18, AR 37.

Mr. Lynn timely filed a Notice of Appeal of the Superior Court's July 22, 2011 Order on July 27, 2011.

V. STANDARD OF REVIEW

A. *Conclusions of Law*

Appellate courts apply the standards of the Administrative Procedure Act (APA), RCW 34.05.570, directly to the agency record in reviewing agency actions. *Spokane County v. City of Spokane*, 148 Wn. App. 120, 124, 197 P.3d 1228, 1230 (2009); *Verizon Northwest, Inc., v. Washington Employment Sec. Dept.*, 164 Wn.2d 909, 915, 194 P.3d 255, 260 (2008). Appellate courts sit in the same position as the superior court and review the agency's legal determinations de novo using the "error of law" standard. *Verizon*, 164 Wn.2d at 915; *Jenkins v. DSHS*, 160 Wn.2d at 297 (2007) ("We review an agency's interpretation of federal law de novo under an "error of law" standard"). A rule shall be declared invalid if:

"the rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious."

Jenkins, 160 Wn.2d, at 295 (citing RCW 34.05.570(2)(c)). The Department's rulemaking authority is limited to adopting, amending, or rescinding administrative rules to ensure personal care services are "provided in conformance with federal regulations." RCW 74.09.520(3).

B. Factual Findings.

“Administrative findings of fact will be upheld on review [by the Court of Appeals or Supreme Court] when supported by substantial evidence” in the record before the agency. *Western Ports Transp., Inc. v. Employment Sec. Dept. of State of Wn.*, 110 Wn. App. 440, 449, 41 P.3d 510, 515 (2002) (citing RCW 34.05.570(3)(e)). “Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.” *Id.* (citing *Heinmiller v. Department of Health*, 127 Wn.2d 595, 607, 903 P.2d 433(1995)).

VI. ARGUMENT

A. The Department’s eligibility scheme improperly discriminates against persons with mental or psychological disabilities.

The Department provides services to persons with developmental disabilities who have significant adaptive functional deficits but denies services to persons who have such developmental disabilities but who also have a mental or psychological disability that may cause adaptive functional deficits. *See* W.A.C. 388-823-0420. This eligibility scheme improperly discriminates based upon the presence of a sensory, mental, or physical disability, in violation of state and federal laws that prohibit discrimination based upon disability. R.C.W. 49.60; Section 504 of the

Rehabilitation Act of 1973, 29 U.S.C. § 794; Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12101-12213.¹⁵

DDD’s eligibility scheme improperly discriminates in at least 3 ways:

1. by direct discrimination based on type of disability;¹⁶
2. by requiring that persons with dual diagnoses be “cured” of their mental or psychological illnesses before DDD will consider them for eligibility for services for their developmental disability; and
3. by forcing persons with such dual diagnoses to be placed in more restrictive or segregated environments such as WSH in order to receive adequate treatment.

Direct Discrimination based on Disability

Title II of the Americans with Disabilities Act provides, in relevant part, that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of

¹⁵ Both the Rehabilitation Act (Section 504) and Americans with Disabilities Act (ADA) protect disabled persons from discrimination in provision of public services. *Maus v. Wappingers Cent. School Dist.*, 688 F. Supp.2d 282 (S.D. N.Y. 2010). The elements of a prima facie ADA case and a Section 504 prima facie case are virtually identical, except that Section 504 covers entities receiving federal financial assistance, whereas Title II of the ADA covers public entities. *See Rothschild v. Grottenthaler*, 907 F.2d 286, 289-90 (2d Cir.1990).

the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.¹⁷ To make out a prima facie case for a violation of the ADA by a “public entity,” a party must show that: (1) the party is a qualified individual with a disability; (2) the party was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that such exclusion, denial of benefits, or discrimination was by reason of the party’s disability. *See Duvall v. County Of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001); *Robinson v. Green River Community College*, 2010 WL 3947493 (W.D. Wash. 2010).

By fully excluding persons who have both developmental disabilities and mental illnesses from eligibility for DDD services W.A.C. 388-823-0420(2) violates virtually every aspect of the federal regulations that proscribe such discrimination based on disability. The ADA regulation governing public entities such as the Department, 28 C.F.R. § 35.130, states, in pertinent part:

(footnote continuation)

¹⁶ For purposes of the ADA, the term “disability” includes “[a]ny mental or psychological disorder, such as ... emotional or mental illness.” 29 C.F.R. § 1630.2(h).

¹⁷ The term “public entity” means any State or local government or any department, agency, special purpose district, or other instrumentality of a State or States or local government. 42 U.S.C. § 12131.

