

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. ~~100581~~

35671

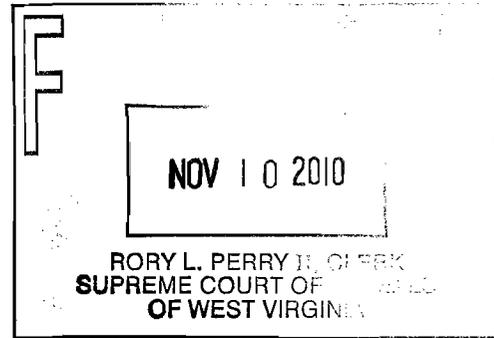
**PATSY HARDY, in her capacity as
Secretary, West Virginia Department of
Health and Human Resources,**

Appellant,

v.

SHAWN SHUMBERA,

Appellee.



BRIEF OF APPELLEE

Appellee, **SHAWN SUMBERA,**
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I. NATURE OF PROCEEDINGS AND RULING BELOW

This case was filed as a class action challenging the policies and procedures of the Defendant in her administration of the MR/DD Waiver Program. The MR/DD Waiver Program provides in-home services to individuals with mental retardation or other developmental disabilities. In 2004, the Defendant changed its medical eligibility procedures, resulting in record denials of otherwise qualified individuals. Preceding the filing of this action and since the Defendant implemented these policy changes in 2004, every appeal of an improper denial filed in Kanawha County had been overturned by the Circuit Court of Kanawha County.

The Plaintiffs sought injunctive and declaratory relief to secure procedural and substantive rights guaranteed by the article III, section 10 of the *West Virginia Constitution*. The Plaintiffs allege the Defendant has a pattern and practice of denying recipients and applicants to the Medicaid MR/DD Waiver Program due process by (1) failing to follow written policy concerning eligibility for the Program; (2) ignoring court decisions concerning Defendant's improper eligibility determinations; (3) failing to provide an impartial decision maker to consider appeals of denials and terminations; and (4) making eligibility determinations based on standards that are not articulated or ascertainable. In addition, the Plaintiffs alleged the Defendant discriminates against recipients and applicants who suffer from a mental illness. The Plaintiffs brought this action to enjoin the Defendant from continuing to deny Program recipients and applicants due process, and to prevent further unlawful discrimination.

The circuit court ultimately issued an order in which the relief the Plaintiffs sought was significantly circumscribed. Rather than grant full class relief on their injunctive claims, the circuit court made findings in which it expected the Defendant to follow in future eligibility determinations.

Plaintiffs did not seek to appeal this common sense approach to addressing the obvious problems with the Defendant's eligibility determinations. Defendant now seeks to appeal the circuit court's order on the ground that the court was incorrect in its determination that Shawn Shumbera – one of the Plaintiffs – was mentally retarded and eligible for the MR/DD Waiver Program. Defendant does not challenge the circuit court's findings related to the Defendant's eligibility determinations, nor the effect of the circuit court's findings on its future administration of the program. Rather, Defendant simply challenges the eligibility of one man who has remained institutionalized for over ten years despite the fact that everyone who has treated him agrees that he would benefit from services from the MR/DD Waiver Program. However, as the following discussion demonstrates, there was ample evidence in the record for the circuit court, who sat in evidentiary hearings over the course of several days, to conclude that Shawn Shumbera was mentally retarded and displayed the limitations necessary to establish medical eligibility for the program. The circuit court's factual findings are not clearly erroneous and should not be disturbed on appeal. Accordingly, Defendant's petition for appeal should be denied and the decision of the circuit court affirmed.

II. STATEMENT OF FACTS

The West Virginia Medicaid MR/DD Waiver Program ("MR/DD Waiver") is designed to provide in-home and community services to individuals with mental retardation or developmental disabilities as an alternative to institutionalization. (See Tr. at 11, 23.) This complements the 2005 federal executive order issued to assist in implementation of the Oldstead decision (Oldstead v. Zimring, 527 U.S. 581 (1999)), which requires states to develop community-based services to the greatest extent possible.

