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STATE OF WASHINGTON  
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NO. 97216-8

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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SEIU 775,

Petitioner,

v.

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT  
OF SOCIAL AND HEALTH SERVICES,

Respondent.

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**ANSWER TO BRIEF OF AMICUS CURIAE DISABILITY RIGHTS  
WASHINGTON**

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## I. INTRODUCTION

Disability Rights Washington (DRW)'s brief does not support direct review because it addresses issues not presented below and not presented in this appeal. This appeal is about whether two DSHS rules comply with the Fair Labor Standards Act, the Minimum Wage Act, and the requirement that agency rules are enacted with full consideration of the attending facts and circumstances. DRW urges this Court to accept review of SEIU 775's appeal in order to consider whether these rules violate the Americans with Disabilities Act and the Rehabilitation Act. Neither of the parties raised these issues below or on appeal, and the factual record is inadequate to conduct the highly fact-dependent analyses required. Moreover, DRW cannot show that the challenged rules violate the rights of people with disabilities, particularly in the context of the facial rule challenges at issue here. None of the grounds presented by amicus DRW warrants this Court's direct review under RAP 4.2(a)(4).

## II. RELIANCE ON PREVIOUS BRIEFING

DSHS relies on its previous Answer to Statement of Grounds for Direct Review (Answer to Statement of Grounds) for the facts of this case, the decision below, and the issues raised by the appeal.

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### III. REASONS WHY DIRECT REVIEW SHOULD BE DENIED

DRW primarily argues that the rules challenged by SEIU 775 (SEIU) violate the Americans with Disabilities Act and the Rehabilitation Act (collectively “ADA”). *See* Brief of Amicus at 5-18. The parties did not raise these issues below and the Court should not consider them for the first time on review. Even if the Court were inclined to consider DRW’s newly-raised arguments, whether an agency has failed to grant a reasonable modification to a public program in violation of the ADA is a fact-specific issue, and there is no record that this Court could use to answer the question. Therefore, this Court should not accept review.

Even if properly part of this appeal, the challenged rules do not increase the risk of institutionalization to any person. Under WAC 388-440-0001, DSHS has the authority and discretion to increase a client’s in-home personal care services benefit specifically to avoid institutionalization. And, as argued in the Answer to Statement of Grounds, Washington’s long-term care programs are an example to the nation and there is no need to accept review to ensure that DSHS clients receive care.

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**A. DRW Raises Issues Not Raised by the Parties and Not Raised Below**

DRW argues that the Court should accept review to consider alleged violations of the ADA and increased risk of institutionalization, issues not raised below and not raised by the parties. *See* Brief of Amicus at 6-12. SEIU challenged the informal support and shared benefit rules on grounds of the Fair Labor Standards Act, Washington Minimum Wage Act, and arbitrary and capriciousness. *See generally* CP 298-349. SEIU did not argue that either rule violated the ADA or put people with disabilities at an unacceptable risk of institutionalization. *See generally id.*

The Court does not generally consider issues raised only by amici and that were not raised at the trial court. *Harris v. Dep't of Labor and Indus.*, 120 Wn.2d 461, 468, 843 P.2d 1056 (1993); *see also Coburn v. Seda*, 101 Wn.2d 270, 279, 677 P.2d 173 (1984); RAP 2.5(a). The Court will only consider such issues if necessary to properly decide a case. *Alverado v. Washington Public Power Supply System*, 111 Wn.2d 424, 429-30, 759 P.2d 427 (1988).

Here, consideration of DRW's ADA arguments is not necessary to decide this case. This is a rule challenge under RCW 34.05.570(2). In such cases, the burden of showing invalidity is on the petitioner challenging the rule. RCW 34.05.570(1)(a). The decision terminating review of this case

will find either that SEIU met its burden under the APA or that it did not. The Court need not consider any other arguments. An issue that is not even part of the case is not a basis for direct review. RAP 2.5(a); RAP 4.2(a)(4).

**B. DRW Raises Issues For Which No Factual Support Exists In The Record**

Consideration of DRW's newly-raised arguments is also inappropriate because the factual record does not exist on appeal to evaluate them. DRW argues that the informal support and shared benefit rules expose individuals with disabilities to an increased risk of institutionalization. No evidence in the trial court record supports that assertion. *See generally* Brief of Amicus. Also, no such evidence can be found in any of the rule-making files in this matter. *See generally* Agency Record.

