IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DYLAN KUEHL, Appellant, v. STATE OF WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES, Respondent.	No. 41076-1-II UNPUBLISHED OPINION

Hunt, J. — Dylan Kuehl appeals the Department of Social and Health Services Division of Developmental Disabilities' (the State's) decision that reduced his monthly disability benefits "base hours" from 145 to 110 hours. He argues that the State (1) violated his procedural due process rights by failing to provide adequate notice of his disability benefits reduction and (2) acted unlawfully by considering only the week preceding the State's assessment in determining whether he had open skin lesions during a seven-day "look-back" period, rather than considering whether he had open skin lesions in the past. We affirm.

FACTS

Twenty-eight-year-old Dylan Kuehl suffers from a range of medical problems, including Down's syndrome and "a history of skin problems including open lesions" that he and his mother, Theresa Rose, treat with ointment and antibiotics. Clerk's Papers (CP) at 15 (internal quotation

marks omitted). Rose is Kuehl's "paid care provider." CP at 14. Kuehl "takes or uses ten prescriptions or over-the-counter products," for which he requires daily assistance to remind him to take at the appropriate times. CP at 15. Kuehl is also "moderately impaired in his decision making," "requires reminders, cues, and supervision in planning and organizing daily routines," and "is unaware of consequences." CP at 16. But he "usually understands others," "is usually able to make himself understood," "has his own business," "is a guest speaker in the community," and "attends school." CP at 16.

I. State Services

Generally, Medicare and Medicaid require that "intermediate care facilit[ies]" administer services for persons such as Kuehl. WAC 388-845-0005(1), (2). Various state laws and regulations "'waive'" these federal requirements and allow persons to receive "services in the home" rather than at a care facility. WAC 388-845-0005(2). The State provides five types of these "waiver services"; one of these services is the "[c]ore waiver" service, for which Kuehl is eligible and which he receives under State law. CP at 14; WAC 388-845-0015. The State does not challenge Kuehl's eligibility for this core waiver service.

Within the core waiver service, the State administers particular programs, including "[p]ersonal care." WAC 388-845-0215. Under this program, the State determines the "limits"[1] of each recipient's personal care program using "the CARE [Comprehensive Assessment Reporting Evaluation] tool." WAC 388-845-0215. The State uses the CARE tool to assess the

[1] In the context of this personal care program, "limits" under WAC 388-845-0215 apparently means the number of hours of personal care that the State may provide for a recipient.

recipient's

> needs and abilities during the seven days prior to the assessment (for activities of daily living) or during the thirty days prior to the assessment (for instrumental activities of daily living). To assess the client's needs using the CARE tool, [State] case workers go to the client's home and input answers to specific questions in a portable computer.

CP at 14.

This CARE assessment evaluates four criteria: (1) cognitive performance; (2) whether the recipient's condition qualifies as a clinical complexity; (3) mood/behaviors symptoms; and (4) activities of daily livings (ADLs), such as bathing, body care, personal hygiene, and medication management. The CARE assessment uses these factors to place recipients into Group A, B, C, D, or E. Each group has a sub-group of "High," "Medium-High," "Medium," and "Low." Former WAC 388-106-0125 (Sept. 1, 2007).[2] Every sub-group, in turn, has a fixed number of "base hours," former WAC 388-106-0125, the maximum number of in-home service hours for which the State will pay.

A. Kuehl's Previous CARE Assessment

Nancy Stewart, Kuehl's case manager, has been evaluating Kuehl using the CARE assessment since at least 2004. A March 22, 2004 CARE assessment located Kuehl within Group D Low and provided him with 145 base hours. The State classified Kuehl in Group D Low again on March 15, 2005, February 9, 2006, and May 4, 2007. During each of these assessments,

[2] The DSHS amended WAC 388-106-0125 in an emergency rule effective September 1, 2007. Wash. St. Reg. 07-18-057. The DSHS enacted another emergency rule, effective December 28, 2007, that modified the only the form of the September 1, 2007 version of WAC 388-106-0125. Wash. St. Reg. 08-02-56. The DSHS made the changes in the December 28 emergency rule permanent effective May 26, 2008. Wash. St. Reg. 08-10-022.