The Plaintiff, Shawn Shumbera,¹ is a twenty-seven year-old individual with mental retardation. (See Tr. at 75.) Shumbera has been found eligible and certified by the Defendant as a Medley class member. (See Tr. at 75.) Mr. Shumbera, has been repeatedly denied eligibility to the MR/DD Waiver Program, despite residing in Mildred Mitchell-Bateman Hospital, a state-supported psychiatric hospital, for six years. (See Tr. at 77.) Mr. Shumbera received MR/DD Waiver services in Florida, prior to his application for services in West Virginia. (See Tr. at 137.)

Mr. Shumbera's treating psychologist at Bateman, Charles Painter, testified that in January, 1999, he administered a psychological evaluation of Mr. Shumbera and diagnosed him with mental retardation. (See Tr. at 126-27; Def. Ex. 3 at Ex. 4.) Mr. Painter admitted under questioning from the Court that diagnosis for mental retardation based on IQ test results involves discretion, and Painter had entered the diagnosis in order to provide Mr. Shumbera with adequate services available to such a diagnosis. (See Tr. at 135-36.) Mr. Painter testified further that there is no question that Mr. Shumbera is in need of therapeutic services, whether at Bateman, or in the community:

A. I do believe he needs the services that he is receiving.

Q. You have maintained all along that he can receive those services in the home and advocate for that; is that correct?

A. I haven't said in the home.

Q. In the community?

A. In the community with a highly structured, well staffed group home.

(Tr. at 143.) Mr. Painter has testified on numerous occasions that Mr. Shumbera is qualified to

¹ The Plaintiff Linda Judd, had been diagnosed with mild mental retardation and bipolar and personality disorders. (See Tr. at 64.) After several years as a Waiver Program participant, Ms. Judd's services were terminated in June, 2006. (See Tr. at 48.) After her denial was reversed by the Circuit Court of Kanawha County and her benefits reinstated, (see Tr. at 49), the Defendant again sought to terminate her benefits in May, 2007. (See Tr. at 49.) Then after the institution of this action the Defendant completed further review and found the Plaintiff Judd eligible. In light of the Defendant's finding that she meet the eligibility criteria for MR/DD Waiver Services at the time of trial there was no factual issue before the circuit court regarding Plaintiff Judd.

receive Waiver services. (See Tr. at 142.) Every evaluation of Mr. Shumbera recommends an ICF/MR level of care for Mr. Shumbera with aggressive training in basic life skills. (See Def. Ex. 3.) Mr. Shumbera has been diagnosed with mental retardation and has demonstrated a need for ICF/MR services.

During his institutionalization, Mr. Shumbera has submitted applications for participation in the MR/DD Waiver Program. However, Mr. Shumbera has been repeatedly denied services, despite testimony from his treating psychologist that Mr. Shumbera is in need of the services and is qualified for the program. (See Tr. 142-43.) Mr. Shumbera appeared before the circuit court, who heard his strong desire to live outside an institution. The Defendant has a legal duty to provide a community living setting for Mr. Shumbera whether it does so through wholly state funds or primarily federal dollars. The evidence presented at trial demonstrated that the loss of in-home health services would result in Ms. Judd, Mr. Shumbera and many putative class members to have to be provided those services through unnecessary institutionalization. (See Tr. at 66, 71, 75.)

Defendant's Eligibility Determinations

Medicaid is a jointly funded cooperative program between states and the federal government providing medical assistance to low income persons including individuals with disabilities. See 42 U.S.C. §§1396-1396v. Since the early 1980s, the federal government has allowed states to apply for waivers that provide mentally retarded and developmentally disabled persons with related conditions with home and community-based care. See 42 U.S.C. § 1396n. "Waivers are intended to provide the flexibility needed to enable States to try new or different approaches to the efficient and cost-effective delivery of health care services, or to adapt their programs to the special needs of particular areas or groups of recipients." 42 U.S.C. § 1396n; see also Wood v. Tompkins, 33 F.3d 600, 602

(6th Cir. 1994) (“[W]aiver[s] save [] both the state and the federal government money, because home care is often less expensive than institutional care”). Waivers, by definition, allow exceptions to the State Plan, but “the Secretary may not waive any requirements that protect the well-being of Medicaid recipients.” Wood, 33 F.3d at 602.

