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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

GREGORY LYNN,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

RESPONSE BRIEF

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COURT OF APPEALS

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I. INTRODUCTION

The Washington State Department of Social and Health Services (DSHS), through its Division of Developmental Disabilities (DDD), provides services to individuals who have developmental disabilities. Under RCW 71A.10.020(3), “developmental disability” means a substantial, life-long disability “attributable to” certain qualifying conditions, including autism.

Appellant Gregory Lynn has been diagnosed with both a mild form of autism and severe mental illness. While Mr. Lynn is clearly disabled, he has not shown that his disability is caused by autism. Rather, the Department found—and Mr. Lynn does not contest—that his limitations are primarily the result of his mental illness. Mr. Lynn produced no evidence that he was substantially disabled by autism prior to the onset of his mental illness. Contrary to the basic thrust of his argument, Mr. Lynn does not have a developmental disability under Washington law because his disability is not attributable to a qualifying condition.

Mr. Lynn also argues that federal law requires Washington to provide specialized DDD services both to individuals who are substantially disabled by autism, and to individuals with mild autism who are disabled by mental illness. Nothing in the Americans with Disabilities Act prevents a state’s disability programs from distinguishing between

developmental disability and mental illness. And because DDD enrollment is not a Medicaid service, Mr. Lynn's citations to Medicaid law are irrelevant.

II. COUNTER-STATEMENT OF ISSUES

1. Under RCW 71A.10.020(3), a "developmental disability" means a disability which "constitutes a substantial limitation to the individual" and is "attributable to" a specific condition such as autism. Under that statute does an individual diagnosed with autism have a developmental disability when he does not have substantial limitations attributable to autism, but does have substantial limitations attributable to mental illness?

2. WAC 388-823-0420(2) states that where an individual's functioning is impaired by injury or mental illness, DSHS will not accept the results of a standardized adaptive functioning test as evidence that the impairment was caused by autism alone. Is WAC 388-823-0420 consistent with the requirement in RCW 71A.10.020(3) that a developmental disability must constitute a substantial limitation and must be attributable to a condition such as autism?

3. Does the federal Americans with Disabilities Act prevent Washington State from providing specialized services to individuals

disabled by autism that it does not provide to individuals disabled by mental illness?

4. Do federal Medicaid regulations restrict how Washington State may define the term “developmental disability” for the purpose of determining eligibility for enrollment in state-funded services?

III. COUNTER-STATEMENT OF THE CASE¹

A. Washington State’s Developmental Disability Program

Washington offers a variety of services to individuals with disabilities. *E.g.*, RCW chapter 74.09 (medical assistance); RCW Title 71 (mental illness). A separate, specialized system of services for individuals with developmental disabilities is established in RCW Title 71A. A person is eligible for services under Title 71A if DSHS finds that he has a developmental disability, as defined in statute. RCW 71A.16.020; WAC 388-823-0020. The statute reads in relevant part:

“Developmental disability” means a disability attributable to intellectual disability, cerebral palsy, epilepsy, autism, or another neurological or other condition . . . which disability originates before the individual attains age eighteen, which has continued or can be expected to continue indefinitely, and which constitutes a substantial limitation to the individual.

¹ References are to the agency Adjudicative Record (AR), the agency Report of Proceedings (RP), and the superior court Clerk’s Papers (CP).

RCW 71A.10.020(3) (emphasis added).² DSHS has the authority to “adopt rules further defining and implementing the criteria” for eligibility. RCW 71A.16.020.

The Department’s rules for DDD eligibility are promulgated in WAC Chapter 388-823. Each applicant must show that he has a qualifying lifelong condition, as well as substantial limitations attributable to that condition. WAC 388-823-0040(1).

An individual applying under the autism category must show that he has a diagnosis of autism as defined in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR), with developmental delays beginning prior to age three. WAC 388-823-0500, -0515(1).³ The applicant must also show that autism constitutes a substantial limitation to his current adaptive functioning. WAC 388-823-0515(2). “Adaptive functioning” refers to a person’s level of independence as indicated by his performance of key activities of daily

² At the time of the administrative hearing in this matter, the statute required the applicant’s disability to constitute a “substantial handicap.” Former RCW 71A.10.020(3) (2008). In the 2010 legislative session, that phrase was replaced with the more respectful “substantial limitation.” Laws of 2010, ch. 94, § 21. The legislature also replaced the term “mental retardation” with “intellectual disability.” *Id.* The changes were effective June 10, 2010, while Mr. Lynn’s request for review was pending before the DSHS Board of Appeals. The legislature meant the changes to “remove demeaning language” from the statute, and did not intend to “expand”, “contract”, or otherwise “change” the statute’s application. *Id.* at § 1. We therefore use the more respectful language throughout this brief wherever possible.

³ The DSM-IV-TR, published by the American Psychiatric Association, is “the authoritative text on diagnosing mental disorders.” RP at 102.

living—motor skills, personal living skills, social and communication skills, and community living skills. RP at 92-93, 118-19, 144; AR at 601.

For DDD eligibility purposes, a “substantial limitation” can be shown by providing a score of two standard deviations below the mean on a standardized adaptive functioning test. WAC 388-823-0420. Adaptive functioning tests are administered by interviewing the adult—other than the subject himself—who is most familiar with the subject’s day-to-day behavior, such as a family member, caregiver, or work supervisor. AR at 28, 646; RP at 143-44.⁴ The tests accepted by DSHS are the Vineland Adaptive Behavior Scales (VABS or Vineland) and the Scales of Independent Behavior, Revised (SIB-R). WAC 388-823-0420(1). If the applicant does not submit a valid VABS or SIB-R score, the Department will normally administer its own adaptive functioning test called the Inventory for Client and Agency Planning (ICAP). WAC 388-823-0420(1)(c).

However, an adaptive functioning test measures only how well the individual is performing; it does not identify the *cause* of an individual’s

⁴ Standardized adaptive functioning tests measure an individual’s *current performance* of activities of daily living, which in some situations—such as when an individual is institutionalized and does not have an opportunity to engage in normal activities such as riding a bus or using a steak knife—may provide a poor estimate of the individual’s *actual ability* to perform those activities. See AR at 28; RP at 144.

impairments. AR at 29. The Department thus requires some proof of causation in cases where the cause of the impairments is in doubt:

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

WAC 388-823-0420(2). If the applicant is disabled by something other than autism at the time of the test, then the test score may reflect not just any effect that autism may have on the individual's functioning, but also the disabling effects of an unrelated illness or injury. A potentially qualifying test score will be disregarded if the Department is not able to determine that the individual is substantially disabled by autism, ruling out the effects of any other illnesses or injuries.

Mr. Lynn challenges that rule and its application to his case.