Kuehl's monthly base hours remained at 145.

B. September 10, 2007 CARE Assessment Reducing Base Hours

On September 10, 2007, Stewart conducted another CARE assessment of Kuehl. Rose sat next to Stewart and "viewed the screens" into which Stewart entered the CARE assessment data. VRP (June 16, 2008) at 68. Rose told Stewart that Kuehl had no open lesions during the seven-day "look-back"[3] period before the assessment,[4] even though Kuehl has a "history of skin problems," including lesions. CP at 44. This determination differed from the May 4 CARE assessment four months earlier, which recorded that Kuehl had "skin issues." VRP (June 16, 2008) at 43. The September 10 CARE assessment also made determinations about Kuehl's personal hygiene and "communication," both of which also differed from the May 4, 2007 assessment. VRP (June 16, 2008) at 102.

The September 10, 2007 CARE assessment assigned Kuehl a behavior point score of 9, a cognitive performance score of 3, and an ADL score of 6. These scores partially qualified Kuehl for both Group B Medium High and Group C Low classifications.[5] Kuehl, however, did not meet the criteria for clinical complexity. Thus, Kuehl was not eligible for the Group C Low

[3] VRP (June 16, 2008) at 45.

[4] According to the State's interpretation of its regulations, Stewart could not take into consideration any open lesions that Kuehl had before this seven-day look-back period.

[5] A recipient qualifies for Group B Medium High if the recipient (1) has a behavior point score greater than 6; (2) has a cognitive performance score of greater than 2; (3) has an ADL score of greater than 1; and (4) does not satisfy the criteria for C, D, or E groups. The State provides 110 base hours for a person in the Group B Medium High classification. Former WAC 388-106-0125.

In contrast, a recipient falls under Group C Low if he (1) meets the criteria for clinical complexity; (2) has a cognitive performance score of less than 4; and (3) has an ADL score of 2-8. In the Group C Low classification, behavior points are irrelevant. The State provides 95 base hours in the Group C Low classification. Former WAC 388-106-0125.

classification (95 monthly base hours), and the State placed him in the Group B Medium High category (110 monthly base hours), a reduction from the 145 monthly base hours he had previously been receiving in the Group D Low category.

On October 18, 2007, Stewart emailed Rose explaining that the State was reducing Kuehl's monthly base hours from 145 to 110 hours. Stewart noted that the State had modified its evaluation of "'[c]omprehension by [o]thers'" from "'sometimes'" "'[u]nderstood'" to "'usually'" "'[u]nderstood'" and that this modification "may have accounted for some of the fluctuation in hours." AR at 566. The email also explained that the State had reduced Kuehl's score "under decision-making" "from a 4 to a 3," that "[Kuehl's] assessment [was] in the mail," and that "Planned Action Notices" "w[ould] accompany the paperwork sent." AR at 566.

The State sent Kuehl a "Planned Action Notice" dated October 19, 2007, which he received the same day. VRP (June 16, 2008) at 200. This notice explained that the State was reducing Kuehl's "personal care" service from 145 to 110 hours per month effective November 1, 2007, and recited former WAC 388-106-0130 (2006) and -0135 verbatim. CP at 7. Under the heading "Reasons for Denial, Reduction or Termination of Service," the State had checked the box next to "It has been determined you do not have an assessed need for the amount of service you requested or previously had." CP at 7. The notice further explained that within 90 days of receipt of the notice, Kuehl could request an administrative hearing to appeal the reduction.

The State also sent Kuehl the "Current Annual DDD Assessment Details" (Assessment Details),[6] which provided explanations of and commentary about all of the State's determinations

[6] Although the record does not establish precisely when the State sent the Assessment Details, Kuehl concedes in his brief that the State sent it at the same date that it sent the Planned Action

from the September 10, 2007 CARE assessment, including the statement, "No current open lesions."[7] AR at 325. Stewart "offer[ed] Ms. Rose an opportunity" to "review the assessment with [Stewart's] supervisor." VRP (June 16, 2008) at 48. This meeting never took place.[8]

II. Procedure

A. Administrative Hearing

Kuehl requested an administrative hearing, stating that he disagreed with the State's "reduction of [his] personal care hours from 145 to 110." AR at 146. A letter from Rose that accompanied the written request for a hearing listed approximately 13 disagreements that Rose had with the State's decision, some of which were broadly-worded assertions that the State's September 10, 2007 assessment was incorrect and some of which disagreed with specific determinations.[9] None of these grievances, however, challenged the State's determination that

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Notice, October 19.

