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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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**RESPONSE OF DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES TO AMICUS CURIAE BRIEF OF  
NORTHWEST JUSTICE PROJECT**

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## I. INTRODUCTION

Amicus Northwest Justice Project (NJP) presents almost no argument or authority supporting the claims brought by SEIU 775 in this case. SEIU primarily bases its rules challenge on alleged violations of wage and hour laws, but NJP largely avoids that issue. While NJP asserts that the rules require providers to work beyond the authorized hours, it ignores both the U.S. Department of Labor's allowance of volunteerism in this unique context and DSHS rules prohibiting individual providers (IPs) from working beyond the hours authorized to them by their clients. Similarly, NJP appears to claim that the informal support rule, which allows but does not require certain IPs to provide services without pay, is not really voluntary. NJP offers no argument or authority supporting this implication.

Instead, NJP complains more generally about the perceived insufficiency of the benefits and the lack of the rules' precision when determining hours of care provided as a benefit. But unlike the cases relied on by NJP, there is no evidence in this record that the benefits provided to clients are insufficient to satisfy the requirements of the Medicaid program or Americans with Disabilities Act (ADA). To the contrary, Washington ranks among the top states in the nation in ensuring that clients have sufficient benefits to avoid institutionalization. Nor are NJP's arguments with respect to the mathematical operation of the rules well taken. Rules

establishing client benefit levels need not have surgical precision, and the informal support and shared benefit rule are reasonable attempts to determine clients' relative need.

## II. ARGUMENT

### A. NJP Does Not Show That the Challenged Rules Violate Wage and Hour Laws

NJP's arguments almost exclusively address its complaints about the way DSHS calculates benefits or NJP's suggestion—entirely unsupported by evidence in the record—that DSHS does not provide sufficient benefits to safeguard against institutionalization of clients. *See generally* NJP Amicus Br. at 6-13. DSHS disagrees with NJP's claims, but even if such claims could be proved in a different case, with a different record, it would not establish any violation of wage and hour laws. Because the basis of SEIU's rules challenge is primarily the alleged violation of wage and hour laws, NJP's arguments do not address the issues before the Court.<sup>1</sup> Although SEIU also claims the rules are arbitrary and capricious because they are inadequately supported by the rulemaking files, that

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<sup>1</sup> SEIU's approach of challenging the rules based on wage and hour laws is likely a conscious litigation strategy. Wage and hour violations, unlike Medicaid program or ADA violations, may lead directly to unpaid wage claims, double damages, and attorney fees. *See* RCW 49.46.090; RCW 49.52.070; *see also* CP at 30 (original complaint of SEIU 775 before rules challenge was bifurcated from wage claim).

challenge is related to their wage and hour claims and, in any event, NJP's amicus brief also ignores the inadequate rulemaking claim.

As discussed more fully in the DSHS Brief of Respondent, the informal support rule allows IP volunteerism in accordance with U.S. Department of Labor guidance. And the shared benefit rule does not require, or create any expectation, that IPs perform work without pay. Other than allowing IPs to volunteer in some circumstances, DSHS rules make clear that clients may not authorize, and IPs may not work, beyond the hours that have been awarded as a benefit to the client. WAC 388-71-0515(3). Thus, even if NJP could establish that DSHS's award of benefits was insufficiently precise or did not match a client's needs, it would fail to establish any violation of wage and hour laws.

**1. The informal support rule allows IPs to volunteer to provide personal care service, in accordance with the Fair Labor Standards Act, the Minimum Wage Act, and U.S. Department of Labor guidelines**

The informal support rule allows IPs who are either household members or family of clients to voluntarily provide some personal care services without compensation. WAC 388-106-0010, -0130(2). As explained in the DSHS Brief of Respondent, such volunteerism is allowed under the Fair Labor Standards Act and Minimum Wage Act in the unique

context of providing personal care services through the Medicaid or similar benefit program. Br. Resp't at 20-27. DSHS amended its rules specifically to comply with the federal Department of Labor guidelines, which allow IPs to volunteer to provide informal support. Br. Resp't at 21-26.

NJP offers no argument as to why the Department of Labor guidance should not or does not apply here. Instead, NJP suggests that informal support provided by household or family members who are also IPs is not truly voluntary. NJP Amicus Br. at 10-11. NJP offers no argument or authority explaining its implication that informal support is not voluntary. And the implication is contradicted by the rule and how DSHS implements it. In May 2016, DSHS issued a Management Bulletin explaining the changes to the informal support rule to DSHS staff who assess clients for benefits. Wash. St. Reg. 18-16-004 at 29-34.<sup>2</sup> The bulletin explains that “[i]t is important to have the conversation with the IP to ensure they are willing to provide unpaid care and understand that answering yes means the client will be eligible for fewer hours of care.” Wash. St. Reg. 18-16-004 at 30. In

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<sup>2</sup> DSHS continues the convention used in its response brief to refer to the rulemaking files at issue. Because SEIU challenges two separate rules that implicate four separate rulemaking files, DSHS refers to the Washington State Register number of the permanent rule that was eventually adopted as a consequence of the rulemaking at issue.

addition, an IP may decide at any time to stop volunteering to provide informal support, in which case DSHS will reassess the client to recalculate the benefit without that informal support. WAC 388-106-0050(2)(c), -0140(1).

