

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
12/4/2019 2:14 PM  
BY SUSAN L. CARLSON  
CLERK

NO. 97216-8

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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SEIU 775,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH  
SERVICES,

Respondent.

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**BRIEF OF RESPONDENT**

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ROBERT W. FERGUSON  
Attorney General

WILLIAM MCGINTY  
Assistant Attorney General  
WSBA# 41868

PETER B. GONICK  
Deputy Solicitor General  
WSBA # 25616  
7141 Cleanwater Drive SW  
PO BOX 40124  
Olympia, WA 98504-0124  
(360) 586-6537  
OID# 91021

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## I. INTRODUCTION

The Department of Social and Health Services (DSHS) administers several programs partially funded by Medicaid for people who need help with certain tasks, such as bathing, dressing, and meal preparation, in their own homes. To determine the amount of assistance each client receives, DSHS developed an assessment tool as required by RCW 74.09.520(3). The assessment tool applies agency rules and awards clients a certain number of hours based on their functional disability, including relative need, within available funding. Clients may use the hours awarded to them to hire an individual provider (IP) or home care agency to provide assistance, or to purchase home-delivered meals, adult day care, or specialized equipment and education. SEIU 775 (SEIU) challenges two rules that result in clients receiving fewer hours: the informal support rule and the shared benefit rule.

SEIU's primary argument against these rules, which relies on wage-and-hour laws, fundamentally misunderstands the nature of the personal care services program. The program and the assessment tool are not designed to meet all of a client's needs for assistance with identified tasks; instead, they are designed to determine the best way to distribute a finite amount of resources by assessing relative functional disability and the individual circumstances of clients. Pursuant to an award of benefits, whether reduced by application of the challenged rules or not, clients may

hire an IP to work only the number of hours awarded, and clients may use those hours for any approved tasks they choose. Thus, regardless of the amount of hours awarded, IPs are not required to perform work without pay.

SEIU's other arguments also fail. SEIU correctly notes that the informal support rule allows IPs to voluntarily perform some tasks without pay. As federal authorities explicitly state, this volunteerism is permitted in the unique circumstance of a family or household member providing personal care services. It is also a necessary alternative to prohibiting family or household members from being hired as IPs. The informal support rule is consistent with labor laws and is not arbitrary and capricious.

The other rule challenged, the shared benefit rule, results in an award of fewer hours to clients who share in the benefit of certain tasks with their paid caregivers or other clients in the household. This rule and its individualized assessment of shared benefit is a direct and rational response to Washington Supreme Court authority. It does not require or assume that IPs will work without pay, but instead limits the total hours clients have to allocate to eligible services, including care provided by an IP. The shared benefit rule does not require IPs to work beyond the total amount of authorized hours. IPs may disagree with the benefit provided to clients as the result of the rule, but they may not simply choose their own assessment of what the benefit should be and request payment for that benefit.

Finally, both rules are adequately supported by the administrative record. DSHS responded to SEIU's critiques, and SEIU simply disagrees with DSHS's conclusions. But DSHS is not required to agree with critique it receives, only to adequately consider it. The superior court order dismissing SEIU's rules challenge should be affirmed.

## **II. COUNTERSTATEMENT OF ISSUES**

1. Where IPs are related to or live with a Medicaid client and the informal support rule allows, but does not require, those providers to provide unpaid personal care for their loved ones, does the rule comply with wage and hour laws?
2. Does the shared benefit rule comply with wage and hour laws where the rule results in fewer hours awarded as a client's benefit and another rule requires that IPs work no more than the number of hours awarded?
3. Did DSHS validly enact the challenged rules where it adequately summarized and responded to comments during rulemaking, enacted the rules to comply with federal guidance, and considered all attending facts and circumstances?

## **III. COUNTERSTATEMENT OF THE CASE**

### **A. Washington Participates in Optional, Medicaid-Funded In-Home Personal Care Services Programs**

Medicaid is a joint state and federal program where the federal government matches funds that the state uses to pay for "medical assistance" for people with low incomes. *See* 42 C.F.R. § 430.0. To participate, states must create a "state plan" that is reviewed by the federal

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Centers for Medicare and Medicaid Services (CMS) for compliance with federal law. *See* 42 C.F.R. § 430.10.

One optional kind of medical assistance, which Washington has chosen to provide, is personal care services. *See* 42 C.F.R. § 440.225; *see also* 42 C.F.R. § 440.167; RCW 74.09.520(3). Personal care services in the context of Washington’s Medicaid state plan means assistance with activities of daily living (ADLs) such as eating, dressing, and bathing; and assistance with instrumental activities of daily living (IADLs) such as meal preparation and ordinary housework. *See* RCW 74.39A.009(23), (24); *see also* WAC 388-106-0010 (defining “personal care services,” “activities of daily living,” and “instrumental activities of daily living.”)

DSHS does not provide personal care services directly to clients, but instead contracts with providers. *See* chapter 74.39A RCW. Providers include contractors who serve clients in their own homes, such as IPs (RCW 74.39A.240) and home care agencies (RCW 70.127.010(7)). *See* RCW 74.39A.009(20). Only IPs are at issue here.

When a client receives in-home personal care services, the client is responsible for directing the tasks to be performed, hiring and terminating the provider, and supervising the provider’s day-to-day provision of care. RCW 74.39.050; RCW 74.39A.270(6)(b); *see also* 42 C.F.R. § 441.545(a). An IP must provide services “according to the client’s direction,

supervision, and prioritization of tasks within the number of hours authorized.” WAC 388-71-0515(3).

Although the goal of the program is to provide for each client’s need for personal care, the program is not designed to necessarily meet all of a particular client’s needs. Instead, the program distributes a finite amount of funds by determining levels of functional disability, including resources the client may have to meet their needs independent of the Medicaid program. RCW 74.09.520(3). Thus, the program is ultimately resource driven rather than needs driven. The AARP ranks Washington’s personal care services program first in the nation overall. Susan Reinhard, et al., *Picking up the Pace of Change*, 8 AARP Public Policy Institute (2017).<sup>1</sup>

**B. The CARE Tool and the Challenged Rules**

A client’s in-home personal care services benefit is measured in hours per month, which the client may use in a variety of ways. WAC 388-106-0130(6). Among those options, a client may use hours to direct an IP to perform any of a number of approved tasks. *See* WAC 388-106-0125, 0130(6)(a); RCW 74.39A.270(6)(b). The number of hours per month a client receives is determined by the client’s level of “functional disability” and “to the extent funding is available.” RCW 74.09.520(3). DSHS is

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<sup>1</sup> Available at <http://www.longtermscorecard.org/2017-scorecard> (last accessed November 14, 2019).

responsible to “design and implement a means to assess the level of functional disability of persons eligible for personal care services.” *Id.*

To meet this responsibility, DSHS designed the Comprehensive Assessment Reporting Evaluation (CARE) tool. *See generally* WAC 388-106-0080 — 0145. The CARE tool assesses a client’s functional disability by considering cognitive performance, clinical complexity, mood and behaviors, ability to self-perform ADLs (such as personal hygiene, toilet use, dressing, and eating), and need for exceptional care to place a client into one of seventeen classification groups. *Id.* Each classification group assigns a number of base hours. WAC 388-106-0125.

