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

SAMANTHA A.,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL & HEALTH
SERVICES,

Appellant.

APPELLANT'S REPLY BRIEF

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COURT OF APPEALS
DIVISION II

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I. INTRODUCTION

DSHS and Respondent agree on several matters in this case. Both parties concur on the three basic issues presented, though they pose them somewhat differently, and both parties agree on some of the basic legal tenets of the issues. They agree, for example, that the federal early and periodic screening, diagnosis and treatment (EPSDT) program requires that children receive all medically necessary services, whether or not such services are covered under the state Medicaid plan; they agree that all recipients of in-home services, including children, require an individualized assessment of their needs; and they agree that a prevailing recipient of public assistance is entitled to reasonable attorney fees under RCW 74.08.080.

However, Respondent's failure to fully address the arguments presented in the Department's opening brief leads her to arrive at conclusions which are legally unsustainable. In her response brief, Respondent fails to address the plain language of the federal statute authorizing states to allocate personal care services; she fails to explain how a proper determination of a child's need for paid assistance with personal care tasks can avoid consideration of a child's developmental stage or consideration of a parent's responsibility for their children; and

she fails to discuss why the law that applies to applicants for services does not also apply to recipients of services. When the relevant statutory and case law is considered, the children's personal care rule must be found to be valid. And though the attorney fee issue in this case is likely moot, to the extent this Court needs to rule on the matter it should find that the amount of attorney fees awarded by the superior court was excessive.

II. FACTUAL CLARIFICATIONS

While Respondent's recitation of the facts of this case is largely accurate, several clarifications or corrections are necessary. First, Respondent conflates her "supervision and care needs" with her needs for assistance with personal care tasks. Br. Resp't at 7 n.2. She notes that if the state were to pay for all her needs, "she would need far more than 90 hours per month." *Id.* While this is certainly true, it is misleading. *All* children of Respondent's age need more than 90 hours of supervision and care per month regardless of whether they have disabilities, but the total care needs of children are not meant to be addressed by the Department's personal care rule for children. The purpose of the rule is only to determine the need for paid personal care services—that is, assistance with activities of daily living. Respondent's list of her behavioral problems is also unrelated to the rule at issue. Br. Resp't at 6-7. All of Respondent's behavioral symptoms need to be managed, of course, but such symptoms

do not necessarily indicate that she requires greater than normal assistance with dressing, toileting, locomotion, or other activities of daily living.

Second, the Department's personal care rule for children does not presume that children's personal care needs are "automatically met for children under the age of 18 who live with one or both parents" Br. Resp't at 7. As explained in the Department's opening brief, the designation "met" does not mean that no assistance is required. DSHS Opening Br. at 9 n.7. The word "met" here is a term of art used by the CARE tool to indicate when no *paid* assistance is required, for whatever reason. For example, the Department does not pay for personal care assistance when a child is in school, so personal care needs for that time are considered "met." In the context of children living with their legally responsible parents, the CARE tool does not presume that all of the child's personal care needs are actually provided for, but rather that a degree of responsibility for the child's care lies with the parents. That degree of responsibility is either total, or, at the discretion of the assessor, three-quarters or more of the time.

Finally, the fact that Respondent's condition may have worsened subsequent to the assessment at issue cannot be attributed to the Department's personal care rule for children, despite Respondent's assertion to the contrary. Br. Resp't at 10. The Department "offered no

evidence to dispute the testimony that Samantha had deteriorated due to the decrease in her MPC services” (*Id.*) because there was no such testimony to dispute. Indeed, there was no testimony *at all* during the hearing. All the evidence related to this claim consists of a set of stipulated facts (AR at 41–44), declarations from Respondent’s mother and doctor (AR at 141–142; AR at 234–235), and the doctor’s evaluation form (AR at 137–140), and none of these documents establish a causal link between a reduction in paid personal care hours and a change in Respondent’s condition. The stipulated facts and Respondent’s mother’s declaration note that mother “observed that Samantha’s speech has deteriorated, her communication has worsened, and her behaviors have increased since the reduction of her personal care hours.” AR at 44; AR at 11.¹ However, both the stipulated facts and the declaration note that Respondent had *no* paid care provider at all at that time.² Dr. Miller’s evaluation states that Respondent has had “[n]o recent medical change, but her progress with the above has plateaued (sic) and in some cases gone

¹ Because there was no testimony, much less expert testimony, there is no explanation in the record to show why a decrease in paid assistance with a recipient’s activities of daily living would have any bearing on the recipient’s speech, communication, or behavior. Personal care needs are completely separate from needs for speech therapy or behavior management.

² The record does not explain why Respondent was not receiving any paid care, but it is always a recipient’s responsibility to find and hire his or her own providers. WAC 388-71-0505(1); WAC 388-825-315(1).

backwards [with] the decrease in in-home support.”³ AR at 138. This is faint support for the claim of causality, but even such support as it offers is contradicted by Dr. Miller’s declaration, signed four days after the evaluation. In her declaration, Dr. Miller simply notes that Respondent “continues to improve.” Thus, the record does not show that Respondent’s condition had deteriorated due to the decrease in authorized services.

III. ARGUMENT

A. **The Children’s Personal Care Rule, WAC 388-106-0213, Does Not Violate The Requirements Of The EPSDT Program**

Respondent emphasizes frequently and at some length the duty of states under the early and periodic screening, diagnosis, and treatment (EPSDT) program to provide Medicaid eligible children with all services and treatments necessary to correct or ameliorate identified health problems, including assistance with personal care tasks. Br. Resp’t at 17-20; *see* 42 U.S.C. §1396d(r). This is largely unnecessary argument, since the Department itself made the same point in its opening brief (as well as throughout the progress of this case). DSHS Opening Br. at 17-18; CP at 90.

