# Developmental Disabilities Administration
## 040 - M2 - DD - INFORMAL SUPPORTS

**Agency Submittal: 11-2017-19-YR Agency Req** **Budget Period: 2017-19**

## SUMMARY

The state must comply with the federal Fair Labor Standards Act (FLSA) by paying for personal care hours provided by non-family Individual Providers (IPs). These hours were previously considered voluntary, unpaid "informal support" hours and not counted in the total hours authorized for payment. The Developmental Disabilities Administration (DDA) requests $838,000 Total Funds ($369,000 GF-State) to pay the hours previously considered informal supports to comply with federal law and avoid the potential financial penalty of triple damages levied for non-compliance.

## PROBLEM STATEMENT

FLSA requires the payment of any hours worked by a contracted provider,. which includes hours that were considered informal support hours that were worked by IPs. Informal supports are situations where the IP indicates during the client's needs assessment that they are willing to provide incidental services that they generally would have been doing anyway without charge. Under FLSA, this situation may continue for family member providers, which account for approximately 70 percent of IPs. However, the federal Department of Labor (DOL) has made it clear that this is not acceptable for non-family member providers; the hours must be paid as with any other personal care hours worked. The consequence of non-compliance is not only to pay back wages for hours estimated that should have been paid, but triple the amount due as a penalty as well. DSHS has also lost decisions at the Board of Appeals level in several cases involving a reduced assessment of need for personal care hours based on the assumption of informal supports (see "Sweeney" attachment).

When this issue became known just prior to the 2016 Legislative session, the initial cost estimate was much higher for two reasons. First, the initial data query run at DSHS was too broad, capturing more hours than were necessary. Second, DSHS had not yet received the clarification from DOL that family member providers were excluded. As a result, the Governor's proposed budget included a request for $43.7 million for the 2015-17 Biennium (including both the Aging and Long-Term Support Administration (ALTSA) and DDA), which the Legislature chose not to fund.

## PROPOSED SOLUTION

The total funding requested for DSHS, including both ALTSA and DDA is $2,856,000 ($1,257,000 GF-State) in order to avoid the legal and financial penalties for being out of compliance with FLSA. Compared to previous estimates, parameters have been clarified and the estimated number of hours converted from informal supports provided by non-family members has been more precisely identified by individual case file reviews done by case managers. Therefore, the funds requested to comply with FLSA are significantly less than the prior estimate.

**Informal Supports Review Results**

**040 - M2 - DD - Informal Supports**

| | | | |
|---|---|---|---|
| | | 4,513 | Hours per Month Difference |
| | $ | 18.63 | Fully Loaded Rate |
| | $ | 84,077 | Monthly Cost |
| **ALTSA** | **$** | **1,008,926** | **Annualized Cost** |
| | | 1,874 | Hours per Month Difference |
| | $ | 18.63 | Fully Loaded Rate |
| | $ | 34,913 | Monthly Cost |
| **DDA** | **$** | **418,951** | **Annualized Cost** |
| **DSHS Total** | **$** | **1,427,878** | **Total Annualized Cost** |

## EXPECTED RESULTS

By paying what were formerly unpaid informal support personal care hours, DSHS will be compliant with federal law and avoid the potential fines and the cost of litigation.

## STAKEHOLDER IMPACT

- Service Employees International Union (SEIU) 775 Northwest has been requesting updates on the status of informal support hours because they strongly request that DSHS comply with FLSA.
- The federal Department of Labor (DOL) has notified states that they expect full compliance with the FLSA.

Agency Contact: Bryan Way, (360) 902-7769
Program Contact: Debbie Roberts, (360) 725-3452

## OTHER CONNECTIONS

**Performance Outcomes/Important Connections**

1. **Does this DP provide essential support to one or more of the Governor's Results Washington priorities?**
   Goal 4: Healthy & Safe Communities - Support People - Help the most vulnerable people become independent and self-sufficient.

2. **The decision package meets the following DSHS' strategic objectives:**
   3.1: Increase access to home and community-based services.

3. **Identify other important connections or impacts below.** (Indicate 'Yes' or 'No'. If 'Yes' identify the connections or impacts related to the proposal.)

a) Regional/County impacts? No

b) Other local government impacts? No

c) Tribal government impacts? No

d) Other state agency impacts? No

e) Responds to specific task force, report, mandate or executive order?

This request involves compliance with the Fair Labor Standards Act (FLSA).

f) Does request contain a compensation change or require changes to a Collective Bargaining Agreement?

No, although any changes in personal care hours often lead to future changes in collective bargaining with SEIU 775 NW.

g) Facility/workplace needs or impacts? No

h) Capital budget impacts? No

i) Is change required to existing statutes, rules or contracts? No

j) Is the request related to litigation? No

k) Is the request related to Puget Sound recovery? No

l) Other important connections? No

**4. Please provide a detailed discussion of connections/impacts identified above.**

The fiscal impact of this request for DDA is $838,000 ($369,000 GF-State) in Fiscal Year 2017 and each year thereafter. DSHS assumes that there have been about 1,874 additional hours authorized for DDA clients per month due to the new rule changes for informal supports. DDA multiplies the 1,874 hours by the average hourly rate with benefits of $18.63 per hour to reach a monthly cost of $35,000. This monthly amount multiplied by 12 (to reach the annual cost) equals $419,000 per fiscal year. These costs are eligible for a 56 percent federal match under Community First Choice (CFC), so the state portion is $184,000 GF-State. Paying for informal supports is a new requirement; therefore, there is no base budget information that can be provided as no base budget currently exists.

**Alternatives/Consequences/Other**

**5. What alternatives were explored by the agency, and why was this alternative chosen?**

The alternative, not paying non-family member IPs for personal care hours previously considered informal supports, is in direct conflict with the United States Department of Labor direction to implement the FLSA.

**6. How has or can the agency address the issue or need within its current appropriation level?**

The current forecast for personal care hours does not assume additional hours for what were previously considered unpaid informal support care hours because the Legislature chose not to fund the additional hours in the 2016 Legislative Session.

**7. Does this decision package include funding for any IT-related costs (hardware, software, services, cloud-based services, contracts or IT staff)?**

☒ **No**

☐ **Yes (Include an IT Addendum)**

## Fiscal Detail

**040 - M2 - DD - Informal Supports**

| Operating Expenditures | FY 2018 | FY 2019 | FY 2020 | FY 2021 |
|---|---|---|---|---|
| 001-1 General Fund-State | 184,000 | 185,000 | 185,000 | 185,000 |
| 001-C General Fund-Medicaid | 235,000 | 234,000 | 234,000 | 234,000 |
| **Total Cost** | **419,000** | **419,000** | **419,000** | **419,000** |

| Staffing | FY 2018 | FY 2019 | FY 2020 | FY 2021 |
|---|---|---|---|---|
| FTEs | 0.0 | 0.0 | 0.0 | 0.0 |

## Performance Measure Detail

| Activity: | | Incremental Changes FY 2018 | FY 2019 | FY 2020 | FY 2021 |
|---|---|---|---|---|---|
| **Program: 040** | | | | | |
| D070 | Other Community Programs | 0 | 0 | 0 | 0 |

No measures submitted for package

## Object Detail

| | | FY 2018 | FY 2019 | FY 2020 | FY 2021 |
|---|---|---|---|---|---|
| N | Grants, Benefits, and Client Services | 419,000 | 419,000 | 419,000 | 419,000 |
| | **Total Objects** | **419,000** | **419,000** | **419,000** | **419,000** |

## DSHS Source Detail

**Overall Funding**

| Operating Expenditures | | FY 2018 | FY 2019 | FY 2020 | FY 2021 |
|---|---|---|---|---|---|
| **Fund 001-1, General Fund-State** | | | | | |
| **Sources** | **Title** | | | | |
| 0011 | General Fund State | 184,000 | 185,000 | 185,000 | 185,000 |
| | ***Total for Fund 001-1*** | **184,000** | **185,000** | **185,000** | **185,000** |
| **Fund 001-C, General Fund-Medicaid** | | | | | |
| **Sources** | **Title** | | | | |
| 19TA | Title XIX Assistance (FMAP) | 235,000 | 234,000 | 234,000 | 234,000 |
| | ***Total for Fund 001-C*** | **235,000** | **234,000** | **234,000** | **234,000** |
| | ***Total Overall Funding*** | **419,000** | **419,000** | **419,000** | **419,000** |

**U.S. Department of Labor**
Wage and Hour Division

(September 2013)

# Fact Sheet #79F: Paid Family or Household Members in Certain Medicaid-Funded and Certain Other Publicly Funded Programs Offering Home Care Services Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information regarding how the FLSA's requirements apply to the employment of a family or household member paid through certain Medicaid-funded and certain other publicly funded programs offering home care services.