The base hours assigned to each classification level does not represent the number of hours that clients need in order to complete all of their ADLs and IADLs. Instead, the hours represent each client’s share of the appropriation for personal care services based on that client’s functional disability relative to other clients. RCW 74.09.520(3). At no time does DSHS measure the number of hours that it takes a client to perform their ADLs or IADLs to determine a client’s base hours. WAC 388-106-0080 — 0145. Likewise, while the CARE tool initially determines clients’ functional disability by considering their ability to self-perform ADLs, it does not take into account a client’s ability to self-perform IADLs, such as shopping, cleaning, and meal preparation. As a result, two clients who are

otherwise identical, except that one client cannot prepare their own meals while the other client can, will be assigned to the same classification and receive the same corresponding base hours per month, because meal preparation is an IADL, not an ADL. *Id.*

Once clients are assigned to a classification group with a corresponding base hour amount, DSHS adjusts a client's monthly benefit for individual circumstances. WAC 388-106-0130. Among these individualized adjustments are those challenged here: informal supports and shared benefits. WAC 388-106-0130(2). Other adjustments include add-on hours that a client can receive based on their living situation—a client can receive up to eight extra monthly hours if wood is the client's sole source of heat, for example. WAC 388-106-0130(3). Clients can also receive extra hours if there are no on-site laundry facilities or if the client lives more than forty-five minutes away from essential services. *Id.*

Clients can use their hours to direct their providers to assist them with any ADL or IADL that they need assistance with. WAC 388-106-0130(6)(a); *see also* WAC 388-71-0515(3). Consistent with the award of hours being tied to functional disability rather than accomplishing specific tasks, the CARE tool does not allocate hours to any particular ADL or IADL. *See generally* chapter 388-106 WAC. Thus, clients can use their hours for other kinds of services. WAC 388-106-0130(6)(b) — (f). A client

can use one hour of their in-home personal care services benefit for one and a half hours of adult day care. WAC 388-106-0130(6)(c). A client can use one half-hour of in-home personal care services for a home delivered meal. WAC 388-106-0130(6)(b). If a client is eligible, a client can exchange their in-home personal care services hours for a budget of money that the client can use to purchase other services, supports, or items such as home modifications or specialized education. WAC 388-106-0130(6)(f); WAC 388-106-1400. The client makes all of these decisions about how to use their benefit. WAC 388-106-1300(5).

#### **1. The Informal Support Rule**

As part of the individualized adjustments that determine client benefits, DSHS assesses the informal supports that are available to assist clients in completing their ADLs and IADLs. WAC 388-106-0130(2). Sources of informal supports may include neighbors, family, friends, school, church, and community members who provide assistance without compensation. WAC 388-106-0010. An IP may be a source of informal support only if the individual provider is “also a family member or a household member who had a relationship with the client that existed before the individual provider entered into contract with the department.” *Id.*

Where clients have informal supports that assist them with ADLs or IADLs that they cannot complete by themselves, the CARE tool reduces the

clients' monthly hours according to a formula specified in WAC 388-106-0130(2). SEIU does not challenge informal supports generally. *See generally* Brief of Appellant (Appellant Br.). SEIU only challenges that aspect of the informal support definition that allows IPs with familial or preexisting household relationships with their clients to voluntarily perform informal supports. *Id.* This "informal support rule" is codified in both WAC 388-106-0010 and WAC 388-106-0130.

The way that CARE accounts for informal supports is mathematically complex. *See* WAC 388-106-0130(2)(b). For purposes of this appeal it is enough to state that that the reduction is not hour-for-hour. *Id.* Contrary to SEIU's suggestion (Appellant Br. at 42), DSHS does not assess the total amount of hours of informal supports that a client receives and reduce a client's benefit by that amount. WAC 388-106-0130(2). Rather, DSHS determines how often informal supports are used to help a client with their ADLs and IADLs and reduces a client's base hours based on the frequency that informal supports are available. WAC 388-106-0130(2). For example, assume a client is in the C-Medium CARE classification, which has 115 base hours per month. WAC 388-106-0125. Assume also that this client requires assistance to complete the IADL of meal preparation, as well as each ADL listed in WAC 388-106-0105 and

each IADL listed in WAC 388-106-0130 except wood supply.<sup>2</sup> This client has an informal support who voluntarily assists the client with meal preparation for seven out of twenty-one meals per week. If the client has no other informal supports or shared benefits, the client's benefit amount would be 110 hours per month instead of 115 because of the informal supports. The client's hours would be 110 per month no matter how long the meals take to make. WAC 388-106-0130(2).<sup>3</sup>

DSHS most recently changed the definition of informal support on July 19, 2018, "to indicate that paid caregivers may not be the source of informal support unless they are household or family members of a client." Administrative Record (AR) WSR 18-16-004.<sup>4</sup> DSHS amended the rule to ensure compliance with the Fair Labor Standards Act (FLSA). AR WSR 18-

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<sup>2</sup> When a client needs assistance to complete the IADL of wood supply where wood is the sole source of heat, the client is eligible for "add on" hours. *See* WAC 388-106-0130(3). How informal supports (and shared benefits) affect add-on hours is shown in the table in WAC 388-106-0130(3).

<sup>3</sup> To calculate reductions for informal supports, DSHS first assigns a number to each ADL and IADL the client needs assistance with. WAC 388-106-0130(2)(b). An ADL or IADL that has no informal supports is assigned the value "1." Where informal supports do apply, a number less than "1" is assigned. WAC 388-106-0130 has a table that shows the various number assignments for the different tasks and the different levels of informal support. The numbers are added and averaged, and a mathematical formula results in a number between 0 and 1 that the base hours are multiplied by to get final adjusted hours. WAC 388-106-0130(2)(b).

<sup>4</sup> Because SEIU challenges two separate rules that implicate four rulemaking files, this brief refers to the administrative record by reference to the Washington State Register number of the permanent rule that was eventually adopted as a consequence of the rulemaking at issue. Here, "AR WSR 18-16-004" refers to the rulemaking file for the permanent rule published at WSR 18-16-004. Each of the rulemaking files filed with the Court follow this convention in the numbering in the bottom right-hand corner.

16-004 at 22-41. As part of its rulemaking, DSHS confirmed its understanding of the FLSA with Department of Labor (DOL) personnel, and summarized a conversation with those personnel reflecting that DSHS's practices with regard to informal support were consistent with the FLSA:

Household and family members may be considered to be sources of informal support both when determining the amount of the benefit available to clients at each assessment and when determining the scope of the employment relationship. Informal support provided by household and family members may be considered in the development of the plan of care and deciding how much paid care is needed. The scope of employment for these providers is limited to the paid number of hours in the plan of care. When hours are provided outside or in addition to those identified in the plan of care this additional assistance is considered to be part of the familial or household member relationship. This is consistent with two examples in the DOL Fact Sheet 79F . .

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*Id.* at 39 (emphasis omitted). No one submitted comments to DSHS during this rulemaking. *Id.* at 68.

DSHS also changed the definition of “informal support” in a rulemaking completed on September 30, 2015. AR WSR 15-20-054 at 175. The change amended the rule to explicitly reference IPs as a potential source of informal support. *Id.* at 180-81. The purpose was to “clarify the definition of informal support in response to decisions from the Health Care Authority Board of Appeals.” *Id.* at 193. These decisions were included in the

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rulemaking file.<sup>5</sup> *See id.* at 50-94. In each of them, DSHS was a party to the litigation and opposed to the ultimate determination that IPs were categorically excluded as sources of informal support. *See id.* In its concise explanatory statement, DSHS explained that there was “no change in policy” and that its interpretation of the former rule, that IPs could be sources of informal support, was “longstanding.” *Id.* at 196.

## **2. The Shared Benefit Rule**

The CARE tool reduces a client’s monthly benefit whenever the client’s provider shares in the benefit of one or more of four IADL tasks, or when more than one client in a multi-client household shares in the benefit of those tasks. WAC 388-106-0130(2). Those tasks are: ordinary housework, essential shopping, meal preparation, and wood supply. *Id.* ADL tasks are not implicated by the shared benefit rule. The “shared benefit rule” is codified in both WAC 388-106-0010 and WAC 388-106-0130.

The shared benefit rule operates similarly to the informal support rule in that DSHS does not examine the actual number of hours expected to be performed as a shared benefit, and thus it does not reduce a client’s benefit based on those expected hours or even a fraction of those hours.

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<sup>5</sup> The Health Care Authority (HCA) is the single state agency responsible for administering Washington’s Medicaid program. RCW 41.05.021(1)(m)(i). DSHS administers much of the Medicaid long-term care programs under delegated authority from HCA. *See* RCW 41.05.021(1)(C)(m)(iii). Consequently, the HCA Board of Appeals has occasion to interpret and apply DSHS rules.