In light of IPs being informed that volunteering to provide informal support means that the client may receive fewer hours, and that IPs may change their mind at any time, NJP's argument that the rule means that no good deed goes unpunished makes no sense. *See* NJP Amicus Br. at 10-11. The good deed at issue here is agreeing to perform the services without compensation. Reducing a client's benefit to reflect the reduced need for paid services is not punishment; it merely acknowledges the good deed.

**2. The shared benefit rule reduces client benefits, it does not require IPs to work without compensation**

The shared benefit rule reduces a client's benefit but does not require IPs to work without compensation. NJP complains of the effects of the rule, but does not acknowledge, let alone provide argument about, DSHS rules requiring IPs to work within the number of hours authorized. As discussed below, NJP's complaints lack support in the record and misstate the basis for the rule. But even if NJP could show that the rule reduces benefits improperly, it offers no support for SEIU's argument that the rule violates wage and hour laws.

Similarly, although NJP criticizes the calculations DSHS uses to determine the amount of the reduction under the shared benefit rule, it never squarely addresses the question of whether there should be any reduction at all. Thus, NJP provides no response to DSHS's explanation of why the shared benefit rule reduces benefit hours due to reduced need, but does not require IPs to work without pay. *See* Br. Resp't at 28-32.

**3. The shared benefit rule as applied to providing services to multiple clients has not been questioned**

Like SEIU, NJP also does not address the aspect of the shared benefit rule that reduces hours when an IP provides services to multiple clients who live in the same household. *See* WAC 388-106-0130(2). And like SEIU, NJP accordingly offers no rationale for invalidating this aspect of the rule. Nor could it. The rule properly recognizes the efficiencies gained when a provider performs tasks such as meal preparation or house cleaning for multiple clients who live in the same household, where DSHS determines on an individualized basis that the clients each receive a benefit from the task being performed. *See* WAC 388-106-0010 ("shared benefit" definition). Because each client will benefit from tasks being performed for the other client, each client will have a corresponding reduced need.

**B. Washington’s In-Home Care Programs Do Not Threaten Clients with Institutionalization**

NJP implies throughout its brief that the reduction in benefits resulting from the informal support and shared benefit rules risks institutionalization of clients and violates the integration mandate. First, these arguments are raised for the first time by amicus and need not be considered by this Court. *See State v. Gonzalez*, 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988) (“[W]e have many times held that arguments raised only by amici curiae need not be considered.”). Second, as discussed above, even if valid, these arguments do not show a wage and hour violation. Third, NJP cites to no evidence in the record that supports its assertions that operation of the informal support and shared benefit rules results in a risk of institutionalization or otherwise fails to provide services to clients in the most integrated setting possible. Such record-free argumentation is particularly out of place in a facial rules challenge, where a petitioner may only succeed by showing that there are “no set of circumstances” in which the rule can be lawfully applied. *Haines-Marchel v. Liquor & Cannabis Bd.*, 1 Wn. App. 2d 712, 736-37, 406 P.3d 1199 (2017) (quoting *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004)).

In any event, publicly available information shows that Washington is a national leader in providing in-home personal care services. In its most recent survey of states' long-term services programs, the AARP ranked Washington as the top state in the nation. Susan Reinhard et al., *Picking Up the Pace of Change: A State Scorecard on Long-Term Services and Supports for Older Adults, People with Physical Disabilities, and Family Caregivers* 8 (AARP Public Policy Institute 2017) (attached as App. 1 to DSHS Answer to Statement of Grounds for Direct Review). The scorecard addresses Washington's long-term care services generally, which include in-home care, home care agencies, adult family homes, assisted living facilities, and other services. But relevant to NJP's concerns, Washington ranked second in choice of setting and provider and in the top quartile for affordability and access, support for family caregivers, and effective transitions from one kind of provider to another. *Id.* at 38. Washington's top rating is not an anomaly: In prior scorecards issued in 2011 and 2014, Washington ranked second in the nation. *Id.* at 6, 11.