In order for the Court to consider DRW's arguments, facts would need to be in the record regarding whether the informal support and shared benefit rules actually increased any individual's or group's risk of institutionalization. This is because, contrary to DRW's characterizations, the ADA does not require states to make drastic changes to their public benefits programs where those programs are broadly successful in serving people in their communities instead of in institutions. The ADA contains

an “integration mandate.” See *Arc of Washington State, Inc. v. Braddock*, 427 F.3d 615, 618 (9th Cir. 2005). “States are required to provide care in integrated environments for as many disabled persons as is reasonably feasible, so long as such an environment is appropriate to their mental-health needs.” *Id.* States must make “reasonable modifications in policies, practices, or procedures” in order to meet this mandate. 28 C.F.R. § 35.130(b)(7)(i). But courts do not “tinker” with “comprehensive, effective state programs for providing care to the disabled.” *Braddock*, 427 F.3d at 618. “So long as states are genuinely and effectively in the process of deinstitutionalizing disabled persons ‘with an even hand’” courts do not interfere. *Id.* at 620 (quoting *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 605-06, 119 S. Ct. 2176, 144 L.Ed.2d 540 (1999)). In 2005, the Ninth Circuit Court of Appeals found that Washington had a comprehensive and effectively working plan to serve people with disabilities in the community based on numerous facts, including that Washington State had reduced its institutionalized population and that the budget for home and community based services had increased commensurate with other state agencies. *Id.* at 621-22.

In order to evaluate whether the State is meeting the integration mandate, there would need to be facts about whether the repeal of these rules would be a “reasonable” modification of Washington’s CARE tool

or if it would be a “fundamental alteration” of its program. *See Braddock*, 427 F.3d at 620. Further, DSHS would very likely put on a defense by showing that it has an effective and comprehensive plan to avoid institutionalization for persons with disabilities. It would do this by offering evidence showing, among other things, that the institutionalized population of Washington State has decreased<sup>1</sup> at the same time as the population receiving home and community based services has increased.<sup>2</sup>

Here, such facts do not exist in the record. This record is comprised solely of the DSHS rule-making files. *See generally* Agency Record; *see also* RCW 34.05.558. Neither party sought to supplement the agency record under RCW 34.05.562 or RCW 34.05.566 to include evidence on these issues because neither party raised these issues. Whether or not the informal support or shared benefit rule violates the integration mandate cannot be an issue of fundamental public importance requiring urgent resolution by this Court, because this Court does not have the factual record in front of it to resolve this issue. DRW’s attempt to raise an issue not raised by the parties, and for the first time on appeal,

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<sup>1</sup> *See* [https://www.cfc.wa.gov/Handouts/LTC\\_HCS\\_nh.pdf](https://www.cfc.wa.gov/Handouts/LTC_HCS_nh.pdf) (last accessed August 14, 2019) (showing caseloads in nursing homes have decreased and are projected to decrease from July 2011 to January 2021).

<sup>2</sup> *See* [https://www.cfc.wa.gov/Handouts/LTC\\_HCS\\_HCS.pdf](https://www.cfc.wa.gov/Handouts/LTC_HCS_HCS.pdf) (last accessed August 14, 2019) (showing caseloads in home and community services have increased and are projected to increase from July 2011 to January 2021).

fails to establish grounds for the Court to accept direct review. *See* RAP 4.2(a)(4).

**C. The Challenged Rules Do Not Violate the ADA**

Even if the Court were to grant direct review, DRW could not demonstrate the challenged rules facially violate the ADA integration mandate. DSHS has the discretion, under WAC 388-440-0001, to increase a client's in-home personal care services benefit specifically to avoid a risk of institutionalization to that client. Because reasonable modifications to a client's particular benefit level are explicitly anticipated by DSHS rules, there is no violation of the integration mandate and no issue of fundamental public importance for this Court to resolve.