[7] Some four months later, on February 22, 2008, the State sent Kuehl another document—the "In-Home Algorithm," containing the scores that Kuehl received in his September 10, 2007 assessment and extraordinary detail about the methodology that DSHS uses to calculate the monthly base hours for each recipient. AR at 568. The State did not, however, send Kuehl the "CARE Results," which show the criteria that Stewart used during the assessment and Kuehl's score for each criterion. VRP (June 16, 2008) at 70; AR 333-46. The CARE Results contain information very similar to the Assessment Details. *Compare* AR at 333-46 *with* AR at 300-32.

[8] According to Rose, she did not participate because she felt that her relationship with the State had become "adversarial," she had "real fear about what was going on," and she did not "think that [she] could do this on [her] own." VRP (June 16, 2008) at 201, 203.

[9] Kuehl also claimed that the State had deprived him of his property rights "without proper notice" because, after Stewart completed her assessment, Kristine Pedersen, a DSHS supervisor, had changed some of Stewart's responses. AR at 152. But Kuehl does not advance this argument on appeal. Instead, he now argues that the State violated his procedural due process rights because the State failed to provide him with the specific reasons for reclassifying him as Group B Medium High.

Kuehl had "[n]o current open lesions." AR at 325.

Kuehl filed a pre-hearing brief explaining that the State had "informally" advised him that his reclassification from Group D Low to Group B Medium High "hinged . . . on one fact: his chronic skin lesions that are a known side effect of his condition and have always been present during past assessments, gave him a break during the last assessment visit and the seven days prior to it." AR at 137. Kuehl argued that (1) because his skin lesions are a chronic condition, it was improper for the State to reclassify him based solely on this anomalous week-long absence of skin lesions[10]; and (2) the State violated his procedural due process rights because he "received his notice of reduction of care hours with a one page notice which contained no reason for the reduction other than that the CARE tool and formula provided by regulation 'said so.'" AR at 137.

During the administrative hearing, Michele Starkey, a case manager supervisor at the DSHS Division of Developmental Disabilities and the State's legal representative during the proceedings below, testified that the

> major driving factor for [the] decrease [in Kuehl's monthly base hours] was . . . that he was in the clinically complex category previously . . . because open lesions were coded on the skin screen in previous assessments and they were not in the current assessment . . . because within the seven day look-back period, . . . included in [WAC] 388-106 . . . his mother reported no open sores during that time.

VRP (June 16, 2008) at 99.

Kuehl filed a post-hearing brief elaborating on his skin lesions argument. He argued that

[10] The State does not contend that Kuehl does not suffer from chronic skin lesions. Instead, it maintains (and Kuehl does not dispute) that Kuehl did not suffer from skin lesions during the applicable seven-day look-back period.

(1) "the seven day look-back period for the presence of open lesions" has "no basis for its existence in any statute or published regulation and is thus void," AR at 39, 41; (2) the State's application of the look-back period to his skin lesions condition was irrational and unconstitutional; and (3) the State had violated his procedural due process rights by providing him with constitutionally inadequate notice.