Washington also compares favorably to other states in terms of the number of hours provided as a benefit to clients for hiring individual providers. Although it can be difficult to compare programs across states,

the maximum number of hours provided by Washington is significantly higher than similar states such as Oregon and California.<sup>3</sup>

The lack of a record showing any risk of institutionalization or lack of integration also distinguishes this case from those NJP seeks to rely on. For example, in *M.R. v. Dreyfus*, 663 F.3d 1100, 1105-06 (9th Cir. 2011), the Ninth Circuit addressed an across-the-board cut to benefits of six to seventeen percent, which was not individualized, was not based on reduction in need, and did not allow for appeal. In finding that plaintiffs had established serious questions going to the merits of their claim for an ADA violation, the Court relied on evidence in the record that the proposed reduction would show a serious risk of institutionalization. *M.R.*, 663 F.3d at 1116-17. Here, there is no evidence in the record regarding risks of institutionalization, the reduction in hours is individualized and based on reduced need, and beneficiaries have appeal rights and may seek an exception to the rules. *See* WAC 388-106-1305 (right to contest CARE assessment or other eligibility decisions); WAC 388-440-0001 (allowing exceptions to rules). *M.R.* has no application here.

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<sup>3</sup> Washington offers a maximum benefit (with even more hours available under certain circumstances) of 393 hours per month. WAC 388-106-0125; WAC 388-440-0001. Oregon and California offer maximums of 234 hours per month and 283 hours per month respectively. Or. Admin. R. 411-030-0020(48) (service period is 14 days), -0070 (sum of maximum hours in service period is 108 hours); World Institute on Disability, *Disability Benefits 101, working with a disability in California: In-Home Supportive Services (IHSS): The Details* (updated Jan. 22, 2020), [https://ca.db101.org/ca/programs/health\\_coverage/medi\\_cal/ihss/program2b.htm](https://ca.db101.org/ca/programs/health_coverage/medi_cal/ihss/program2b.htm) (last visited Feb. 17, 2020).

Another case cited by NJP, *Townsend v. Quasim*, 328 F.3d 511 (9th Cir. 2003), also has no application here. *See* NJP Amicus Br. at 6. There, the Ninth Circuit determined that providing in-home care services to some beneficiaries who qualified for care in skilled nursing facilities but not others arguably violated the ADA. *Townsend*, 328 F.3d at 513. The case did not address whether the benefit awarded was sufficient more generally, nor did the case address any wage and hour claims. The case has no relevance here.

Like its claims regarding the risk of institutionalization, NJP's claims that the informal support and shared benefit rules can lead to findings against IPs of abuse and neglect by Adult Protective Services is wholly without support in the record. *See* NJP Amicus Br. at 13. It also misunderstands the role of an IP. IPs are not responsible to perform all of the tasks identified in a care plan for a client. Rather, it is the client who is responsible for directing the tasks to be performed, choosing which providers to hire, and supervising the provider's work in providing care. RCW 74.39.050; RCW 74.39A.270(6)(b); WAC 388-71-0515(3). In keeping with the client-centered approach adopted by DSHS, which seeks to provide autonomy to clients, clients even retain the right to turn down services. WAC 388-106-1300(4). If IPs are subject to allegations of abuse or neglect, it could not be because they declined to perform services

beyond the number of hours authorized, since they have no obligation to do so. *See* WAC 388-71-0515(3) (IPs must provide services “according to the client’s direction, supervision, and prioritization of tasks within the number of hours authorized[.]”).

**C. The Rules Are A Reasonable Effort to Measure Relative Need in Distributing Medicaid Funds**

Finally, NJP complains that the informal support and shared benefit rules make deductions based on quartile categories and do not precisely identify how many hours of reduced need each individual beneficiary should be assigned. NJP Amicus Br. at 6-12. Again, this Court need not consider these arguments as they are raised only by amicus. *E.g., Gonzalez*, 110 Wn.2d at 752 n.2. And again, these arguments do not address whether the rules violate wage and hour standards.

In any event, the rules are a reasonable effort to measure relative need that, contrary to NJP’s assertions, are based on an individualized determination of reduced need. NJP has cited no authority suggesting that DSHS must calculate with precision the number of hours each individual beneficiary benefits from informal support or shared benefit, and that any reduction in hours based on a reduction of need must meet that same level of granularity. DSHS is aware of no such authority. Instead, as NJP itself recognizes, “DSHS may use ‘reasonable standards’ to determine the amount

of medical assistance it provides[.]” NJP Amicus Br. at 8 (citing *V.L. v. Wagner*, 669 F. Supp. 2d 1106, 1117-20 (2009)); *see also* 42 U.S.C. § 1396a(a)(17) (states participating in Medicaid must use “reasonable standards” for determining eligibility and the extent of medical assistance). Not only are “reasonable standards” allowed by law, but that policy makes sense. Otherwise, social service agencies would spend an undue share of precious dollars in administrative costs rather than providing services.