WAC 388-106-0130(2). Rather, DSHS determines the frequency with which the provider or more than one client shares in the benefit of the completion of any of the four IADLs at issue. *Id.* As above, a client in the C-Medium classification who requires assistance with all ADLs and IADLs, except for wood supply, and who has meals prepared for them as a shared benefit for seven out of twenty-one meals per week would receive 110 hours per month instead of 115 no matter how long the meals take to prepare. *Id.*<sup>6</sup>

DSHS enacted the shared benefit rule after two decisions from the Washington State Supreme Court invalidated previous DSHS rules. The Court invalidated the former “shared living rule” because the rule used irrebuttable presumptions—rather than individualized circumstances—to reduce a client’s monthly hours solely on the basis of the client’s living situation. *Jenkins v. Dep’t of Soc. And Health Serv.*, 160 Wn.2d 287, 298, 157 P.3d 388 (2007). In *Samantha A. v. Dep’t of Social and Health Servs.*, 171 Wn. 2d 623, 256 P.3d 1138 (2011), the Court similarly invalidated the former “children’s rule” because it reduced a client’s benefit on the basis of irrebuttable presumptions made because of a client’s status as a minor. Unlike the instant case, both *Jenkins* and *Samantha A.* turned on a federal Medicaid requirement that a state must offer comparable services to all

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<sup>6</sup> DSHS calculates shared benefits in the same manner as informal supports. WAC 388-106-0130(2)(b).

Medicaid clients. *Jenkins*, 160 Wn.2d at 298-300; *Samantha A.*, 171 Wn. 2d at 630-32.

The shared benefit rule was enacted to fix the deficiencies identified by the Court in these two decisions. *See* AR WSR 14-04-097 at 328, 479. In its concise explanatory statement, DSHS explained, “[e]ach client receives an individual determination during the assessment of the amount of shared benefit based on their individual circumstances.” *Id.* at 479. Thus, if a client and a provider living together do not share in the benefit of a task, then shared benefit is not assessed. DSHS first enacted the shared benefit rule as an emergency rule in 2011. AR WSR 12-14-064 at 468.

DSHS reduces client benefits due to shared benefits for two reasons. First, where a provider does their own shopping for groceries that will be shared, cleans up after themselves in a space that the client also lives in, or prepares a meal for themselves and shares it with their client, the client obtains an incidental benefit that has the consequence of reducing the client’s need for paid services. *See Jenkins*, 160 Wn.2d at 292. Similarly, an IP who performs tasks for multiple clients in a household will reduce one client’s needs when working for the other. Second, Medicaid dollars may not be used for the benefit of anyone but a Medicaid beneficiary—DSHS cannot pay an IP for tasks that primarily benefit the IP themselves. *See* 42 U.S.C. § 1396(d) (defining “medical assistance”).

DSHS proposed the shared benefit rule for permanent adoption in 2012 along with another rule change that eliminated add-on hours for off-site laundry and clients that live far away from essential services.<sup>7</sup> AR WSR 12-14-064 at 8-28. The vast majority of the comments DSHS received during the rulemaking had to do with the elimination of these add-on hours. *See id.* at 34-357. All of the comments by IPs quoted by SEIU, at pages 14-15 of their opening brief, related to these add-on hours.<sup>8</sup> DSHS ultimately did not make the elimination of add-on hours permanent. *Id.* at 370-75, 379; *see also* WAC 388-106-0130(3). DSHS also did not make the shared benefit rule permanent at the conclusion of the 2012 rulemaking. AR WSR 12-14-064 at 370-75. Instead, DSHS proposed the shared benefit rule for permanent adoption in 2013. AR WSR 14-04-097 at 33. It was made permanent in a rulemaking order issued on February 4, 2014, and it became effective as a permanent rule thirty-one days later. *Id.* at 328.

It was during the 2012 rulemaking (that did not result in a permanent rule) that SEIU submitted comments. AR WSR 12-14-064 at 40. SEIU first analogized the shared benefit rule to the shared living rule invalidated in

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<sup>7</sup> DSHS temporarily eliminated add-on hours in an emergency rule to reduce a budget shortfall necessitated by increased benefits DSHS provided to comply with the Supreme Court's decision in *Samantha A.* AR WSR 12-14-065 at 379.

<sup>8</sup> None of the comments from which the quotes were taken mention the shared benefit rule or informal support rule; four of the comments explicitly addressed the reduction of add-on hours; and one comment addressed more generally "cuts to caregivers." Appellant. Br. at 14-15; WSR 12-14-064 at 32-33, 46, 76, 93, 333.

*Jenkins. Id.* It wrote, “The Shared Benefit Rule, similarly violates Medicaid comparability by reducing benefits for those clients who live with their paid providers.” *Id.* It further commented that, under the version of WAC 388-71-0515 and the provider contracts then in effect, “the ‘shared benefit’ analysis incongruously requires home care workers to perform the same tasks contained in a client’s CARE plan but, upon implementation of the rule, without receiving payment for those tasks.” *Id.*

In the concise explanatory statement for the shared benefit rule, DSHS summarized SEIU’s comment this way:

One comment expressed concern regarding the shared benefit rule, and requested that the language regarding shared benefit be removed as it requires home care workers to perform tasks identified in a client’s CARE plan without receiving payment for those tasks. Commenters state that like the shared living rule, the shared benefit rule violates Medicaid comparability by reducing benefits for clients who live with their paid caregivers. The shared benefit analysis incongruously requires home care workers to perform the same tasks contained in a client’s CARE plan but, upon implementation of the rule, without receiving payment for those tasks.

AR WSR 14-04-097 at 479. DSHS responded to the comment by writing, “No change was made as a result of these comments. Determination of shared benefit is guided by rebuttable presumptions. Each client receives an individual determination during the assessment of the amount of shared benefit based on their individual circumstances.” *Id.* While not referenced

in DSHS's 2014 response, in late 2012 DSHS amended WAC 388-71-0515, cited by SEIU in its 2012 comment regarding the shared benefit rule, to provide that IPs must only work "within the number of hours authorized." WSR 13-02-023 (filed December 20, 2012, and effective January 20, 2013).

**C. The Proceedings Below**

SEIU filed a petition for judicial review under RCW 34.05.570(2) of the informal support and shared benefit rules on September 25, 2017. CP 15, 164-220.<sup>9</sup> After a hearing, the superior court ruled in favor of DSHS, holding that neither the informal support rule nor the shared benefit rule violated the FLSA or the Minimum Wage Act (MWA). CP at 435-40. The court held that the informal support rule "does not result in compelled volunteerism," did not discriminate against family or household member IPs, and that volunteer work that an IP does agree to provide under the rule "is not part of any employment relationship." RP 55-56 (3/15/19). The court held that the shared benefit rule does not require any IP to work uncompensated hours; "rather, the IP's [sic] are prohibited from working hours that would be uncompensated." RP 57:11-14 (3/15/19). The court

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<sup>9</sup> SEIU first filed a combined petition for judicial review of agency rules and complaint for damages and injunctive relief on September 25, 2017. CP 15. Subsequently, the superior court issued an order severing the APA and non-APA claims. CP at 161-63. SEIU's non-APA claims are pending before the Thurston County Superior Court. These include claims for monetary damages for violations of the MWA, the Wage Rebate Act, and the contractual duty of good faith and fair dealing. *See* CP 29-33.

further held that the rules were not arbitrary and capricious. RP 57:18-22 (3/15/19).

#### **IV. ARGUMENT**

The informal support and shared benefit rules do not violate wage and hour law. The informal support rule allows IPs with pre-existing household or family-member relationships with Medicaid clients to volunteer for their loved ones. This is consistent with both the FLSA and the MWA and is the only practical way to allow people with close personal relationships with their clients to be IPs at all. The shared benefit rule does not require, or create any expectation, that any IP will perform work without compensation. In fact, DSHS rules prohibit IPs from working more hours than those awarded pursuant to the CARE tool.

While the challenged rules are compliant with wage and hour law, the FLSA and the MWA do not apply in the way that SEIU argues. SEIU did not show that DSHS is the joint employer of every IP in the state as a matter of law. Without such a showing, and in the context of a facial rule challenge decided solely on the rulemaking files, SEIU failed to establish that the challenged rules could not be lawfully applied under the FLSA. The MWA, meanwhile, requires that DSHS compensate IPs at least minimum wage for services that the IPs' clients are eligible to receive, but it does not allow IPs to work and be compensated for hours outside of a client's service

plan. Because the informal support and shared benefit rules determine the benefit a client is eligible for, the rules do not conflict with the MWA.