**Who are paid family or household care providers?**

Certain Medicaid-funded and certain other publicly funded programs allow a recipient of home care services (or that person's representative) to select and supervise the care provider and further allow the selection of a family or household member of that person as a paid care provider.

Under these programs, the particular services to be provided and the number of hours of paid work are described in a written agreement, usually called a "plan of care," developed and approved by the program after an assessment of the services the recipient of care requires and that person's existing supports, such as unpaid assistance provided by family or household members.

**What is the significance of an FLSA employment relationship?**

The FLSA requires, among other things, the payment of minimum wage and overtime compensation to all workers who are employees, *i.e.*, who are in an employment relationship with an employer. See Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act. Under the FLSA, family or household members can be hired as employees of other family or household members to provide home care services, creating an employment relationship. If such an employment relationship is created, it is subject to the requirements of the FLSA.

Ordinarily, under the FLSA, including in the context of domestic service work such as home care, if an employment relationship exists, all hours worked by an employee for an employer must be paid. See Fact Sheet #79D: Hours Worked Applicable to Domestic Service Employment Under the Fair Labor Standards Act (FLSA). For example, if an elderly person hires a certified nursing assistant (CNA) to provide medical care in her home and the elderly person and CNA agree that the CNA will work and be paid for 30 hours per week, if the CNA actually works for 35 hours in a given week, she must be paid for all 35 hours.

**What is the scope of a paid family or household care provider's FLSA employment relationship?**

When a paid care provider is a family or household member of the person receiving home care services, the decision to hire the family or household member does not turn all care provided into employment. There is both a familial or household relationship and an employment relationship, and only hours worked within the scope of the employment relationship are covered by the FLSA. In these circumstances, the employment relationship is limited by a "plan of care" or other written agreement developed with the involvement and approval of the

Medicaid-funded or certain other program if that agreement reasonably defines the hours for which paid care services will be provided.

For example, a familial relationship, but not an employment relationship, exists where a father assists his adult, physically disabled son with eating dinner and bathing in the evenings. If the son enrolled in a Medicaid-funded or certain other publicly funded program and the father became his son's paid care provider under a program-approved plan of care that funded eight hours per day of services, the father would then also be in an employment relationship with his son for purposes of the FLSA. If the requirements described below are met, the father's employment relationship with his son extends only to the eight hours per day of paid work contemplated in the plan of care. The assistance he provides at other times stems from his familial relationship and is not part of that employment relationship and therefore need not be paid. If, based on the structure of the program, a state or other agency was also an employer of the father, see Fact Sheet #79E: Joint Employment in Domestic Service Employment Under the Fair Labor Standards Act (FLSA), this interpretation would also apply to the employment relationship between the father and that agency.

**What are the requirements for the application of this special interpretation limiting the scope of the employment relationship of paid family and household care providers?**

**(1) Home Care In or About a Private Home**

This unique interpretation only applies in the home care service context. Under the FLSA, home care is domestic service employment because workers are providing services of a household nature in or about a private home. See Fact Sheet #79 Private Homes and Domestic Service Employment Under the Fair Labor Standards Act. Work done by family or household members in other contexts, such as for a family business, is subject to the typical FLSA law and regulations regarding the employment relationship and hours worked.

**(2) Family or Household Relationship**

This unique interpretation also does not generally apply to relationships that do not involve preexisting family ties or a preexisting shared household. Therefore, except as noted below, it would not apply to a direct care worker who did not have a family or a household relationship with the individual in need of services prior to the individual's need arising or the creation of the plan of care. In other words, all services provided by a direct care worker who becomes so close to the consumer as to be "like family," or a direct care worker who becomes part of the consumer's household when hired to be a live-in employee, must be paid pursuant to typical FLSA law and regulations. If the consumer and caregiver enter into a new family relationship during the course of an employment relationship (*e.g.*, through marriage or civil union), however, then the FLSA employment relationship would be limited even though the family relationship did not predate the employment relationship.

**(3) Reasonableness of the Plan of Care**

An employment relationship is limited to the paid hours contemplated in the plan of care or other written agreement developed and approved by certain Medicaid-funded or certain other publicly funded home care programs only if that agreement is reasonable. 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. In other words, a plan of care that reflects unequal treatment of a care provider because of his or her familial or household relationship with the consumer is not reasonable. For instance, the program may not reduce the number of paid hours in a plan of care because the selected care provider is a family or household member. In addition, a program may not require an increase in the hours of unpaid services performed by the family or household care provider in order to reduce the number of hours of paid services.

For example, an older woman who can no longer care for herself enrolls in a Medicaid-funded program administered by the county in which she lives. She is assessed to need paid services for 30 hours per week beyond the existing unpaid assistance she receives from her daughter and other relatives. If the hours in the plan of care are reduced by the county to 15 hours per week because the woman's daughter is hired as the paid care provider, the paid hours in the plan of care will not determine the scope of the FLSA employment relationship.

**Additional Resources and Relevant Information**

For more information about the Fair Labor Standards Act, and in particular, how it applies in the context of home care and other domestic services provided in or about a private home, please see the following resources:

Fact Sheet: Final Rule Concerning Domestic Service Workers Under the Fair Labor Standards Act (FLSA)
Fact Sheet #79: Private Homes and Domestic Service Under the Fair Labor Standards Act (FLSA)
Fact Sheet # 79A: Companionship Services Under the Fair Labor Standards Act (FLSA)
Fact Sheet #79B: Live-In Domestic Service Workers Under the Fair Labor Standards Act (FLSA)
Fact Sheet #79C: Recordkeeping Requirements for Individuals, Families, or Households who Employ Domestic Service Workers Under the Fair Labor Standards Act (FLSA)
Fact Sheet #79D: Hours Worked Applicable to Domestic Service Employment Under the Fair Labor Standards Act (FLSA)
Fact Sheet #79E: Joint Employment in Domestic Service Employment Under the Fair Labor Standards Act Service Workers Under the Fair Labor Standards Act (FLSA)

**For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).**

This publication is for general information and is not to be considered in the same light as official statements of position contained in the Department's regulations.

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TTY: 1-866-487-9243
**Contact Us**

STATE OF WASHINGTON
HEALTH CARE AUTHORITY
BOARD OF APPEALS

MAILED
JUN 30 2014
DSHS
BOARD OF APPEALS

| | | |
|---|---|---|
| In Re: | ) | Docket No. 04-2012-HCA-0369<br>10-2012-HCA-0221 |
| **RENEE SWEENEY** | ) | **REVIEW DECISION AND FINAL ORDER** |
| Appellant | ) | Chore/COPES/Medicaid Personal Care |

## I. NATURE OF ACTION

1. The Division of Developmental Disabilities (DDD) within the Aging and Disability Services Administration (ADSA) of the Department of Social and Health Services (Department or DSHS) reduced the in-home personal care hours for Renee Sweeney (Appellant) by notice dated March 26, 2012. In response, Diane Huskey, the Appellant's grandmother and representative, requested an administrative hearing on April 16, 2012 to contest this reduction in personal care hours. Subsequent to an annual assessment August 9, 2012, the Department sent another notice on October 9, 2012. A hearing was requested on this notice on October 11, 2012. Each request was assigned a docket number and they are combined in the caption above.

2. Administrative Law Judge (ALJ) Sherry Clark Peterson of the Olympia Office of Administrative Hearings (OAH) held a hearing on January 16, 2013.

3. The OAH mailed an *Initial Order* on June 14, 2013. In this decision, the ALJ upheld the Department's reduction from 168 in-home personal care hours per month to 114 hours of paid in-home care per month.

4. After requesting and receiving a filing deadline extension, the Appellant's representative timely filed a petition for review of the *Initial Order* with the Board of Appeals (BOA) on July 5, 2012.