West Virginia has participated in the waiver program since 1984 and receives federal funds to pay providers of in-home support or supported living services. (See Tr. at 23). The MR/DD Waiver Program is an alternative to ICF/MR services. See WV Medicaid MR/DD Waiver Manual Policy (choice is “between ICF/MR services and home and community-based services under the MR/DD Waiver Program”). ICF/MRs are residential institutions providing health and rehabilitative services to eligible persons with mental retardation in need of specific services. See id.; see also, 42 C.F.R. § 440.15; Tr. at 158-60. The waivers typically include an array of home- and community-based services and allow individuals to live in a more integrated setting than an ICF/MR. To be eligible for MR/DD waivers, individuals must have a diagnosis of mental retardation and/or a related developmental disability, substantial adaptive deficits as a result of mental retardation and/or related developmental disability in three or more of six major life areas that requires active treatment at an ICF/MR level of care. See id. The presence of substantial deficits must be supported by documentation submitted for review, i.e., the IEP, occupational therapy evaluation, narrative descriptions, etc. The West Virginia MR/DD Medicaid Waiver Program allows for the provision of:

Payment for part of all home and community-based services (other than room and board) approved by the secretary which are provided pursuant to a written plan of care to individuals with respect to whom there has been a determination that, *but for the provision of such services the individuals would require the Level of Care provided in Intermediate Care Facility for the Mentally Retarded* the costs of which could be reimbursed under the state plan.

42 U.S.C. §1396a(c)(1); see also 42 CFR §441.301(b)(1)(iii)(emphasis added); WV Medicaid MR/DD Waiver Policy.

To be eligible for the West Virginia MR/DD Waiver benefits, applicants/recipients must have a diagnosis of either (1) mental retardation or (2) a related condition that constitutes a severe and chronic disability.

A related condition is defined as any condition, other than mental illness, that is related to a mental or physical disability and limits three of the following major life activities:

- (1) Self-Care;
- (2) Learning (functional academics);
- (3) Mobility;
- (4) Capacity for Independent Living (home living, social skills, health, and safety, community use, leisure);
- (5) Receptive and/or Expressive Language;
- (6) Self-Direction

West Virginia MR/DD Waiver Manual, Chapter I, Section § I.C. (Plfs.' Ex. 12).

The Defendant contracts with a private, for-profit firm to conduct eligibility determination for the MR/DD Waiver Program. (See Tr. at 145-46.) The principals of the firm are Linda and Richard Workman, a married couple who are also largely responsible for the initial and annual re-certification eligibility decisions in the MR/DD Waiver Program. Linda Workman, the Department's witness, is a school psychologist. (See Tr. at 163-64.) The Defendant pays the Workmans approximately \$264,000 annually to administer aspects of the MR/DD Waiver Program. (See Tr. 166.) The Defendant's consultants – the Workmans – assist the Defendant in drafting of policy with respect to eligibility guidelines, make individual eligibility determinations, and testify at hearings in support of one another's eligibility determinations. (See Tr. at 168, 170.) The Defendant's

consultants discuss individual cases and form conclusions collectively about their medical eligibility in private discussions among themselves. (See Tr. at 181.) These private discussions about individual eligibility determinations are not, however, introduced at hearings. (See Tr. at 182.) The consultants routinely defend one another's decisions at hearings. The Defendant's consultant acknowledged that both she and her husband have a natural inclination to defend their own and their spouse's eligibility determinations. (See Tr. at 184.)

Recent to the filing of this action, the Defendant and its consultants have routinely denied many current recipients during annual re-certification eligibility as well as new applicants to the MR/DD Waiver Program on three separate grounds, which the Plaintiffs challenge in this case:

(a) Defendant denies eligibility to individuals with a dual diagnosis of mental retardation and mental illness, claiming the mental illness is the cause of the individual's deficits, (see Tr. at 42, Plfs.' Exs. 5, 9);

(b) Defendant denies eligibility to individuals who do not require twenty-four hour hands-on supervision in an ICF/MR facility, (see Tr. at 41); and

(c) Defendant disputes mental retardation diagnoses on a number of persons that Defendant itself has found mentally retarded and certified as a Medley class member. (See Tr. at 75.)