Finally, DSHS adequately supported the challenged rules in the administrative records. The 2015 informal support rule appropriately relied on Medicaid laws and clarified DSHS rules to implement the long-standing policy that IPs could be sources of informal supports. The 2018 rulemaking readopted the informal support rule, and specifically considered guidance from the federal DOL. These two rulemakings are independently sufficient to uphold the informal support rule. The 2014 rulemaking in which DSHS adopted the shared benefit rule appropriately responded to all comments in the concise explanatory statement. And, in any event, SEIU is time-barred from challenging the adequacy of a 2014 concise explanatory statement in a challenge filed in 2017. RCW 34.05.375.

**A. Standard of Review**

A court may invalidate a rule only if the rule: 1) violates constitutional provisions; 2) exceeds the statutory authority of the agency; 3) was adopted without compliance with statutory rule-making procedures; or 4) is arbitrary and capricious. RCW 34.05.570(2)(c). The burden of establishing rule invalidity is on the petitioner. RCW 34.05.570(1); *Washington Public Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003). Whether agency rules are valid is a question of law

reviewed de novo. *Ass'n of Washington Spirits and Wine Distributors v. Liquor Control Bd.*, 182 Wn.2d 342, 350, 340 P.3d 849 (2015).

In a facial rule challenge, like this one, the petitioner can 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, 462 P.2d 988 (2017) (quoting *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004)).

**B. The Challenged Rules Comply with Wage and Hour Laws**

The in-home personal care services context is unique, and the informal support rule appropriately recognizes its uniqueness by allowing IPs to volunteer to perform personal care tasks (such as making dinner) for their loved ones. The shared benefit rule similarly complies with wage and hour laws. The rule reduces a client’s eligibility for benefits; it does not require that any IP work without pay. To the contrary, IPs are required not to work beyond the hours for which a client is eligible. Thus, the challenged rules do not violate the FLSA or the MWA.

**1. The informal support rule allows family and household member IPs to volunteer within the scope of the personal relationships they have with their clients, consistent with the FLSA and the MWA**

The informal support rule allows IPs who are either household members or family with their clients to choose to provide some personal care services without compensation. The rule is entirely voluntary – it

allows IPs to make up their own mind either way, and to change their mind at any time. In the unique context of in-home personal care services—where caregivers and clients often have much deeper personal connections than those found in other employment relationships—this is consistent with both the FLSA and the MWA. It is also in this unique context that, perhaps counter-intuitively, IPs do sometimes wish to volunteer to perform services that they could be paid for, for dignitary or other personal reasons.<sup>10</sup>

In most contexts, an employee may not volunteer for their employer to do the same sort of work for which the employment relationship exists. 29 C.F.R. § 553.101(d). But personal care services provided by family or household members is not most contexts. The federal DOL recognized this special relationship when it extended FLSA protections to IPs. When it first enacted rules eliminating exceptions from the FLSA for employees providing personal care services, it simultaneously published guidance in the federal register and in a “Fact Sheet” emphasizing that different considerations apply where the employee has a pre-existing household or family relationship with the client. 78 Fed. Reg. 60487-89; *see also* U.S.

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<sup>10</sup> For example, an IP may not wish to be paid by the state for providing care to their client while attending church, or a daughter who is now the IP for her aging mother where the two have always enjoyed a Sunday brunch together may not feel it is appropriate to be paid for preparing the brunch.

Department of Labor, Fact Sheet #79F (June 2014).<sup>11</sup> Where such a personal relationship exists alongside an employment relationship, and the services provided are personal care services, then an employee covered by the FLSA *can* volunteer. 78 Fed. Reg. 60488.

The DOL's guidance is highly persuasive both for purposes of construing the FLSA and for interpreting the MWA. Where a federal agency responsible for administering a statute issues guidance on that statute, the agency's interpretation is highly persuasive. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The Court should adopt the DOL's interpretation for the purposes of the MWA as well because the DOL came to its conclusion by applying the economic realities test, which both Washington and federal courts use to determine if an employment relationship exists. *See Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 871, 281 P.3d 289 (2012). Under the economic realities test, selecting a household or family member as a care provider does not transform all care provided by that family member into compensable work:

[I]n the context of direct care services under a Medicaid-funded or certain other publicly-funded home care program, the FLSA "economic realities" test does not require that the decision to select a family or household member as a paid

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<sup>11</sup> DSHS inserted this guidance document from the DOL into the rulemaking file for the 2018 informal support rule. AR WSR 18-16-004 at 24-28. For further citations to this guidance, this brief cites to the rulemaking file.

direct care worker means that all care provided by that person is compensable.

78 Fed. Reg. 60488. In addition, Washington courts applying the MWA look to federal interpretations of the FLSA for guidance. *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 524, 7 P.3d 807 (2000); *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 298, 996 P.2d 582 (2000). The DOL's guidance is thus highly persuasive both for FLSA and MWA purposes.

Because a household or family provider can volunteer under the FLSA and the MWA, the DOL advises that a reasonable plan of care can determine the boundaries of an employment relationship. 78 Fed. Reg. 60489. The client, or a social services agency who employs the provider, is only obligated to compensate the provider for services provided within the plan of care. *Id.* A "reasonable" plan of care is one that does not discriminate against household or family care providers by presuming that they will volunteer for the client. DOL Fact Sheet #79F, AR WSR 18-16-004 at 26.

For purposes of an FLSA analysis, "reasonable" does not mean whether the amount or type of services or paid hours to be provided are appropriate for the consumer. Instead, in this context, a determination of reasonableness will take into account whether the plan of care would have included the same number of paid hours if the care provider had not been a family or household member of the consumer.

*Id.*

The DOL was also clear that a family or household member provider's volunteer services can be considered in determining the client's benefit level. It did so in a series of examples published in the Fact Sheet #79F. *See* AR WSR 18-16-004 at 27-28. One, regarding a 23-year old man with developmental disabilities, is particularly on point. *See id.* at 27. At the assessment of this hypothetical client, the assessor determined that if he remained at home with his parents "he will need 40 hours of paid services each week in addition to the natural supports he receives from his parents." *Id.* Whereas, if he moved into his own apartment "his parents will still provide some natural supports, but he will need 55 hours of paid services." *Id.* The man decided to move out, and received 55 hours of paid services. *Id.* "As long as the 55-hour allotment remains in place regardless of whether the paid care provider is a family member (such as either or both of his parents) or any other individual . . . , the plan of care is 'reasonable' for FLSA purposes." *Id.* Here, the parents provided some natural supports,<sup>12</sup> which the program accounted for in determining the 55 hour per week figure. *Id.* And, so long as that 55-hour per week figure remains the man's benefit, the benefit is reasonable, even if one or both of his parents is his caregiver. *Id.* In sum, the FLSA and the MWA allow care providers with

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<sup>12</sup> "Natural supports" is a term used by the federal government that has approximately the same meaning as "informal support" as used in WAC 388-106-0010. *See* 42 C.F.R. § 441.725(b)(5).

household or family relationships with their clients to volunteer, and their volunteerism may reduce the benefit levels of their clients. *Id.* at 22-27, 39.

The informal support rule operates exactly this way. It does not presume that any IP will perform services without compensation. *See id.* at 30. DSHS instructs its case managers to have a conversation with each family or household 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.” *Id.* A client’s service plan is developed based on whether and how much an informal support is available (and willing) to provide unpaid care. And, if the IP (or any other source of informal support) ever wants to stop providing informal supports, DSHS will reassess the client to recalculate their benefit without those informal supports included. WAC 388-106-0050(2)(c), 0140(1).

The informal support rule also does not discriminate against family or household member IPs. It is true that only household or family member IPs are allowed to volunteer to provide informal supports—but that is just a consequence of the DOL’s guidance that limits the ability to volunteer to care providers with those relationships. *See* 78 Fed. Reg. 60489. Under DSHS’s rule, if a family member or household member of the client wants to provide informal supports, the client will receive the same number of hours no matter whom the client chooses as their IP. For example, take the

client described above in the C-Medium classification group, and assume that the client's sibling provides the client's informal supports. *See supra* at 9-10. That client would receive 110 hours per month no matter who the client's IP is—whether it is the client's sibling or anybody else. SEIU's preferred policy would actually discriminate against non-household and non-family member IPs. If SEIU's theory were adopted, then the above client would receive 115 hours if the sibling were the client's IP, but 110 if anyone else were. That is not required by the FLSA or the MWA.