5. The Department filed a response to this petition on July 22, 2013.

## II. FINDINGS OF FACT

To determine the adequacy and appropriateness of the ALJ's Findings of Fact in this matter and to make any necessary modifications to those findings, the undersigned reviewed the entire record, including the available audio recordings or written verbatim transcripts of the proceedings, any documents presented as evidence or included in the hearing file, the *Initial Order*, any written arguments or objections submitted, the petition for review of the *Initial Order*, and any response to the petition. No ruling by the ALJ on the admissibility of proffered evidence is overruled or altered unless that is made explicit in this *Review Decision and Final Order.*

When making the Conclusions of Law found in this *Review Decision and Final Order*, the undersigned considered the following necessary and relevant facts, which are supported by the evidence in the record:

1. The Appellant, Renee Sweeney (Renee), was born on April 29, 2001. Exhibit 11, p. 1.

2. Renee has lived with her grandparents, David and Diane Huskey, since shortly after her birth. Testimony of Diane Huskey. At 6 weeks old, Renee was hospitalized at Madigan after being shaken by her father. Exhibit 15, p. 9; Testimony of David Huskey and Diane Huskey. Her brain injuries were severe enough the doctors did not expect her to survive. Id. She spent 6 weeks in the hospital. Id. As Renee began to improve, CPS approached Mr. and Mrs. Huskey, asking them if they would consider taking their grandchild and caring for her. Id. Renee was not expected to live to 12 years old because of the severity of her brain injury. Id. If Mr. and Mrs. Huskey did not take Renee in 2001, she would have been placed in Western State. Id. Mr. and Mrs. Huskey agreed to care for Renee, and Renee was placed with Mr. and Mrs. Huskey by the Department of Social and Health Services on June 28, 2001 under a Children's Protective Services Agreement. Exhibit L. The Children's Protective Services Agreement expired on December 28, 2001. Id. Mr. and Mrs. Huskey have not adopted Renee and there is no court order designating them guardians of Renee. Testimony of David and

Diane Huskey. Though he has no legal duty to provide for Renee, Mr. Huskey feels a moral obligation to care for her. Testimony of David Huskey. If Renee did not live with the Huskeys, she would be living at Western State. Testimony of Diane Huskey.

3. Renee lives with her grandmother and grandfather in a double wide mobile home in the Woodbrook neighborhood of Lakewood. Testimony of David Huskey. Mr. Huskey was laid off from his normal employment because of economic downturn. Id. He currently works through a temp agency earning about $1,600.00 per month. Mr. Sweeney works Monday through Friday from 7 a.m. until 3 p.m. Mrs. Sweeny is paid $10.03 per hour to care for Renee and receives union benefits. Id.

4. When Renee came to live with the Huskeys, Mrs. Huskey was working. Testimony of David Huskey; Testimony of Diane Huskey. Her prior employment was as a housekeeper, and she worked for Center Force in the grounds department supervising ground maintenance. Testimony of David Huskey. When Mrs. Huskey worked, the state paid for daycare for Renee. Renee was not thriving. Id.

5. In 2009, the Huskeys decided Mrs. Huskey should quit her forty hour per week job and care for Renee full time. Once Mrs. Huskey took over full time care of Renee, she began to thrive. Id. Mrs. Huskey provides full time 24 hour a day care for Renee. Testimony of Diane Huskey. Renee currently attends Woodbrook Middle School 20 hours per week (4 hours per day). Exhibit 15, p. 2. Renee is totally dependent on Mr. and Mrs. Huskey for all her care. She is tube fed, has hand, feet and neck braces, steel braces in her back and no muscle tone. She will never be able to walk and talk. Testimony of Mr. Huskey.

6. Renee is diagnosed with Cerebral Palsy, MS, Shaken Baby Syndrome, Scoliosis, and severe vision impairment in both eyes. Exhibit 15, pp. 1,9.

7. Michelle Ruiz has been Renee's case manager since September 2008. Testimony of Michelle Ruiz.

8. On March 6, 2012 Renee was assessed based on DDD's directive that all children would be reassessed by June 30, 2012 because of the *Samantha A.* case. Id.; Exhibit 11, pg. 1. The March 6, 2012 CARE assessment was performed by a temporary employee of DDD, Annette Plymole. Id. Ms. Plymole interviewed Diane and David Huskey by phone. Exhibit 11, pg. 2.

9. On March 26, 2012 DDD sent Renee a Planned Action Notice regarding the March 6, 2012 CARE assessment. Exhibit 9, pg. 1. The Planned Action Notice stated that effective May 1, 2012, Renee's MPC hours would be reduced from 302 hours to 200 hours. Id. The reduction in hours was based on WAC 388-106-0126 which provided for different base hours in each of the 17 classification groups for clients who were over age 21 and for clients 21 and older; WAC-106-0125 placement in classification group for in-home care and WAC 388-106-0130 determination of hours for in-home care. Id.

10. Renee was in Classification Group E High, which has 393 base hours. That means she is entitled to over 13 hours a day of care paid for by the Department for each and every day of a thirty day month. Those base hours were adjusted to 200 because some tasks were age appropriate based on Developmental Milestones, and because some assistance with personal care tasks was available from an informal provider, through a shared benefit, or from other community resources. Id. Renee requires 16-18 hours of care per day. In addition to normal waking hours, Renee wakes during the night and must be attended to. Testimony of David Huskey.

11. On April 16, 2012 the Office of Administrative Hearings received a Request for Hearing from Renee challenging March 6, 2012 assessment and the reduction of MPC hours effective May 1, 2012. Exhibit 8

12. Michelle Ruiz performed Renee's yearly assessment on August 9, 2012. Testimony of Michelle Ruiz. The assessment was done in the Huskeys' home. Id. The entire assessment took about 1 ½ to 2 hours. Both David and Diane Huskey were there, as was

Renee. Id. Ms. Ruiz was not able to see the full daily care Renee receives during the assessment. Id. During her visit to the Huskey home, Ms. Ruiz observed Renee had a hospital bed in the living room because she recently had back surgery. Id. Renee is tube fed. Mrs. Huskey got up every few minutes because Renee was having a lot of issues with throwing up. Id.

13. On October 9, 2012 the Department sent Renee a Planned Action Notice letting her know the reduction from 302 to 200 hours would remain in effect. Exhibit 13, pg. 1. The effective date of the Planned Action Notice was October 31, 2012. Id.

14. Renee filed a Request for Hearing regarding the October 9, 2012 Planned Action Notice on October 11, 2012.

15. According to the Individual Support Plan ("ISP") Diana Huskey and David Huskey are Renee's Formal Providers. Exhibit 15, pg. 25. (At the time of the August assessment, only Diane had a contract with the Department. David signed a contract at some time subsequent to the assessment.[1] Testimony of David Huskey, Testimony of Ms. Ruiz.) As Renee's Formal Providers they each have the same agreed upon tasks which are:

> Behavior Supports, Community Living, Employment, Home Living, Health and Safety, Lifelong Learning, Medical Support, Protection and Advocasy, Social Activities, Application ointments/lotions, Bathing, Bed Mobility, Dressing, Eating, Essential Shopping, Housework, Locomotion in Room, Locomotion Outside Room, Meal Preparation, Med. Mgmt., Nails trimmed in last 90 days, Nutrition/hydration, Occupational therapy, Orthotics, Personal Hygiene, Physical Therapy, Pressure relieving device, Range of motion (passive), Speech therapy, Telephone, Toilet Use, Transfers, Transportation, Tube feedings, Turning/repositioning program.
> Exhibit 15, pg. 25.

16. Renee has been awarded 200 paid hours per month for her formal providers to complete the designated tasks after adjustments for informal care. This computes to approximately 6.6 hours per day for every day for the entire month. Mr. and Mrs. Huskey

[1] The testimony on this is a little confusing because becoming a provider and signing a contract to provide care for an individual are two different steps in the process. The testimony of Mr. Huskey on p. 56 of the first volume of the transcript seems to establish that he only began providing care for Renee for pay a little before the January 2013 hearing.

indicated they want to continue getting paid for the MPC services they provide Renee. Exhibit K.

17. Renee's ISP indicates she attends school 20 hours per week. Exhibit 15, pg. 2. She is in a special education classroom where she receives speech therapy, occupational therapy and physical therapy. Exhibit 15, p. 4. She does not attend school during the summer and was not receiving support from the school at the time of the assessment. Testimony of Ms. Ruiz.

18. Renee's mother visits 2-3 times a week at the Huskey home. Exhibit 15, pg. 4. One of the grandparents is always present during these visits. Testimony of Mr. Huskey. There is no evidence she provided any support for Renee's activities of daily living. Mr. Huskey works Monday through Friday. He leaves the house at about 6 AM and returns about 4 PM. He is home on weekends. He provides care for her when he gets home from work on weekdays and on the weekends. "The weekends are kind of my day with her." Testimony of David Huskey. Although this testimony refers to the period of time in January 2013 when he is a paid caregiver, the undersigned finds it also reflects his care during the look back periods for the August 9, 2012 assessment.

