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I. ARGUMENT

A. DDD's eligibility regulation, WAC 388-823-0420, categorically denies DDD services and benefits to some persons.

The Department's legal arguments ignore the practical effect of its eligibility regulation for DDD services. The regulation in question, WAC 388-823-0240, provides, in pertinent part at subsection (2), that:

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... DDD will not accept the results [of its selected adaptive functioning assessments such as the Vineland] and will not administer the ICAP.

On its face and as applied to Mr. Lynn the regulation fully excludes from eligibility for all DDD services some persons who have a developmental disability who also have an unrelated injury or illness that impairs their adaptive functioning.

Mr. Lynn's case boils down to a simple issue: Can a person who has both a developmental disability that causes adaptive functioning deficits and a mental illness that also causes such deficits ever be eligible for DDD services?¹

¹ DDD's assertion that Mr. Lynn concedes that his adaptive functioning deficits are "primarily the result of his mental illness", DDD Response Brief at p. 1, is incorrect and not supported by the record.

The answer, according to DDD, is no because it is impossible to determine the source of the adaptive functioning deficits and therefore, pursuant to WAC 388-823-0240(2), such dually-diagnosed persons are automatically excluded from receiving DDD services and benefits.

DDD now claims, in its appellate brief, that it can make such an analysis and determine whether the source of a client's adaptive functioning deficits is the client's developmental disability or some other unrelated condition. However the record here does not support that argument, at least as to a mental illness such as Mr. Lynn's condition.

At the hearing in this matter Kay Stotesbury, the DDD intake worker on Mr. Lynn's case, testified that, although DDD required that a person with autism be subjected to a current adaptive functional assessment in order to be eligible for DDD services, she did not perform such an assessment on Mr. Lynn because his mental illness made it impossible to determine the source of his adaptive function deficits as between his developmental disability and his co-occurring mental illness.²

Also at the administrative hearing in this matter, DDD's psychologist, Dr. Gene McConnachie, testified first that:

² Tr. 30 & 34.

And probably primarily I think the major mental illness in my professional opinion is the cause of his substantial functional deficits. And that's from reading his record, not the autistic disorder.³

A few minutes later the following discussion took place:

Mr. Bashford (AAG for DDD): And based upon all these records we've discussed what your current professional judgment on the ability of DDD or anyone else to conduct an adaptive functioning test to measure Mr. Lynn's functional deficits as a result of his autism?

Dr. McConnachie: Well the adaptive tests can be given at any time for many purposes, but at this point his – his functional abilities are confounded and we'll never know what was due to the autism, what's due to mental illness, bipolar disorder or other illnesses, and there's no way to separate out the impact of which is causing how much of what.⁴

While Dr. McConnachie may have speculated that Mr. Lynn's adaptive functioning deficits were “probably” the result of his mental illness he fully admitted, under questioning of DDD's own attorney, that it was impossible for anyone to determine the source of Mr. Lynn's adaptive functioning deficits.

Additionally, Linda Lundsford, a DDD intake and eligibility program manager, testified at the hearing as follows:

Mr. Casas (attorney for Mr. Lynn): And section 2 of [WAC 388-823-0420] allows DDD to – to deny or terminate eligibility if DDD is unable to

³ Tr. 100. Dr. McConnachie admitted that he had only met Mr. Lynn once, briefly in 2004. Id. at 142.

⁴ Tr. 138.

determine that a person's current adaptive functioning impairment is the result of a developmental disability because of an unrelated injury or illness, correct?

Ms. Lundsford: Yes.

Mr. Casas: So how could anybody under that rule who is both mentally and developmentally disabled establish their eligibility?

Ms. Lundsford: It's – it's very difficult. If – if we have significant evidence of impairments, qualifying impairments, prior to the outset of a mental illness it's possible that we would be able to consider that evidence in determining eligibility. But generally it's – it's very difficult.⁵

A few minutes later the following exchange took place:

Mr. Casas: Is it the Department's position that it is never possible to distinguish between substantial limitations attributable to autism and those attributable to mental illness?

Ms. Lundsford: I – I think it's – it's really (sic) depends on the current presentation of the individual and a current assessment. I don't – I mean I – I think in general yes, it's pretty – it's pretty difficult for us to ever be sure that the current functioning is attributable solely to the developmental the visibility when there is also a mental illness.⁶

In his Initial Order dated January 4, 2010, the administrative law judge held that:

DDD argued that no [Vineland] should be considered at all because Mr. Lynn's mental illness was an unrelated condition making it impossible to determine whether and to what degree limitations on

⁵ Tr. 158-59.