³ As noted in the Department’s opening brief, it is unclear what “the above” refers to in this sentence. Presumably, it is the four “Activities of Daily Living” listed at the top of the page.

The relevant question here is not whether the Department is required to provide (or more accurately, to pay for) medically necessary services, but whether the Department has in fact failed to pay for such services. Respondent does not address this question, either in reference to her particular circumstance or in general. Nowhere in her brief, or indeed in the record as a whole, is there any evidence that the operation of the children's personal care rule has led to children being denied medically necessary services. Instead, there is only the specific assertion that Respondent did not receive all the paid personal care services her physician recommended and the general assertion that the children's personal care rule does not allow consideration of physicians' recommendations. These allegations put the cart before the horse.

Regarding Respondent herself, there *is* evidence in the record that her condition deteriorated in some fashion prior to the administrative hearing, but there is no basis for linking that deterioration to a failure to authorize all the personal care services her physician recommended. There was no testimony subject to cross-examination distinguishing between the effects of a reduction in authorized services due to the children's personal care rule and the effects of having no paid personal care service provider at all. Nor was there any testimony explaining how a reduction in assistance with activities of daily living could lead to

problems with speech, communication, or behavior. The mere association in time of two events does not make them causally related.

Perhaps more important, Respondent has offered no explanation for (much less evidence of) how the authorization of fewer personal care hours than a doctor recommends has any particular effect on recipients in general. All of the cases cited by Respondent for the proposition that the EPSDT program requires states to provide such services as a physician recommends involve medical or dental services for which evidence clearly established that negative consequences would ensue if the services were not provided. *See, e.g., Rosie D. v. Romney*, 410 F. Supp. 2d 18, 29-32 (D. Mass. 2006) (“prodigious” and “comprehensive” evidence that children with serious emotional disturbances required specialized behavioral and mental health services); *Collins v. Hamilton*, 349 F.3d 371, 373 (7th Cir. 2003) (child with multiple psychiatric problems required inpatient psychiatric treatment); *Pediatric Specialty Care, Inc. v. Ark. Dep’t of Human Services*, 293 F.3d 472, 476 n.2 (8th Cir. 2002) (children who were not able to function and learn in a normal day care setting required early intervention day treatment); *Urban v. Meconi*, 930 A.2d 860, 862 (Del. Sup. Ct. 2007) (breast reduction surgery necessary to alleviate pain, rashes, and other adverse effects of bilateral macromastia); *Hummel v. Ohio Dep’t of Job & Fam. Services*, 164 Ohio App.3d 776, 2005-Ohio-

6651, 844 N.E.2d 360, 360-361 (Applied Behavior Analysis effective in treating symptoms of autism).

Respondent seems to recognize that the Department is not required to pay for personal care services simply because a physician recommends them, but she still argues that the Department must give “meaningful consideration” to such recommendations. In so arguing, she does not address how meaningful consideration would have changed the Department’s decision in this case. As discussed in the opening brief, the minimal information provided by Dr. Miller provided no basis to believe that the Department’s determination should have been different. Indeed, Dr. Miller recommended an amount of hours that even Respondent herself did not claim.⁴

But Respondent also does not explain how meaningful consideration of physicians’ recommendations generally would be applicable to personal care services. She does not address the fact that “personal care services” is the only medical assistance category that specifically gives states the choice of paying for services authorized by physicians *or authorizing those services themselves*. See 42 U.S.C.

⁴ Respondent sought invalidation of WAC 388-106-0213, which in her case would mean that she would be eligible for 90 hours of care on her 2006 assessment, rather than the 96 hours Dr. Miller recommended. The superior court subsequently ordered the Department to retroactively reimburse Respondent for any properly documented expenses related to personal care during that time, up to 90 hours per month. CP at 269.

§1396d(a)(24). This is a key difference between personal care services and all other medical assistance categories, and the reason for that difference cannot be ignored: the medical expertise of physicians is unnecessary when it comes to personal care services.

None of the federal cases cited by Respondent deal with personal care services. Indeed, the distinction between personal care services and other covered medical services has received no attention from federal courts at all. A Florida case, *C.F. v. Dep't of Children & Families*, 934 So. 2d 1 (Fla. Dist. Ct. App. 2005) has discussed EPDST in relation to personal care services, but as noted in the Department's opening brief, the decision in that case relied on Florida precedent unrelated to EPSDT. *Id.* at 7. Respondent also discusses at some length a Connecticut case, *Semerzakis v. Comm'r of Social Servs.*, 274 Conn. 1, 873 A.2d 911 (2005), but the application of that case to this is misplaced. While the court there held that further technical information from a dentist should be (and was) considered by the state to determine eligibility for orthodontic treatment (*Id.* at 915), that holding cannot be extended to physicians' recommendations for personal care services. "Dental services" is a listed Medicaid service (42 U.S.C. 1396d(a)(10)),⁵ but unlike "personal care

⁵ Dental services are also specifically identified as an EPSDT service in the section of the Medicaid statute that addresses the EPSDT benefit, 42 U.S.C. §1396d(r)(3); personal care services are not.

services” (42 U.S.C. 1396d(a)(24)), the “dental services” sub-section of the statute has no modifying language relating to authorization of the service by the state agency rather than by physicians.⁶ Respondent’s assertion that personal care services would be subject to the exact same requirement for physician (or dentist) involvement as other Medicaid services is entirely speculative—and given physicians’ lack of expertise and understanding of personal care services, highly problematic if true.

