No. 84325-2

Stephens, J. (dissenting)—I disagree with the majority's conclusion regarding the invalidity of WAC 388-106-0213, the children's personal care rule. At issue here is the Department of Social and Health Services' (DSHS) allotment of Medicaid dollars to pay for personal care services. Personal care services consist of "physical or verbal assistance with activities of daily living (ADL) and instrumental activities of daily living (IADL)." WAC 388-106-0010. ADLs include in total: bathing, bed mobility, body care, dressing, eating, locomotion in the home, locomotion outside the home, walking in the home, medication management, toilet use, transfer (such as from sitting to standing), and personal hygiene. *Id*. IADLs include in total: meal preparation, ordinary housework, essential shopping, wood supply (if wood is the sole source of fuel for heating and/or cooking), travel to medical services, managing finances, and telephone use. *Id*.

The children's personal care rule limits the amount of paid care a child may

receive for personal care services (i.e., assistance with ADLs and IADLs) based on the premise that a parent will provide many of these same services as part of his or her parental responsibilities. The so-called comparability provision of 42 U.S.C. § 1396a(a)(10)(B)(i) requires that a state Medicaid plan must provide "that the medical assistance made available to any individual . . . shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual." Medical assistance is defined as "payment of part or all of the cost" of enumerated services like personal care services. 42 U.S.C. § 1396d(a). Thus, in plain terms, the Medicaid statutes do not require a state to cover the entire cost of medical assistance. Rather, the State has the ability to "place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures." 42 C.F.R. § 440.230(d).

The question here is whether DSHS has placed appropriate limits on paid personal care services by recognizing the obligation of parents to provide unpaid support for their children. Put another way, this court must decide whether the Medicaid comparability provision requires a state to pay for 100 percent of a client's assessed personal care needs with Medicaid dollars.

The clear answer is no. As noted, medical assistance itself is defined as partial *or* full payment of a service. And a state may place appropriate limits on a service. The majority errs when it reads the comparability provision as requiring the state to pay for *all* of every client's assessed needs. The error flows from a misunderstanding of how the comparability provision's requirements are met by

DSHS's rule. The majority concludes the comparability provision requires total payment because the majority believes the limits at issue are not based on an individualized assessment of the client's actual need. *See* majority at 10-11 (citing *Jenkins v. Dep't of Soc. & Health Servs.*, 160 Wn.2d 287, 299, 157 P.3d 388 (2007) (observing that "DSHS violates the comparability requirement when it reduces a recipient's benefits based on a consideration other than the recipient's actual need"). But an individualized assessment of the client's actual need is exactly what occurred here.

Using its comprehensive assessment reporting evaluation (CARE) tool, DSHS assessed Samantha's need for personal care hours at 90 hours. This assessment considered a range of information, including information from medical providers. The question then becomes how many of the 90 hours will be delivered by a paid provider funded through Medicaid dollars and how many will be delivered by nonpaid support—in this case, Samantha's mother.[1] To be clear, under DSHS's assessment, *all* of Samantha's personal care needs are met; only some are met through *paid care* using Medicaid dollars. This is entirely consistent with the definition of medical assistance under 42 U.S.C. § 1396d(a) and the State's ability to limit services under 42 C.F.R. § 440.230(d), and it is consistent with the *Jenkins* requirement that limitations be tied to actual need because Samantha's needs are

[1] Samantha also spends some time enrolled as a junior high school student. The administrative law judge here determined "that some of Samantha [A.]'s needs are met while in school which presumably is a full school day." Administrative Record (AR) at 25. Samantha did not assign error to that finding. AR at 3.

met.[2] To read the comparability provision as the majority does—i.e., that comparable services means every client receives total paid care—is to obliterate the State's prerogative under federal statute and regulation to allocate partial payment for services and to place appropriate limits on already scarce resources. One questions how any limitation on paid services could survive the majority's analysis.

The fact that the children's personal care rule limits a child's paid personal care services based on a presumption tied to the child's age does not render the limitation inappropriate. It simply recognizes that a child of a certain age will need some personal care from a parent regardless of disability. The majority contends that the presumption is not individualized enough to satisfy the comparability provision: "In this case, Samantha's base MPC [Medicaid personal care] hours were mechanically reduced from 90 to 39 hours without any personalized determination that Samantha's needs would continue to be met." Majority at 14.