The informal support rule is also the only manageable way to extend wage and hour protections to in-home personal care services providers. As the DOL acknowledges, the home care context is unique. 78 Fed. Reg. 60488. It is not unusual in home care for a parent to care for their adult child with developmental disabilities. *See* AR WSR 18-16-004 at 27. Home care work involves highly intimate and domestic tasks, such as helping a person get dressed, bathe, make dinner, or use a toilet. *See* WAC 388-106-0010 (defining “activities of daily living” and “instrumental activities of daily living”). It is not practical for a social services agency to forbid a parent from performing these tasks for their child, like employers typically forbid their employees from volunteering. If typical employer-employee norms extend into this context, social services agencies would  
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simply have to bar household or family members from being direct care workers at all.

Where a household or family member wants to volunteer for a loved one who is also a beneficiary of in-home personal care, the guiding principle is the voluntariness of the unpaid work. AR WSR 18-16-004 at 26, 39. So long as work is not coerced, allowing volunteer work on the part of a household or family member provider is not a violation. *Id.* The informal support rule allows the client and the provider to define for themselves the extent of their relationship that is outside of any employment relationship. As the DOL explains, the analysis “is warranted because of the special relationships between family and household members and the special environment of the home.” 78 Fed. Reg. 60489. It is only respectful to allow those families or those households to tell the social services agency what their relationship is. A parent who has always gone shopping for their developmentally disabled child, where the child is now a Medicaid client and entitled to personal care, may not feel that it is appropriate to be paid for that activity. But, that same parent may wish to be paid for the more intensive direct-care duties, such as transfers, toileting, and bathing assistance. A different family might feel exactly the opposite. The informal support rule allows families and household members to make those choices. Allowing this choice is consistent with the FLSA and the MWA.

**2. The shared benefit rule reduces client benefits; it does not require any IP to work without compensation**

The shared benefit rule reduces client benefits. It does not require, or create any expectation, that an IP will work without pay. In fact, DSHS rules prohibit IPs from working beyond the hours for which a client is eligible. Because SEIU cannot show that the shared benefit rule requires an IP to work without pay, its challenge to the shared benefit rule fails.

The FLSA and the MWA require employers to pay their employees at least minimum wage for every hour worked. 29 U.S.C. § 206; RCW 49.46.020. SEIU alleges that the shared benefit rule facially conflicts with these laws. Appellant Br. at 30-33. In order to succeed in its challenge, SEIU must show that as a matter of law the shared benefit rule requires IPs to work without pay. *See Haines-Marchel*, 1 Wn.App.2d at 737; *see also Reno v. Flores*, 507 U.S. 292, 300-01, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993). SEIU cannot meet this burden.

“An individual provider must . . . [p]rovide the services as outlined on the client’s plan of care . . . according to the client’s direction, supervision, and prioritization of tasks *within the number of hours authorized.*” WAC 388-71-0515(3) (emphasis added). Clients determine the number of hours their IPs work for them and also the tasks that those IPs perform. *See* WAC 388-106-0130(6), WAC 388-106-1300; *see also*

RCW 74.39A.270(6)(b). For example, a client with a benefit of 100 hours and two providers determines how many hours each provider can work out of the client's benefit, or whether the client will use hours for other benefits, such as home-delivered meals. RCW 74.39A.270(6)(b). The shared benefit rule reduces the number of hours that a client can assign to a provider or use for other authorized benefits, and it reduces the number of hours that the client's providers can work in total, but it does not require that any IP work without pay. On the contrary, if a given hour of personal care services would exceed what the client has authorized the IP to perform out of the client's benefit, then the rules forbid the IP from working it. WAC 388-71-0515(3).

SEIU erroneously argues that the rule requires IPs to work without pay because a client's benefit is reduced proportionally to how often personal care services are provided as shared benefits. Appellant Br. at 32. But nothing about the reduction in the client's benefit level causes an IP to work without compensation. Under the shared benefit rule, DSHS compensates IPs for every hour of personal care services they perform—whether those personal care services are performed as shared benefits or not. The client simply has fewer hours per month to assign to their providers. *See* WAC 388-106-0130(2). SEIU is also incorrect that DSHS determines that clients “need” the base hours per month applicable to their classification group. Rather, the benefit clients receive represents the

client's share of the budget appropriation for personal care. RCW 74.09.520(3). The hours are not tied to the amount of time it takes a provider to perform the client's ADLs or IADLs. WAC 388-106-0080 – 0145. It is therefore not true, as SEIU asserts, that IPs are presumed to provide the base hours applicable to a client's classification group even where the client's benefit is reduced for shared benefits. Appellant Br. at 15.

Neither is DSHS forbidden by the FLSA or the MWA to reduce a client's benefit on the basis of incidental benefits the client receives from an IP's performance of tasks primarily for the IP's benefit. "Work" means activity "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, No. 409, 321 U.S. 590, 598, 64 S. Ct. 698, 88 L. Ed. 949 (1944); *see also Anderson v. Dep't of Soc. and Health Servs.*, 115 Wn. App. 452, 456, 63 P.3d 134 (2003) (holding that employees are only entitled to compensation for time they are "on duty") (quoting WAC 296-126-002). Where an employee engages in activity primarily for the employee's own benefit and at the employee's own direction, the fact that the employer obtains an incidental benefit does not transform the activity into compensable work. *Local 1605 Amalgamated Transit Union, AFL-CIO v. Central Contra Costa County Transit Authority*,

73 F. Supp. 2d. 1117, 1124 (N.D. Cal. 1999); *Leone v. Mobil Oil Corp.*, 523 F.2d 1153, 1163 (D.C. Cir. 1975). Here, when an IP cleans the IP's own house or buys the IP's own groceries, and that happens to benefit the IP's client as well, that does not constitute compensable work under either the FLSA or the MWA, despite reducing the client's need for these tasks to be performed. Where the client directs the IP to perform these tasks, DSHS pays for every hour the IP spends working. The shared benefit rule simply acknowledges the efficiencies gained under these circumstances.<sup>13</sup>

SEIU argues that this explanation of the shared benefit rule is a *post hoc* rationalization created for litigation purposes, and that DSHS is estopped from raising it because it was not present in DSHS's concise explanatory statement for the rule. Appellant Br. at 28-30. SEIU cites no authority for the idea that an agency concedes a possible interpretation of its rules by failing to raise it in a concise explanatory statement. *Id.* at 28. Such a notion would also be contrary to precedent. The rule-making file "is not necessarily the exclusive basis for agency action on the rule." *Washington Indep. Tel. Ass'n v. Washington Utils. and Transp. Com'n*, 148 Wn.2d 887, 906, 64 P.3d 606 (2003). For this reason, "the reviewing

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<sup>13</sup> Consider, for example, a client who does not have an IP who shares in the benefit of IADL tasks. Such a client who wanted a glass of milk would have to direct their IP specifically to, e.g., buy a gallon of milk, whereas an IP in a household that shares groceries may have purchased the milk already and need only pour the client a glass.

court must consider the relevant portions of the rule-making file *and the agency's explanations for adopting the rule as part of its review.*" *Id.* (emphasis added). An agency is not limited to the four corners of the rulemaking file to explain the effects of a challenged rule, especially where, as here, the explanation relies on the plain meaning of the regulatory scheme.

Far from being a post-hoc rationalization, that the shared benefit rule does not require any IP to work without compensation is just a straightforward application of the rule.<sup>14</sup> Clients get benefits. WAC 388-106-0135. Clients assign, out of their benefits, hours to their providers. RCW 74.39A.270(6)(b). Providers are required to work no more than the hours they receive from their clients. WAC 388-71-0515(3). So a reduction in a client's benefit does not mean that the provider works, but is not paid. A reduction in client benefits may mean that one or more of the clients' providers *work less*, depending on how the client decides to allocate their benefit. It may likewise mean that the client decides not to use benefits for home-delivered meals or the other benefits authorized by WAC 388-106-

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<sup>14</sup> *Rekhter v. Department of Social and Health Services*, 180 Wn.2d 102, 323 P.3d 1036 (2014), relied on by SEIU, is distinguishable from this case in many respects. *Rekhter* upheld a jury verdict that DSHS violated the duty of good faith and fair dealing imposed by contracts that it had with IPs by applying the shared living rule, which is no longer in effect. *Id.* Where *Rekhter* was a class action asserting a contract claim decided after a trial, this is a facial challenge to agency rules. And where *Rekhter* addressed as a matter of fact whether IPs were asked to perform tasks without pay, here SEIU claims the rules do so as a matter of law. These cases are not comparable, much less analogous.