Respondent points out that the Centers for Medicare and Medicaid Services (CMS) recently advised the Department that because the provision of personal care services is “a component of the mandatory EPSDT benefit”, states cannot impose limits on that service that impair medical necessity. Br. Resp’t at 23-24; Respondent’s Appendix A. The context of that advice was a legal challenge to a Washington legislative mandate to reduce the base hours of all personal care recipients. The federal district court judge who heard the case did not believe the reduction affected medically necessary treatment or services for children, but wanted to hear from CMS on the matter. *Koshelnik-Turner v. Dreyfus*, No. 3:09-cv-05379-RBL (W.D. Wash. 2009), transcript of hearing on

⁶ The rationale for providing an option for state authorization of personal care services is well demonstrated by comparing the additional information at issue in *Semerzakis*—the professional determination of “severe deviations affecting the mouth and underlying structures”(Semerzakis, 873 A.2d at 915)—and Dr. Kelly’s minimal assessment of personal care service needs in this case. Dentists are clearly the experts in dental care, but DSHS has the appropriate expertise in personal care.

TRO at 43-45 (Appendix A). The Department consequently wrote to CMS, and received the reply cited by Respondent here.⁷

The advice from CMS in that case does not implicate the validity of the children's personal care rule. Whether the reductions at issue in *Koshelnik-Turner* impaired medical necessity or not (that issue was never determined), the action of the children's personal care rule is not an across-the-board cut of base hours as in that case but a considered adjustment of base hours based on a child's age and whether he or she lives with a parent who is responsible for providing for the child's basic care needs. As discussed in the Department's opening brief and enumerated below, the children's personal care rule pointedly *incorporates* a medical necessity determination, since it only reduces paid service hours when children do not require them—either because the child's needs are unrelated to a disability, or because the parent has a duty to meet those needs.

In short, the EPSDT mandate to provide all medically necessary services for Medicaid eligible children is fully honored by the Department's personal care rule for children.

⁷ The Department settled the case by rescinding the across-the-board reductions as they apply to children under 21. Notice of Settlement Agreement, *Koshelnik-Turner v. Dreyfus*, No. 3:09-cv-05379-RBL (W.D. Wash. 2009 filed on 09/08/2009) (Appendix B).

B. The Children's Personal Care Rule Does Not Violate The Medicaid Comparability Requirement

Respondent argues that the children's personal care rule violates the Medicaid comparability requirement because it allegedly fails to provide or allow for an "individualized assessment" and makes improper "irrebuttable presumptions." Br. Resp't at 29-31. These allegations are based on false or irrelevant premises, and are inapposite to a legal analysis of the rule.

The allegation that the children's personal care rule precludes an "individualized assessment" or an "individualized determination" ignores the fact that WAC 388-106-0213 is only one of a large number of rules that describe the operation of the CARE assessment process. *See* WAC 388-106-0050 through -0235. That process involves an individualized assessment of recipients' abilities and needs. *See* WAC 388-106-0050(1); WAC 388-106-0085. All recipients, both children and adults, receive the same individualized assessment upon which they are classified into one of 17 classification groups based on the level of their needs. WAC 388-106-0125. Each classification group has a set number of base hours associated with it. *Id.* The CARE tool then requires an adjustment in base hours related to the availability of informal support and other variables. WAC 388-106-0130. For adults, the process

of adjustment relies mostly on the coding by assessors of the level of a recipient's self performance and the amount of informal support available for certain activities of daily living (ADLs) and instrumental activities of daily living (IADLs). *Id.*

For children under 18, the process is somewhat different because of their developmental stage and legal status. It could not be otherwise: treating children the same as adults would mean that normal needs for assistance related to a child's age and development would trigger paid services, and that parents would be exempted from having to provide such assistance for their own children. The assessment process *must* account for developmental needs and parental responsibility, or else the state would be paying for unnecessary and inappropriate services that parents are required to provide. The question then is whether the CARE assessment properly accounts for those variables.

1. The Age Guidelines In WAC 388-106-0213(2) Properly Distinguish Between Needs Related To Disability And Needs Related To Normal Development

Respondent challenges the age guidelines in WAC 388-106-0213(2) on the basis that they represent "an arbitrary guess about what non-disabled children need." That is a conclusory allegation that fails to meet a rule challenger's burden under RCW 34.05.570(1)(a): it is not the Department's responsibility to show that the age guidelines are correctly

calibrated, it is the challenger's responsibility to show that they are not. In this case, Respondent would need to show that it is improper to assume that *all* 12 year olds, regardless of disability, require supervision of their medications and telephone use, and cannot be expected to provide for their transportation, shopping, housework, finances, and meal preparation. Or, to challenge the rule as it relates to children younger than 12, the challenger would have to present evidence that, for example, normally developing children below age six do not need total assistance with bathing, or that normally developing children below age four do not need some level of assistance with eating. Respondent has presented no such evidence in this case.

But even if evidence had been presented showing that the particular ages indicated in WAC 388-106-0213(2) were inexact as dividing lines that separate normal developmental needs from needs related to disability, that showing by itself would not establish that the rule was arbitrary and capricious. The rule could only be arbitrary and capricious if it could be shown that there was substantial evidence regarding developmental milestones that the Department ignored, or if there were no reasonable basis to set age guidelines at all. As noted above, the record contains no evidence whatsoever disputing the accuracy of the guidelines. And it is simply untenable to suggest that the

Department should not set such guidelines at all. Age guidelines are essential to *any* assessment, and if they were not established in rule, they would still be applied by assessors—they would simply be applied in a *truly* arbitrary fashion. Assessors would bring their own judgment about the age at which a particular level of assistance represents a deviation from the norm. That would result in variation based on the assessor, not the recipient. The age guidelines thus are not an improper “irrebutable presumption” but a means to ensure consistency in the assessment process.⁸

2. The Parental Responsibility Requirement In WAC 388-106-0213(c) Properly Recognizes Parents’ Duty To Provide For Their Children’s Personal Care Needs

Regarding the parental responsibility element of the children’s personal care rule, Respondent seems to argue that the Department is entirely prohibited from recognizing parents’ responsibility for assisting their children with their personal care tasks. This argument leads to clearly absurd results: a parent could say that she no longer wishes to cook her child’s meals, clean up after the child, help the child dress, or drive the