NJP correctly states that the informal support and shared benefit rules are driven by quartile-based metrics rather than the specific number of times a task must be completed, or how long a particular task may take. NJP Amicus Br. at 9. But contrary to NJP’s claims, neither this Court nor any other authority requires DSHS to identify reduced need hour-by-hour before reducing a client’s benefit.<sup>4</sup> In several opinions, this Court has invalidated rules reducing benefits where the reduction was not based on any individualized circumstances, but instead relied on presumptions of reduced need for classes of people. *Samantha A. v. Dep’t of Soc. & Health Servs.*, 171 Wn.2d 623, 631-32, 256 P.3d 1138 (2011); *Jenkins v. Dep’t of Soc. & Health Servs.*, 160 Wn.2d 287, 300, 157 P.3d 388 (2007).

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<sup>4</sup> Taking NJP’s rationale to its logical conclusion, even identifying reduced need hour-by-hour may be considered arbitrary because one can always attempt to assess the reduced need with even greater precision, such as by quarter-hour, or even by minute.

Nowhere in those opinions does the Court suggest that DSHS must identify each client's reduced need by the hour in order to reduce a benefit. Quite the opposite. Both opinions support DSHS's initial determination of hours, which assesses levels of functional disability rather than individualized determinations of the specific number of hours a client may need. *Samantha A.*, 171 Wn.2d at 631 (quoting *Jenkins*, 160 Wn.2d at 299); *Jenkins*, 160 Wn.2d at 299 ("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"). And both opinions support a reduction of hours using DSHS's method of assigning beneficiaries into quartile categories and assessing the frequency of tasks met rather than hours of reduced need. *Samantha A.*, 171 Wn.2d at 633 ("[Determining whether a particular recipient requires care or services] is also what occurs when the recipient's base MPC hours are later reduced by an assessor's individualized findings regarding the recipient's self-performance and the amount of informal supports for ADL and IADL."); *Jenkins*, 160 Wn.2d at 300 ("We conclude that no reduction is justified unless an individual determination is made *supporting that reclassification.*" (Emphasis added.)).

Here, there is no presumption of reduced need like that in *Samantha A.* or *Jenkins*. The informal support rule, already endorsed by this Court in *Samantha A.*, makes an individualized determination of the informal supports that an IP voluntarily wishes to provide. And the shared benefit rule similarly makes an individualized determination of how often (estimated using a quartile metric) IPs provide services in which they share in the benefit.

**D. NJP’s Hypotheticals Do Not Show Wage and Hour Violations**

In attempting to show how DSHS’s method of calculating benefit reductions works, NJP provides two hypothetical situations. NJP Amicus Br. at 12. Although NJP attempts to show the allegedly disproportionate impact the rules have on higher-needs clients, this effort is undermined by several unstated assumptions or misunderstandings about the rules’ operation. Initially, NJP misstates the operation of the rule when it claims that “[b]ecause *Rita lives with Joe*, the shared benefit rule reduces her pay by three hours per month.” NJP Amicus Br. at 12 (citing WAC 388-106-0130). In fact, as a direct response to this Court’s *Jenkins* decision, DSHS amended its rule to remove the presumption that a provider who lives with the client would perform tasks in which the provider would share in the benefit (e.g., routine cleaning of shared living spaces). The shared benefit rule now requires an individualized determination of how

often a client and a paid caregiver both share in the benefit of an IADL task or two or more clients in a multi-client household benefit from the same IADL task being performed. WAC 388-106-0010.

NJP also does not provide any explanation of how each of the two hypothetical clients have been assessed as having a shared benefit for housework being met more than three quarters of the time. NJP Amicus Br. at 12. Based on the description of the second, higher-needs client, it is highly likely that the shared benefit would be assessed at a lower frequency than the first client. That is because the tasks like separately doing laundry because of incontinence or clearing meals separately would not result in a shared benefit because the tasks would be done exclusively for the client.

NJP's real complaint appears to be that the benefit is reduced on a proportional basis, rather than an hour-by-hour assessment of individual reduced need. As discussed above, there is no requirement for an hour-by-hour assessment, and reducing hours on a proportional basis is a reasonable and administratively efficient way of determining relative need. NJP also ignores the ability to provide exceptions to the rules based upon individual circumstances of the client. *See* WAC 338-440-0001.

### **III. CONCLUSION**

NJP's arguments do not support SEIU's rules challenge because they primarily address alleged deficiencies in the rules unrelated to SEIU's

challenge. The informal support rule and shared benefit rule do not violate the Fair Labor Standards Act or the Minimum Wage Act, and they are a reasonable measure of relative need. This Court should affirm the trial court and uphold DSHS's rules.

RESPECTFULLY SUBMITTED this 25th day of February 2020.

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