B. Mr. Lynn's Developmental And Psychiatric History

Gregory Lynn⁵ is 28 years old. AR at 17.⁶ Intelligence testing at age 21 showed that Mr. Lynn had a full-scale IQ of 108, which is in the

⁵ Mr. Lynn has at times identified as a female named Ericca Adams or Claire. AR at 17 n.8; RP at 50-51, 177. He is so identified at some places in the record. *E.g.*, AR at 261. Lacking any testimony from Mr. Lynn as to how he prefers to be addressed, this brief follows the lead of Mr. Lynn's counsel by using male pronouns and Mr. Lynn's birth name. *E.g.*, Opening Br. at 1. No disrespect is intended.

high end of the average range. AR at 21, 249. As a person who is “very verbal, very articulate in his speech,” Mr. Lynn falls within “the high end of the verbal range of autism.” RP at 124. He was diagnosed with Asperger’s syndrome—a milder form of autism—when he was twelve years old. AR at 17, 244.⁷ When Mr. Lynn applied for DDD services at the age of 18, he was initially denied enrollment because Asperger’s syndrome, unlike autism, is not a qualifying condition. AR at 17; RP at 24. Shortly thereafter, Mr. Lynn’s clinical psychologist Dr. Darrow Chan changed the diagnosis to autism. AR at 17, 229-31; RP at 24. As Dr. Chan noted at the time, Mr. Lynn’s autistic qualities are “mild.” AR at 229. For instance, he “possesses adequate verbal skills for answering concrete questions and for expressing his basic needs” but “lacks subtle [communication] skills that are required to effectively interact with an adult community.” AR at 230.⁸

⁶ Mr. Lynn does not assign error to any findings of fact in the DSHS Final Order (AR at 17-31). See discussion *infra* at 17. Those findings are thus verities on appeal. E.g., *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 100, 11 P.3d 726 (2000).

⁷ On the continuum of conditions collectively called Autism Spectrum Disorder, autism (also known as autistic disorder or classic autism) is the most severe form, while Asperger’s syndrome is a milder form. See National Institute of Neurological Disorders and Stroke, Autism Fact Sheet, available at http://www.ninds.nih.gov/disorders/autism/detail_autism.htm (last visited Nov. 8, 2011). As Mr. Lynn’s psychologist observed, “[t]he mental health field still has not clearly set a boundary between these two diagnoses.” AR at 229; see also RP at 168 (Mr. Lynn’s father authored a book addressing, *inter alia*, differentiating between Asperger’s syndrome and high functioning autism).

⁸ Some of Dr. Chan’s observations from 2001 are no longer accurate. For instance, in 2001 Dr. Chan noted that “Mr. Lynn does not have any friends.” AR at 230.

While the record thus indicates that Mr. Lynn has *some* limitations due to autism, there is no evidence that his mild autism causes *substantial* limitations resulting in adaptive functioning scores two standard deviations below the mean, as required by WAC 388-823-0420. See AR at 37 (Mr. Lynn “failed to provide the requisite evidence of adaptive functioning limitations” resulting from his autism).⁹ And in fact, mental illness—not autism—is “the primary cause” of Mr. Lynn’s functional limitations. AR at 31.

Mr. Lynn has a long history of significant mental illness. AR at 25. At age seven, he was diagnosed with Attention Deficit Hyperactivity Disorder and Tourette’s syndrome. AR at 25, 243. Over the following decade he was diagnosed at various times with Pervasive Developmental Disorder, Obsessive Compulsive Disorder, Oppositional Defiant Disorder, major depression, and an anorexic episode. AR at 25, 220, 244. In 2001 he was hospitalized for two weeks for mental illness treatment. AR at 20, 244. He was subsequently diagnosed with probable Schizophrenia;

At the 2009 hearing in this case, Mr. Lynn’s father indicated that Mr. Lynn had “friends at [Western State] hospital” during his residence there. RP at 175.

⁹ Nor does every person with a diagnosis of autism have substantial functional limitations. The mean Vineland adaptive functioning test score for individuals with verbal autism is 65.7, with a standard deviation of 13.3. AR at 650. Because the average range is one standard deviation above or below the mean, the average expected score would be between 52.4 and 79.0. Scores of 70 or above do not reflect a substantial functional limitation. WAC 388-823-0420. Thus, many individuals with a diagnosis of autism function above the level that would qualify them for DDD services. Because Mr. Lynn functions in “the high end of the verbal range of autism” his scores would be expected to be “somewhat higher” than average. RP at 124.

Psychosis, Not Otherwise Specified; Borderline Personality Disorder; and finally in 2005 with Bipolar I Disorder. AR at 25-26, 233, 255. At the time of the hearing Mr. Lynn carried a diagnosis of Bipolar I Disorder, most recent episode manic with psychotic features. AR at 26, 413. With the exception of brief periods of incarceration, Mr. Lynn was institutionalized for mental health treatment at Western State Hospital from 2006 until 2009, when he moved to a group home in Burien, Washington. AR at 26.¹⁰

During periods when his mental illness flared and he stopped taking his medications, Mr. Lynn acted dangerously including by assaulting his parents, self-cutting, drinking antifreeze, attempting to put metal objects into electrical outlets, and removing and attempting to set fire to his clothing in a hotel elevator. AR at 22, 26, 236-39, 261.

Mr. Lynn's mental illness causes substantial limitations to his adaptive functioning. AR at 23. Bipolar Disorder by definition causes adaptive functioning deficits, and individuals with Bipolar I Disorder in particular have a high rate of functional impairment. AR at 30-31, 614-15, 631, 640-43; RP at 104. Bipolar I Disorder with psychotic features—the

¹⁰ Mr. Lynn claims that he is currently institutionalized at Western State Hospital "and has been since mid-March 2008." Opening Br. at 17 n.18. In fact, at the time of the hearing in 2009, Mr. Lynn had been released from the hospital and was living in the community. AR 26; RP at 176-77 (testimony of Mr. Lynn's father indicating that Mr. Lynn moved into a group home in Burien on July 10, 2009). The record does not indicate whether, when, or why Mr. Lynn returned to Western State Hospital.

type Mr. Lynn suffers from—is the most severe form of the disorder and can be expected to have the most disabling impact. RP at 109-110. Mr. Lynn’s other mental health diagnoses also cause adaptive functioning deficits. AR at 30. There is a substantial disparity between Mr. Lynn’s functional limitations and the limitations that might be attributable to autism alone. AR at 27, 653; *see* RP at 122 (Mr. Lynn is “testing . . . like someone who has severe mental retardation” despite his “average intellectual functioning”), 125 (“Mr. Lynn is scoring like someone with severe mental retardation which you wouldn't expect just by having autism and his verbal abilities. We'd expect him to score much higher.”).

Testing at Western State Hospital indicated that if his mental illness were properly controlled, Mr. Lynn could live independently in the community. AR at 30, 289. Prior to his decompensation and subsequent hospitalization in 2006, Mr. Lynn lived in his own apartment for six months. AR at 21, 240. He worked at Safeway for a year. AR at 20, 248. When he is not experiencing the symptoms of mental illness, his adaptive functioning is good: he is able to independently groom and dress himself and keep his residence in good order. AR at 21, 243. When his mental illness gets worse, his functioning becomes poor and his competence with basic living skills declines. AR at 21, 254. The pattern of Mr. Lynn’s

functioning is consistent with disabling mental illness, which fluctuates—not autism, which is static. AR at 20.