⁸ It is worth noting here that only way an assessment process could fully avoid presumptions would be to follow the recipient and care provider with a stopwatch, timing exactly how much care is provided. Even then, there would be a presumption that the timed amount of care for that period was representative of the amount of care generally provided. Any assessment process, CARE included, inevitably makes presumptions about actual needs. This fact was recognized by the dissent in *Jenkins v. Dep’t of Soc. & Health Servs.*, 160 Wn.2d 287, 313, 157 P.3d 388 (2007), in a well-reasoned analysis.

child to medical appointments, and the state would be obligated to pay for someone else to do those tasks. In this case, for example, Respondent's mother noted that she had not agreed to meet Respondent's needs because she was "a divorcing mother of two children and a full time employee." AR at 142. While circumstances such as this may be difficult for parents to manage, they are the kind of difficulties *all* parents of young children face. Parents of children with disabilities are not exempted from normal child care duties and responsibilities, and Respondent does not state a viable legal basis for the contrary position.

Respondent first claims that "state law . . . does not contemplate that parenting functions and MPC services are synonymous." Br. Resp't at 35. In other words, according to Respondent, personal care services are something different than what parents ordinarily do for their children. This is absolutely untrue: personal care services are *precisely* what parents do for their children. Respondent provides no examples or evidence to show that parents do not provide assistance to their children with their activities of daily living. She notes only that, "[u]nlike parents, MPC providers are required to receive specific training on how to care for people with disabilities." *Id.* at 34. However, Department rules specifically *exempt* personal care providers for children from any training requirement.

WAC 388-825-355(2).⁹ The fact that “personal care services” is a medical assistance category under federal Medicaid law does not mean that ordinary tasks of parenting are transformed into specialized medical service.¹⁰ Providers of personal care services for adults help recipients bathe, get dressed, comb their hair, and eat their meals, just like parents do for their children. Personal care assistance is self-evidently a parent’s job.

The only other basis on which Respondent challenges the parental responsibility portion of the children’s personal care rule is that it allegedly contradicts state policy. Br. Resp’t at 36-37. This is an entirely new claim, and should be rejected on that basis alone. But even if the allegation were appropriately before the Court, and even if it were accepted as true, it would not be sufficient to invalidate the rule: a rule that contradicts a loosely defined “state policy” is not thereby invalid.

In any event, the rule does not contradict state policy. The fact that some children may be admitted to an institution or to voluntary placement foster care does not absolve parents of responsibility when children remain at home. They are entirely separate issues. Parents obviously cannot

⁹ State law does require some training for personal care providers who care for their own adult children, but only 12 hours rather than the 35 hours required for providers who do not care for their own step, adoptive, or biological children. RCW 74.39A.075.

¹⁰ The federal personal care statute and regulation state that personal care may be provided by anyone other than a legally responsible relative. 42 U.S.C. §1396d(r), 42 C.F.R. § 440.167. This clearly indicates a recognition that federal and state money should not be used to replace parent’s normal duties.

provide care for their children who are placed outside of the home, but that does not mean that someone should be paid to supplant parents when children remain in the home. If in-home and out-of-home placements operated by the same standards, the Department would have to pay for someone to come in to children's homes around the clock, and the amount of time a child needed help with personal care tasks would be irrelevant. Respondent seems to think that the plain statement in RCW 74.13.350 that "parents are responsible for the care and support of children with developmental disabilities" is not applicable to the issue in this case because it occurs in the section of the Child Welfare Services chapter that addresses foster care for children with developmental disabilities. On the contrary—the fact that the state offers out-of-home options in extraordinary cases without mitigating parental responsibility reinforces the legislative intent that parents remain responsible for their children's care even when children are placed in specialized foster care. They are not able to provide personal care services in those circumstances, of course, but they remain the persons primarily responsible for their children's care and well-being.

To the extent the expectation that parents provide personal care services for their own children is an "irrebutable presumption," it is entirely a presumption of law. Unlike the *factual* presumption invalidated

in *Jenkins*—that clients who live with their care providers require fewer paid service hours due to the needs they both share—the presumption in the children’s personal care rule is based on the undeniable *legal* duty of parents to care for their children. It is not a presumption that children do not need the level of personal care assistance identified in their individual assessment, but rather a recognition that the provider of that assistance should in the first instance be the child’s legally responsible parent.

The myriad circumstances that might arise to make it difficult for parents to fulfill their duties cannot be adopted in rule. There are far too many permutations of household stress to develop a clear and complete list of acceptable and non-acceptable exemptions for parents. The mechanism of the exception to rule process is the only fair and feasible means of determining when the particular exigencies of a household mean that a fully responsible parent can be excused from meeting the parenting needs of his or her child.

In summary, the Medicaid comparability requirement is not compromised in the least by the children’s personal care rule, since it properly adjusts hours based on age and parental responsibility.

C. The Attorney Fees Awarded By The Trial Court Were Excessive

In arguing that the Equal Access to Justice Act (EAJA) does not apply to the determination of reasonable attorney fees in this case, Respondent fails to address the fact that a challenge to a denial or termination of eligibility for services would have been guided by the EAJA requirements for attorney fees. *Johnstun v. Dep't of Soc. & Health Servs.*, 53 Wn. App. 140, 143, 766 P.2d 1104 (1988). Had this been a challenge to a DDD eligibility rule under chapter 388-823 WAC rather than a benefit reduction case, there is no question that the determination of reasonable fees would have had a \$25,000 limit. Respondent does not explain why attorneys who represent DSHS clients who wish to maintain a previous level of benefits should be paid more than attorneys who try to help individuals to become or remain eligible for benefits in the first place.