In 2006, the Defendant attempted to include a provision in state policy/regulation that excluded applicants and recipients to the MR/DD Waiver Program if the individual was unable to provide clinical verification that mental illness is not the cause of the individual's deficits. (See Tr. 28, Plfs.' Ex. 3.) The effect of this change would be, as a practical matter, to exclude individuals with a dual diagnosis of mental retardation and mental illness. In response to public and expert

comment that demonstrated that this change imposed a medically and psychologically invalid requirement, the Defendant removed the proposed change from policy. (See Tr. 28-29; Plfs.' Ex. 3.) Consequently, currently there is no provision in policy that excludes individuals from the MR/DD Waiver Program because they also have a mental illness. (See Tr. at 28-29, 171-72; Plfs.' Ex. 3.)

Testimony at trial was undisputed that prior to the period at issue here: (a) no Medley class members were denied Medicaid Waiver services on the basis that they were not mentally retarded – this determination is required to be certified as Medley class member; (b) no applicants or recipients were denied Medicaid Waiver services on the basis that they did not require 24-hour, hands-on care; or (c) no applicants or recipients who were dually diagnosed were denied Medicaid Waiver services on the basis of their mental illness.

In March, 1997, Dennis Gallagher from Region III of the Health Care Financing Administration (“HCFA”) forwarded an interpretative letter to West Virginia and neighboring states in Region III construing the definition of ICF/MR level of care as it is defined in federal regulations. (See Plfs.' Ex. 2.) In the letter, the HCFA states that certain higher functioning individuals should be accorded Waiver services, despite the fact that the individual may not require 24-hour, hands-on supervision in an ICF/MR facility. (See Plfs.' Ex. 2.)

Defendant's Hearing Procedures

All Medicaid funded programs are required by federal constitutional, statutory and regulatory law to have hearing procedures. See 42 U.S.C. § 1396a(a)(3); Goldberg v. Kelly, 397 U.S. 254 (1970); State ex rel. K.M. v. W.Va. Dept. of Heath & Human Res., 212 W .Va. 783, 799, 525 S.E.2d 393, 409 (2002); Haymons v. Williams, 795 F. Supp. 1511 (M.D. Fla. 1992); Sears v. Lewis, Civil

No. 2:94-0093 (S.D. W. Va. 1995); Benjamin H. v. Ohl, 1999 WL 34783552 (S.D. W. Va. 1999).

Appeals of Defendant's terminations or denials of eligibility for the MR/DD Waiver Program are entrusted to seven non-attorney hearing officers within the West Virginia Department of Health and Human Resources, Office of Inspector General, Board of Review. (See Tr. at 113.) The supervision of the hearing officers making these decisions is entrusted to the Chairman of the Board of Review, who is responsible for direction and training. (See Tr. at 98-99, 113.) Currently there is no written training protocol for hearing officers. (See Tr. at 120.)

For more than sixteen years prior to mid-2004, the chairman of the hearing officers assured that (a) in weighing the evidence for the adjudication of disability determinations, the hearing officers followed established law that the testimony of the examining psychologist/physician was given greater weight than that of the Defendant's consultant who had not seen the individual claimant, and (2) the policy/eligibility regulations of DHHR were applied by the hearing officers in making their adjudications. (See Tr. at 88-89.)

The current chairperson who assumed responsibility in 2004 testified that, contrary to prior practice, hearing officers accord greater weight to the testimony of Defendant's consultants – as opposed to treating providers (physicians and psychologists) – on issues of whether “the documents meet the eligibility criteria” (Tr. at 102.) The chairperson further stated that in training, hearing officers are not instructed to accord the testimony of claimants' treating providers greater weight. (See Tr. at 111.) In fact, in the chairperson's mind, there are no hard and fast rules about weighing conflicting testimony between treating and non-treating provider opinions. (See Tr. at 114.) Rather than according treating providers' testimony greater weight than non-treating, the chairperson testified she instructs hearing officers that the Defendant's consultants (who have not treated or even

visited personally with the individual) should be accorded deference on eligibility determinations because such determinations involve a legal conclusion. (See Tr. at 116-18.) Said chairperson testified there is currently no written policy regarding the proper evidentiary rule to apply to this context. At best, hearing officers considering appeals of MR/DD Waiver denials fail to employ a standard evidentiary rule regarding the proper deference to be accorded treating providers when their testimony contradicts the testimony of the Defendant's consultant; at worst, hearing officers are abdicating their decision-making responsibility to weigh evidence by simply deferring to the Defendant's witness in hearings on issues of eligibility.