Dr. Wendy Marlowe conducted a Vineland adaptive functioning test for Mr. Lynn on July 23, 2008. AR at 26-27, 388. Dr. Marlowe’s testing inappropriately relied on interviews with individuals who had no recent daily contact with Mr. Lynn, resulting in an invalid test administration. AR at 29; RP at 98. Dr. Marlowe also failed to review any of Mr. Lynn’s mental health records from Western State Hospital. AR at 29, 388; RP at 98-99. Based on the invalid testing, Dr. Marlowe concluded that Mr. Lynn had substantial limitations in adaptive functioning, and further concluded that his mental illness had *no effect* on his functioning. AR at 29, 391. The DSHS Review Judge found Dr. Marlowe’s conclusions “stunning” in light of well-established science showing the effects of mental illness on adaptive functioning, and rejected the evaluation as neither credible nor useful. AR at 29, 31.

C. Procedural History

1. 2001 program enrollment.

Mr. Lynn first applied for DDD enrollment at age 18, and was found ineligible because his diagnosis of Asperger’s syndrome was not a qualifying developmental disability. AR at 17; *see* WAC 388-823-0040. Shortly afterward, Mr. Lynn’s psychologist changed the diagnosis to

autism. AR at 17, 229-231. At the time, the DDD eligibility rules did not require evidence of adaptive functioning deficits to qualify for benefits under the Autism category. AR at 17 n.10; former WAC 388-825-030(5)(b)(ii) and (6)(b)(ii) (2001) (allowing substantial disability to be demonstrated by “current or previous eligibility for participation in special education”); *see* AR at 246 (Mr. Lynn received special education services “[t]hroughout his school years”). In 2001, Mr. Lynn was found DDD eligible on the basis of his autism diagnosis. AR at 17.

2. 2007 eligibility termination and judicial review.

The Department revised its DDD eligibility rules in 2005, including by requiring individuals with autism to provide specific evidence of adaptive functioning deficits. Wash. St. Reg. 05-12-130; AR at 17. In August 2006, Mr. Lynn requested new DDD services from the Department, triggering an automatic eligibility review under the new rules. AR at 18, 198; WAC 388-823-1010(3).¹¹ The Department reviewed Mr. Lynn’s diagnosis history and concluded that his diagnosis of autism did not meet the requirements of WAC 388-823-0500 because he lacked early language delays. AR at 18. At the initial adjudicative hearing an administrative law judge found Mr. Lynn to have a qualifying diagnosis of autism. AR at 205. On administrative review, the DSHS

¹¹ At the time, Mr. Lynn was receiving services from DSHS through its Mental Health Division as a patient at Western State Hospital. *See* AR 26.

Board of Appeals disagreed and issued a final order terminating Mr. Lynn's eligibility on the basis that he had not established a valid diagnosis of autism. AR at 18, 195.¹²

On a petition for judicial review, Pierce County Superior Court concluded that the DSHS final order had applied the incorrect evidentiary standard and was not supported by substantial evidence. AR at 18, 195. The court overturned the DSHS final order and reinstated the administrative law judge's initial order, remanding to the Department for further proceedings. AR at 196.

3. 2009 eligibility termination and appeal.

Under the initial order reinstated by the superior court, Mr. Lynn was determined to have a valid diagnosis of autism. AR at 205. However, there was insufficient evidence in the record for the administrative law judge to determine whether or not Mr. Lynn had "adaptive functioning limitations due to autism." AR at 205. Accordingly, the Department accepted Mr. Lynn's diagnosis of autism and went on to consider Mr. Lynn's adaptive functioning. AR at 18; RP at 26-30. After reviewing Mr. Lynn's records, including documents from Western State Hospital, a DDD eligibility specialist determined that Mr. Lynn's mental illness was too severe to determine what portion, if any, of his functional deficits were

¹² The previous DSHS Board of Appeals order, which was subsequently overturned, does not appear in the record.

due to autism. AR at 19; RP at 30, 33-36. In January 2009, the Department sent Mr. Lynn a new DDD termination notice. AR at 24-25, 207-217. The notice explained that “the Department is unable to determine that Mr. Lynn’s current adaptive functioning is the result of the Autistic Disorder diagnosis because of the extensive and ongoing history of serious mental health problems.” AR at 217.

Mr. Lynn requested an administrative hearing. AR at 25, 218. He stipulated that he did not meet the requirements for eligibility under the categories of intellectual disability, cerebral palsy, epilepsy, another neurological condition, or other condition. RP at 32-33. The hearing thus focused on whether Mr. Lynn was eligible under the rules for autism, namely the adaptive functioning requirements of WAC 388-823-0420. In an initial order, the administrative law judge concluded that Mr. Lynn was not eligible for DDD services. AR at 70-81.

Mr. Lynn appealed the ALJ’s decision to the DSHS Board of Appeals. AR at 54-69. The Board upheld the ALJ’s determination in a Final Order. AR at 1-38. The Board first found that Mr. Lynn had “significant mental illness that caused substantial impairment in his adaptive functioning.” AR at 23. Because autism was not the only potential source of Mr. Lynn’s impairments, the Board looked for

additional information that might show whether Mr. Lynn's autism resulted in substantial impairments to his functioning:

To find out what [Mr. Lynn]'s abilities were before the onset of mental illness, we would need a Vineland study from that period. No test results for the period before [Mr. Lynn]'s first diagnosis of mental illness are available. Nor are any test results available for the period before [Mr. Lynn]'s first diagnosis of Bipolar I.

AR at 29. Given that lack of evidence, the Board found that “[n]obody can determine what, if any, functional limitations [Mr. Lynn] has as a result of his autism alone[.]” AR at 37. Applying WAC 388-823-0420(2), the Board ruled that the Department could not accept Mr. Lynn's adaptive functioning test results or administer its own testing. AR at 35-36. Until Mr. Lynn “can demonstrate a qualifying [adaptive functioning test] score unaffected by an unrelated injury or illness” the Board held that it would be unable to determine that Mr. Lynn is eligible under the DDD eligibility category for autism. AR at 36. The Board thus held that Mr. Lynn had failed to meet his burden of showing that he has qualifying functional limitations due to his autism. AR at 37.

Mr. Lynn sought judicial review from Thurston County Superior Court. *See* CP at 10. The court found WAC 388-823-0420 to be consistent with the statutory definition of “developmental disability” and affirmed its application in this case, holding that “Mr. Lynn has not shown

that his autism substantially limits his adaptive functioning.” CP at 11. The court found substantial evidence supporting the Department’s finding that mental illness “is the primary cause of [Mr. Lynn’s] functional limitations.” CP at 11. It rejected his argument that DSHS had failed to comply with the Pierce County Superior Court’s prior order on judicial review. CP at 12. Finally, the court rejected Mr. Lynn’s claims that WAC 388-823-0420 is in conflict with federal law. CP at 12-13.

Mr. Lynn timely appealed. CP at 14-22.

IV. ARGUMENT

Under Washington law, a developmental disability is a disability that constitutes a substantial limitation to the individual and is attributable to a particular qualifying condition. Mr. Lynn does not dispute that mental illness is the primary cause of his disabilities, and he presents no evidence that his mild autism constitutes or has ever constituted a substantial limitation to his functioning. In short, while Mr. Lynn is disabled, his disability is not attributable to autism. He nonetheless argues that he should be considered developmentally disabled under state law because (1) he has a diagnosis of autism, (2) he is disabled, and (3) the Department cannot require him to establish that autism is the cause of his disability. His argument is contrary to the plain language of RCW 71A.10.020(3), as well as the cases construing that statute. The legislature clearly intended

DDD eligibility to be restricted to those with significant disabilities resulting from conditions such as autism. Services for those with disabilities caused by serious injury, medical condition, or mental illness are provided under other programs.