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

The regulation sections, although lengthy, are quoted here because the Department's eligibility scheme, which provides services to persons with developmental disabilities who have significant adaptive functional deficits but denies services to persons who have such adaptive deficits and developmental disabilities but who also have a mental or psychological disability, violates virtually every cited section of the ADA regulation.

Discrimination Based on Type or Severity of Disability

The Department also improperly discriminates against persons based on the type and degree of their disabilities. The ADA prohibits discrimination on the basis of type and severity of disability. *See, e.g., Winkler v. Interim Services, Inc.*, 36 F. Supp.2d 1026, 1029 (M.D. Tenn. 1999).

As the court held in *Messier v. Southbury Training School*, 562 F. Supp.2d 294, 322 (D. Conn. 2008):

The Attorney General's regulations implementing the Title II of the ADA make it clear that a state cannot discriminate on the basis of severity of disability in providing services. 28 C.F.R. § 35.130 provides that

A public entity, in providing any aid, benefit, or service, may not ... [p]rovide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others, unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others.

See also Helen L., 46 F.3d at 336, (“[I]f Congress were only concerned with disparate treatment of the disabled as compared to their nondisabled counterparts,” then the ADA's reference to the persistence of discrimination in institutionalization would constitute a “non sequitur”); *Williams v. Wasserman*, 937 F. Supp. 524, 530 (D. Md.1996) (holding that “the ADA does oblige the defendants to make [a program of community-based treatment options] available to otherwise qualified individuals without regard to the severity or particular classification ... of their disabilities”). *Hahn v. Linn Cty.*, 130 F. Supp.2d 1036, 1050 (N.D. Iowa 2001). *See also Martin v. Voinovich*, 840 F. Supp. 1175, 1191-92 (S.D. Ohio 1993); *Jackson v. Fort Stanton Hosp. & Training Sch.*, 757 F. Supp. 1243, 1299 (D. N.M. 1990) (“The severity of plaintiffs' handicaps is itself a handicap which, under § 504, cannot be the sole reason for denying plaintiffs access to community programs”), *rev'd on other grounds*, 964 F.2d 980 (10th Cir.1992); *Conner v. Branstad*, 839 F. Supp. 1346, 1356 (S.D. Iowa 1993); *Garrity v. Gallen*, 522 F. Supp. 171, 214-15 (D. N.H.1981); *Lynch v. Maher*, 507 F. Supp. 1268, 1278-79 n. 15 (D. Conn.1981).

The Department's eligibility scheme thus violates the ADA by (1) discriminating against persons who both have a mental or psychological disability and a developmental disability in favor of persons who only have a developmental disability and (2) by discriminating against persons who are more severely disabled (those with dual diagnoses) in favor of less disabled persons (those who only have developmental disability).

Violation of the Integration Mandate

“A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d). The Supreme Court has concluded that the discrimination forbidden under Title II of the ADA

includes “[u]njustified isolation” of the disabled. *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581, 597, 119 S. Ct. 2176 (1999) (unnecessary segregation of individuals with disabilities in institutions may constitute discrimination based on disability and states should provide community-based services rather than institutional placements for individuals with disabilities.); *Parsons v. DSHS*, 129 Wn. App 293, 296 n. 3 (Div. I 2005), *rev. denied*, 157 Wash.2d 1004 (2006). “The ‘most integrated setting’ is defined as ‘a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.’” *Brantley v. Maxwell-Jolly*, 656 F. Supp.2d 1161, 1170 (N.D. Cal.2009) (citing 28 C.F.R. pt. 35 app. A); *Olmstead*, 527 U.S. at 592.

When DDD terminated Mr. Lynn’s eligibility for services it denied to him, among other services and supports for the developmentally disabled, access to supported and structured residence in intermediate care facilities (ICF/MR) and in community-based supported housing such as adult homes or group homes. In order to receive adequate care and treatment now for his disabilities Mr. Lynn has been institutionalized at Western State Hospital off and on for the last several years.¹⁸ The

¹⁸ Mr. Lynn is currently a patient at Western State Hospital and has been since mid-March 2008.

Department's discriminatory termination of Mr. Lynn's DDD eligibility has thus resulted in his unnecessary and unjustified isolation and segregation in an institution, in violation of the ADA.

B. The Department's and the Board of Appeals' interpretation of W.A.C. 388-823-0420 is inconsistent with governing state law.

The Department and the Board of Appeals held that Mr. Lynn's autism did not meet the definition of a qualifying condition because the Department could or would not determine if he had a developmental disability because he had some other "unrelated illness or condition that [impaired his] current adaptive functioning". W.A.C. 388-823-0420(2). The Superior Court found that the eligibility requirements in W.A.C. 388-823-0420 were "reasonably consistent" with the definition of a "developmental disability" set forth in R.C.W. 71A.10.020 (3).