SEIU brought a facial challenge to DSHS rules. *See* CP 164-220. For a court to invalidate a rule on its face, it must be invalid in all conceivable circumstances. *Haines-Marchel v. Wash. State Liquor & Cannabis Bd.*, 1 Wn.App.2d 712, 737, 406 P.3d 1199 (2017); *see also Fields v. Dept. of Early Learning*, 193 Wn.2d 36, 53-54, 434 P.3d 999 (2019) (J. McCloud, concurring).

Here, the informal support and shared benefit rules may impact the Department-paid in-home personal care services hours available to some clients. *See* WAC 388-106-0130. However, DSHS can make an exception to any of its rules where "the client is at serious risk of

institutionalization.” WAC 388-440-0001.<sup>3</sup> This is not limited to exceptions to the shared benefit or informal support rules, either. While the CARE tool works as a means to allocate personal care services funding to clients based on their relative functional disabilities,<sup>4</sup> clients might exist for whom the CARE tool is a bad fit. For those clients, and especially where strict application of the CARE tool would put the client at risk of institutionalization, DSHS can increase the in-home personal care services benefit to better serve the client.<sup>5</sup> WAC 388-440-0001.

The informal support or shared benefit rules do not facially violate the integration mandate, because DSHS rules themselves allow the agency to avoid risks of institutionalization. DRW fails to show that the challenged rules put persons with disabilities at increased risk of institutionalization. Rather, DSHS is meeting its obligations to serve

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<sup>3</sup> Other criteria exist. The client’s situation must also be different from the majority, the exception must not contradict federal law or state statute and the exception must be in the interest of overall economy and the client’s welfare. *See* WAC 388-440-0001.

<sup>4</sup> *See Jenkins v. Dep’t of Soc. and Health Serv’s*, 160 Wn.2d 287, 299, 157 P.3d 388 (2007) (“We agree that DSHS may use the CARE assessment program to initially classify, rate, and determine a recipient’s level of need because this process is consistent with the Medicaid program’s purpose.”); *see also* RCW 74.09.520(3) (“The department shall design and implement a means to assess the level of functional eligibility for personal care services under this section. The personal care services benefit shall be provided to the extent funding is available according to the assessed level of functional disability.”).

<sup>5</sup> DSHS utilizes WAC 388-440-0001 routinely, particularly where it has evidence that a client may be at risk of institutionalization in the absence of an exception. As discussed in part B above, DSHS would have offered evidence of this practice if the parties raised this issue below.

individuals with disabilities in the community and has all of the tools necessary to do so at its disposal.

**D. The Shared Benefit Rule Does Not Require Any Individual Provider to Provide Care Without Compensation**

While DSHS will fully address the operation and effect of the challenged rules in its brief on the merits of this case, certain inaccurate statements by DRW warrant immediate correction. In particular, the shared benefit rule does not require any Individual Provider to perform personal care services without compensation.<sup>6</sup>

DRW's misunderstanding fails to recognize that personal care hours are not determined or awarded on a task-by-task basis. This is demonstrated in at least three ways. First, DSHS does not precisely calibrate each grant of hours to clients to the particular client's "needs." *Contra* Brief of Amicus at 14. A client receives a certain number of hours that they can use to direct an in-home care provider to assist with a number of tasks.<sup>7</sup> *See* WAC 388-106-0130(6). The number of hours represents the client's proportional share of the legislative appropriation

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<sup>6</sup> The informal support rule does allow certain Individual Providers with familial or preexisting household relationships with the client to volunteer to perform certain tasks that exist as part of the personal relationship between the provider and the client rather than the employment relationship. As discussed in the Answer to Statement of Grounds, this is compliant with the Washington Minimum Wage Act and the Fair Labor Standards Act, to the extent either apply to this particular situation. *See* Answer to Statement of Grounds at 9-11.