Mr. Lynn also essentially argues that, to the extent that RCW 71A.10.020(3) requires his disability to be attributable to autism and not to mental illness, it is preempted by federal law. The requirement that developmental disability services be provided only to individuals with substantial disabilities attributable to autism is not discrimination “on the basis of disability” under the Americans with Disabilities Act. A state may lawfully require an applicant for disability services to provide evidence of a qualifying disability. Finally, the Medicaid regulations Mr. Lynn cites are simply irrelevant: DDD eligibility is a state program, not a federal Medicaid service.

A. Standard of Review

The Administrative Procedure Act (APA), chapter 34.05 RCW, governs this Court’s review of agency action. A 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. Empl. Sec. Dep’t*, 164 Wn.2d 909, 915, 194 P.3d 255

(2008). Under the APA the “burden of demonstrating the invalidity of agency action is on the party asserting invalidity.” RCW 34.05.570(1)(a).

RCW 34.05.570(3) provides nine grounds on which an agency adjudication may be reversed. The only ground specifically cited by Mr. Lynn is that an order may be overturned if it is not supported by substantial evidence. Opening Br. at 10 (citing RCW 34.05.570(3)(e)). Mr. Lynn fails to identify any particular DSHS finding that he believes is erroneous, and his Issues Presented make no mention of a challenge to the sufficiency of the evidence. Opening Br. at 2-3. Because he does not challenge any of the DSHS findings of fact, those findings are verities on appeal.

Mr. Lynn argues that the Department based its order on an invalid rule, apparently meaning to argue that the Department’s final order exceeds DSHS’s statutory authority, RCW 34.05.570(3)(b); or that DSHS “has erroneously interpreted or applied the law.” RCW 34.05.570(3)(d). Those questions of law are reviewed de novo. *E.g., Ames v. Dep’t of Health*, 166 Wn.2d 255, 260-61, 208 P.3d 549 (2009).

A court may invalidate an agency rule only if it violates a constitutional provision, was not adopted in compliance with statutory rule-making procedures, exceeds the statutory authority of the agency, or was arbitrary and capricious. RCW 34.05.570(2)(c). Courts have no

authority to invalidate rules on any other grounds. *Ass'n of Wash. Bus. v. Dep't of Rev.*, 121 Wn. App. 766, 776, 90 P.3d 1128 (2004), *aff'd and modified*, 155 Wn.2d 430, 120 P.3d 46 (2005). “[R]ules adopted pursuant to a legislative grant of authority are presumed to be valid and should be upheld on judicial review if they are reasonably consistent with the statute being implemented.” *Campbell v. Dep't of Soc. & Health Servs.*, 150 Wn.2d 881, 892, 83 P.3d 999 (2004) (internal quotation marks omitted).

B. WAC 388-823-0420 Is Consistent With The Statutory Definition Of “Developmental Disability”

The legislature defines “developmental disability” as:

a disability attributable to intellectual disability, cerebral palsy, epilepsy, **autism**, or another neurological or other condition . . . which disability originates before the individual attains age eighteen, which has continued or can be expected to continue indefinitely, and **which constitutes a substantial limitation to the individual.**

RCW 71A.10.020(3) (emphasis added). Mr. Lynn argues that WAC 388-823-0420 is inconsistent with that definition and therefore exceeds DSHS’s authority. Opening Br. at 18-20. He bases his argument on an assertion that the Department’s rule “excludes from eligibility every person with a developmental disability . . . who also has a coexisting condition that may affect their [sic] adaptive functioning.” *Id.* at 18.

Mr. Lynn misreads both the rule and the statute. WAC 388-823-0420 does not systematically exclude mentally ill individuals from DDD

services. Rather, it articulates the evidence required to show that the individual's disability is attributable to a qualifying condition rather than an unrelated illness or injury. That rule is a reasonable implementation of the statutory language that a disability must be attributable to a qualifying condition, and that the qualifying disability must constitute a substantial limitation.

1. **WAC 388-823-0420(2) is a fact-based inquiry, not an automatic disqualification from DDD eligibility for individuals who are diagnosed with mental illness.**

In his brief, Mr. Lynn makes numerous references to an alleged “blanket exclusion” of individuals with mental illness from DDD eligibility. Opening Br. at 23; *see also* Opening Br. at 4 (“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”); at 12 (“fully excluding persons who have both developmental disabilities and mental illnesses”). In this case Mr. Lynn did not meet his burden of showing that his functional limitations are the result of autism rather than mental illness. But as a matter of both law and fact, WAC 388-823-0420(2) does not exclude dually-diagnosed individuals. As the Department found in its final order, “there are no automatic disqualifications” for mental illness. AR at 19.

A person who has substantial limitations due to autism is eligible for DDD services regardless of his mental health status.

This Court addressed a similar argument in *Pitts v. Dep't of Soc. & Health Servs.*, 129 Wn. App. 513, 119 P.3d 896 (2005), a case involving the pre-2005 DDD eligibility rules. In *Pitts*, the Department terminated the DDD eligibility of an individual with a diagnosis of epilepsy. *Pitts*, 129 Wn. App. at 519. Mr. Pitts's epilepsy was controlled by medication. *Id.* at 518. He also suffered from mental illness. *Id.* at 519-20. A standardized adaptive functioning test showed that Mr. Pitts had substantial limitations to his functioning. *Id.* at 521. While the facts were in dispute, there was substantial evidence "that Pitts functioned well when he was not experiencing acute mental illness and that his currently low adaptive skills are most logically attributable to his psychiatric disorders" rather than epilepsy. *Id.* at 531; *see also id.* at 521.

Like Mr. Lynn, Mr. Pitts argued "that the legislature did not intend to exclude persons with dual or multiple diagnoses from receiving DDD services[.]" *Id.* at 525. In affirming the DDD termination, the court noted that "it may be difficult" to show that an adaptive functioning test score is "not attributable to mental illness," but rejected the argument that the evidentiary burden was so "impossible" as to entirely exclude persons with mental illness from DDD services. *Id.* at 531. The applicant was not

automatically disqualified, but rather “presented no evidence that his [adaptive functioning test] scores are attributable to anything other than his psychiatric disorders.” *Id.* at 525.

A review of final orders published in the DSHS index of significant decisions confirms that the Department still engages in a fact-intensive, case-by-case inquiry to determine the source of each applicant’s disability, rather than applying any kind of automatic disqualification. In at least three recent indexed cases, the Department found that a qualifying condition was the source of the applicant’s substantial limitations, even though the applicant also suffered from significant mental illness. *See* DSHS Docket No. 04-2009-A-1523 (Jan. 12, 2010) (eligible despite bipolar disorder), *available at* <http://www.dshs.wa.gov/pdf/boa/04-2009-A-1523%20DDD.pdf>; DSHS Docket No. 02-2009-A-1739 (Sept. 29, 2009) (eligible despite schizoaffective disorder), *available at* <http://www.dshs.wa.gov/pdf/boa/02-2009-A-1739%20DDD.pdf>; DSHS Docket No. 09-2008-A-1000 (Aug. 31, 2009) (eligible despite psychotic disorder), *available at* <http://www.dshs.wa.gov/pdf/boa/09-2008-A-1000%20DDD.pdf>.¹³ In each case the Department applied a

¹³ Those decisions are indexed by DSHS according to RCW 42.56.070(6) (precedential agency records must be indexed), and RCW 34.05.220(2) and (3) (precedential agency decisions must be available for public inspection).

preponderance of the evidence standard, not a blanket exclusion, to determine the cause of the applicant's disability.