19. The August 2012 assessment evaluated the following ADLs and IADLs. Bed Mobility is how an individual moves to and from a lying position, turns side to side and positions their body while in bed. Exhibit 15, pp. 14-15. Renee's caregivers must assist her to sit up in bed; assist with elevating legs/feet, keep sheets clean and smooth, monitor pressure points daily, use pillows/towels for support. Exhibit 15, pg. 25. According to the ISP, Mrs. Huskey gets up between 2-4 times a night to re-position Renee as needed. Id. When Ms. Ruiz performed the CARE Assessment, she operated from the assumption the activity of bed mobility was partially met ¾ if the time but not all the time unless Mr. or Mrs. Huskey gave her a reason this was not the case. There is no informal support from school for the activity of bed mobility when she does attend school. Testimony of Michelle Ruiz. Renee is in bed 7 hours per night. During

that time she has to be repositioned on average 3 times. Testimony of David Huskey. Each repositioning takes 10 minutes to ½ hour. Id.

20. Ms. Ruiz applied the presumption the Huskeys were available ¾ of the time but not all the time in coding this task. Testimony of Ms. Ruiz.

21. Transfer is how a person moves between surfaces, to/from bed, chair, and to a standing position. Transfer does not include moving to and from the bath or the toilet. Exhibit 15, pg. 15. In this task, Renee's needs are total dependence. She requires a one person physical assist with all wheelchair transfers. Renee is unable to be transferred without the help of another person. Exhibit 15, pg. 25. Renee has to be talked through each transfer. She is transferred at least 6-7 times a day. Exhibit 15, pg. 16. Transfers would not occur at school unless Renee soiled herself and needed to be changed. Testimony of Michelle Ruiz.

22. Ms. Ruiz applied the presumption the Huskeys were available ¾ of the time but no all the time in coding this task because Ms. Huskey was physically capable of performing the task and did not indicate she would not provide the task if she was not paid. Testimony of Michelle Ruiz.

23. Eating is how an individual eats and drinks. It includes the intake of nourishment by other means to include tube feeding. Exhibit 15, pg. 16. Renee is totally dependent on others to perform the task of eating for her. Id. The instructions to her caregiver are to "use adaptive equipment, feed client." Id. Renee's formula is delivered from Olympic Pharmacy. She is fed through a G-Tube continuously during her waking hours. Ms. Huskey maintains the G-Tube feeds. She fills the bag before Renee goes to school. The school only checks her feeding pump while she is there. Id. The G-Tube has a pad that slides around it. The pad has to be checked and changed to prevent infection. Testimony of David Huskey.

24. Ms. Ruiz applied the presumption the Huskeys were available ¾ of the time. Id. There was no adjustment made for the G-Tube feedings because the pump runs 12 hours. The

actual supervision is just to monitor for how fast the food is being given. Id. The pump has an alarm to alert when adjustments are needed.

25. Toileting involves the use of the toilet room, commode, bed pan, or urinal. It includes transfers on/off the toilet, cleanses, the changing of incontinence pads, and adjustment of clothing. Exhibit 15, pg. 16. Renee is unable to perform any aspect of this task herself, therefore she is totally dependent on others to perform this task for her. Id. Renee's caregiver instructions are to change her pads every two hours, maintain an inventory of supplies and provide perineal care. Exhibit 15, pg. 17. Renee has diapers and has to be cleaned at each diaper change. Mrs. Huskey does all the diaper changes which are estimated to be "many" times per day. Testimony of Mrs. Huskey.

26. Ms. Ruiz applied the presumption the Huskeys were available ¾ of the time. Id. The Huskeys did not bring up the extra time needed. Renee has severe toileting issues. Testimony of Michelle Ruiz. Renee is on a liquid diet, which results in loose stool. This requires extra diaper changes. Testimony of Ms. Huskey.

27. Dressing involves how an individual is able to put on, fasten, and take off all items of street clothing. Exhibit 15, pg. 18. Renee is totally dependent on her caregiver in the task of dressing as she is unable to perform any aspect of the task. Id. Her "caregiver instructions" are to dress Renee's lower body, dress her upper body, help select clean clothes and put on/take off footwear. Id. Dressing includes the necessity to change clothing if Renee's clothing is soiled as a result of incontinence. Testimony of Michelle Ruiz. The task of dressing is typically performed at home, not at school. Testimony of Michelle Ruiz.

28. Ms. Ruiz applied the presumption the Huskeys were available ¾ of the time but no all the time in coding this task because Ms. Huskey was physically capable of performing the task and did not indicate she would not provide the task if she was not paid. Id.

29. In the 7 days prior to the assessment, Renee needed an extra change of clothing (other than morning or evening) at least once a day because of loose stools. Testimony of

David Huskey. A clothing change took at least ½ hour as Renee is not cooperative. She needs to be talked through each step. If she gets upset, she stiffens up and the Huskeys cannot fight her. They have to wait for her to relax before the change can be completed. Id.

30. Combing hair, brushing teeth, shaving, applying makeup, washing/drying face, hands and perineum are all included in how an individual maintains her personal hygiene. Exhibit 15, pg. 18. Renee cannot brush/comb her hair. She cannot brush her teeth, she cannot raise her arms. Id. Renee is totally dependent on someone else to perform these tasks for her. Id. Her caregivers, Mr. and Mrs. Huskey, are instructed to brush Renee's teeth daily, shampoo her hair, trim her fingernails as needed and to wash Renee's hands and face. Id. Ms. Ruiz applied the presumption the Huskeys were available ¾ of the time. Id

31. Renee is totally dependent on someone to perform the task of bathing, which includes showering, a sponge bath, and transfer in and out of the shower. Exhibit 15, pg. 19. Renee cannot be left unattended in the shower. She is unable to shampoo her hair. Id. Ms. Huskey does all Renee's bathing on a daily basis. Id. Renee's providers are instructed to apply lotion after a bath, wash Renee's back, legs and feet, shampoo her hair, monitor the water temperature, assist with drying and dressing, transfer her in and out of the tub/shower, protect Renee's eyes when washing her hair and avoiding water in her face. Id. Mr. Huskey indicated at times, Renee requires an extra bath during the day because of loose stools. Testimony of David Huskey.

32. Ms. Ruiz applied the presumption the Huskeys were available ¾ of the time for bathing. Testimony of Michelle Ruiz.

33. Renee needs care 16 hours per day. Testimony of David Huskey. She has night terrors and wakes up screaming. She sleeps about 2 hours at a time. Either he or Mrs. Huskey has to go in and settle Renee down. Id. Renee wakes up for the day at 6:30. Her bed time is generally 8:30 p.m. Testimony of David Huskey.

34. Renee attends school from 10 a.m. to 3 p.m. four days a week during the school year. Testimony of David Huskey. She is transported to school half the time by the Huskeys and half the time by a bus. Id. Renee goes to therapy 2-4 hours per week. Diane Huskey is in the room with Renee and participates in the therapy. Id.

35. After consideration of the testimony received regarding the number of times the tasks toileting, dressing and bathing occurred and the amount of time for each task, toileting was adjusted to Partially Met ¼ to ½ of the time. Dressing was adjusted to Partially met ½ to ¾ of the time. Bathing was adjusted to Partially met ½ to ¾ of the time. Testimony of Ms. Ruiz.

36. For the 30-day look-back period prior to the August 2012 assessment, the Appellant was found to be totally dependent for the IADLs of Meal Preparation, Ordinary Housework, Shopping, Transportation, and Managing Finances. The parties did not dispute any of the above-referenced findings, they did not change previous assessment, and the undersigned observed nothing in the hearing record that was inconsistent with Ms. Ruiz's determinations about the Appellant's level of self performance with these IADLs. The Department considered her IADLs fully met by informal support. See Exhibit 21.

37. The Department determined that the Appellant was clinically complex. The Appellant's confirmed diagnosis of cerebral palsy and her ADL score which is greater than fourteen met the criteria to classify her as clinically complex in the opinion of the Department. Exhibit 21.

38. In August 2012, the Appellant was assessed as meeting the first set of criteria for mood and behavior. This is because she awoke throughout the night requiring care or intervention. Exhibit 17, p. 5.

39. The Appellant's Cognitive Performance Scale (CPS) score was rated by the Department as 1. Exhibit 17 p. 10.

40. Ms. Ruiz determined when conducting the August 2012 assessment that the Appellant did have an ADL score of greater than or equal to 22, She also need nutrition through

a tube and met the rest of the second criterion list for exceptional care. Exhibit 17, p. 11. The parties did not dispute these findings and the undersigned observed nothing in the hearing record that was inconsistent with Ms. Ruiz's determinations about the Appellant's exceptional care needs.

41. Based on Ms. Ruiz's August 2012 assessment of the Appellant's ADLs, clinical complexity, mood and behaviors, and cognitive performance, she determined using the CARE algorithm that the Appellant should be classified as Group E High with 393 base hours. Exhibit 17.