0130(6). The shared benefit rule does not require any IP to work without compensation and it therefore complies with the FLSA and MWA.

**3. The shared benefit rule is not discriminatory**

The shared benefit rule does not require or assume that any IP works without compensation. Therefore, the Court need not consider whether it discriminates against family or household IPs to determine that the rule complies with the FLSA. If a social services agency discriminates against a family or household care provider in the creation of the plan of care for the client, then that renders the plan of care “unreasonable,” and the social services agency may no longer rely on that plan of care to define the employment relationship between the agency and the care provider. 78 Fed. Reg. 60489. But this rule only applies where the employment relationship must be defined to distinguish between services provided as an IP and services provided as a volunteer, like the scenario addressed by the informal support rule. Under that circumstance, if a plan of care were unreasonable, the social services agency must compensate the provider for personal care services that would have been authorized had there not been discrimination. *Id.* There is no need to define an employment relationship in this way where the IP is not expected to work unpaid. Here, because the shared benefit rule does not require or expect any IP to work without pay, DSHS does not depend on the shared benefit rule to limit any employment

relationship that may exist between DSHS and IPs. DSHS simply pays IPs for every hour they work; because no IP goes unpaid for services performed because of the shared benefit rule, the rule cannot violate the FLSA or the MWA.

In any event, the shared benefit rule does not discriminate against family or household members. Application of the shared benefit rule hinges on whether shared benefits exist, not on the household or family member relationship between IPs and clients. The clearest example of this relates to multi-client households where more than one client shares in the benefit of a task. *See* WAC 388-106-0010 (defining “shared benefit”). Here, it is irrelevant what the relationship is between the provider and the clients.

Even where the provider shares in the benefit of the task, the household or family member relationship of the IP to the client is irrelevant to whether a shared benefit exists. *See id.* A provider might prepare lunch for both the provider and the client even if no household or family member relationship exists. This would result in a shared benefit. *Id.* Where a household or family member relationship does exist, it might be the case that the provider never shares in the benefit of the meals the provider prepares for the client, perhaps because the client has a special diet prescribed by a physician. Even regarding ordinary housework—which will usually result in a shared benefit if the provider and the client live

together—it could be the case that the client is bed-bound, only uses one or two rooms, and the client receives the entirety of any benefit of cleaning those rooms. In that case, there would be no shared benefit. The shared benefit rule does not deny any provider compensation for any hour of work—but the shared benefit rule also does not discriminate. The trigger for application of the shared benefit rule is shared benefits, not household or family member status of the provider.

**C. SEIU Has Not Met its Burden to Prove That DSHS is in an Employment Relationship With Every IP as a Matter of Law**

SEIU’s claim that the informal support and shared benefit rules violate the FLSA depends on showing that DSHS is a joint employer of every IP in the state as a matter of law. But SEIU has not met this burden because DSHS does not have the kind of control over IPs that employers have over their employees. Moreover, in the context of this facial challenge to administrative rules, the record does not exist for the Court to find that DSHS is an employer of IPs under the FLSA.

The obligations of the FLSA apply only to employers, as the act defines that term. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728, 67 S. Ct. 1473 (1947). Whether an entity is an employer is determined by the economic realities test, which depends on a number of fact-intensive inquires. They include: “whether the alleged employer (1) had the power to

hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.” *Bonnette v. Cal. Health and Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).

A putative employee may have more than one employer—in which case a “joint-employment” relationship exists. *See Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 134-35 (4th Cir. 2017). “The ultimate determination of joint employment must be based upon the ‘circumstances of the whole activity.’” *Schultz v. Capital Intern Sec., Inc.*, 466 F.3d 298, 306 (2006) (quoting *Bonnette*, 704 F.2d at 1470). The question depends upon “all the facts in the particular case.” 29 C.F.R. § 791.2(a).

In this case, the client is the IP’s employer. *See* RCW 74.39A.270(6)(b). In order for the FLSA’s obligations to extend to DSHS, DSHS would have to be in a joint-employment relationship with the client and the IP. 29 C.F.R. § 791.2(a). This is also a facial challenge to administrative rules decided on the rulemaking file. The Court has access to the rulemaking file and any materials of which the Court may take judicial notice, but the parties did not submit documentary or testimonial evidence below. *See generally* CP; *see also* RCW 34.05.562. For example, the contracts between IPs and DSHS are not included in the record. In this context, SEIU’s facial challenge to the rules on FLSA grounds depends on

showing that every IP in Washington is in an employment relationship with DSHS as a matter of law. *See Haines-Marchel* 1 Wn.App.2d at 736-37. This is SEIU's burden to prove. RCW 34.05.570(1)(a). And whether DSHS is a co-employer is not a foregone conclusion.

It is the client, not DSHS, who determines the essential conditions of the IP's employment, and who may supervise, hire, and fire their IPs. RCW 74.39A.270(6)(b). In many ways, DSHS has the same relationship to IPs as it has to other Medicaid contractors. *See, e.g.,* WAC 388-71-0516. That is, DSHS distributes a public benefit to a client of the program, the client chooses the provider they want, and tells the provider what services they want. DSHS's role includes paying the contractor for those services and determining qualifications and authorized services for providers. Setting a reimbursement rate for the provision of Medicaid services is a core function of a Medicaid agency. 42 C.F.R. § 447.201(b). If merely deciding how much IPs are to be paid, and how, makes DSHS an employer of IPs under the FLSA, then every doctor with a Medicaid contract is likewise an employee of the state of Washington. *See* WAC 182-502-0100 (specifying conditions for payment for services under Washington's Medicaid plan).

The lack of factual support in the administrative record distinguishes this case from authority relied on by SEIU. For example, in *Bonnette*, the Ninth Circuit determined that California was an employer of in-home

personal care services workers. *Bonnette*, 704 F.2d at 1470. But this conclusion was made after a trial, which developed facts about the relationship between California and the workers, including that California’s social workers “had periodic and significant involvement in supervising the [] worker’s job performance,” and that California occasionally hired and fired the workers. *Id.* at 1468, 1470 (quotation marks omitted). To the contrary here, no evidence is in the record about the degree to which DSHS supervises IPs and whether DSHS hires or fires IPs, and statute expressly allows clients to do so. *See generally* AR; RCW 74.39A.270(6)(b) (client may select, hire, terminate, and supervise the work of IPs). SEIU cannot make the showing that it needs to in this facial rule challenge.

In lieu of relying on the kind of evidence that justified the *Bonnette* holding, SEIU seeks to hold DSHS to certain statements it made in documents included in the rulemaking file for the informal support rule on a theory of judicial estoppel. *See* Appellant Br. at 43-44. But there is no authority for the proposition that an agency is estopped by statements placed into a rulemaking file. The animating force behind judicial estoppel—that litigants respect judicial proceedings—does not compel the extension of the doctrine into agency rulemaking files either. *See Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (discussing underpinnings of judicial estoppel). More importantly, DSHS never conceded that it was the

joint employer of every IP in the state. *See* AR WSR 18-16-004 at 29-34. DSHS concedes that IPs are covered by the FLSA, and that DSHS has voluntarily decided to comply with the FLSA as if IPs were its employees (at least in some respects), but DSHS has not conceded that it is an employer of IPs for FLSA purposes.

SEIU cannot show that DSHS is an employer, as a matter of law, of every IP in the state and so cannot show that the challenged rules are facially invalid under the FLSA.

**D. The MWA Does Not Require that DSHS Compensate an IP for Personal Care Services in Excess of Their Client's Benefit**

As shown above, the informal support rule and shared benefit rule are entirely consistent with the FLSA and MWA. In addition, Washington statutes that limit application of the MWA in this circumstance provide even greater support that the rules do not violate the MWA. RCW 49.46.800 obligates DSHS to pay IPs minimum wage, overtime, and paid sick leave in accordance with the MWA, but that statute says nothing about how DSHS determines a client's Medicaid benefit. Nor does it require DSHS to pay for personal care services in excess of the client's benefit. This limited application of the MWA should be read in conjunction with statutes and rules authorizing DSHS to determine a client's benefit, requiring that DSHS  
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maximize federal financial participation, and requiring that clients do not exceed their benefit when hiring IPs.