The Administrative Law Judge (ALJ) disagreed with Kuehl's argument that the State's application of the look-back period was incorrect, stating, "If Mr. Kuehl's interpretation were accepted, clients would qualify if they had any of the listed conditions in the past." AR at 84 (Conclusion of Law (CL) 20). The ALJ upheld the State's determination that, under the applicable regulations, Kuehl had to have had open skin lesions within the seven-day look-back period immediately preceding the September 10, 2007 CARE assessment in order to qualify as having a "clinica[l] complex[ity]" under WAC 388-106-0095. AR at 85 (CL 21). Also ruling for the State on the procedural due process issue, the ALJ rendered the following Conclusions of Law:

> 31. . . . Kuehl contends that the Planned Action Notice is inadequate and should be dismissed or withdrawn because it does not specify the reasons for the reduction. The Planned Action Notice contains basic information about the new number of hours, the effective date of the change, two of the WAC sections involved, and the process and deadline for requesting a hearing to challenge the reduction. The CARE assessment process is a lengthy series of facts and computations resulting in the number of hours allowed. It would be very difficult to summarize all the steps which must be covered in order to calculate the final number. Theoretically, the [State] could attach to the Planned Action Notice a copy of the current assessment [from September 10, 2007] and the last assessment [from May 4, 2007] to allow the client to identify the differences in scoring each element. This would not result in practical notice with more helpful information to the parties. To some extent, the client himself identifies what parts of the CARE assessment will be the issues at a hearing. Even if a Planned Action Notice were

> required to identify all differences between a current assessment and the previous assessment, a client may still challenge the scoring of [how] an item was scored identically the last time.
>
> 32. Due to the complexity of the CARE assessment, it is not reasonable to require the [State] to list on the Planned Action Notice all reasons for the number of hours of care awarded. Clients may contact the [State] for copies of their current and previous CARE assessments. The Planned Action Notice was sufficient and should not be dismissed.

AR at 91 (CL 31 and 32). Kuehl appealed the ALJ's decision to DSHS's Board of Appeals.

B. Board of Appeals

The Board of Appeals affirmed the ALJ's decision. Addressing Kuehl's look-back argument, the Board noted that it

> could locate no Department [of Social and Health Services] rule, state statute, or relevant case law decision to support [Kuehl's argument], and fails to find [Kuehl's] argument to be persuasive. [WAC 388-106-0095] clearly states that to be classified as "clinically complex," the client must "***have*** one or more of the following problems . . . Open lesions." [Kuehl] cites no legal authority to support his argument that a ***history*** of open lesions should be construed as ***currently exhibiting or having open lesions***. The Department [of Social and Health Services] must be applied in this proceeding as the first source of law and an administrative decision cannot ignore or invalidate the rules' ***clear language***. Therefore, the ALJ appropriately determined that [Kuehl's] historical medical conditions failed to qualify him as "clinically complex" for the purposes of ***this*** CARE assessment.

AR at 16-17 (CL 11).

Addressing Kuehl's procedural due process argument, the Board again agreed with the ALJ:

> Pursuant to the Department [of Social and Health Services]'s rules, the *Planned Action Notice* gave timely notice of the [State's] action, cited the relevant legal authority for the action, offered a reason for the action, and provided the mechanism for requesting an administrative hearing, thereby affording at least the ***minimal*** *due process* protections required by law. Furthermore, the WAC allows

> the [State] to later supplement or amend a *Planned Action Notice* in writing, in order to provide additional, necessary information. By later supplying a copy of [Kuehl's] "In-home Algorithm Exhibit[]" [on February 22, 2008] the [State] supplemented their notice to provide ***any*** possible information the client might need to dispute the [State's] action/decision. Therefore, the ALJ correctly concluded that as a matter of law, the [State's] *Planned Action Notice* was sufficient to meet due process requirements and should not be dismissed.

AR at 18-19 (CL 17) (footnotes omitted). Kuehl appealed to the Thurston County Superior Court under the Administrative Procedure Act (APA), chapter 34.05 RCW.

C. Superior Court

The superior court affirmed the Board's decision. The superior court ruled that the "[State's] interpretation of WAC 388-106-0095 to include a seven-day lookback [sic] period when determining whether an individual 'has' open lesions, is reasonable" and that such an interpretation "is not arbitrary or capricious; and does not violate constitutional requirements of due process." CP at 126 (CL 8, 9). Addressing Kuehl's procedural due process argument, the superior court stated, (1) "The administrative record is not entirely clear as to what information accompanied the Planned Action Notice sent to Mr. Kuehl on October 19, 2007," CP at 124 (Finding of Fact (FF) 6); (2) but "there is insufficient evidence in the record . . . to conclude that the [State] failed to follow all statutory and regulatory notice requirements, including the requirements of WAC 388-106-0050(3)[11] and sending to Mr. Kuehl the CARE Assessment Details document," CP at 124 (FF 6) (citing AR at 300-32); and (3) "[the State] provided Mr. Kuehl with constitutionally adequate pre-deprivation notice of the basis for its action reducing his