## III. CONCLUSIONS OF LAW

1. The Appellant's petition for review of the *Initial Order* was timely filed and is otherwise proper.[2] The ALJ had jurisdiction to hear and decide the Appellant's challenge to the Department's determination about her in-home personal care hours.[3] Chapter 388-106 WAC implements RCW 74.09.520(2) through (6), and Chapters 388-825 and 388-828 WAC implement Chapter 71A.12 RCW. The authority to promulgate rules related to: (1) personal care services is granted to the Department in RCW 74.09.520(2) and (2) State services for individuals with developmental disabilities is granted to the Department in RCW 71A.12.030. Administrative hearings conducted pursuant to Chapters 388-106, 388-825, and 388-828 WAC and subsequent administrative review of the ALJs' *Initial Orders* are subject to the statutes and regulations found at Chapter 34.05 RCW, Chapter 10-08 WAC, and Chapter 388-526 WAC.[4] Jurisdiction exists to review the *Initial Order* and to enter the Department's *Review Decision and Final Order*.[5]

2. The Health Care Authority (HCA) is now the designated single state agency for

[2] WAC 388-526-0560 through WAC 388-526-0585. *See* WSR 12-13-003 (eff. June 10, 2012).
[3] RCW 74.09.741; RCW 34.12.040; and WAC 388-526-0215. *See also* WAC 388-106-1305.
[4] *See also* RCW 71A.10.050.
[5] Chapter 34.05 RCW; RCW 74.09.741; WAC 388-526-0218; WAC 388-526-0530(2); WAC 388-526-0570; and WAC 388-526-0600(1).

administering the Washington State Medicaid program,[6] including in-home personal care services.[7] The HCA may collaborate with other state agencies to carry out its duties.[8] In this case, the HCA collaborated with the Department in making eligibility and service level determinations for in-home personal care hours, as well as in the administrative hearings process associated with client challenges to those determinations.

3. It may help to explain briefly at the outset the unique characteristics and specific limitations of the administrative hearing process. An administrative hearing is held under the auspices of the executive branch of government and neither the ALJ nor the Review Judge enjoys the broad equitable authority of a Superior Court Judge within the judicial branch of government. It is well settled that administrative agencies, such as the OAH and the BOA, are creatures of statute, without inherent or common law powers, and, consequently, they may exercise only those powers expressly granted in enabling statutes or necessarily implied therein.[9] It is also well settled that an ALJ's or a Review Judge's authority to render a decision in an administrative hearing is limited to that which is specifically provided for in the authorizing statute(s) or Washington Administrative Code (WAC) provision(s).[10] "The power of an administrative tribunal

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[6] RCW 74.09.530(1)(a). *See also* 42 USC § 1396(a)(5); 42 CFR § 431.10; and RCW 74.09.010 note (stating **Agency transfer -- 2011 1st sp.s. c 15**: "(1) All powers, duties, and functions of the department of social and health services pertaining to the medical assistance program and the medicaid purchasing administration are transferred to the health care authority to the extent necessary to carry out the purposes of this act. All references to the secretary or the department of social and health services in the Revised Code of Washington shall be construed to mean the director or the health care authority when referring to the functions transferred in this section....
(4) All rules and all pending business before the department of social and health services pertaining to the powers, functions, and duties transferred shall be continued and acted upon by the health care authority...").

[7] RCW 74.09.520(1)(l), (2), and (5) (defining the term "medical assistance" to include "personal care services," and describing what those services entail).

[8] RCW 74.09.530(1)(d). *See also* RCW 43.20A.865 (directing the DSHS Secretary to enter into agreements with the HCA Director to administer and divide responsibilities related to the Medicaid program, including long-term care services such as in-home personal care) and RCW 74.09.741(4) and (5) (giving an applicant or recipient the option of filing a hearing request with either the Department or HCA, and describing an appellant's right to a consolidated adjudicative proceeding when more than one agency has rendered a decision).

[9] *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County*, 135 Wn.2d 542, 558 (1998), and *Taylor v. Morris*, 88 Wn.2d 586, 588 (1977). *See also* WAC 388-526-0216 (stating that "[t]he authority of the ALJ and the review judge is limited to those powers conferred (granted) by statute or rule... [t]he ALJ and the review judge do not have any inherent or common law powers").

[10] *Id.*

to fashion a remedy is strictly limited by statute."[11] Again, the only discretionary authority afforded to ALJs and Review Judges is that which is set forth, either explicitly or implicitly, in statute or agency regulation.[12] As a result, the ALJ and the undersigned have extremely limited authority to grant equitable relief in this administrative forum.[13] Equity within the administrative hearing process generally comes from equal application of the law to the supported facts for all who appear before the tribunal. ALJs and Review Judges do not have the same opportunity as Superior Court Judges to fashion an equitable remedy.

4. In an adjudicative proceeding such as this, the undersigned has the same authority as the ALJ to enter Findings of Fact, Conclusions of Law, and Orders.[14] The Washington Administrative Procedure Act also states that the undersigned Review Judge has the same decision-making authority when deciding and entering the *Review Decision and Final Order* as the ALJ had while presiding over the hearing and deciding and entering the *Initial Order*, unless the Review Judge or a provision of law limits the issue(s) subject to review.[15] RCW 34.05.464(4) grants the undersigned Review Judge the same decision-making authority as the ALJ and in the same manner as if the undersigned had presided over the administrative hearing proceedings.[16] This includes the authority to make credibility determinations, weigh the evidence, and change or set aside the ALJ's findings of fact.[17] This is because "...administrative

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[11] *Skagit Surveyors,* 135 Wn.2d at 558.
[12] WAC 388-526-0216. *But see* WAC 388-526-0220(2) (stating that if there is no WAC provision that addresses a specific issue then the ALJ and the Review Judge must refer to "...the best legal authority and reasoning available...").
[13] WAC 388-526-0495 (setting forth the only explicit equitable remedy of which the undersigned is aware in administrative hearings applying HCA's WAC provisions).
[14] WAC 388-526-0600(1); WAC 388-526-0215; and WAC 388-526-0520. *See also* RCW 34.05.464(4); *Tapper v. Employment Security*, 122 Wn.2d 397 (1993), *superseded by statute on other grounds*, RCW 50.04.294 (2003), and *overruled on other grounds by Markam Group, Inc. v. Employment Sec. Dep't*, 148 Wn. App. 555, 562 (2009); and *Northwest Steelhead and Salmon Council of Trout Unlimited v. Washington State Dept. of Fisheries,* 78 Wn. App 778 (1995).
[15] RCW 34.05.464(4). *See also* WAC 388-526-0600(1).
[16] *Kabbae v. Dep't of Soc. & Health Servs.*, 144 Wn. App. 432, 443 (2008) (citing RCW 34.05.464(4) as the basis for invalidating WAC 388-02-0600(2)(e)—now repealed—which purported to limit the scope of the undersigned's decision-making authority when reviewing certain types of cases).
[17] *See Hardee v. Dep't of Soc. & Health Servs.*, 152 Wn. App. 48, 59 (2009), *aff'd,* 172 Wn.2d 1 (2011) (referring to the court in *Regan v. Department of Licensing*, which "...held that a reviewing officer has the authority 'to modify or replace an ALJ's findings, including findings of witness credibility' and stated that the statute does not require a reviewing judge to defer to the ALJ's credibility determinations, but rather authorized the reviewing judge to make his

review is different from appellate review."[18] The undersigned Review Judge does not have the same relationship to the ALJ as an Appellate Court Judge has to a Trial Court Judge or that a Trial Court Judge has to a Review Judge in terms of the level of deference owed by the Review Judge to the presiding ALJ's findings of fact.[19] The Review Judge's authority to substitute his or her judgment for that of the presiding ALJ on matters of fact as well as law is the difference.[20] However, if the ALJ specifically identifies any findings of fact in the *Initial Order* that are based substantially on the credibility of evidence or demeanor of the witnesses,[21] a Review Judge must give due regard to the ALJ's opportunity to observe the witnesses when reviewing those factual findings by the ALJ and making his or her own determinations.[22] This does not mean a Review Judge must defer to an ALJ's credibility findings, but it does require that they be considered.[23]

5. Review Judges must personally consider the whole record or such portions of it

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or her own independent determinations based on the record"). *See also Regan v. Dep't of Licensing*, 130 Wn. App. 39, 59 (2005) and *Hardee v. Dep't of Soc. & Health Servs.*, 172 Wn.2d 1, 18-19 (2011) (stating that:

> When reviewing the factual findings and conclusions of an ALJ,
>
> > "The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing. In reviewing findings of fact by presiding officers, the reviewing officers shall give due regard to the presiding officer's opportunity to observe the witnesses."
>
> *Tapper*, 122 Wn.2d at 404 (emphasis omitted) (quoting RCW 34.05.464(4)); *see also* WAC 170-03-0620 (providing the Department's own definition of the Review Judge's authority). Regardless of whether "[i]t would perhaps be more consistent with traditional modes of review for courts to defer to factual findings made by an officer who actually presided over a hearing," the legislature chose otherwise. *Tapper*, 122 Wn.2d at 405. "[I]t is not our role to substitute our judgment for that of the Legislature." *Id.* at 406. The findings of fact relevant on appeal are the reviewing officer's findings of fact – even those that replace the ALJ's. *Id.* Here, the Review Judge meticulously reviewed the evidence, as well as the ALJ's factual findings, and appropriately substituted her own findings when warranted...(footnotes omitted)).