Respondent does cite *Tofte v Dep't of Soc. & Health Servs.*, 85 Wn.2d 161, 165, 531 P.2d 808 (1975) for the proposition that the attorney fee requirement in RCW 74.08.080 is meant to punish the Department for violations of that title or its own regulations. Br. Resp't at 41 (citing *Tofte*, 85 Wn.2d at 165). However, no Washington appellate court has applied this reasoning in an award of attorney fees since at least 1980 (*See Berry v. Burdman*, 93 Wn.2d 17, 24, 604 P.2d 1288 (1980), and in 1995

the legislature adopted the EAJA. Laws of 1995, ch. 403 § 901). As noted in the Department's opening brief, the EAJA is meant "to ensure that [individuals, smaller partnerships, smaller corporations, and other organizations] have a greater opportunity to defend themselves from inappropriate state agency actions and to protect their rights." *Id.* In other words, the EAJA is meant for the very circumstances of this case.

But even if the policy cited in *Tofte* were still applicable, it should not apply here. Respondent's assertion that "[a]t every turn, the Department has ignored the clear legal requirements in this area" is patently untrue. Br. Resp't at 41. Even if this Court were to find in Respondent's favor, it would still be unreasonable to hold that the law *clearly* led to that conclusion. Several months before this case was decided in superior court, the same legal issues were raised in a separate judicial review before the same Thurston County Superior Court judge who ruled against the Department in one of the cases that were consolidated in *Jenkins v. Dep't of Soc. & Health Servs.* See Appendix B to Department's opening brief. That judge ruled in favor of the Department on this issue. Thus, if the judge who found the Department in error on the shared living rule failed to find error in the children's personal care rule, the legal basis for invalidating this rule is at the very least far from obvious.

The Department attempts at all times to make rules that follow all state and federal requirements and in addition fairly allocate public resources. Punishment of the Department is wholly inappropriate when it adopts a rule that reasonable and objective observers agree meet that difficult standard, even if subsequent review by an appellate court finds the rule lacking in some way. Here, adherence to the policy allegedly underlying RCW 74.08.080 leads to an outcome that inhibits the Department from doing the very thing that it is supposed to do—fairly and equitably allocate public resources.

The plain language of RCW 74.08.080(3) authorizes *reasonable* attorney fees. In the absence of any further clarification within Title 74 RCW of what constitutes reasonable fees, the best guidance must come from the EAJA. This is because it is the statute that applies to challenges to eligibility determinations for DDD services. In other words, it is the statute that deals with the most similar kind of concerns to this case—indeed, it deals with cases that address matters that are necessarily *more* important to individuals with developmental disabilities, such as basic eligibility, than cases like this, which address only the amount of benefits a recipient may receive.¹¹ Furthermore, there is no conflict between the

¹¹ Respondent notes that the Supreme Court declined to use cost limitations from RCW 4.84.010 in *Jenkins*. Br. Resp't at 40 n.12. While this is true, it is irrelevant. Attorney costs are not at issue here, and RCW 4.84.010 is not the EAJA.

lodestar standard and the EAJA, since the lodestar method requires only that reasonable attorney fees be based on reasonable rates and reasonable hours. What would be reasonable in this case is \$25,000 or less for a prevailing party.

IV. REPLY TO RESPONDENT'S SECOND AMENDED BRIEF

In her response brief, Respondent failed to request attorney fees for the appellate stage of this case as required by RAP 17.1(b). She has attempted to correct this oversight through submission of a second amended brief that includes such a request. Washington case law is silent on whether an amended brief that includes a fee request is sufficient to meet the requirements of the rule. However, Washington courts have repeatedly held that failure to strictly comply with the mandate in RAP 17.1(b) is basis for denying attorney fees to the prevailing party. *See, e.g., Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998), citing *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 705, 915 P.2d 1146 (1996). (“[Respondent] includes a request for attorney fees and costs in the last line of the conclusion of its Supplemental Brief, but does not include a separate section in its brief devoted to the fees issue as required by RAP 18.1(b). *This requirement is mandatory.*” (Emphasis added.)).

In this case, the amended brief that included the fee request was the *second* amended response brief submitted by Respondent. While the Department has not been substantially prejudiced by the multiple amended briefs, that is not the only appropriate basis for determining whether a brief may be amended by motion. Repeated amendments to a brief clearly violate the spirit of a case schedule, and create disruption for the opposing party. Furthermore, where, as here, a rule is clear and is supported by unambiguous case law, it must be strictly construed. Respondent failed to request attorney fees for work at the appellate stage of this case in her brief, and she should not be allowed to amend the brief a second time to correct this error.

In the event that the amended brief is accepted, the Department's arguments in its opening brief and in this reply brief (regarding attorney fees for the superior court stage of this case) apply equally to the request for fees at the appellate stage.

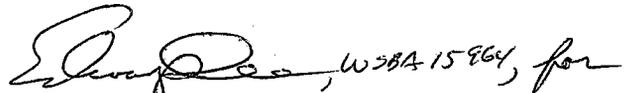
V. CONCLUSION

For the reasons discussed above and in the Department's opening brief, Respondent has failed to meet her burden to show that the children's

personal care rule, WAC 388-106-0213, should be invalidated. The ruling of the superior court in this case should be reversed.

RESPECTFULLY SUBMITTED this 20th day of January 2010.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read "Bruce Work", with the text "WSBA 15864, for" written in smaller script to the right of the signature.

Bruce Work, WSBA No. 33824
Assistant Attorney General
P.O. Box 40124
Olympia, WA 98504-0124
(360) 586-6496

PROOF OF SERVICE

I certify that I served a copy of this document, Appellant's Reply Brief, on all parties or their counsel of record on the date below as follows:

Name/Address of Party Served:

Regan Bailey
Susan Kas
Disability Rights Washington
315 5th Avenue South Suite 850
Seattle, WA 98104
FAX: (206) 957-0729

E-mail to DRW
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E-mail to EleanorHamburger

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

DATED this 20th day of January 2010, at Olympia, Washington.