<sup>7</sup> The tasks are enumerated and called "activities of daily living" and "instrumental activities of daily living." *See* WAC 388-106-0010.

for personal care services based on the client's functional disability. *See* RCW 74.09.520(3). At no time does DSHS ever measure the amount of time that a client requires to perform any of the tasks they are eligible to receive assistance with. *See* WAC 388-106-0080—0145. For example, two clients with the exact same functional disability will receive the exact same number of hours of in-home personal care services even if one client lives in a 2,000 square foot house and the other lives in a 500 hundred square foot studio apartment. *See id.* This is true even though it would take significantly longer to perform the task of ordinary housework<sup>8</sup> for the client with the house. *See id.*

Second, in-home personal care services hours are not apportioned to any particular task. A client receives a number of hours per month that the client can use for *any* task for which they are eligible to receive assistance. WAC 388-106-0130(6). For that reason, Individual Providers must perform services according to the client's "direction, supervision, and prioritization of tasks within the number of hours authorized." WAC 388-71-0515. The client with the 2,000 square foot house might not want to use their limited benefit to clean the whole house, and might prioritize other tasks, such as meal preparation, or bathing assistance.

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<sup>8</sup> Ordinary housework is one of the tasks that eligible clients may direct their in-home providers to provide assistance with. *See* WAC 388-106-0010 (defining "instrumental activities of daily living").

Third, clients can even use their in-home personal care services hours and trade them for other kinds of services. *See* WAC 388-106-0130(6). A client can trade half an hour of in-home personal care for a home delivered meal. *Id.* A client can trade an hour of in-home personal care for an hour and a half of adult day care. *Id.* If eligible, a client can trade an hour of in-home personal care for an hour of nursing care provided by a private duty nurse. *Id.*

DRW resists the notion that the range of available in-home personal care services tasks are like a menu from which the client can choose. Brief of Amicus at 14-15. But, that is the reality. The state grants to clients a benefit that they can use to meet their needs according to their own prioritization of tasks. WAC 388-71-0515. In the same way that DSHS does not tell a recipient of food assistance how to meet their nutritional needs (other than to buy food), DSHS does not tell a recipient of in-home personal care how to meet their needs (other than to authorize personal care). *Compare* WAC 388-412-0046(2)(b) *with* WAC 388-71-0515.

In that context, when the shared benefit rule reduces a client's total benefit amount, it simply reduces the total number of hours that a client can trade for other benefits or authorize their provider to perform. *See* WAC 388-71-0515. No Individual Provider is required to perform services

without compensation; in fact, except for informal supports, the rules prohibit it. *Id.* While, as described above, the issues DRW raises are insufficient to support a motion for direct review, the Court should also disregard them because DRW relies on an inaccurate description of the shared benefit rule.

**E. Cases Involving Long-Term Care Do Not Automatically Merit Direct Review, and Neither Does This One**

While the in-home personal care services programs are undoubtedly important, not all cases involving them merit direct review in this Court. DRW argues that any case involving personal care services or long-term care involves issues that should be heard on direct review because access to care is an important issue. Brief of Amicus at 4-5. As argued in the Answer to Statement of Grounds, Washington's long-term care system is exemplary, ranked first in the nation, and there is no demonstrated failure of Washington's long-term care system or inability of DSHS clients to receive care. *See* Answer to Statement of Grounds for Direct Review at 5-7, 14-15. Direct review is not appropriate in this case.

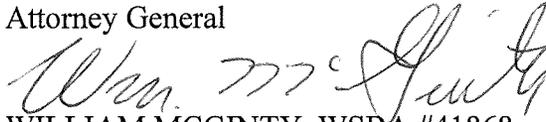
**IV. CONCLUSION**

For the reasons stated above, DRW identifies no issues of fundamental public importance raised by this case that require urgent  
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resolution by this Court. The Court should deny the petition for direct review.

RESPECTFULLY SUBMITTED this 6th day of September, 2019.

ROBERT W. FERGUSON  
Attorney General

A handwritten signature in cursive script, appearing to read "Wm. McGinty", is written over the printed name of William McGinty.

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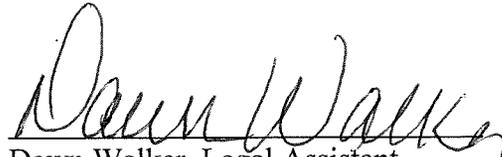
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

EXECUTED this 6<sup>th</sup> day of September, 2019 at Olympia, WA.

  
Dawn Walker, Legal Assistant

**SOCIAL AND HEALTH SERVICES DIVISION, ATTORNEY GENERALS OFFICE**

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