RCW 49.46.800(2) reads: “The state shall pay individual providers, as defined in RCW 74.39A.240, in accordance with the minimum wage, overtime, and paid sick leave requirements of this chapter.” Nothing about this statute requires DSHS to pay IPs under circumstances that DSHS was not already obligated to pay them. It only mandates that DSHS compensate IPs according to certain terms—that is with a minimum wage, overtime pay, and paid sick leave. *Id.*

Read as SEIU reads it, the statute would require that DSHS pay an IP to provide personal care services that their client was not eligible for. Appellant Br. at 48. But that reading ignores related statutes that give DSHS the authority to define the personal care services benefit clients are eligible for and also that mandate DSHS maximize federal financial participation in the Medicaid program. When construing a statute, the Court examines all related statutes to discern legislative intent. *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002).

Here, the Legislature has granted DSHS the authority to determine how many hours of personal care services clients get as a benefit. RCW 74.09.520(3); RCW 74.39A.510(1)(b). It is DSHS’s “[c]ore responsibility to manage long-term in-home care services . . . including

determination of the level of care that each consumer is eligible to receive.” RCW 74.39A.510(1)(b). In spite of this, SEIU would interpret RCW 49.46.800 to require that DSHS pay an IP for any personal care services the IP provides regardless of the client’s benefit level. *See* Appellant Br. at 46-48. Under SEIU’s interpretation, a client assessed as “A-low” and eligible for 22 hours per month of care (WAC 388-106-0125) who instructs their IP to provide 100 hours in a month would see the state pay their IP for those 100 hours. But this would fly in the face of the legislative direction to provide for personal care services in accordance with assessed functional disability. RCW 74.09.520(3). Nothing in RCW 49.46.800 requires this result.

SEIU’s interpretation would also contradict the Legislature’s intent—as evidenced throughout chapters 74.09 and 74.39A RCW—to maximize federal financial participation in the Medicaid programs. *See* RCW 74.09.340, .470, .500, .510, .520, .522, .5222, .523, .530, .565, .575, .585, .595, .756, .800; *see also* RCW 74.39A.030, .180, .300, .326. Obviously, the federal government will not share in the cost of providing any services that the client was not eligible to receive under the state’s Medicaid plan. *See, e.g.*, 42 C.F.R. §§ 441.535 – 540. For the hypothetical A-low client above, who nonetheless received 100 hours of care, 22 of their hours would be paid approximately 50/50 by the state and federal

governments, but the balance of 78 hours would have to come from state funds only, because the client was not eligible to receive those hours. *See id.* Again, SEIU’s interpretation of RCW 49.46.800 unnecessarily places it in conflict with related statutes that the Court should harmonize instead. RCW 49.46.800 does not require DSHS to pay for services outside a client’s benefit—it requires DSHS to compensate an IP for the provision of personal care that a client is eligible for according to certain terms.

SEIU argues that the entirety of the MWA, including case law and guidance interpreting the phrase “hours worked,” applies to the DSHS-IP relationship in virtue of RCW 49.46.800. But RCW 49.46.800 explicitly does not apply the entirety of the MWA to this relationship. It could have done so very easily by, for example, making IPs “employees” of DSHS for the purposes of the act. *Compare* I-1433, § 6 *with* Laws of 1989, ch. 1, § 1(5)(a) (amending RCW 49.46.010 to include certain agricultural workers via initiative). But RCW 49.46.800 does not change the fundamental nature of the DSHS-IP relationship under state law, which is that IPs are employees of the state “solely for the purposes of collective bargaining.” RCW 74.39A.270(3); *see also* *Rekhter*, 180 Wn.2d at 123-24. Instead, RCW 49.46.800 only requires that DSHS pay IPs at least minimum wage and overtime for authorized hours, and provide paid sick leave. DSHS can do this (and does do this) without paying for personal care services clients

are not eligible to receive. Because RCW 49.46.800 does not require that DSHS pay an IP for hours provided in excess of the client's eligibility, it works in harmony with the informal support and shared benefit rules, which determine client eligibility. The rules are valid under the MWA.

**E. The Challenged Rules Are Consistent with Federal and State Law and Based on an Adequate Administrative Record**

Neither the informal support rule nor the shared benefit rule are arbitrary and capricious. Rules are only arbitrary and capricious if they are “willful and unreasoning and taken without regard to the attending facts and circumstances.” *Washington Indep. Tel. Ass’n*, 148 Wn.2d at 905. It is SEIU’s burden to prove that the challenged rules are arbitrary and capricious. RCW 34.05.570(1)(a). Here, SEIU’s challenges to the adequacy of the concise explanatory statements fail.

**1. The 2015 informal support rulemaking was adequately supported by the administrative record, and the current rule is adequately supported by the 2018 record**

The informal support rule is not arbitrary and capricious. First, the administrative record adequately supported the 2015 rulemaking. DSHS appropriately clarified its rules to correct administrative decisions that DSHS disagreed with. DSHS reasonably interpreted Medicaid regulations to require that natural supports—even where those natural supports come from a person who is also an IP—must be included in a client’s plan of care. Second, SEIU only attacks DSHS’s failure to adequately consider IP

volunteerism during the 2015 rulemaking. Appellant Br. at 35-38. But the 2018 rulemaking considered this exact question, and substantially revised the definition of informal support on the basis of those considerations. Even if the 2015 rulemaking was arbitrary and capricious—which it was not—the 2018 rulemaking cures any defect.

DSHS enacted the 2015 informal support rule to correct adverse decisions by the Health Care Authority Board of Appeals that DSHS disagreed with at the time they were made. *See* AR WSR 15-20-054 at 195-96. The rule reestablished a “longstanding” interpretation that IPs could act as sources of informal support, and contrary to SEIU’s claim, there was “no change in policy” requiring special explanation. *Id.* *See* Appellant Br. at 38 n.23. DSHS cited controlling federal authority that requires a client’s plan of care to reflect natural supports available to the client. *See id.*; *see also* 42 C.F.R. § 441.540(b)(6). DSHS fully explained its reasons in the concise explanatory statement, and the rule is not arbitrary and capricious.

SEIU erroneously challenges the 2015 rulemaking by misconstruing a federal regulation and guidance from CMS. Appellant Br. at 35-38. But both the federal rule and CMS guidance support DSHS’s rulemaking. Federal regulations require that a client’s service plan “reflect the services and supports (paid and unpaid) that will assist the individual to achieve identified goals, and the providers of those services and supports,

including natural supports.” 42 C.F.R. § 441.540(b)(5). “Natural supports cannot supplant needed paid services *unless* the natural supports are unpaid supports that are provided voluntarily to the individual in lieu of an attendant.” *Id.* (emphasis added).

But this does not mean that the same individual cannot be both a paid and an unpaid support, as SEIU asserts. Appellant Br. at 36. According to the very same guidance SEIU relies on, 42 C.F.R. § 441.540(b)(6) “does not require that caregivers need to be paid beyond the paid hours authorized in the plan,” showing that paid caregivers can provide additional services for which they do not need to be paid. *See CMS, Community Choice State Plan Option, SDM #16-011 (Dec. 30, 2016) (CMS Guidance) at 5.*<sup>15</sup> In other words, and as recognized by the DOL, one person can act both as a paid caregiver and as a natural support. *See AR WSR 18-16-004 at 25-27.* Rather “this language is to set forth the requirement that informal caregivers, family members and friends cannot be *required* to provide unpaid supports as a condition for an individual receiving CFC services.” CMS Guidance at 5 (emphasis added). DSHS clearly explained in its 2015 concise explanatory statement that “[t]he rule change will not in any way force caregivers to provide unpaid care.” AR WSR 15-20-054 at 196. DSHS

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<sup>15</sup> Available at <https://www.medicaid.gov/federal-policy-guidance/downloads/smd16011.pdf> (last accessed October 10, 2019).