[18] *Kabbae*, 144 Wn. App. at 441 (explaining that this is because the final decision-making authority rests with the agency head). *See also Messer v. Snohomish County Bd. of Adjustment*, 19 Wn. App. 780, 787 (1978) (stating that "[t]he general legal principles which apply to appeals from lower to higher courts do not apply to administrative review of administrative determinations").

[19] *See, e.g., Tapper*, 122 Wn. 404-05, and Andersen, *The 1988 Washington Administrative Procedure Act – An Introduction*, 64 Wash. L. Rev. 781, 816 (1989).

[20] *Id.*

[21] RCW 34.05.461(3).

[22] RCW 34.05.464(4) and WAC 388-526-0600(1).

[23] *Hardee*, 152 Wn. App. at 59 (stating that RCW 34.05.464(4) permits a Review Judge to make his or her own independent credibility determinations and need not defer to the ALJ's as long as the ALJ's credibility findings are duly contemplated).

as may be cited by the parties.[24] Consequently, the undersigned has considered the adequacy, appropriateness, and legal correctness of all initial Findings of Facts, Conclusions of Law, documents in the hearing file, including admitted evidence and any written arguments, and any previous proceedings and orders in this particular matter, regardless of whether any party has asked that they be reviewed. Because the ALJ is directed to decide the issues *de novo*,[25] the undersigned has also decided the issues *de novo*.[26] In accordance with RCW 34.05.464(4) and WAC 388-526-0600(1), the undersigned has given due regard to the ALJ's opportunity to observe the witnesses, but has otherwise independently decided the case. It is the normal practice in any case applying the CARE tool, when the appellant simply states that he or she needs more hours, to review the entire body of evidence and each step of the analysis. Some ALJs may seek to narrow the issues after the commencement of the hearing, but the undersigned does not believe that to be appropriate for this kind of case. Nevertheless, in this case, the Department has placed Ms. Sweeney in the highest possible classification group. Her counsel is experienced in these cases. The parties agree that the only issue which materially affects the outcome is modification to the number of hours subsequent to placing her in that group. Their briefs and written closing arguments are limited to the issue as well. The undersigned is going to pass lightly over the issues establishing her classification as E High.

6. The standard of proof refers to the amount of evidence needed to prove a party's position.[27] Unless a WAC provision, RCW provision, or published case law states otherwise, the standard of proof in an HCA hearing is a preponderance of the evidence.[28] A preponderance of the evidence means that it is more likely than not that something happened or exists.[29] The burden of proof[30] is borne by the party attempting to persuade the ALJ that his or her position is

[24] RCW 34.05.464(5). *See also* WAC 388-526-0560(4).
[25] WAC 388-526-0215(1).
[26] RCW 34.05.464(4) and WAC 388-526-0600(1). *See also Hardee*, 152 Wn. App. at 59.
[27] WAC 388-526-0485.
[28] *Id.*
[29] *Id.*
[30] *Schaffer v. Weast*, 546 U.S. 49, 56 (U.S. 2005) (stating:

correct.[31]

7. ALJs and Review Judges must first apply the HCA and/or Department rules adopted in the WAC to resolve an issue.[32] If there is no agency WAC governing the issue, the ALJ and the Review Judge must resolve the issue based on the best legal authority and reasoning available, including that found in federal and Washington constitutions, statutes and regulations, and court decisions.[33] The ALJ and the Review Judge may not declare any rule invalid, and challenges to the legal validity of a rule must be brought *de novo* (anew) in a court of proper jurisdiction.[34]

8. During the course of this particular case, some of the applicable WAC provisions were amended.[35] As clarified in WAC 388-526-0220(3) "[w]hen applying program rules regarding the substantive rights and responsibilities of the parties (such as eligibility for services, benefits, or a license), the ALJ and Review Judge must apply the program rules that were in effect on the date the agency notice was sent, unless otherwise required by other rule or law...."[36] In this matter, this means the substantive rules set forth in Chapter 388-106—as opposed the procedural rules set forth primarily in Chapter 388-526 WAC—describing the Appellant's rights and responsibilities that were in effect at the time of the Department's alleged

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The term 'burden of proof' is one of the "slipperiest member[s] of the family of legal terms." 2 *J. Strong, McCormick on Evidence* § 342, p 433 (5th ed. 1999) (hereinafter McCormick). Part of the confusion surrounding the term arises from the fact that historically, the concept encompassed two distinct burdens: the "burden of persuasion," i.e., which party loses if the evidence is closely balanced, and the "burden of production," i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 272, 114 S. Ct. 2251, 129 L. Ed. 2d 221 (1994)).

[31] WAC 388-526-0480(2).

[32] WAC 388-526-0220(1).

[33] WAC 388-526-0220(2).

[34] WAC 388-526-0225(1).

[35] *See* WSR 11-14-040, WSR 11-22-028, WSR 12-05-037, WSR 12-13-003, WSR 12-20-078 (noting amendments made to Chapter 388-526 WAC on an emergency basis because HCA was obligated, pursuant to 2E2SHB 1738, to promulgate hearing rules related to Medicaid-funded services when the single state Medicaid agency was transitioned from DSHS to HCA, which were effective July 1, 2011, October 27, 2011, February 13, 2012, June 10, 2012, and October 5, 2012); WSR 12-22-009 (setting forth the version of WAC 388-106-0010 that was in effect at the time of the agency's action in this matter); WSR 12-22-009 (noting amendments made to WAC 388-106-0130 as an emergency rule, effective October 28, 2012); and WSR 12-15-039 (noting amendments to WAC 388-106-0125, which were effective July 13, 2012, on an emergency basis, and are applicable to the agency's October 31, 2012 action).

[36] *See also Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 900 (D.C.Cir.1992), *cert. denied* 511 U.S. 1068 (1994) (holding that the rights and responsibilities of the parties must be adjudicated as they were under the law prevailing at the time of the Department's conduct that gave rise to the hearing because "[i]t is the general rule that substantive statutory amendments do not apply to pre-amendment conduct").

actions in this case are the rules that must be applied. The date of the HCA action is defined as "...the date when the HCA's decision is effective."[37] The date of the action here is October 31, 2012 pursuant to this definition. WSR 12-22-009, effective October 28, 2012, is the version of WAC 388-106-0130 that must be applied to this case. Where the undersigned analyzed the facts of this case based on WAC and/or RCW provisions that have been amended since the agency's action, the former WAC and/or RCW provisions are cited and noted.

9. "When applying program rules regarding the procedural rights and responsibilities of the parties, the ALJ and review judge must apply the rules that are in effect on the date the procedure is followed."[38] This generally means those procedural rules that were in place when the ALJ or the undersigned Review Judge followed them are those that must be applied rather than the procedural rules that were in effect at the time of the agency's action. The ALJ and Review Judge are required to apply the rules in Chapter 388-526 WAC on the date each rule was effective, including WAC 388-526-0220 (originally effective July 1, 2011).[39]

10. Personal care services are long-term care services designed to help eligible clients remain in the community, either in their own homes or in residential facilities.[40] It is undisputed that the Appellant is eligible for personal care services; the Appellant's issue when requesting a hearing was how many personal care hours the Appellant should have been awarded based on the Appellant's CARE assessment.

11. When determining whether the Department's decision regarding the number of personal care hours for which the Appellant was eligible was correct, the undersigned must review the Appellant's most recent annual assessment.[41] WAC 388-106-0010 defines the term "assessment or reassessment" as an inventory and evaluation of a client's needs and abilities based on an in-person interview that takes place in the client's place of residence using the

[37] WAC 182-526-0010.
[38] WAC 388-526-0220(4).
[39] WAC 388-526-0220(6).
[40] WAC 388-106-0015(1) and (2).
[41] WAC 388-106-1310 (stating that when a CARE assessment takes place between a request for hearing and the hearing, the ALJ must review the most recent assessment).