W.A.C. 388-823-0420, on its face and as applied here, automatically excludes from eligibility every person with a developmental disability, who might otherwise be eligible for Department services, who also has a coexisting condition that may affect their adaptive functioning. However this position is inconsistent with the statutory definition of the term "developmental disability" set forth in R.C.W. 71A.10.020(3) and the regulatory definition of "developmental disability" set forth in W.A.C. 388-823-0040.

According to the statutory scheme establishing and governing DDD, eligibility for DDD services extends to all those who have conditions or disorders that meet the statutory definition of “developmental disability”. R.C.W. 71A.10.015 & 71A.16.020(1). R.C.W. 71A.10.020(3) defines “developmental disability” as:

... a disability attributable to mental retardation, cerebral palsy, epilepsy, autism, or another neurological or other condition of an individual found by the Secretary to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, which disability originates before the individual attains age eighteen, which has continued or can be expected to continue indefinitely, and which constitutes a substantial handicap to the individual.¹⁹

The statute does not exclude an entire class of persons from DDD eligibility who may have one of the qualifying conditions but who also have some other unrelated illness or condition that may affect their adaptive functioning. The statute only requires that the qualifying condition or disorder be or be similar to certain listed conditions or disorders or require similar treatment, that the condition or disorder originated before the person turned 18, that the condition or disorder has

¹⁹ W.A.C. 388-823-0040 (entitled “What is a developmental disability?”) similarly defines a developmental disability as: 1) attributable to mental retardation, cerebral palsy, epilepsy, autism, or other neurological or other condition found by DDD to be closely related to mental retardation or requiring treatment similar to that for individuals with mental retardation; 2) originating prior to age 18; 3) expected to continue indefinitely; and 4) resulting in substantial limitations to an individual’s adaptive functioning.

continued or can be expected to continue indefinitely and that the condition or disorder constitute a substantial handicap to the individual. Mr. Lynn met those requirements. The statutory definition does not include an exception for persons who have coexisting but unrelated conditions or disorders that may affect adaptive functioning.

DDD may only adopt regulations that are consistent with its legislatively defined authority. An agency rule will be declared invalid if it exceeds the statutory authority of the agency. R.C.W. 34.05.020. *See Fahn v. Cowlitz County*, 93 Wash.2d 368, 374 (1980). W.A.C. 388-823-0420(2) is significantly inconsistent with the statutory authority granted to DDD by the Legislature in its definition of “developmental disability” set forth in R.C.W. 71A.16.020(3) because the regulation denies eligibility to entire classes of persons that the Legislature intended to be eligible for DDD services and benefits if they could show that their condition or disorder resulted in a substantial handicap to them.

C. States Have a Duty to Provide Medicaid Services in Compliance with the Federal Medicaid Act

Mr. Lynn is a Medicaid recipient. Medicaid is a cooperative state-federal program that directs federal funding to states to assist them in providing medical assistance to low-income individuals. *Katie A. v. Los Angeles County*, 481 F.3d 1150, 1153 (9th Cir 2007). Once a state enters the program it must comply with the federal Medicaid Act and its

implementing regulations. *Alexander v. Choate*, 469 U.S. 287, 289 n.1, 105 S. Ct. 712 (1985). Washington State has opted to participate in the Medicaid program. *Jenkins v. Wash. State Dep't Social & Health Servs.*, 160 Wash.2d 287 (2007). However, DDD has implemented regulations that wrongfully limit Mr. Lynn's eligibility for and access to DDD services and benefits in violation of the Medicaid Act and its regulations.

1. The DDD eligibility rules violate federal Medicaid laws and regulations on comparability.

Participating states must provide medicaid funded services that are sufficient in amount, duration, and scope to reasonably achieve the purpose of the medicaid act. 42 U.S.C. § 1396a(a)(17); 42 C.F.R. § 440.230(b); *Beal v. Doe*, 432 U.S. 438, 441, 97 S. Ct. 2366 (1977). Federal law specifically requires that participating states assure that: “the [medicaid] services available to any individual . . . Are equal in amount, duration, and scope for all recipients within the group.” 42 C.F.R. § 440.240(b). *Jenkins, supra* at 296-300. As recently held in *V.L. v. Wagner*, 669 F. Supp.2d 1106, 1114 (N.D. Cal. 2009):

The “comparability” requirement of the Medicaid Act mandates comparable services for individuals with comparable needs and is violated when some recipients are treated differently than others where each has the same level of need. 42 U.S.C. § 1396a(a)(10)(B); *see also* 42 C.F.R. § 440.240; *Jenkins v. Washington State Dep't of Social & Health Servs.*, 160 Wash.2d 287, 157 P.3d 388, 392 (2007); *Sobky v. Smoley*, 855 F. Supp. 1123, 1139 (E.D. Cal.1994) (comparability requirement “creates an

equality principle” for all medically needy individuals); *Schott v. Olszewski*, 401 F.3d 682, 688-89 (6th Cir.2005).