But as noted, under DSHS's assessment, Samantha's needs were individually assessed using CARE and all of Samantha's assessed personal care needs are met, either by a parent or a paid provider. The individualized determination that would be needed to allay the majority's concerns in this regard would not have to do with Samantha; it would have to do with her mother. That is, the majority requires that

[2] Samantha's counsel pointed out at oral argument that it may be more difficult for a parent to find a paid provider for only 39 hours per month as opposed to 90 hours. Wash. Supreme Court Oral Argument, *Samantha A. v. Dep't of Soc. & Health Servs.*, No. 84325-2 (Nov. 9, 2010), at 23 min., 27 sec., *video recording by* TVW, Washington State's Public Affairs Network, *available at* http://www.tvw.org. While the staffing difficulties families often face should not be underestimated, these are outside the purview of a CARE assessment.

DSHS determine whether Samantha's mother is capable or available to provide care for her child. While the very difficult trials faced by a parent of a disabled child are a serious reality, the fact is that DSHS must take into account the needs of Samantha, not the needs of her parent. As a custodial parent, Samantha's mother is legally responsible for providing care that is akin to personal care services, and it is appropriate for DSHS to presume she will do so.[3]

The majority believes that personal care services "are unlike the care parents typically provide to their children because MPC services are 'medical assistance' administered by DSHS in compliance with federal requirements" and Medicaid personal care providers "are statutorily required to obtain specialized training before caring for the disabled." Majority at 16 (footnote omitted). While it is hardly surprising that individuals receiving pay with Medicaid dollars must receive some sort of specialized training before contracting with the State, that does not mean unpaid personal care is not delivered by a family member. The federal center for medicaid services has recognized as much. "We believe spouses and parents are inherently responsible for meeting the personal care needs of their family members, and, therefore, it would not be appropriate to allow Medicaid reimbursement for such services." Medicaid Program; Coverage of Personal Care Services

[3] Although the record is silent as to its applicability here, it should be noted that some division of developmental disabilities clients are eligible to receive respite care, which is "short-term intermittent relief for persons normally providing care for waiver individuals." WAC 388-845-1600. Respite care cannot replace paid personal care hours available to a client. WAC 388-845-1620(3)(b). Thus, respite care and Medicaid personal care hours are not synonymous, and it should not be assumed that paid personal care hours are the only support available to a parent caring for a disabled child.

(Supplementary Information), 61 Fed. Reg. 9405, at 9407 (proposed Mar. 8, 1996) (codified at 42 C.F.R. pt. 440). It simply belies common sense to claim that personal care services—tasks such as bathing, dressing, and feeding—are not akin to the things a parent does for a child every day.

Whether Medicaid-funded or not, personal care services are *exactly* like the daily tasks parents perform on behalf of their children. The majority worries that "two categorically needy recipients who are individually assessed as requiring the same needs will ultimately be treated differently simply because one recipient lives with a legally responsible parent and the other lives with someone other than a parent." Majority at 11. But the disabled child who does not live with a legally responsible adult may therefore have no support available to him or her that does not need payment. Thus, the child's assessed needs cannot be met any other way than through *paid* personal care. Under either scenario, however, DSHS's assessment accounts for the individual client's needs.[4]

Contrary to the majority's belief, *Jenkins* does not control here. In *Jenkins*, we rejected the use of a presumption to avoid an individualized determination of a client's actual need. *Jenkins*, 160 Wn.2d at 300. As noted above, the process here does account for an individual's actual need, but further defines how much of that

[4] The majority believes that agreeing with DSHS's position regarding parental responsibility would "presumably allow DSHS to reduce a developmentally disabled child's MPC hours to zero." Majority at 16. But this is not so. As long as DSHS offers medical assistance in the form of personal care services, it is obligated to pay for at least part of the service. 42 U.S.C. § 1396d(a). However, under the majority's analysis today, the converse of its fears is possible. The majority's reasoning could require DSHS to pay for all of a child's assessed needs, meaning the parent is no longer responsible for the child's care at all.