KATHY ANDERSON, Legal Assistant

FILED
COURT OF APPEALS
DIVISION II
10 JAN 22 PM 1:40
STATE OF WASHINGTON
BY 
DEPUTY

APPENDICES

APPENDIX A

1 grants this TRO is a direct result of the congressional
2 mandate that children be provided all medically necessary
3 services. The mandate does not extend to adults. So while
4 that question may be concerning to us as human beings, it is
5 not a legal question before the Court.

6 So in closing, I would like to make one final point, which
7 I think I have made before, but I just would like to reiterate
8 it one final time. The choice to reduce services to children,
9 medically necessary services to children, in the first place
10 is a choice that is not available to the State of Washington.
11 Case law has made that clear and state and federal courts
12 across the country, medically necessary services have to be
13 provided. The choice to reduce services to adults is a choice
14 available to the state, and how the state chooses to respond,
15 if this Court issues a TRO, is a state decision, and while the
16 Court may have some feeling about or some concern about how
17 that is, it's a political decision for the state if the Court
18 simply enforces what the federal Medicaid law requires in this
19 case, which we believe is the granting of the TRO.

20 Thank you.

21 THE COURT: Ms. Crewdson, thank you very much.

22 MS. CREWDSON: Thank you.

23 THE COURT: Here's what I'm going to do. I'm going
24 to grant the TRO for a month, Mr. Dee. In that month I want
25 some evidence supplied as to the communication between the

1 state and CMS and CMS's response to the decision by the state.

2 I'm not at all convinced that the cut in hours affects
3 medically necessary treatment or services, but I want to make
4 sure that the State of Washington and the federal government,
5 at least at the agency level, understand what's happening and
6 why. Ideally, I would prefer a correspondence from CMS to the
7 state commenting on what the state is doing and the manner in
8 which it's doing it as to children.

9 That may be a bridge too far, and based on what you bring
10 me I may extend the TRO based on a deeper analysis of the
11 merits. But right now it's important that the status quo be
12 maintained while a critical piece of information, in my
13 judgment, is provided.

14 If you need a written order to that effect -- careful,
15 he's nodding his head -- you're going to prepare it and submit
16 it.

17 Do you understand?

18 MR. DEE: Yes, Your Honor. The communication between
19 CMS and the state, is that something that you're saying had to
20 have preceded the --

21 THE COURT: I'm not saying that. No, no. I want CMS
22 to weigh in on this issue. That's what I want. And I'm
23 giving you time to go get that, because that's a huge
24 uncertainty here. They may have some take on the substantive
25 issue as well.

1 MR. DEE: I appreciate that, Your Honor.

2 THE COURT: Basically I'm giving you the month of
3 July. I know these budget cuts are supposed to be implemented
4 on July 1.

5 MR. DEE: Yes.

6 THE COURT: It's now August 1. If you will prepare a
7 very brief order to that effect, and if you don't get it
8 right, I will prepare it.

9 MR. DEE: We will give it a try, Your Honor.

10 THE COURT: All right. And that's what we're going
11 to do. I want more information, and if there are any
12 questions, now is the time to ask them. That's where we are
13 at.

14 MR. DEE: Thank you.

15 THE COURT: Everybody know.

16 Thank you to the lawyers. You have done a marvelous job,
17 and as I said, I'm always a little reluctant to ask what I
18 perceive to be hard questions because these are sensitive
19 issues. They are real people who are impacted, and the
20 sensitivity in which you and you have dealt with these issues
21 is greatly appreciated. This is hard stuff, and I admire you
22 greatly for the way you approached the task.

23 Court will be at recess.

24 MR. DEE: Thank you.

25 (Above hearing concluded at 10:55 a.m.)

APPENDIX B

HON. RONALD B. LEIGHTON

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PARKER KOSHELNIK-TURNER, by his
guardian and next friend, GLEN TURNER;
VIRGINIA KOSHELNIK-TURNER, by her
next friend, GLEN TURNER, on behalf of
themselves and of a class of persons similarly
situated,

Plaintiffs,

v.

SUSAN DREYFUS, in her official capacity as
Secretary of the Washington State Department
of Social and Health Services,

Defendant.

NO. 3:09-cv-05379-RBL

NOTICE OF
SETTLEMENT AGREEMENT

The parties have reached a settlement agreement on all issues except for
attorneys fees. The Settlement Agreement is attached as *Exhibit A*.

Plaintiffs will submit a petition for attorneys fees within 30 days of today.

DATED: September 8, 2009.

SIRIANNI YOUTZ
MEIER & SPOONEMORE

/s/ Eleanor Hamburger
Eleanor Hamburger (WSBA #26478)
Attorneys for Plaintiffs

COLUMBIA LEGAL SERVICES

/s/ Amy L. Crewdson
Amy L. Crewdson (WSBA #9468)
Attorneys for Plaintiffs

B

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on September 8, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel on the Electronic Mail Notice List, and that I mailed a copy of the foregoing document to counsel on the Manual Notice List (if applicable):

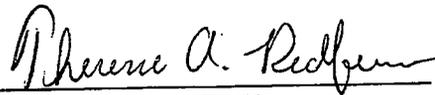
Electronic Mail Notice List

- **Amy Louise Crewdson**
amy.crewdson@columbialegal.org, carol.chestnut@columbialegal.org, fanny.cordero@columbialegal.org
- **Edward Joseph Dee**
edward.dee@atg.wa.gov, kathya@atg.wa.gov, cherylc1@atg.wa.gov
- **Eleanor Hamburger**
ehamburger@sylaw.com, matt@sylaw.com, theresa@sylaw.com
- **William Bruce Work**
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Manual Notice List

- (No manual recipients)

DATED: September 8, 2009, at Seattle, Washington.