W.A.C. 388-823-0420 allows for the provision of DDD services and benefits to Medicaid recipients who have only a developmental disability but denies such services and benefits to Medicaid recipients who have both a developmental disability and some other unrelated illness or condition even though persons in both groups may have the same level of adaptive functioning deficits and may have the same service needs. Accordingly DDD’s eligibility regulations violate Medicaid laws and regulations because they deny comparable services and benefits to similarly situated Medicaid recipients.

2. The DDD eligibility rules violate federal Medicaid laws and regulations that proscribe diagnosis discrimination.

Federal law also prohibits states from discriminating in the provision of Medicaid benefits against an otherwise eligible person on the basis of that person’s diagnosis, type of illness, or condition. 42 C.F.R. § 440.230(c). Prohibited discrimination includes arbitrarily denying or reducing the amount, duration, or scope of a Medicaid-funded service or benefit “to an otherwise eligible recipient solely because of the *diagnosis, type of illness, or condition.*” *Id.* (emphasis added).

It is a violation of the federal diagnosis discrimination prohibition to use an exclusive list of conditions, diagnoses, or impairments to limit

Medicaid-funded services. *See e.g., White v. Beal*, 555 F.2d 1146 (3rd Cir. 1977); *V.L. v. Wagner*, *supra*. In *White*, the court struck down a Pennsylvania rule that authorized Medicaid payment for prescription eye glasses only for certain eye diseases, but not for refractive errors even though Medicaid recipients with refractive errors may suffer from vision impairments equal or worse than persons with covered eye diseases. *Id.* at 1152. The *White* court wrote:

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

Id. at 1151 (emphasis added); *See also Jeneski v. Myers*, 163 Cal. App.3d 18, 33, 209 Cal. Rptr. 178 (1984) (“federal [Medicaid] regulations permit a state to discriminate when providing Medicaid benefits based on the degree of the person’s medical necessity but not based on the medical disorder from which the person suffers”; *citing White*).

The Department’s blanket exclusion from eligibility for services of person with dual diagnoses, even if such persons have the same adaptive functional deficits and the same needs as persons with a developmental disability alone, discriminates on the basis of diagnosis or etiology rather than the person’s need for services. Mr. Lynn has shown that he meets eligibility requirements for DDD services because he has a developmental

disability, autism, and severe adaptive functional deficits. Mr. Lynn has shown that he needs DDD services. DDD terminated his eligibility for services, not because he did not meet the eligibility requirements or because he did not need services, but because his psychological conditions or illnesses did not meet its definition of a developmental disability. This is raw and improper discrimination based upon diagnosis or etiology; not upon medical necessity or need for services. Such an eligibility scheme violates the diagnosis discrimination provisions of Medicaid Act because it denies services to similarly situated Medicaid recipients and discriminates against Medicaid recipients based solely upon etiology rather than the need for the service.

3. DDD's eligibility rules are unreasonable and therefore preempted by Medicaid law.

Federal Medicaid law requires that participating states develop reasonable standards for determining the extent of assistance available under their state plan, and that those standards be consistent with the Medicaid Act. 42 U.S.C. § 1396a(a)(17). *See Beal v. Doe*, 432 U.S. at 444; *see also Weaver v. Reagan*, *supra* at 197 (interpreting the reasonable standards provision to require states to provide medically necessary treatment to comply with Medicaid's objectives); *Kerr v. Holsinger*, 2004 WL 882203 (E.D. Ky. 2004) ("Medicaid regulations adopted for the wrong reasons, i.e., without a Medicaid-related or health-related purpose,

are contrary to the purposes of the Act because they are inherently arbitrary, unreasonable and invalid”).

The eligibility requirements of W.A.C. 388-823-0420 impose unreasonable and arbitrary eligibility standards that are not based upon medical necessity or that are health-related, in violation of the Medicaid Act.

VII. CONCLUSION

For the foregoing reasons, the superior court decision should be reversed. Mr. Lynn should be found to be eligible to receive DDD services and benefits.

DATED this 10th day of October, 2011.

David Girard P.S.



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Certificate of Service

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I certify, under penalty of perjury pursuant to the ^{CR} Laws of the State of Washington, that on October 9, 2011, a true copy of the foregoing ^{DEPUTY} BRIEF OF APPELLANT was served, by hand, upon counsel of record as indicated below:

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