[11] WAC 388-106-0050(3) provides, "When the department modifies your current assessment, it will notify you using a Planned Action Notice of the modification regardless of whether the modification results in a change to your benefits. You will also receive a new service summary and assessment details."

personal care benefits." CP at 125 (CL 6).

D. Appellate Courts

Kuehl sought direct review by our Supreme Court, which transferred the appeal to our court. On appeal, we review the record before the Board.

ANALYSIS

I. Procedural Due Process

Kuehl first argues that the State violated his procedural due process rights[12] because the State did not provide him with adequate notice of its reduction of his monthly base hours. We disagree. We review constitutional issues de novo. *In re Crace*, 157 Wn. App. 81, 96, 236 P.3d 914 (2010), *review granted*, 171 Wn.2d 17 (2011).

A. Standing

The State argues that Kuehl lacks standing to raise this procedural due process argument. We disagree. "When a state seeks to deprive a person of a protected interest, procedural due process requires than an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation." *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (citing *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S. Ct. 893, 47 L Ed. 2d 18 (1976)). Neither party disputes that Kuehl's monthly base hours are a protected interest, and cases from other jurisdictions confirm this. *See, e.g.*, *Baker v. Dep't of Health & Soc. Serv.*, 191 P.3d 1005 (Alaska 2008); *see also Mansfield v. Comm'r of Dep't of Pub. Welfare*, 40 Mass. App. Ct. 1, 660 N.E.2d 684 (1996). Thus, Kuehl has standing to raise his procedural due process

[12] U.S. Const. amend. XIV, § 1; Wash. Const. art. I, § 3.

argument.

B. State's Notice Satisfied Procedural Due Process

As the United States Supreme Court has explained,

> [T]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal.

Goldberg v. Kelly, 397 U.S. 254, 266, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) (internal citations omitted). Our State Supreme Court follows *Goldberg*, explaining that "[w]hen a state seeks to deprive a person of a protected interest, procedural due process requires than an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation." *Amunrund*, 158 Wn.2d at 216 (citing *Mathews*, 424 U.S. at 348). "'Part of the function of notice is to give the charged party a chance to marshal the facts in his defense.'" *In re Matter of Cashaw*, 68 Wn. App. 112, 124, 839 P.3d 332 (1992) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 564, 94 S. Ct. 2963, 41 L. Ed. 2d. 935 (1974)), *aff'd*, 123 Wn.2d 138 (1994).

The issue of what kind of notice the State must provide before reducing a personal care recipient's monthly base hours is apparently an issue of first impression in this state. Thus, we may look to other jurisdictions for persuasive decisional law. *See, e.g.*, *Petcu v. State*, 121 Wn. App. 36, 66, 86 P.3d 1234 (2004); *see also In re Dependency of M.J.L.*, 124 Wn. App. 36, 40, 96 P.3d 996 (2004). Kuehl extensively cites *Baker*, a decision from the Alaska Supreme Court. 191 P.3d 1005. We do not find *Baker* persuasive.

In revamping Alaska's analogue to Washington's CARE program, Alaska sent out notices to recipients about their reduction in services; these notices, however, did not include a copy of

the 13-page worksheet "PCAT" that the recipient's case worker would use in interviewing and reevaluating each recipient's eligibility for continued services.[13] *Baker*, 191 P.3d at 1007. The Alaska Supreme Court held that Alaska's notice to the recipients violated their procedural due process rights because the notice did not do enough "to ensure that [the] recipients have the information they need to understand and, if necessary, to challenge the state's action concerning their benefits." *Baker*, 191 P.3d at 1011. The *Baker* court explicitly noted, however, that "[i]nclusion of the PCAT Form with the [n]otice [w]ould [s]atisfy [d]ue [p]rocess." *Baker*, 191 P.3d at 1011.