need may be met by paid care as opposed to nonpaid support, here a parent. The presumption at issue in *Jenkins* assumed that a caregiver spent time doing some daily tasks that benefited the caregiver and the client, such as housekeeping and meal preparation. DSHS reduced a client's paid hours by 15 percent for the time a caregiver spent on tasks that presumably benefited both the client and the caregiver. But there was no indication that a caregiver did in fact duplicate tasks or that the 15 percent reduction in any way accurately reflected such duplication. *Jenkins*, 160 Wn.2d at 292 (noting that "DSHS determined 15 percent was appropriate based on the study's conclusion that the percentage of time devoted by live-in caregivers to household tasks ranged from 33 percent to 42 percent but, DSHS does not explain in the study or elsewhere how it arrived at the 15 percent figure"). To the extent any presumption exists here, it is a presumption of law, i.e., a parent is responsible for providing care for a child. This is markedly different from the presumption of fact at issue in *Jenkins*.[5]

Moreover, it is a misnomer to describe the limitation here as an "across-the-board reduction[]." Second Am. Br. of Resp't at 23. The children's personal care rule takes into account appropriate developmental milestones for a child at a certain age. Thus, the rule will function differently for a five year old, than for a 10 year old, than for a 15 year old. Unlike the rule invalidated in *Jenkins*, the children's

[5] Because DSHS has not argued that *Jenkins* should be overruled, I have not considered that possibility. *See* concurrence in dissent (Madsen, C.J.) at 1. But to the extent that *Jenkins* continues to compel results invalidating a state's ability to place appropriate limits on Medicaid resources, I agree with Chief Justice Madsen's view that it is incorrect and harmful.

personal care rule does not treat all similarly situated clients the same regardless of individual circumstances. It is not a mechanical reduction. *See* majority at 14.

Echoing Samantha's argument, the majority faults DSHS for the absence of time studies or other such empirical data supporting its benchmark determinations of a child's independent functioning based on age. Majority at 13-14; Second Am. Br. of Resp't at 34. Although not entirely clear from Samantha's briefing, this appears to be an argument that the children's personal care rule is arbitrary and capricious, an entirely separate claim from an assertion that the rule violates Medicaid's comparability provision. The burden is on a party challenging an administrative rule to demonstrate it is arbitrary and capricious. *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 903, 64 P.3d 606 (2003) (citing RCW 34.05.570(1)(a)).

> [W]hen a rule is challenged as arbitrary and capricious, the reviewing court must consider the relevant portions of the rule-making file and the agency's explanations for adopting the rule as part of its review in order to determine whether the agency's action was willful and unreasoning and taken without regard to the attending facts or circumstances.

*Id.* at 906. While the rule-making file here does not contain data explaining DSHS's age guidelines, neither is there any evidence presented in the rule-making file or elsewhere that the guidelines are based on arbitrary or unreasoning action, or taken without regard to the attendant facts and circumstances. The majority errs by placing the burden on DSHS to produce evidence that its action is reasonable, particularly when the evidence the majority requires—time studies or the like—is not required by the Administrative Procedure Act, chapter 34.05 RCW.[6]

Because the limitation imposed on paid personal care services under the children's personal care rule is valid, I would uphold the application of the rule to Samantha. This rule reasonably accounts for the obligation of a custodial parent to provide for a child's basic care. Moreover, application of the rule follows an individualized assessment of the child's needs and comports with Medicaid requirements. I respectfully dissent.

[6] The majority seems to suggest DSHS arbitrarily reduced Samantha's paid hours in part because it applied the children's personal care rule "despite having a medical provider recommendation indicating that Samantha required roughly the same amount of MPC hours as the initial CARE assessment provided her." Majority at 13. The suggestion is that the medical provider's opinion needed to be considered in determining the appropriate number of paid hours. This is incorrect. The plain language of 42 U.S.C. § 1396d(a)(24) allows a state to authorize MPC hours at its total discretion. Under that statute, personal care services may be authorized "by a physician in accordance with a plan of treatment *or (at the option of the State) otherwise authorized for the individual in accordance with a service plan approved by the State*." *Id.* (emphasis added). Moreover, even if the State's assessment here did not take precedence over the medical provider's opinion as to the personal care hours needed, the doctor's opinion was not rendered in accordance with a plan of treatment, as the statute requires.

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WE CONCUR:

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