⁶ Tr. 162-63.

adaptive functioning may be attributable to autism on one hand or mental illness on the other.⁷

The administrative law judge then concluded that:

DDD has, and in the view of the Tribunal, correctly so, determined that the Appellant has an unrelated illness which impairs both his current adaptive functioning and his adaptive functioning as it existed in 2005 and early 2006. Accordingly Dr. Marlowe's Vineland results cannot be considered, much less accepted, by DDD. WAC 388-823-0240(2)(a).⁸

The initial order ignores the evidence in the record and is based upon an improper premise: that DDD can determine whether it is the unrelated condition or the developmental disability that is causing the adaptive functioning deficits in all cases. If that was true a client or applicant for DDD services might be able to meet the burden of showing that his adaptive functioning deficits were caused by his developmental disability rather than an unrelated condition. It may be possible to make such a determination regarding the source of adaptive functioning deficits where the client or applicant has an unrelated physical disability or some other unrelated condition with the adaptive functioning deficits can be easily traced back to the unrelated condition. However, in those cases where it is impossible to determine the source of the adaptive functioning

⁷ Conclusion of Law 5, AR 79.

⁸ Id.

deficits as DDD claims, as between the developmental disability and the concurrent unrelated condition, DDD automatically denies or terminates eligibility for services.

DDD justifies its denial or termination of services in such cases by claiming that the client or applicant has not met their burden of showing the source of their adaptive functioning deficits. But, as DDD admits, it is impossible for anyone to meet such a burden.⁹

The Board of Appeals' final order is internally inconsistent on the issue of the source of Mr. Lynn's adaptive functioning deficits. First the Board of Appeals found that: "[b]ased on the testimony of Dr. McConnachie, this order finds that [Mr. Lynn's] mental illness is the primary cause of his substantial functional deficits".¹⁰ A few pages later the Board of Appeals held that:

[n]obody can determine what, if any, functional limitations [Mr. Lynn] has as a result of his autism alone; under WAC 388-823-0420(2), the DDD is barred from attempting that impossible task."¹¹

⁹ This case does not involve an initial application for DDD eligibility. Mr. Lynn was already eligible for DDD services based on his diagnosis of autism. This is a termination case. WAC 388-823-0110 (relied upon by DDD here), which places the burden of proof on an initial applicant for DDD eligibility, does not apply, on its face, to termination cases. Accordingly DDD should have had the burden of showing that its termination of Mr. Lynn's DDD eligibility was justified.

¹⁰ Finding of Fact 40, AR 31

¹¹ AR 37.

Despite the impossibility of making such a determination the Board of Appeals, relying upon the contradictory testimony of Dr. McConnachie and ignoring the testimony of the two other DDD personnel who testified regarding the impossibility of making such a determination, held that Mr. Lynn's mental illness was the source of his adaptive functioning deficits and upheld the termination of his DDD eligibility.

The Superior Court affirmed this error, holding that:

[t]he Department found that Mr. Lynn's mental illness substantially limits his adaptive functioning, and in fact is the primary cause of his functional limitations. Those findings are supported by substantial evidence in the record.¹²

If it is, as DDD has claimed and the Board of Appeals held, impossible to determine the source of adaptive functioning deficits in persons with both a developmental disability and a mental illness then DDD's eligibility regulation does, in fact and in practice, create a blanket exclusion from eligibility to receive DDD services for such dually diagnosed persons.

Accordingly, DDD's reliance on *Pitts v. Dep't. of Social & Health Services*, 129 Wn.App. 513 (Div. II 2005) is misplaced. *Pitts* supports Mr. Lynn's position. In *Pitts* a DDD client had a developmental disability,

¹² Order dated July 22, 2011 at Conclusion of Law 6, p. 5.

epilepsy, and mental illness. DDD terminated his eligibility because it believed that his mental illness, rather than his epilepsy, was the cause of his functional disabilities. The DDD client appealed, asserting that the ALJ erred in ruling that his handicapping disabilities were the result of his mental illness and not his epilepsy.¹³ This Court upheld the administrative determination, stating that:

[w]hile it may be difficult under the current testing methods to prove that [adaptive functioning deficits] are not attributable to mental illness, Pitts has not shown that it is impossible in all cases. 129. Wn App. at 531.