Theresa A. Redfern

Exhibit A

HON. RONALD B. LEIGHTON

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PARKER KOSHELNIK-TURNER, by his
guardian and next friend, GLEN TURNER;
VIRGINIA KOSHELNIK-TURNER, by her
next friend, GLEN TURNER, on behalf of
themselves and of a class of persons similarly
situated,

Plaintiffs,

v.

SUSAN DREYFUS, in her official capacity as
Secretary of the Washington State Department
of Social and Health Services,

Defendant.

NO. 3:09-cv-05379-RBL

SETTLEMENT AGREEMENT

I. INTRODUCTION

The parties have agreed to settle this matter. The parties enter into this Settlement Agreement ("Agreement") to resolve the claims brought on behalf of two individual plaintiffs on their own behalf and on behalf of all others similarly situated Medicaid beneficiaries under the age of 21 receiving Medicaid-funded in-home personal care services.

Plaintiffs filed this lawsuit to halt the implementation of across-the-board to Medicaid-funded in-home personal care services for children and youth under age

1 21 as directed by ESHB 1244. Defendant (also referred to as "the Department")
2 planned to implement these cuts on July 1, 2009 until preliminarily enjoined by this
3 Court.

4 **II. TERMS OF SETTLEMENT**

5 Defendant agrees that the Department will not apply the emergency rules
6 contained in WSR 09-14-046 to the Medicaid in-home personal care services provided
7 to children and youth under the age of 21.

8 Defendant has already disseminated notice to the class that the
9 reductions are not being imposed and will not be imposed on children and youth
10 under the age of 21 absent further notice. *See Attachment 1.*

11 To further implement this Settlement Agreement, the defendant agrees to
12 adopt an emergency rule (*see Attachment 2*) in substantially this form and amend WAC
13 388-106-0125 (*see Attachment 3*) by emergency rule in substantially this form no later
14 than September 30, 2009.

15 The parties agree that Plaintiffs are entitled to reasonable attorneys fees
16 and costs associated with bringing this case. The parties agree that as of the date of this
17 agreement, the costs associated with this litigation include the filing fee, copying fees,
18 and the court reporter's transcript fee totaling \$569.25.

19 Defendant agrees to pay Plaintiffs \$569.25 by September 30, 2009.

20 The parties are unable to reach agreement regarding the amount of
21 reasonable attorneys fees Defendant shall pay. The parties agree to litigate this issue.
22 Plaintiffs will file a motion for the award of attorneys fees within 30 days of today's
23 date.

24 Agreed to on September 8th, 2009 by the undersigned who represent
25 they have the authority to enter into this settlement on behalf of the parties.

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SIRIANNI YOUTZ
MEIER & SPOONEMORE

/s/Eleanor Hamburger
Eleanor Hamburger (WSBA #26478)

COLUMBIA LEGAL SERVICES

/s/ Amy L. Crewdson
Amy L. Crewdson (WSBA #9468)
Attorneys for Plaintiffs

ROB MCKENNA
Attorney General

/s/ Edward J. Dee
Edward J. Dee (WSBA #15964)
Assistant Attorney General

/s/ Bruce Work
William Bruce Work (WSBA #33824)
Assistant Attorney General

Attorneys for Defendant

Appendix 1

PLEASE READ URGENT NOTICE ABOUT YOUR IN-HOME PERSONAL CARE HOURS

August xx, 2009

Client Name
Address
City, State Zip

NSA Rep Name

As a result of the 2009-2011 Operating Budget passed by the Legislature (Engrossed Substitute House Bill 1244), the Department was directed to reduce in-home personal care hours for clients in order to achieve an identified level of savings. This was one of a number of changes made across government to address the State's revenue shortfall. The base hours for all recipients were to be reduced by a certain percentage depending on the level of acuity.

However, on June 29, 2009, the Department received a Temporary Restraining Order (TRO) from the U.S. District Court in Tacoma requiring the Department to postpone implementing these reductions for clients under age 21. The TRO has been extended until November 1, 2009.

Therefore, the Department will continue to postpone the in-home personal care hour reductions for clients under age 21 until at least November 2, 2009. The Department will notify you if there are any further changes to in-home personal care hours for children under age 21.

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At this time, the in-home personal care hours you are eligible for will continue to be determined based upon the CARE classification base hours that were in effect prior to June 30, 2009. When you turn 21, you will be notified that your personal care hours will be reduced based on the adult base hours of your CARE classification group. Your case manager will complete assessments for you each year or when there are any changes in your needs for assistance with personal care.

Your current personal care hours per month as of August XX are xxx.

If you have any questions about your services or service plan, please contact your case manager.

Sincerely,

Kathy Leitch, Assistant Secretary
Aging and Disability Services Administration

Appendix 2

WAC 388-106-0126 If I am under age 21, hHow does CARE use criteria to place me in a classification group for in-home care? CARE uses the criteria of cognitive performance score as determined under WAC 388-106-0090, clinical complexity as determined under WAC 388-106-0095, mood/behavior and behavior point score as determined under WAC 388-106-0100, ADLS as determined under WAC 388-106-0105, and exceptional care as determined under WAC 388-106-0110 to place you into one of the following seventeen in-home groups. CARE classification is determined first by meeting criteria to be placed into a group, then you are further classified based on ADL score or behavior point score into a classification sub-group following a classification path of highest possible base hours to lowest qualifying base hours.

(1) If you meet the criteria for exceptional care, then CARE will place you in **Group E**. CARE then further classifies you into:

(a) **Group E High** with 420 base hours if you have an ADL score of 26-28; or

(b) **Group E Medium** with 350 base hours if you have an ADL score of 22-25.