In this case, the Department likewise examined the exhibits and testimony to determine the cause of Mr. Lynn's disabilities. After reviewing Mr. Lynn's developmental and psychiatric history, the Department determined that mental illness is "the primary cause" of Mr. Lynn's current functional limitations. AR at 31. The Department then attempted to determine whether Mr. Lynn would still have substantial functional limitations after controlling for the effects of his mental illness. Given his currently poor mental health, determining what limitations Mr. Lynn faced from his autism would have required the production of adaptive test scores from prior to the onset of his mental illness. AR at 29. As the DSHS staff psychologist testified, it would be "odd" for no such testing to have been done in a case where the individual had in fact suffered significant functional limitations throughout childhood. RP at 147.

Mr. Lynn was unable to produce any records or testimony that would allow the Department to attribute substantial limitations to his autism. That fact does not turn WAC 388-823-0420(2) into a *de facto* automatic disqualification for persons with mental illness.

Mr. Lynn's claim that DSHS enforces a blanket exclusion of otherwise eligible, dual-diagnosed individuals from DDD services is thus contrary to *Pitts* and inconsistent with the fact-intensive analysis applied by the Department in this case and others. As discussed below, WAC 388-823-0420 reasonably implements the language of RCW 71A.10.020(3) by requiring evidence that an individual's limitations are caused by a qualifying condition.

2. RCW 71A.10.020(3) requires a causal link between the qualifying diagnosis and the individual's substantial limitations.

The statutory definition of "developmental disability" includes only disabilities "attributable to" a small number of conditions. RCW 71A.10.020(3); *see Campbell*, 150 Wn.2d at 894-95 (disabling childhood medical conditions are not developmental disabilities). "Regardless of his treatment needs, an individual qualifies for [DDD] benefits only on demonstrating a condition that is a developmental disability recognized under applicable statutes and administrative rules." *Slayton v. Dep't of Soc. & Health Servs.*, 159 Wn. App. 121, 132, 244 P.3d 997 (2010). Not every person with a qualifying diagnosis is eligible for DDD services. *See Nix v. Dep't of Soc. & Health Servs.*, 162 Wn. App. 902, 256 P.3d 1259 (2011) (individual with mental retardation diagnosis had IQ score too high to qualify for DDD services). Rather, the

qualifying disability must “constitute[] a substantial limitation to the individual.” RCW 71A.10.020(3).

By its plain language, RCW 71A.10.020(3) requires not only a qualifying condition and a substantial limitation, but also a causal link between the two. A person does not have a developmental disability by virtue of having a diagnosed condition, plus a substantial limitation to his functioning. Rather, the substantial limitation must be *attributable to* the qualifying condition; or conversely, the qualifying condition must *constitute* a substantial limitation to the individual.

Any alternative reading of RCW 71A.10.020(3) would lead to results clearly not intended by the legislature. For example, an individual whose epilepsy is entirely controlled by medication does not have a “developmental disability” under the statute because he is not substantially limited in his functioning. If that same individual later becomes disabled by a condition that is clearly not a developmental disability, such as progressive scoliosis (the condition at issue in *Campbell*), the individual now has both epilepsy and substantial limitations to his functioning. But the individual’s disability is not “attributable to” epilepsy, and epilepsy still does not “constitute a substantial limitation” to his functioning. To say that the individual now has a developmental disability would read those words of causation out of the statute.

That hypothetical is only slightly removed from this Court's decision in *Pitts*, in which the applicant's non-disabling epilepsy was accompanied, not by a disabling medical condition as in the example above, but by mental illness. This Court determined that the DDD applicant did not have a developmental disability because "he has not shown that his epilepsy is evidenced by low [adaptive functioning] scores or that the condition has any affect [sic] on his scores whatsoever." *Pitts*, 129 Wn. App. at 530. The applicant "presented no evidence that his [adaptive functioning test] scores are attributable to anything other than his psychiatric disorders." *Id.* at 525. While "mental illness may not be the *sole* cause of his cognitive impairment," it was the applicant's burden to show that his limitations were due to a qualifying condition in the face of substantial evidence that his functioning was limited by mental illness. *Id.* at 531-32. The argument Mr. Lynn makes in this case is thus directly contrary to this Court's decision in *Pitts*, as well as the plain language of the statute.

3. WAC 388-823-0420(2) implements the statutory requirement that a "developmental disability" must be attributable to a qualifying condition.

The DDD autism eligibility rules implement the statutory causation requirement, just as the epilepsy rules did in *Pitts*. WAC 388-823-0420 describes the evidence needed to show that autism constitutes a substantial

limitation to an individual's functioning. The first part of the rule describes acceptable adaptive functioning tests, professionals who can administer those tests, and qualifying test scores. WAC 388-823-0420(1). The rule then requires that an individual's score be attributable to a qualifying condition:

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.

WAC 388-823-0420(2). Where autism is the only potentially disabling condition, the analysis is straightforward: any adaptive functioning deficits can be attributed to autism, so a test score two standard deviations below the mean is qualifying. *See* WAC 388-823-0420(1). But where the individual has both autism and "an unrelated injury or illness," the Department must consider the evidence to "determine" whether the impairment "is the result of" autism. WAC 388-823-0420(2). If DSHS is able to determine that autism results in substantial limitations to the individual's functioning, the test results can be accepted. *Id.*; RP at 158-

159. If the applicant produces insufficient evidence to substantiate that his low test score is attributable to a qualifying condition, DSHS will disregard the test. WAC 388-823-0420(2)(a).¹⁴

WAC 388-823-0420(2) is “reasonably consistent with” RCW 71A.10.020(3) and should be upheld as a valid exercise of the Department’s rulemaking authority. *Campbell*, 150 Wn.2d at 892. RCW 71A.10.020(3) does not permit DSHS to extend DDD services to a person whose autism does not constitute a substantial limitation. “The Department has no authority to expand the definition of developmental disability beyond what the legislature has permitted.” *Id.* at 895. As Mr. Lynn himself notes, the legislature intended individuals with autism or other qualifying conditions to be eligible for DDD enrollment only “if they could show that their condition or disorder resulted in a substantial handicap to them.” Opening Br. at 20. WAC 388-823-0420(2) merely requires applicants to make that showing.¹⁵

¹⁴ The Department imposes similar causation requirements throughout the DDD eligibility rules. *See* WAC 388-823-0215(2) (IQ score “cannot be attributable to mental illness”), -0215(2)(a) (DSHS will “exclud[e] the effects of the mental illness” when considering IQ scores), -0230(1)(b) (DSHS “will review the pattern” of IQ scores “to ensure that the [IQ] is resulting from” a qualifying condition), -0600 (central nervous system impairment may not be “attributable to a mental illness or psychiatric disorder”); WAC 388-823-0615(3) (the applicant’s “intellectual impairment and physical assistance needs must be the result of the central nervous system impairment and not due to another condition or diagnosis.”).