The Alaska Supreme Court explained:

> The department asserts that the PCAT would not provide recipients with information "that would contribute to their decision whether to request, or how to prepare for, a hearing." We disagree. It is true that if a recipient disputes, for example, that fifteen minutes, twice a day is sufficient time to prepare necessary light meals, she can request a hearing based on nothing more than her belief that the agency has underestimated the time that it takes to make a sandwich on her service plan. But if the recipient wishes to appeal the reduction of hours generally, it would be helpful to understand the basis for the agency's determination, and this cannot be gleaned from the service plan alone. The PCAT provides insight into

[13] Alaska revamped its "Personal Care Attendant" program, *Baker*, 191 P.3d at 1007, which is similar to the Washington program for which Kuehl qualifies here. Alaska instituted a "Personal Care Assessment Tool" (PCAT), similar to the CARE assessment tool here, which state-contracted registered nurses would administer. *Baker*, 191 P.3d at 1007. Alaska's process for determining disability services is almost identical to the CARE assessment here.

Use of this new uniform assessment tool caused many Alaska recipients to suffer a reduction in services. *Baker*, 191 P.3d at 1008. To notify these recipients of the change in service, Alaska sent each recipient "form letters" that contained: (1) a statement that Alaska had adopted new regulations requiring the State to reevaluate the recipients using the PCAT; (2) a statement the recipients would experience a decrease in the amount of services; and (3) an explanation of what this new services entailed. *Baker*, 191 P.3d at 1008. Alaska did not, however, include the PCAT itself—"a thirteen-page worksheet-like form that is filled out . . . on the basis of information gathered during a personal interview with a . . . recipient in that person's home." *Baker*, 191 P.3d at 1007.

> what the assessor understood of the individual's abilities and disabilities, and while this information may not be necessary to perfect an appeal to the agency, it may well contribute to the recipient's decision to initiate one.

Baker, 191 P.3d at 1012.

The State's notice to Kuehl here satisfied the requirements that the Alaska Supreme Court outlined in *Baker*. Here, the State provided Kuehl with the Department of Developmental Disabilities Planned Action Notice and the Assessment Details within one day after informing him that it was reducing his monthly base hours. The Planned Action Notice recited verbatim former WAC 388-106-0130 and -0135, which contain an outline of the formula that the State uses during its CARE assessments. And the Assessment Details provided explanations of and commentary on all of the State's determinations from the September 10, 2007 CARE assessment, including the statement, "No current open lesions." AR at 325. Both of these documents were designed to be "helpful to understand the basis for the agency's determination," which is what the *Baker* court noted procedural due process requires and Alaska did not provide to its recipients. *Baker*, 191 P.3d at 1012.[14]

Not only did the documents that the State provided to Kuehl exceed the due process requirements noted in *Baker*, but also Kuehl and Rose's actions demonstrated that Kuehl had adequate opportunity to "'marshal the facts in his defense.'" *Cashaw*, 68 Wn. App. at 124 (quoting *Wolff*, 418 U.S. at 564). First, Rose sat next to Stewart during the entire September 10, 2007 CARE assessment and "viewed the screens" as Stewart entered the data into the computer.

[14] The other foreign authorities that Kuehl cites, such as *Corella v. Chen*, 985 F. Supp. 1189 (D. Ariz. 1996), present situations similar to those in *Baker*: Notice from the State did not "detail the reasons for the proposed action." *Corrella*, 985 F. Supp. at 1194.

VRP (June 16, 2008) at 68. Second, within the same month that the State sent Kuehl the Planned Action Notice and Assessment Details, Rose wrote a letter to the State listing specific disagreements that she and Kuehl had with the assessment results. Finally, the Planned Action Notice clearly informed Kuehl that he had the right to appeal within 90 days, which right he exercised. Accordingly, we hold that the State did not violate Kuehl's procedural due process rights.