CARE tool. As such, the most recent assessment for the Appellant, which the ALJ and the undersigned must review per WAC 388-106-1310, was completed on August 9, 2012. Both the 7-day and 30-day look back periods for the Appellant's ADLs and IADLs, respectively, must be calculated from that date.[42]

12. In order to determine a client's ability to care for himself or herself and to evaluate the need for personal care services, the Department administers the CARE tool.[43] This tool replaced all other assessment methods previously used by the Department to determine a client's eligibility for Department-funded home and community based long-term care programs.[44]

13. The CARE tool uses the criteria of cognitive performance, clinical complexity, mood behaviors, ADLs, and exceptional care to place each client into one of seventeen classification groups.[45] Only the self performance for each ADL and each IADL within the seven and 30 days, respectively, prior to the assessment is considered.[46] Each CARE classification group is assigned a base number of hours for which a client may be eligible.[47] The base hours for which a client may be eligible may be adjusted by the CARE tool to account for available informal support deductions or living environment add-on hours.[48] As an eligible Medicaid recipient living at home, the number of in-home personal care hours the Appellant was authorized to receive was determined by the CARE tool's placement of the Appellant in a specific classification group and any applicable adjustments.[49]

14. The first step in the CARE calculation process is determining the ADL scores, based on the Appellant's level of self performance with ADLs as defined in WAC 388-106-0010, ranging from zero to four for each of the seven ADLs included in the total ADL score, which thus

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[42] *See* WAC 388-106-0010 (defining the terms "self performance for ADLs" and "self performance for IADLs").
[43] WAC 388-106-0050; WAC 388-106-0055; WAC 388-106-0070; WAC 388-106-0075; and WAC 388-828-1040(3).
[44] *See* WAC 388-106-0070.
[45] WAC 388-106-0085.
[46] *See* WAC 388-106-0010 (defining the terms "self performance for ADLs" and "self performance for IADLs").
[47] Former WAC 388-106-0125. *See* WSR 11-23-092.
[48] Former WAC 388-106-0130. *See* WSR 12-05-075.
[49] WAC 388-106-0080 and former WAC 388-106-0125. *See* WSR 11-23-092.

ranges from zero to 28.[50]

15. Given the testimony provided at the hearing, the information contained in the evidentiary exhibits, and the stipulation of the parties, the undersigned concludes that the Department correctly determined the Appellant's self performance in the seven days prior to the August 2012 assessment, and the resulting ADL scores, for all of the Appellant's ADLs. Her ADL score is 28 under the regulations cited above.

16. The second step in the CARE calculation process is determining clinical complexity. A client eligible for personal care services is determined to be "clinically complex" if he or she is diagnosed with a specific medical condition or requires specific medical procedures that significantly increase the amount of time or effort necessary for his or her daily care. Pursuant to WAC 388-106-0095, the CARE tool determines a client to be "clinically complex" only when he or she currently exhibits one or more of the conditions listed and has the corresponding ADL score listed. The Department correctly determined her to be clinically complex because she was diagnosed with cerebral palsy and had an ADL score of fourteen or more.

17. The third factor to consider in the CARE calculation process is the mood and behavior category. In the look-back period for the assessment, the Appellant demonstrated one or more behaviors supporting her placement in the "mood and behavior classification group," pursuant to WAC 388-106-0100(3).

18. The fourth step in the CARE calculation process is determining the Appellant's cognitive performance scale (CPS) score, which may range from zero (intact) to six (very severe impairment).[51] The parties stipulated that the facts led to a score of one under the rule. As it

[50] *See also* WAC 388-106-0075 and WAC 388-106-0105 (noting in WAC 388-106-0105(2) that although nine ADLs are listed in WAC 388-106-0105(1), only the highest score among locomotion in room, locomotion outside room, and walk in room is included in the total ADL score).
[51] WAC 388-106-0090(1).

does not change the classification, the undersigned will not alter this stipulation.[52]

19. The fifth step in the CARE calculation process is an evaluation of whether the client needs "exceptional care" in order to complete everyday life tasks. As set forth in WAC 388-106-0110, an individual is determined to need exceptional care and is placed in the Group E classification when the criteria set forth in either Diagram 1 or Diagram 2 of that regulation are satisfied. The parties have stipulated that facts exist which meet the requirements of this regulation.

20. The sixth step in the CARE calculation process is placing the client into one of the seventeen in-home classification groups—based on the data gathered in steps one through six—each of which has a corresponding number of base hours. This classification placement was done in accordance with former WAC 388-106-0125.[53] The Department's ultimate classification of the Appellant in Group E High based on her assessment was correct. This is because she met the criteria for clinical complexity qualification set forth in WAC 388-106-0095, required exceptional care, and her ADL score was 28.[54] Group E High has a base number of hours set at 393.[55] Renee is entitled to that many hours of paid in-home care per month unless the Department has a basis to adjust them downward.

21. The Department is permitted to adjust the base hours allocated under former WAC 388-106-0125, if it is determined a client's need for personal care services is actually met in some other way through informal support, shared benefit, and age appropriate functioning.[56] Informal support is defined as follows:

> "Informal support" means a person or resource that is available to provide assistance without home and community program funding. The person or resource providing the informal support must be age 18 or older. Examples of informal supports include but are not limited to: family members, friends, neighbors, school, childcare, after school activities, adult day health, church or

[52] The parties also agreed that "age appropriate" analysis did not apply to this case for purposes of adjusting hours, and yet the Department scored her decision making as age appropriate. See Exhibit 17
[53] *See* WSR 11-23-092.
[54] Former WAC 388-106-0125(2)(c).
[55] Id.
[56] Former WAC 388-106-0130(2).

community programs.

22. The Department did not seek to apply the shared benefit analysis or age appropriate functioning analysis to adjust hours.

23. The undersigned will address the several legal issues surrounding informal support in this case and then perform the calculation to adjust the base number of hours.

24. Informal support means a person or resource that is available to the client at no cost the Department, as noted above. Therefore the paid caregiver is not a source of informal support. The Department case manager agreed with and even articulated this several times during her testimony. Diane Huskey was at all relevant times a paid caregiver.

25. A legally responsible parent includes parents, step-parents and adoptive parents.[57] There was no evidence tending to prove that the grandparents had this legal relationship with Renee. They are not legally responsible parents within the meaning of the regulation. Whatever significance or presumptions may apply to such parents do not apply to this case.

26. According to WAC 388-106-0130(8)(b), the Department will presume a child has informal support available to assist with ADLs and IADLs over three-quarters of the time. This may be rebutted if the appellant provides specific information (i.e., evidence) that this is not the situation. In this case, no presumption will apply because there is abundant evidence of the amount of informal support actually available to Renee. The presumption is rebutted.

27. In very few cases would this presumption need to be applied. The purpose of the assessment is to gather such information. WAC 388-106-0050 through -0065 requires the Department to do so. The Department case manager is fully aware that the client is a child and that informal support is an issue. The case manager asks all the questions during an assessment to elicit the necessary information.

28. Based on the case manager's testimony, the presence of the paid caregiver by

[57] WAC 388-106-0130(8)(d).

itself served as enough evidence for the Department to presume that informal support was available three quarters of the time. This is not consistent with the regulation or the definition of informal support. WAC 388-106-0130(8)(b) only presumes informal support, which by definition does not come from a paid caregiver. During periods of time when evidence shows the only source of support for Renee was Diane Huskey, there was zero informal support.

29. David Huskey did not have a contract to provide care for Renee during the lookback periods related to the August 9, 2012 assessment. He signed a contract later. For the periods of time he was, in fact, available to provide support and did provide support, the Department will adjust the in-home care hours pursuant to the formula below.

30. Informal supports for school age children include supports actually available through a school district, regardless of whether those supports are used.[58] During the look back periods before August 9, 2012, no school supports were actually available. It was summer break. The undersigned cannot count them as informal support based on that assessment. The Department has authority under WAC 388-106-0050(2) to modify the number of in home care hours between assessments to reflect changes in informal support. But they cannot count school supports in an assessment when they are not "actually" available.

31. According to Finding of Fact18 above, Mr. Huskey was available between 4 and 8 PM during weekdays and all day Saturday and Sunday. Nevertheless, there are some ADLs that that only Mrs. Huskey performed. This is the case with bathing and toileting (i.e. diaper changes) as established in specific Findings above, since Renee is a young woman and requires a female caregiver for these tasks. Mr. Huskey is not available to perform these. Since Mr. Huskey leaves the house at around six in the morning, and dressing Renee takes some time, he is not available to help dress her in the morning or during unscheduled clothing changes resulting from leaking diapers. Meal preparation in this case means preparing her tube each day, so Mr. Huskey is only available on Saturday and Sunday. Based on this, Mr. Huskey

[58] WAC 388-106-0130(8)(c).

is available to assist, and does assist, between ¼ and ½ of the time for ADLs and IADLs other than bathing and toileting. This is true of both scheduled and unscheduled activities.