It is not disputed that hearing officers are required to follow written policy, and hearing officers may not add disqualifying exceptions not contained in the policy. (See Tr. 89, 108-09.)

The Court was asked to take judicial notice of several Orders issued by the appellate Circuit Court of Kanawha County, the Board of Review and the Defendant's denial determination. (See Plfs.' Exs. 6-8, 10, 11; see also Def. Exs. 3, 4). The Circuit Court sitting in its role as an appellate court reviewing the evidentiary record has repeatedly concluded that (a) individuals with a dual diagnosis of mental illness and mental retardation are not disqualified from the program; (b) there is no requirement that a claimant demonstrate that he or she requires twenty-four hour, hands-on supervision in an ICF/MR facility; and (c) there was no requirement that a claimant demonstrate severe, as opposed to mild, mental retardation. (See, e.g., Plfs.' Exs. 6-8, 10 11.)

Hearing officers did not follow these rulings construing the law because they were not provided copies of the decisions, and the chairperson testified they are not accorded any precedential value. (See Tr. at 109-10.) Under the prior chair, copies of Circuit Court decisions were routinely provided to hearing officers. (See Tr. at 87-88.) The failure to provide hearing officers with copies

of Circuit Court decisions considering appeals of MR/DD Waiver denials, based on the notion that the rulings of Circuit Court in construing legal requirements are not entitled to any consideration, leads to the continued application of disqualifying rules that do not in fact exist in policy/regulation.

III. ARGUMENT

A. Standard of Review.

The Supreme Court of Appeals of West Virginia will consider this Court's decision on a Rule 59 motion for abuse of discretion. See Tennant v. Marion Health Care Foundation, Inc., 194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995). However, the Court's factual findings, on appeal, will not be disturbed unless clearly erroneous. See id. Defendant's petition for appeal seeks to disturb a factual conclusion of this Court and would be subject to the clearly erroneous standard of review on appeal.

B. The Court's Conclusion that Shawn Shumbera Was Mentally Retarded Was Amply Supported by the Record.

After sitting as a finder of fact in the evidentiary hearing on Plaintiff's Motion for Preliminary and Permanent Injunction, the circuit court heard from several witnesses, including Mr. Shumbera himself. The court's preliminary conclusion that Mr. Shumbera was mentally retarded was well supported. Consider the following evidence that Mr. Shumbera is indeed mentally retarded:

- Mr. Shumbera has been found eligible and certified by the Defendant as a Medley class member. (See Tr. at 75.) Participation in the Medley class is based on a finding of mental retardation.
- Mr. Shumbera received MR/DD Waiver services in Florida, prior to his application for services in West Virginia. (See Tr. at 137.) Accordingly, the State of Florida had previously found Mr. Shumbera suffered from mental retardation.

- Mr. Shumbera's treating psychologist at Bateman, Charles Painter, testified that in January, 1999, he administered a psychological evaluation of Mr. Shumbera and diagnosed him with mental retardation. (See Tr. at 126-27; Def. Ex. 4.)
- Every evaluation of Mr. Shumbera recommends an ICF/MR level of care for Mr. Shumbera with aggressive training in basic life skills. (See Def. Ex. 4.)
- Mr. Shumbera appeared before the circuit court. From his testimony – which indicated his strong desire to live outside an institution – the Court could observe his limited functional capacity.

This evidence was more than sufficient to conclude that Mr. Shumbera suffers from mental retardation.

Defendant's only evidence contradicting the abundant evidence in the record was the testimony of Mr. Painter, at trial, recanting his previous diagnoses. Mr. Painter's trial testimony was based on his assumption about an earlier IQ test. However, under questioning from the Court, Mr. Painter admitted that diagnosis for mental retardation based on IQ test results involves discretion, and Painter had entered the diagnosis in order to provide Mr. Shumbera with adequate services available to such a diagnosis. (See Tr. at 135-36.)