¹⁵ Mr. Lynn also states that he is eligible for DDD enrollment because he “has shown that he needs DDD services.” Opening Br. at 24. In addition to being unsupported by citation to the record, that statement is legally irrelevant. A need for

C. The Americans With Disabilities Act Does Not Prevent Washington From Requiring An Applicant For Developmental Disability Services To Show That His Disabilities Are Attributable To A Qualifying Condition Such As Autism

Mr. Lynn argues that WAC 388-823-0420(2) is contrary to various federal laws. Opening Br. at 10-18, 20-25. Because WAC 388-823-0420(2) is an implementation of the plain language in RCW 71A.10.020(3), and because “contrary to federal law” is not a separate basis for invalidating a rule under RCW 34.05.570(2)(c), his argument is best viewed as a preemption challenge to the requirement in RCW 71A.10.020(3) that an individual’s disability must be attributable to a qualifying condition like autism rather than an unrelated condition such as mental illness. That requirement is not preempted by federal law.

Federal law preempts state law only if it was the “clear and manifest purpose of Congress” to do so. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (internal quotations omitted). “Congress may preempt local law by explicitly defining the extent to which its enactments preempt laws (express preemption). Preemption may also occur where the federal government intends to exclusively occupy a field (field preemption) and where it is impossible to

services does not establish DDD eligibility. *Slayton*, 159 Wn. App. at 129-31. And services that Mr. Lynn needs may be provided through other state programs for which he does qualify, such as the mental health system established by RCW Title 71.

comply with both state and federal law (conflict preemption). . . . There is a strong presumption against preemption.” *Campbell*, 150 Wn.2d at 897.

Title II of the Americans with Disabilities Act (ADA) provides in pertinent part: “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such an entity.” 42 U.S.C. § 12132. Mr. Lynn appears to again rely on the incorrect notion that DSHS enforces a blanket exclusion of mentally ill individuals from DDD services. As previously stated, an individual who is substantially limited by autism qualifies for developmental disability services regardless of whether he or she also has a mental illness. *Supra* at 20-24.

To the extent that his challenge is to the Department’s rule as actually written, Mr. Lynn seems to argue that the ADA forbids a state from requiring evidence that an individual is disabled by autism, rather than mental illness, in order to qualify that individual for specialized state services. Mr. Lynn presents no argument that Congress meant the ADA to eliminate the many legal distinctions between developmental disabilities and mental illnesses.¹⁶ While he believes Washington’s distinction

¹⁶ For instance, at English common law “there was a marked distinction in the treatment accorded ‘idiots’ (the mentally retarded) and ‘lunatics’ (the mentally ill).” *Heller v. Doe*, 509 U.S. 312, 326, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) (internal

between developmental disability and mental illness “violates virtually every . . . section” of 28 C.F.R. § 35.130(a), (b) and (c), Opening Br. at 15, Mr. Lynn cannot identify a single analogous case from any jurisdiction. That failure is particularly noteworthy given that “many States . . . have separate agencies for addressing [the] needs” of persons with developmental disabilities and persons with mental illness, *Heller*, 509 U.S. 312, 326-28, 113 S. Ct. 2637 125 L. Ed. 2d 257 (1993); and thus necessarily distinguish between those two groups.

Mr. Lynn fails to meet his burden of showing that the DSHS regulation conflicts with the ADA. WAC 388-823-0420(2) does not discriminate on the basis of disability; Mr. Lynn is not unnecessarily institutionalized; and the accommodation he requests is not reasonable.

1. The state does not discriminate on the basis of disability by requiring an applicant for services to establish that he has a qualifying disability.

To prove a public program or service violates Title II of the ADA, a plaintiff must show:

quotes omitted). States can rationally create legal distinctions between the two groups because developmental disabilities and mental illnesses are different types of conditions, presenting different issues of diagnosis, and requiring different kinds of treatment. *Id.* at 322-328. Congress itself makes that distinction. *Compare, e.g.*, Developmental Disabilities Assistance and Bill of Rights Act of 2000, §§ 101-305, 42 U.S.C. §§ 15001-15115, *with* Protection and Advocacy for Individuals with Mental Illness Act, §§ 101-301, 42 U.S.C. §§ 10801-10851. As do federal Medicaid regulations. *E.g.*, 42 C.F.R. § 435.1010, definition of “Persons with related conditions” (services in Intermediate Care Facilities for the Mentally Retarded includes related conditions such as autism but excludes mental illness).

(1) he is a “qualified individual with a disability”; (2) he was either excluded from participation in or denied the benefits of a public entity’s services, programs or activities, or was otherwise discriminated against by the public entity; and (3) *such exclusion, denial of benefits, or discrimination was by reason of his disability.*

Weinreich v. Los Angeles Cy. Metro. Transp. Auth., 114 F.3d 976, 978 (9th Cir. 1997) (emphasis in original). “[A] plaintiff proceeding under Title II of the ADA must . . . prove that the exclusion from participation in the program was ‘solely by reason of disability.’” *Id.* at 978-79 (citation omitted). It is not discrimination on the basis of mental illness to require that Mr. Lynn produce adequate evidence to prove that his limitations are attributable to autism. Nor is it discrimination on the basis of autism to require that Mr. Lynn establish that autism constitutes a substantial limitation to him.

In part, Mr. Lynn seems to argue that it is an ADA violation not to extend DDD services to persons with mental illness regardless of whether they have a qualifying developmental disability. But nothing in the ADA requires that persons with one type of disability are treated the same as persons with another type of disability. *See, e.g., Traynor v. Turnage*, 485 U.S. 535, 108 S. Ct. 1372, 99 L. Ed. 2d 618 (1988) (the Rehabilitation Act does not prohibit discrimination among different kinds of disabilities);¹⁷

¹⁷ Title II of the ADA was modeled after, and in all relevant respects is identical to, Section 504 of the Rehabilitation Act. *E.g., Zukle v. Regents of the Univ. of Cal.*, 166

Currie v. Group Ins. Comm'n, 290 F.3d 1, 24 n.7 (1st Cir. 2002) (“it is permissible for [a public entity] to discriminate between people with different disabilities, i.e., mental and physical.”); *Rogers v. Dep’t of Health and Environ. Control*, 174 F.3d 431, 433 (4th Cir. 1999) (Title II of the ADA does not require equal benefits for different types of disabilities). DSHS properly requires each applicant for specialized DDD services to establish that he or she has a developmental disability, while excluding individuals with other types of disability such as a medical condition or mental illness.

Mr. Lynn may instead mean to argue that DSHS improperly discriminated by placing the burden on him to show that he has a disability attributable to autism. But the ADA does not prevent a state from placing the responsibility on applicants to establish their eligibility for a program intended for individuals with qualifying disabilities. *Weinreich*, 114 F.3d at 979. In *Weinreich*, the plaintiff challenged a transit agency’s requirement that persons seeking a reduced fare must provide periodic medical reports to substantiate a disability. *Id.* The Ninth Circuit rejected the claim:

Weinreich’s exclusion from the Reduced Fare Program was not based on the fact or perception that he has a disability. To the contrary, his exclusion was based on the possibility

F.3d 1041, 1045 (9th Cir. 1999) (analyzing both disability discrimination claims simultaneously).

that he does *not* have a qualifying disability. Specifically, his exclusion was based on his failure to provide updated certification that he has a qualifying disability.