This case presents the flip side of the *Pitts* decision. Here substantial evidence, presented largely by DDD's own witnesses, shows that it is impossible in Mr. Lynn's case to determine the source of his adaptive functioning deficits between his developmental disability and his mental illness. Faced with this impossible task Mr. Lynn, and others like him, can never be eligible to receive DDD services. In other words it is functionally impossible for persons like Mr. Lynn to meet the burden of proof of eligibility under WAC 388-823-0240 because, as the Board of

¹³ The eligibility scheme challenged by Mr. Lynn here, pursuant to WAC 388-823-0240, was not at issue in the *Pitts* case. Nor did the DDD client in *Pitts* raise the discrimination and Medicaid claims raised here by Mr. Lynn.

Appeals held, “[n]obody can determine what, if any, functional limitations [Mr. Lynn] has as a result of his autism alone[.]”¹⁴

So what is the legal effect of an eligibility scheme that makes it impossible for some dually-diagnosed persons to ever be eligible for DDD services and benefits? First, such persons could never show such eligibility pursuant to the definition of a developmental disability set forth in RCW 71A.10.020(3) because they could never show that their disabilities were “attributable” the developmental disabilities defined in the statute or that they had a disability “which constitutes a substantial limitation to the individual” as the statute requires. And they could never show such eligibility pursuant to WAC 338-823-0240 because it is impossible for anyone to determine the source of their adaptive functioning deficits. An eligibility scheme for public services that imposes impossible conditions on persons who might otherwise be eligible to receive such services is arbitrary and capricious and may constitute an improper and unconstitutional irrebuttable presumption.

¹⁴ AR 37.

B. The administrative cases cited by DDD do not support its assertion that it can determine the source of a person's adaptive functioning deficits by engaging in an intensive fact based inquiry.

DDD has consistently taken the legal position in similar cases that it is impossible to determine the source of a person's adaptive functioning deficits when the person has both a developmental disability and an unrelated condition. That DDD should take such a position is not usual given that its eligibility regulation, WAC 388-823-0240, requires such a position.

Nonetheless DDD cites three administrative decisions for the proposition that it engages in a fact intensive, case-by-case inquiry to determine the source of each dually diagnosed applicant's disability, rather than applying any kind of automatic disqualification. DDD did not assert any such position in the three administrative cases it cites here. In each of the cited administrative decisions DDD's legal position, presented in each through the testimony of Dr. McConnachie, was that it was impossible to separate out the effects on adaptive functioning of the applicant caused by his or her unrelated condition as compared to the applicant's developmental disability. Only the rejection of DDD's legal position by the same review judge of the DSHS Board of Appeals in all three cases prevented the denial of DDD eligibility that DDD sought for the applicants in those administrative decisions.

Here, when it supported DDD's termination of Mr. Lynn's eligibility for its services, DDD reversed course from its historical position and asserted that Mr. Lynn's mental illness was undoubtedly the cause of his adaptive functioning deficits. In support of its new legal position DDD had one of its staff workers go through hundreds of pages of Mr. Lynn's records at Western State Hospital in an attempt to show that his adaptive functioning deficits were the product of his mental illness alone.

In a further attempt to support its new legal position, that Mr. Lynn's adaptive functioning deficits were the product of his mental illness and not his developmental disability, Dr. McConnachie testified that:

And probably primarily I think that major mental illness in my professional opinion is the cause of the substantial functional deficits. And that's from reading his record, not the autistic disorder.¹⁵

However Dr. McConnachie soon returned to DDD's traditional legal position and testified that:

... [Mr. Lynn's] functional abilities are confounded and we'll never know what was due to autism, what's due to the mental illness, bipolar disorder or other illnesses, and there's no way to separate out the impact of which is causing how much of what. The only thing we can do is say, 'this is now he's functioning right now'.¹⁶

¹⁵ Tr. 100.

¹⁶ Id. at 138.