32. Mrs. Huskey is present at physical therapy, and the therapy is medical in nature, so the existence of a physical therapy regime and assistance from therapists does not result in any of the ADLs or IADLs being partially met by informal support. Therapy is not informal support for this purpose.

33. When administering the CARE tool, the assessor must determine the level of assistance available to assist the client in the completion of each activity.[59] "Assistance available" is assessed in one-quarter increments and defined as follows:

> ...means the amount of assistance available for a task if status is coded partially met or shared benefit due to availability of other support. The department determines the amount of the assistance available using one of four categories:
> (a) Less than one-fourth of the time;
> (b) One-fourth to one-half of the time;
> (c) Over one-half of the time to three-fourths of the time; or
> (d) Over three-fourths but not all of the time.[60]

34. Former WAC 388-106-0130(2) sets forth the process for determining informal support, shared benefit, and age appropriate functioning based on a chart of numeric values set forth in WAC 388-106-0130(2)(a).

35. The Appellant's personal care base hours and the deductions to them for informal support in these assessments are changed and correctly calculated as follows:[61]

| Adjustments to Base Hours for Met, Unmet, & Partially Met Needs | | | |
|---|---|---|---|
| **ADL/IADL** | **Status[62]** | **Assistance Available** | **Value Percentage** |
| Self-Administration of Medications | n/a | | |
| Walk in Room | Partially met | ¼ > ½ | .7 |
| Bed Mobility | Partially met | ¼ > ½ | .7 |

[59] Former WAC 388-106-0130(2)(a).
[60] Former WAC 388-106-0010.
[61] *See* former WAC 388-106-0130(2).
[62] *See* former WAC 388-106-0010 (defining this term).

| Adjustments to Base Hours for Met, Unmet, & Partially Met Needs | | | |
|---|---|---|---|
| **ADL/IADL** | **Status**[62] | **Assistance Available** | **Value Percentage** |
| Transfers | Partially met | ¼ > ½ | .7 |
| Toilet Use | Unmet | | 1.0 |
| Eating | Partially met | ¼ > ½ | .7 |
| Bathing | Unmet | | 1.0 |
| Dressing | Partially met | ¼ > ½ | .55 |
| Personal Hygiene | Partially met | ¼ > ½ | .55 |
| Meal Preparation | Partially met | ¼ > ½ | .2 |
| Transportation | Partially met | ¼ > ½ | .7 |
| Shopping | Partially met | ¼ > ½ | .2 |
| Housework | Partially met | ¼ > ½ | .2 |
| ***12 ADLs/IADLs (Y)*** | ***TOTALS*** | | ***7.2 (X)*** |
| Average Percentage of ADSA-Paid Support (x ÷ y) | | | 7.2 ÷ 12 = 0.6 (A) |
| Average Percentage of Informal Support Available (1 – A) | | | 1.0 – .6 = .4 (B) |
| 1/3 of the Informal Support Available (B ÷ 3) | | | .4 ÷ 3 = .13 (C) |
| Addition of 1/3 Informal Support Available to Average Percentage of ADSA-Paid Support (C + A) | | | .13 + .6 =0.73(D) |
| **Total Adjusted Hours** determined by multiplying the total average percentage of ADSA-Paid Support by the base hours from the client's classification group (D x Base Hours for Group E High). | | | 0.73 x 393 = 286.89<br>Round to<br>**287 Hours** |

36. Based on the evidence in the record, the Appellant was eligible for 287 personal care hours per month, effective August 31, 2012, based on the August 2012 assessments.

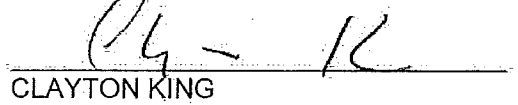
37. The undersigned has considered the *Initial Order* and the entire hearing record. Any arguments in the petition for review or response that are not specifically addressed in this decision have been duly considered, but are found to lack merit or to not substantially affect a party's rights. The procedures and time limits for seeking reconsideration or judicial review of this decision are in the attached statement.

## IV. DECISION AND ORDER

1. The *Initial Order* is ***modified.***

2. Effective August 31, 2012, the Appellant was eligible for 287 in-home personal care hours per month.

*Mailed on the* 30th *day of June, 2014.*



CLAYTON KING
Review Judge/Board of Appeals

Attached: Reconsideration/Judicial Review Information

Copies have been sent to: Renee Sweeney, Appellant
Diane Huskey, Appellant's Representative
Jonothan Bashford, Department's Representative
Stacy Graff, Program Administrator, MS: 45600
Annette Schuffenhauer, Other, MS: 45504
Sheri Clark Peterson, ALJ, Olympia OAH

Sent MR. Bashford's Copy to R. Miyoshi

Sent Stacy Graff's Copy to Shannon Marion

Washington State Department of Social & Health Services

STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
BOARD OF APPEALS

Washington State Health Care Authority

# PETITION FOR RECONSIDERATION OF REVIEW DECISION

See information on back.

Print or type detailed answers.

NAME(S) (PLEASE PRINT) | DOCKET NUMBER | CLIENT ID OR "D" NUMBER

MAILING ADDRESS | CITY | STATE | ZIP CODE

TELEPHONE AREA CODE AND NUMBER

Please explain why you want a reconsideration of the Review Decision. Try to be specific. For example, explain:

- Why you think that the decision is wrong (why you disagree with it).
- How the decision should be changed.
- The importance of certain facts which the Review Judge should consider.

I want the Review Judge to reconsider the Review Decision because. . .

PRINT YOUR NAME | SIGNATURE | DATE

| MAILING ADDRESS | PERSONAL SERVICE LOCATION |
|---|---|
| BOARD OF APPEALS<br>PO BOX 45803<br>OLYMPIA WA 98504-5803 | DSHS / HCA Board of Appeals<br>Office Bldg 2 (OB-2), 1st Fl. Information Desk<br>1115 Washington St. SE, Olympia WA |
| FAX | TELEPHONE (for more information) |
| 1-(360) 664-6187 | 1-(360) 664-6100 or 1-877-351-0002 |



DSHS 09-822 (REV: 07/2011)

## If You Disagree with the Judge's Review Decision or Order and Want it Changed, You Have the Right to:

(1) Ask the Review Judge to reconsider (rethink) the decision or order **(10 day deadline)**.

(2) File a Petition for Judicial Review (start a Superior Court case) and ask the Superior Court Judge to review the decision **(30 day deadline)**.

DEADLINE for Reconsideration Request - 10 DAYS: The Board of Appeals must RECEIVE your request within ten (10) calendar days from the date stamped on the enclosed Review Decision or Order. The deadline is 5:00 p.m. If you do not meet this deadline, you will lose your right to request a reconsideration.

If you need more time: A Review Judge can extend (postpone, delay) the deadline, but you must ask within the same ten (10) day time limit.

HOW to Request: Use the enclosed form or make your own. Add more paper if necessary. You must send or deliver your request for reconsideration or for more time to the Board of Appeals on or before the 10-day deadline (see addresses on enclosed form).

COPIES to Other Parties: You must send or deliver copies of your request and attachments to every other party in this matter. For example, a client must send a copy to the DSHS office that opposed him or her in the hearing.

Translations and Visual Challenges: If you do not read and write English, you may submit and receive papers in your own language. If you are visually challenged, you have the right to submit and receive papers in an alternate format such as Braille or large print. Let the Board of Appeals know your needs. Call 1-(360)-664-6100 or TTY 1-(360) 664-6178.

DEADLINE for Superior Court Cases - 30 DAYS: The Superior Court, the Board of Appeals, and the state Attorney General's Office must all RECEIVE copies of your Petition for Judicial Review within thirty (30) days from the date stamped on the enclosed Review Decision or Order. There are rules for filing and service that you must follow.

EXCEPTION: IF (and only if) you file a timely reconsideration request (see above), you will have thirty days from the date of the Reconsideration Decision.

Refer to the Revised Code of Washington (RCW), including chapter 34.05, the Washington Administrative Code (WAC), and to the Washington Rules of Court (civil) for guidance. These materials are available in all law libraries and in most community libraries.

If You Need Help: Ask friends or relatives for a reference to an attorney, or contact your county's bar association or referral services (usually listed at the end of the "attorney" section in the telephone book advertising section). Columbia Legal Services, Northwest Justice Project, the Northwest Women's Law Center, some law schools, and other non-profit legal organizations may be able to provide assistance. You are not guaranteed an attorney free of charge.