Id. at 979 (emphasis added); *see also Vinson v. Thomas*, 288 F.3d 1145, 1153 (9th Cir. 2002) (agency faced with ADA accommodation request may require reasonable documentation). Like the plaintiff in *Weinreich*, Mr. Lynn failed to qualify for a public program because he did not provide documentation necessary to qualify for that program—in this case, evidence that his functional impairments were the result of autism rather than non-qualifying mental illness.

Every DDD applicant, regardless of mental health diagnosis, is required to provide adequate evidence to show that he or she has a disability attributable to a qualifying condition. *E.g.*, WAC 388-823-0110 (“You [the applicant] are responsible to obtain all of the information needed to document your disability.”). “[A] facially neutral governmental restriction does not deny ‘meaningful access’ to the disabled simply because disabled persons are more likely to be affected by it.” *Patton v. TIC United Corp.*, 77 F.3d 1235, 1246 (10th Cir. 1996). Where two different classes of applicants for state services are subject to the same limitations on those services, there is no discrimination on the basis of disability. *See Alexander v. Choate*, 469 U.S. 287, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985) (under the Rehabilitation Act, reduction in Medicaid

coverage did not discriminate against persons with disabilities because both disabled and non-disabled individuals were “subject to the same durational limitation.”). Because DSHS requires every DDD applicant to show that his or her disability is attributable to a qualifying condition, and because individuals who make such a showing are eligible regardless of whether they also have a mental illness, the eligibility requirements do not discriminate on the basis of disability. DDD eligibility is open to otherwise qualifying individuals with mental illness. *Compare Lovell v. Chandler*, 303 F.3d 1039, 1045 (9th Cir. 2002) (aged, blind, and disabled were categorically excluded from a state program in violation of the ADA and Rehabilitation Act).

Mr. Lynn was not denied DDD services because he has a mental illness, nor because he has autism. Quite the opposite: “his exclusion was based on the possibility that he does *not* have a qualifying disability,” namely a substantial disability attributable to autism. *Weinreich*, 114 F.3d at 979. Mr. Lynn failed to provide documentation or testimony to show that autism constitutes a substantial limitation to his functioning, or that the limitations he has are attributable to autism. Mr. Lynn also makes no argument or showing that he was unable to provide such evidence by reason of his disability. A state does not discriminate “solely by reason of disability” by requiring a person to show that he has substantial limitations

by reason of his autism in order to qualify for specialized developmental disability services.

2. Mr. Lynn provides no evidence that he has been unnecessarily institutionalized.

ADA regulations require state agencies to “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified persons with disabilities.” 28 C.F.R. § 35.130(d). Under this integration mandate, “states are required to provide care in integrated environments for as many disabled persons as is reasonably feasible.” *Arc of Wash. State, Inc. v. Braddock*, 427 F.3d 615, 618 (9th Cir. 2005). The Supreme Court has held that “unjustified institutional isolation of persons with disabilities is a form of discrimination.” *Olmstead v. Zimring*, 527 U.S. 581, 600, 119 S. Ct. 2176, 144 L. Ed. 2d 540 (1999).

Mr. Lynn alleges without citation to the record that he has been unnecessarily institutionalized at Western State Hospital for the last several years. Opening Br. at 17-18. The record does not even reflect that Mr. Lynn is currently institutionalized, much less that any current institutionalization is unnecessary. At the time of hearing, when Mr. Lynn’s mental illness was under control, he was out of Western State Hospital and receiving services in an integrated community setting. AR at

26; RP at 176-78 (testimony of Mr. Lynn's father).¹⁸ The record provides no basis at all for Mr. Lynn's *Olmstead* claim.¹⁹

3. Mr. Lynn has not identified a reasonable accommodation.

Even if WAC 388-823-0420 were understood to subject Mr. Lynn to discrimination on the basis of a disability, he fails to make a request for a reasonable accommodation. The ADA requires public entities to “make reasonable modifications in policies, practices, or procedures” in order to “avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7). A party asserting an ADA violation “bears the initial burden of producing evidence both that a reasonable accommodation exists and that this accommodation would enable him to meet the [program]’s essential eligibility requirements.” *Wong v. Regents of the Univ. of Cal.*, 192 F.3d 807, 816-17 (9th Cir. 1999) (internal quotes and brackets omitted).

¹⁸ Even going beyond the record to recognize that Mr. Lynn currently resides in Western State Hospital, there is no indication of when or why he began residing there, nor whether he has been denied a request for less restrictive placement, nor whether a less restrictive placement would be appropriate to his needs.

¹⁹ Ironically, Mr. Lynn also complains that his unnecessary institutionalization is due in part to denial of services in an Intermediate Care Facility for the Mentally Retarded (ICF/MR). Opening Br. at 17. An ICF/MR is an institutional placement in which disabled residents are segregated from the community. *See* 42 U.S.C. § 1396d(d). Since ICF/MR services are no less restrictive than Mr. Lynn’s current placement at Western State Hospital, denial of such services would not violate the *Olmstead* integration mandate. Moreover, Mr. Lynn has not requested ICF/MR services, so any claim related to the denial of such services is premature at best.

Mr. Lynn fails to specify what accommodation he should be granted and thus fails to meet his initial burden. To the extent Mr. Lynn is requesting that he be deemed to have a developmental disability under state law, without having to provide evidence that he is disabled by a qualifying condition, such an accommodation is unreasonable and a fundamental alteration of Washington's program for persons with developmental disabilities.

Every DDD applicant necessarily asserts that he or she is significantly disabled by intellectual disability, cerebral palsy, epilepsy, autism, or a similar condition. RCW 71A.10.020(3). If DSHS is required to make eligible any person who has both a qualifying condition and a significant disability, even if the disability does not result from the qualifying condition, the entire purpose and approach to specialized DDD programs under RCW Title 71A would be eviscerated. For instance, a person diagnosed with epilepsy whose condition is completely managed with medication, but who was disabled by severe mental illness, would be made DDD eligible—even though that individual would have no need for specialized services to treat his epilepsy, and even though the state makes available separate programs for those with mental illness under RCW Title 71. *See Pitts*, 129 Wn. App. at 531. The applicants in *Pitts*, *Slayton*, and *Nix* may all have been eligible under such an “accommodation” even

though none of them had substantial limitations attributable to a qualifying condition. Disregarding the requirement that the disability be attributable to a qualifying condition would fundamentally alter the DDD program. It is therefore not a reasonable accommodation.

D. The Federal Medicaid Act Does Not Preempt Washington's Definition Of Developmental Disabilities

Mr. Lynn argues that Washington is preempted by federal Medicaid statutes and regulations from differentiating between a person who experiences substantial limitations due to autism, and a person who experiences substantial limitations due to mental illness. He relies on the Medicaid Act's provisions regarding diagnosis discrimination, 42 C.F.R. § 440.230(c); comparability, 42 C.F.R. § 440.240(b); and reasonableness, 42 U.S.C. § 1396a(a)(17). Response Br. at 21-25. Those arguments are without merit.