C. Due Process Does Not Require Reduction Based on Single Factor

To the extent that Kuehl contends that the State failed to provide a single, decisive reason why it reduced his monthly base hours, his argument fails.[15] Examination of the CARE assessment methodology reveals that the State did not base its determination to reclassify Kuehl on a single, dispositive factor, but rather based it on a complex formula that takes into account a multitude of different characteristics, including behaviors, daily activities, and cognitive abilities.[16] *See* former WAC 388-106-0125, -130. Moreover, the State provided Kuehl with notice that included both the assessment's formula and the data that the State used in that formula, which,

[15] Kuehl's assertion that "[c]ounsel was . . . informally advised that this single fact [Kuehl's lack of skin lesions] resulted in the entire reduction" misconstrues the record. Br. of Appellant at 4. Kuehl cites Michele Starkey's administrative hearing testimony that "the *major driving factor* for that decrease [from 145 to 110 monthly base hours] was . . . [that] [Rose] reported no open sores during [the 7 day look-back period." VRP (June 16, 2008) at 99 (emphasis added). Contrary to Kuehl's assertion, Starkey did not give the lack of skin lesions during the seven-day look-back period as the sole reason for the reduction in Kuehl's benefits.

[16] For example, when Stewart emailed Rose about the change in the State's evaluation of the ability of others to understand Kuehl, Stewart wrote that this change "may have accounted for *some* of the fluctuation in hours." AR at 566 (emphasis added). And Starkey explained that the absence of skin lesions was the "*driving* feature," but not the only feature, behind Kuehl's reclassification. VRP (June 16, 2008) at 138 (emphasis added).

together, conveyed to Kuehl the entire assessment that served as the basis for the State's reclassification.

D. Due Process Does Not Require Score Sheet Comparison

Kuehl also contends that the State acted unconstitutionally by failing to "compare the score sheet for [him] that was finally produced with the previous one, see what had changed, and notify [him]." Reply Br. of Appellant at 8. This argument also fails. Procedural due process requires the State's notice to give the recipient of a reduction in services "'a *chance* to marshal the facts in his defense,'" *Cashaw*, 68 Wn. App. at 124 (emphasis added) (quoting *Wolff*, 418 U.S. at 564); it does not require the State to organize the facts and provide a ready-made defense. Less than two weeks after the State notified Kuehl of the reduction in his personal care hours, Rose wrote a letter to Stewart listing specific disagreements that she and Kuehl had with particular components of the State's assessment. This fact demonstrates that Rose, on behalf of Kuehl, was able to analyze carefully the September 10, 2007 assessment and to evaluate the accuracy of the State's individual determinations with respect to Kuehl.

As the ALJ aptly pointed out, "To some extent, the client himself identifies what parts of the CARE assessment will be the issues at a hearing." AR at 91. The record shows that the State's notice enabled Kuehl to do so. There may be a better, more efficient way to provide notice, but that is the province of the government agencies to implement, not for the courts to dictate.[17] Nevertheless, we hold that the State's notice to Kuehl in 2007 and 2008 satisfied procedural due process.

[17] To this end, the State is apparently implementing enhanced reduction notices as of August 1, 2011. *See* Br. of Amicus (Columbia Legal Serv.) at 1-4.

II. WAC 388-106-0095 "Look-Back Period"

Kuehl next argues that applying WAC 388-106-0095's seven-day look-back period to his skin lesion condition was arbitrary, capricious, and unconstitutional because, in so doing, the State ignored the ongoing chronic nature of this condition and the open skin lesions that occurred before the look-back period. The State counters that Kuehl lacks standing to make this challenge because he would have received the same number of monthly personal care hours even if the State had considered his pre-look-back period skin lesions and classified him as "clinically complex." Br. of Resp't at 46. We agree with the State.

To bring an appeal under the APA, the complaining party must satisfy the following standing requirements:

> A person has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action. A person is aggrieved or adversely affected within the meaning of this section only when all three of the following conditions are present:
> (1) The agency action has prejudiced or is likely to prejudice that person;
> (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
> (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person cause or likely to be caused by the agency action.