Despite the testimony of Dr. McConnachie in prior cases and here that no one could determine the source of Mr. Lynn's adaptive functioning deficits, between his mental illness and his developmental disability, the Board of Appeals, relying upon Dr. McConnachie's testimony, held that: "[Mr. Lynn's] mental illness is the primary cause of his substantial functional deficits".¹⁷

Dr. McConnachie's conflicting testimony here, particularly when combined with his past contradictory testimony in similar cases and the traditional legal position taken by DDD that it is impossible to determine the cause of a person's adaptive functioning deficits when a person has a developmental disability and an unrelated condition, is not credible and should not be considered substantial evidence to support the conclusion that the cause of Mr. Lynn's adaptive functioning deficits is his mental illness.

C. DDD's categorical exclusion of persons with concurrent conditions that cause adaptive functioning deficits violates the ADA and Section 504

DDD first argues that Mr. Lynn can only show violation of the ADA or Section 504 if he can show that those federal laws preempt state

¹⁷ AR 31.

law. This assertion is incorrect. In order to show a violation of the ADA or Section 504 in the context of a public benefit or service a plaintiff need only show that (1) he is a qualified individual with a disability, (2) he was excluded from participation in or otherwise discriminated against with regard to a public entity's services, programs, or activities, and (3) such exclusion or discrimination was by reason of his disability. Americans with Disabilities Act of 1990, § 202, 42 U.S.C. § 12132. In the same context, to establish a violation of Rehabilitation Act, plaintiff must show only that (1) she is handicapped within the meaning of Act; (2) she is otherwise qualified for the benefit or services sought; (3) she was denied the benefit or services solely by reason of her handicap; and (4) the program providing the benefit or services receives federal financial assistance. Rehabilitation Act of 1973, § 504(a), as amended, 29 U.S.C. § 794(a). A plaintiff need not show that it was the clear and manifest purpose of Congress to preempt state law in order to establish a violation of renewed the ADA or Section 504. *See, e.g. Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002).

DDD next argues that nothing in the ADA requires that persons with one type of disability be treated the same as persons with another type of disability. It may be that the ADA tolerates some types of different treatment between persons with different disabilities. However categorical

denial of or exclusion from public benefits and services based upon one's disability violates both the ADA and Section 504. *Lovell v. Chandler*, 303 F.3d at 1050.

The situation is no different here. DDD categorically excludes from the receipt of public benefits and services those persons who have concurrent conditions that cause adaptive functioning deficits. In other words, DDD excludes from the receipt of public benefits and services certain persons based upon their disabilities. Such discrimination violates the ADA and Section 504.

D. DDD's eligibility scheme violates Medicaid

DDD admits that as a condition of receiving federal Medicaid funding, it cannot arbitrarily deny or reduce certain Medicaid services to a person solely on the basis of that individual's diagnosis or condition. However DDD claims that this prohibition against diagnosis discrimination only applies to Medicaid services that are required to be provided and that mere enrollment with DDD is not a required Medicaid service.

However, as DDD admits, all DDD enrollees are entitled to Medicaid case management services. A DDD client's case manager is the

gatekeeper who will determine the type, duration and scope of the required Medicaid services the client will receive.¹⁸ Accordingly, denial of case management services based upon diagnosis discrimination is the functional equivalent of denial of required Medicaid services based upon diagnosis discrimination because without case management services a Medicaid recipient will never receive any Medicaid funded services.

II. 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.

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¹⁸ In its manual, at <http://www.dshs.wa.gov/ddd/services.shtml> , DDD defines “case management” for its clients as:

Case management

Case Resource Managers assist clients and their families to

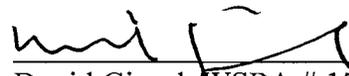
- Identify interests and support needs; and
- Access DDD services and/or other community resources for which you are eligible and have a need.

If it is determined that you are an eligible client of the Division, your access to DDD paid services depends on:

- Your meeting eligibility requirements for the specific service;
- Having an assessed need for the service; and
- Available funding for the service. The availability of funding does not apply to Medicaid State Plan services or services available under the DDD Medicaid Home and Community Based Waivers

DATED this 16th day of December, 2011.

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COURT OF APPEALS
DIVISION II

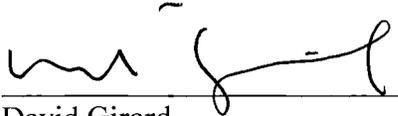
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I certify, under penalty of perjury pursuant to the laws of the State of Washington, that on December 16, 2011, a true copy of the foregoing Reply Brief was served, by e-mail and first class mail per agreement of counsel, upon counsel of record as indicated below:

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