explained that it trains its assessors to have a conversation with the client and with potential sources of informal support to ascertain whether the client and the informal providers were willing to continue to provide informal supports. *Id.* at 195. If not, then the assessor “will not attribute any informal support to the provider.” *Id.* at 196. If, after an assessment is completed, a source of informal support decides that they no longer want to provide informal supports, DSHS will recalculate the benefit without those informal supports. WAC 388-106-0050(2)(c). DSHS follows the regulation and the CMS guidance to the letter, and nothing about the 2015 rulemaking was arbitrary and capricious.<sup>16</sup>

Regardless of SEIU’s challenges to the 2015 rulemaking, the 2018 rulemaking regarding informal supports cures any alleged defects. SEIU contends that the 2015 rulemaking was arbitrary and capricious because DSHS did not adequately consider whether the informal support rule unjustifiably allows IPs to volunteer for their clients. *See* Appellant Br. at 35-38. But the 2018 rulemaking was undertaken to consider exactly that issue. *See* AR WSR 18-16-004 at 22-41, 68. DSHS considered selections

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<sup>16</sup> Even though SEIU relies on Medicaid regulations and the CMS guidance to argue that the 2015 informal support rule is arbitrary and capricious, SEIU does not argue that the informal support rule is invalid because it conflicts with Medicaid law. *See generally* Appellant Br. To the extent SEIU does attempt to raise such an argument, this appeal would be the first time. *See* CP at 164-79, 298-327. The court generally does not consider issues raised for the first time on appeal. RAP 2.5(a). Also, SEIU would not have standing to challenge DSHS rules on the basis of Medicaid regulations, whose protections inure to the benefit of Medicaid clients, not providers. RCW 34.05.530.

from the federal register regarding FLSA regulations, guidance issued by the DOL, and had conversations with DOL personnel regarding the DOL rules. *Id.* It received no comments—written or oral—to which it had to respond. *Id.* at 68. And DSHS substantially changed the definition of informal support after its considerations to mirror guidance from the DOL. *See* AR WSR 18-16-004 at 62. As discussed above, the informal support rule is compliant with the FLSA in that it allows IPs with close personal relationships to volunteer for their clients. *See supra* section IV.B.1. Even if DSHS did not adequately consider IP volunteerism during the 2015 rulemaking, DSHS did so in 2018. The informal support rule before the court, the one now codified in WAC 388-106-0010, was unquestionably the product of an adequately deliberative process. SEIU does not allege that any aspect of the 2018 rulemaking was arbitrary and capricious. *See generally* Appellant Br. SEIU’s arbitrary and capriciousness challenge to the informal support rule fails.

**2. The rulemaking file for the shared benefit rule is adequate and SEIU is time barred from challenging the concise explanatory statement**

The shared benefit rule was enacted in 2014 in order to provide for individualized determinations of shared benefit, instead of irrebuttable presumptions, as required by the Washington State Supreme Court. AR WSR 14-04-097 at 328, 479; *see also Jenkins*, 160 Wn.2d at 300.

Enacting the rule on that basis was not arbitrary and capricious. The rule was also not arbitrary and capricious because DSHS adequately responded to SEIU's comment made during rulemaking and, in any event, SEIU's procedural challenge to the adequacy of the concise explanatory statement is untimely.

A rule can be arbitrary and capricious if an agency ignores facts or data contained in comments to a proposed rulemaking that show the agency will not achieve its stated goals (or goals mandated by legislation) by adopting the proposed rule. *See Center for Environmental Law & Policy v. Dep't of Ecology*, \_\_\_ Wn. App. \_\_\_, 444 P.3d 622, 634 (June 26, 2019); *see also Puget Sound Harvesters Ass'n v. Dep't of Fish and Wildlife*, 157 Wn. App. 935, 949-50, 239 P.3d 1140 (2010).

Here, SEIU mounts no such challenge to the shared benefit rule. SEIU's comment, made during the 2012 rulemaking, made legal and policy objections—not factual objections—to the shared benefit rule. It claimed that the shared benefit rule was similar to the shared living rule in that it would violate Medicaid comparability law. AR WSR 12-14-064 at 40. It further claimed that the shared benefit rule would require IPs to work without pay, citing to a former version of WAC 388-71-0515. *See id.* DSHS accurately summarized SEIU's comment in its concise explanatory statement of the shared benefit rule, and explained that the shared benefit

rule, unlike the shared living rule, had no irrebuttable presumptions. AR WSR 14-04-097 at 479. Meanwhile, in late 2012, DSHS amended WAC 388-71-0515 to specifically provide that IPs must only work “within the number of hours authorized.” *See* WSR 13-02-023 (filed December 20, 2012 and effective January 20, 2013). While DSHS did not reference the amendment to WAC 388-71-0515 in the concise explanatory statement of the shared benefit rule (enacted in 2014), that does not render the rule arbitrary and capricious because it does not show that the rule itself was unreasoning or enacted without due regard of all attending facts and circumstances. *See Washington Indep. Tel. Ass’n*, 148 Wn.2d at 906. In sum, an agency is not required to agree with comments critical of a proposed rule, and DSHS correctly considered and responded to SEIU’s comment.

To the extent SEIU relies on a procedural defect in DSHS’s rulemaking (i.e., the alleged failure of DSHS to respond to its comment), SEIU’s arbitrary and capriciousness challenge to the shared benefit rule is also untimely. SEIU complains that DSHS failed to respond adequately to its comment in the concise explanatory statement. Appellant Br. at 28-29. But a litigant may challenge a rule for failure to complete a concise explanatory statement only up to two years following the effective date of the rule. RCW 34.05.375. The shared benefit rule became effective on March 7, 2014. AR WSR 14-04-097 at 328. SEIU filed its lawsuit on

September 25, 2017—more than a year too late. CP 1. Even if DSHS's response to SEIU's comment was inadequate (which it was not), SEIU did not file its challenge in time to invalidate a rule based on an inadequate concise explanatory statement.

## V. CONCLUSION

DSHS properly enacted both of the challenged rules. The informal support rule allows IPs with close personal relationships with their clients to choose whether to provide volunteer services. In the unique context of in-home personal care services, this is compliant with state and federal wage and hour law. The shared benefit rule allows for a reduction in total client benefits, but it never requires any IP to work without pay. The rules are not arbitrary and capricious. The Court should affirm the superior court and uphold the challenged rules.

RESPECTFULLY SUBMITTED this 4 day of December, 2019.

ROBERT W. FERGUSON  
Attorney General



WILLIAM MCGINTY, WSBA #41868

Assistant Attorney General

PETER B. GONICK, WSBA # 25616

Deputy Solicitor General

7141 Cleanwater Drive SW

PO BOX 40124

Olympia, WA 98504-0124

(360) 586-6537

OID# 91021

**CERTIFICATE OF SERVICE**

I certify that on the date indicated below, I served a true and correct copy of the foregoing document on all parties or their counsel of record via E-service through the Court's E-file Portal to:

Jennifer Robbins, Darin Dalmat  
& Sarah Derry  
Schwerin Campbell Barnard Iglitzin  
& Lavitt  
18 W. Mercer Street, Suite 400  
Seattle, WA 98119-3971

Katherin Jensen  
Northwest Justice Project  
132 West 1<sup>st</sup> Lane Ave  
Colville, WA 99114-2329

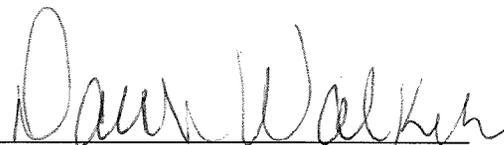
Sujatha Jagadeesh Branch  
Northwest Justice Project  
401 2<sup>nd</sup> Ave South, Suite 407  
Seattle, WA 98104-3811

Jonathan Jeung-Meng Fork  
Northwest Justice Project  
711 Capitol Way South, Suite 704  
Olympia, WA 98501-1237

Susan Kas  
Disability Rights Washington  
315 5<sup>th</sup> Ave S, Suite 850  
Seattle, WA 98104

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

EXECUTED this 4<sup>th</sup> day of December, 2019 at Olympia, WA.

  
Dawn Walker, Legal Assistant



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

**December 04, 2019 - 2:14 PM**

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**Appellate Court Case Title:** SEIU 775 v. State of Washington, et al.  
**Superior Court Case Number:** 17-2-05201-6

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**Filing on Behalf of:** William McGinty - Email: williamm1@atg.wa.gov (Alternate Email: )

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P.O. Box 40124

Olympia, WA, 98504-0124

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