RCW 34.05.530. "The first and third factors require a showing of 'injury in fact,' while the second requires the party to establish that the 'Legislature intended the agency to protect the party's interests when taking the action at issue.'" *Nat'l Elec. Contractors Ass'n v. Emp't Sec. Dep't*, 109 Wn. App. 213, 219-20, 34 P.3d 860 (2001) (quoting *St. Joseph Hosp. & Health Care Ctr. v. Dep't of Health*, 125 Wn.2d 733, 739-40, 887 P.2d 891 (1995)).

"'The injury in fact test requires more than an injury to a cognizable interest. It requires

that the party seeking review be himself among the injured.'" *Allan v. Univ. of Washington*, 92 Wn. App. 31, 37, 959 P.2d 1184 (1998) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)), *aff'd*, 140 Wn.2d 323 (2000)). And the injury must be "concrete and particularized, rather than conjectural or hypothetical." *Allan*, 92 Wn. App. at 37 (citing *Lujan*, 504 U.S. at 560). Kuehl does not make this showing here.

Kuehl argues that the State incorrectly reclassified him from Group D Low to Group B Medium High, which reduced his monthly base personal service hours from 145 to 110. Specifically, Kuehl contends that the State should have determined that he was "clinically complex," which would have qualified him for classification in Group C Low. Br. of Appellant at 38. Other than its failure to classify him as "clinically complex," Kuehl does not challenge any part of the State's reclassification. *See* Br. of Appellant at 30-49.

As the State notes, however, Group C Low (which Kuehl now contends should have been the result of the September 10, 2007 assessment) allows only 95 monthly base hours, *fewer* hours than the 110 hours allowed under the State's Group B Medium High reclassification, which Kuehl now challenges. The State concedes that providing fewer base hours for Group C Low (which includes recipients who have a "clinical complexity") than those in Group B Medium High (those who do not have a "clinically complexity") appears paradoxical. Br. of Resp't at 45. According to the State, however, it has resolved this paradox by granting exemptions to Group C Low recipients "as if they had been given a B-Medium-High classification." Br. of Resp't at 45. Thus, the State would have provided Kuehl with the same number of monthly base hours (110) regardless of whether it had determined that Kuehl had open skin lesions (and therefore had a

"clinical complexity"). Accordingly, Kuehl fails to show injury from the State's determination that he lacked open skin lesions for purposes of the September 10, 2007 assessment.

We acknowledge that Kuehl suffered an "injury" when the September 10, 2007 assessment reclassified him from the Group D Low category to the Group B Medium High category, which reduced his monthly personal care hours from 145 to 110. But Kuehl does not attack the substance of this entire assessment; instead, he challenges only one component—the State's conclusion that he did not have a "clinical complexity." As we explained previously, however, the State would have provided Kuehl with 110 monthly personal care hours even if the State had classified him as having a "clinical complexity." In other words, his injury is attributable to more than the skin lesion component.[18]

Kuehl also asks us to examine the State's open skin lesions determination because his other conditions, such as behavior issues, "*may be subject* to alteration" in the future.[19] Reply Br. of Appellant at 24 (emphasis added). The APA, however, does not allow Kuehl to appeal an agency action based on a "conjectural or hypothetical" injury that might occur in the future. *Allan*, 92 Wn. App. at 37. Nor do we render such advisory opinions.

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[18] In addition, Kuehl claims another type of injury: The State will seek repayment from him for extra monthly personal care hours that he received during the period of disputed reduction, "unless," according to Kuehl, "he prevails on appeal." Reply Br. of Appellant at 24. This argument fails. Again, even if Kuehl "prevail[ed]" on this issue and was correct that the State should have given him a "clinically complex" determination, the State still would have assigned him only 110 monthly person care hours and sought reimbursement from him for the excess hours provided. Reply Br. of Appellant at 24.

[19] We do note, however, although not relevant to the issue before us, that the State has apparently restored Kuehl's monthly base hours to 145.

We hold, therefore, that Kuehl lacks standing to challenge his reclassification because he shows no qualifying injury attributable solely to the lack of skin lesions during the seven-day look-back period, the only ground on which he attempts to challenge his reclassification.

Accordingly, we affirm the Board. Because Kuehl's appeal fails, we deny his request for attorney fees.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Penoyar, C.J.

Worswick, J.