Mr. Lynn does not identify any Medicaid service to which he has been denied access. The mere fact that "federal [Medicaid] moneys are used for some Department services" is insufficient to demonstrate federal preemption of Washington's DDD eligibility rules. *Campbell*, 150 Wn.2d at 897. DDD serves individuals who are developmentally disabled under state law, whether or not they are eligible for medical assistance through Medicaid under federal law. Medicaid law does not dictate eligibility

criteria for state programs like DDD. Mr. Lynn's Medicaid arguments can be rejected on that ground alone, but they would also fail even if DDD were a federal Medicaid program.

1. WAC 388-823-0420 is reasonable.

Even if Medicaid regulations applied to the DDD eligibility decision, WAC 388-823-0420 is not unreasonable or arbitrary under 42 U.S.C. § 1396a(a)(17). DDD programs are targeted to individuals whose disabilities result from certain developmental disabilities. Mental illness and developmental disabilities require very different treatments and supports, but can cause similar functional limitations that are difficult to tell apart using current testing instruments. *See Heller*, 509 U.S. at 322-28 (upholding as rational legal distinctions between developmental disability and mental illness because they are different types of conditions, presenting different issues of diagnosis, and requiring different kinds of treatment); AR at 601 (chart indicating that adaptive functioning scores of subjects with mental illness are comparable to the scores of subjects with intellectual disability). WAC 388-823-0420 merely places the burden on the applicant to provide adequate evidence for the Department to tell those distinct disabilities apart. There is nothing unreasonable about requiring evidence of a developmental disability prior to offering specialized developmental disability services.

2. The Department did not deny any required Medicaid service to Mr. Lynn solely because of his diagnosis.

As a condition of receiving federal Medicaid funding, states cannot “arbitrarily deny or reduce” certain Medicaid services to a person solely on the basis of that individual’s diagnosis or condition. 42 C.F.R. § 440.230(c); 42 U.S.C. § 1396a(a)(10)(B)(i). The diagnosis discrimination provision applies only to Medicaid services that are “required” under 42 C.F.R. §§ 440.210 or .220. 42 C.F.R. § 440.230(c). As this Court recently held, enrollment with the state Division of Developmental Disabilities is not a required Medicaid service. *Nix*, 162 Wn. App. at 916-17. “[T]he lack of a required service is ‘fatal’ to a diagnosis discrimination claim.” *Id.* (quoting *Rodriguez v. City of New York*, 197 F.3d 611, 617 (2d Cir. 1999)).²⁰

Because DDD eligibility is not a required Medicaid service, Mr. Lynn’s Medicaid diagnosis discrimination claim must fail. Even if Mr. Lynn had been denied a required Medicaid service, that denial was not solely on the basis that Mr. Lynn is diagnosed with a disabling mental

²⁰ The only service to which DDD enrollees are automatically entitled is case management. See RCW 71A.16.050 (determination of DDD eligibility is separate from determination of eligibility for services); WAC 388-823-0030 (same); WAC 388-825-0571 (DDD enrollees remain eligible for case management regardless of eligibility for other services); WAC 388-831-0070(2) (same). Case management, while potentially a Medicaid service, is not required under 42 C.F.R. §§ 440.210 or .220.

illness. Rather, as discussed *supra* at 31-36, the denial was based on the determination that Mr. Lynn is not disabled by autism.

3. The Medicaid comparability requirement is waived by the federal government to allow Washington to offer specialized Medicaid programs to persons who meet the state's definition of developmental disability.

The Medicaid comparability requirement mandates that the medical assistance a state provides for any categorically needy individual “shall not be less in amount, duration, or scope” than the assistance provided to any other Medicaid recipient. 42 U.S.C. § 1396a(a)(10)(B). That provision requires states to offer similar Medicaid services to all similarly situated persons. Mr. Lynn fails to state what Medicaid service he believes he was denied by being terminated from DDD eligibility. The only Medicaid services Washington offers to persons with developmental disabilities that are not offered to other Medicaid recipients are through a program in which the federal government has explicitly waived the Medicaid comparability requirement.

Medicaid services are normally available only in an institutional setting such as a hospital or nursing home. However, a state may offer Medicaid services in community settings through “waivers” authorized under 42 U.S.C. § 1396n(c). Those “home and community based services” waivers must be approved by the U.S. Department of Health and

Human Services' Centers for Medicare and Medicaid Services (CMS). CMS has the authority to waive the comparability requirement in order to allow states to target waiver services to specific populations. 42 U.S.C. § 1396n(c)(3).

DSHS administers five Medicaid waivers that are offered only to individuals who meet the state's definition of developmental disability. WAC 388-845-0015; WAC 388-831-0030(1). Such a restriction would normally violate the Medicaid comparability requirement. However, CMS explicitly waived the comparability requirement for the DDD waiver programs. *E.g., Application for a § 1915(c) HCBS Waiver* ("Basic Waiver" application) at 5 (Nov. 1, 2006, amended effective Apr. 1, 2010), available at <http://www.dshs.wa.gov/pdf/adsa/ddd/BasicWaiver.pdf>, *6 (last visited Oct. 27, 2011) (waiving "§ 1902(a)(10)(B) of the [Social Security] Act"). CMS also specifically approved the use of Washington's definition of "developmental disability" as a limitation on eligibility for the programs. *See id.*, Appendix B-1 at 1-2, *19-20 (waiver participants must meet definition of developmental disability "as contained in state law and stipulated in state administrative code").²¹

²¹ CMS has approved each of Washington's DDD waiver applications. A list of all 15 of Washington State's approved Medicaid waivers is available online at <https://www.cms.gov/MedicaidStWaivProgDemoPGI/MWDL/list.asp> by selecting "Show only items whose State is: Washington". The approved waiver applications for all

CMS thus expressly allows Washington State to offer certain services to DDD-eligible individuals without extending the same services to all Medicaid recipients. Assuming that Mr. Lynn means to argue that he has been denied access to the DDD Medicaid waivers, his comparability argument clearly fails.

V. CONCLUSION

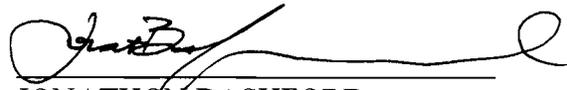
In order to show that he has a developmental disability, a DDD applicant must provide evidence that his disability constitutes a substantial limitation and is attributable to a qualifying condition. Mr. Lynn's current functioning is limited by severe mental illness; there is no evidence that autism causes substantial functional limitations in his case. In differentiating between disabilities caused by qualifying conditions and those caused by unrelated illness or injury, WAC 388-823-0420(2) properly implements the statutory requirement that a developmental disability be attributable to a qualifying condition. That statutory requirement does not discriminate on the basis of disability, and as a state program requirement is not preempted by federal Medicaid regulations.

five of Washington's DDD waivers are available online at <http://www.dshs.wa.gov/ddd/waivers.shtml>, listed at the bottom of the page.

This Court should affirm the superior court by holding that the Department properly terminated Mr. Lynn's DDD eligibility.

RESPECTFULLY SUBMITTED this 16th day of November 2011.

ROBERT M. MCKENNA
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A handwritten signature in black ink, appearing to read "Jonathon Bashford", written over a horizontal line.

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PROOF OF SERVICE

I certify that on November 16, 2011, I served a true and correct copy of this document on all parties or their counsel of record by email PDF attachment and by depositing in the U.S. Mail with first class postage prepaid, addressed as follows:

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

Dated this 16th day of November 2011 at Tumwater, Washington.

Cheryl Chafin
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