(2) If you meet the criteria for clinical complexity and have cognitive performance score of 4-6 or you have cognitive performance score of 5-6, then you are classified in **Group D** regardless of your mood and behavior qualification or behavior points. CARE then further classifies you into:

(a) **Group D High** with 280 base hours if you have an ADL score of 25-28; or

(b) **Group D Medium-High** with 240 base hours if you have an ADL score of 18-24; or

(c) **Group D Medium** with 190 base hours if you have an ADL score of 13-17; or

(d) **Group D Low** with 145 base hours if you have an ADL score of 2-12.

(3) If you meet the criteria for clinical complexity and have a CPS score of less than 4, then you are classified in **Group C** regardless of your mood and behavior qualification or behavior points. CARE then further classifies you into:

(a) **Group C High** with 200 base hours if you have an ADL score of 25-28; or

(b) **Group C Medium-High** with 180 base hours if you have an ADL score of 18-24; or

(c) **Group C Medium** with 140 base hours if you have an ADL score of 9-17; or

(d) **Group C Low** with 95 base hours if you have an ADL score of 2-8.

(4) If you meet the criteria for mood and behavior qualification and do not meet the classification for C, D, or E groups, then you are classified into **Group B**. CARE further classifies you into:

- (a) **Group B High** with 155 base hours if you have an ADL score of 15-28; or
- (b) **Group B Medium** with 90 base hours if you have an ADL score of 5-14; or
- (c) **Group B Low** with 52 base hours if you have an ADL score of 0-4; or
- (5) If you meet the criteria for behavior points and have a CPS score of greater than 2 and your ADL score is greater than 1, and do not meet the classification for C, D, or E groups, then you are classified in **Group B**. CARE further classifies you into:
 - (a) **Group B High** with 155 base hours if you have a behavior point score 12 or greater; or
 - (b) **Group B Medium-High** with 110 base hours if you have a behavior point score greater than 6; or
 - (c) **Group B Medium** with 90 base hours if you have a behavior point score greater than 4; or
 - (d) **Group B Low** with 52 base hours if you have a behavior point score greater than 1.
- (6) If you are not clinically complex and your CPS score is less than 5 and you do not qualify under either mood and behavior criteria, then you are classified in **Group A**. CARE further classifies you into:
 - (a) **Group A High** with 78 base hours if you have an ADL score of 10-28; or
 - (b) **Group A Medium** with 62 base hours if you have an ADL score of 5-9; or
 - (c) **Group A Low** with 29 base hours if you have an ADL score of 0-4.

Appendix 3

WAC 388-106-0125 If I am over age 21, how does CARE use criteria to place me in a classification group for in-home care? CARE uses the criteria of cognitive performance score as determined under WAC 388-106-0090, clinical complexity as determined under WAC 388-106-0095, mood/behavior and behavior point score as determined under WAC 388-106-0100, ADLS as determined under WAC 388-106-0105, and exceptional care as determined under WAC 388-106-0110 to place you into one of the following seventeen in-home groups. CARE classification is determined first by meeting criteria to be placed into a group, then you are further classified based on ADL score or behavior point score into a classification sub-group following a classification path of highest possible base hours to lowest qualifying base hours.

(1) If you meet the criteria for exceptional care, then CARE will place you in **Group E**. CARE then further classifies you into:

- (a) **Group E High** with 416 base hours if you have an ADL score of 26-28; or
- (b) **Group E Medium** with 346 base hours if you have an ADL score of 22-25.

(2) If you meet the criteria for clinical complexity and have cognitive performance score of 4-6 or you have cognitive performance score of 5-6, then you are classified in **Group D** regardless of your mood and behavior qualification or behavior points. CARE then further classifies you into:

- (a) **Group D High** with 277 base hours if you have an ADL score of 25-28; or
- (b) **Group D Medium-High** with 234 base hours if you have an ADL score of 18-24; or
- (c) **Group D Medium** with 185 base hours if you have an ADL score of 13-17; or
- (d) **Group D Low** with 138 base hours if you have an ADL score of 2-12.

(3) If you meet the criteria for clinical complexity and have a CPS score of less than 4, then you are classified in **Group C** regardless of your mood and behavior qualification or behavior points. CARE then further classifies you into:

- (a) **Group C High** with 194 base hours if you have an ADL score of 25-28; or
- (b) **Group C Medium-High** with 174 base hours if you have an ADL score of 18-24; or
- (c) **Group C Medium** with 132 base hours if you have an ADL score of 9-17; or
- (d) **Group C Low** with 87 base hours if you have an ADL score of 2-8.

(4) If you meet the criteria for mood and behavior qualification and do not meet the classification for C, D, or E groups, then you are classified into **Group B**. CARE further classifies you into:

- (a) **Group B High** with 147 base hours if you have an ADL score of 15-28; or
 - (b) **Group B Medium** with 82 base hours if you have an ADL score of 5-14; or
 - (c) **Group B Low** with 47 base hours if you have an ADL score of 0-4; or
- (5) If you meet the criteria for behavior points and have a CPS score of greater than 2 and your ADL score is greater than 1, and do not meet the classification for C, D, or E groups, then you are classified in **Group B**. CARE further classifies you into:
- (a) **Group B High** with 147 base hours if you have a behavior point score 12 or greater; or
 - (b) **Group B Medium-High** with 101 base hours if you have a behavior point score greater than 6; or
 - (c) **Group B Medium** with 82 base hours if you have a behavior point score greater than 4; or
 - (d) **Group B Low** with 47 base hours if you have a behavior point score greater than 1.
- (6) If you are not clinically complex and your CPS score is less than 5 and you do not qualify under either mood and behavior criteria, then you are classified in **Group A**. CARE further classifies you into:
- (a) **Group A High** with 71 base hours if you have an ADL score of 10-28; or
 - (b) **Group A Medium** with 56 base hours if you have an ADL score of 5-9; or
 - (c) **Group A Low** with 26 base hours if you have an ADL score of 0-4.