Mr. Painter testified further that there is no question that Mr. Shumbera is in need of therapeutic services, whether at Bateman, or in the community:

A. I do believe he needs the services that he is receiving.

Q. You have maintained all along that he can receive those services in the home and advocate for that; is that correct?

A. I haven't said in the home.

Q. In the community?

A. In the community with a highly structured, well staffed group home.

(Tr. at 143.) Mr. Painter has testified on numerous occasions that Mr. Shumbera is qualified to receive Waiver services. (See Tr. at 142.) The evidence was also undisputed that prior to Mr. Painter's recent in-court testimony, the Defendant had denied Mr. Shumbera's application for the MR/DD Waiver Program despite there being absolutely no dispute of his mental retardation diagnosis. (See Tr. 142-43.)

The Court certainly had the discretion to discount Mr. Painter's in-court testimony, when it was contradicted by the weight of the evidence, including Mr. Painter's prior diagnoses. Because the Court's factual conclusion was not clearly erroneous, Defendant's petition should be denied.

C. Petitioner's Contention That the Record Does Not Contain Evidence of Plaintiff's Shumbera's Eligibility for MR/DD Waiver Services Was Waived.

For the first time on appeal, Petitioner now contends that there is no evidence that Plaintiff Shumbera meets the eligibility criteria for the MR/DD Waiver Program. Defendant never raised the eligibility argument at trial, failed to include it in post-trial motions, and now the matter is waived. Defendant make two arguments: (1) there is no evidence that Shumbera has substantial limitations in three or more major life areas and (2) there is no evidence Shumbera is in need of treatment provided in an ICF/MR facility. Up until its petition for appeal, Defendant solely argued that Plaintiffs could not demonstrate Shawn Shumbera was mentally retarded, and therefore he was not qualified for the program. (See Def.'s Proposed Findings of Fact and Conclusions of Law ¶¶ 15-21, 69; Def.'s Mot to Alter or Amend J. at 4-8; Def.'s Reply at 3-8.) Having failed to argue that Shumbera lacked evidence of his eligibility for the program, Defendant has waived this ground for appeal. See State ex rel. Cooper v. Caperton, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996) ("To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness

to alert a circuit court to the nature of the claimed defect.”); accord Miller v. Triplett, 203 W. Va. 351, 354, 507 S.E.2d 714, 717 (1998); Brooks v. Galen of West Virginia, Inc., 220 W. Va. 699, 649 S.E.2d 272 (2007).

Notwithstanding that Defendant has waived these grounds for appeal, it is incorrect that there was no record of Shumbera’s substantial limitations and his need for treatment in an ICF/MR facility. (See Def. Ex. 3 at Ex. 1 (psychological evaluation); see also Tr. at 142-43 (testimony of Shumbera’s treating physician stating that Shumbera is in need of MR/DD waiver services).) Indeed, at trial, and as is more obliquely argued in her brief, Defendant contended that Shumbera’s limitations and need for treatment are related to his diagnosis of mental illness, rather than his mental retardation. There was never any serious contention that Mr. Shumbera did not have substantial limitations in three or more major life activities or that he was in need of treatment available in an ICF/MR facility. However, the issue of whether Shumbera’s limitations were related to his mental illness or mental retardation was a major factual issue at trial. The circuit court had the benefit of Shumbera’s psychological evaluations and testimony from his treating physician. The circuit court’s factual determination that Mr. Shumbera qualified for MR/DD Waiver services was not clearly erroneous and should be affirmed.

IV. CONCLUSION

Defendant’s petition for appeal is its latest attempt in a more than ten year old fight to deny Shaun Shumbera MR/DD Waiver Services. The circuit court had the opportunity to review Mr. Shumbera’s psychological evaluation, hear the testimony of his treating physician, and observe Mr. Shumbera himself. The circuit court’s factual determination that Mr. Shumbera is indeed mentally retarded and eligible for the program is well supported by the record, only contradicted by Mr.

Painter's changed testimony at trial. The circuit court's determination to discount the in-trial testimony, which is outweighed by the evidence in the record, was no clearly erroneous. Accordingly, the petition for appeal should be denied.

Respectfully Submitted,
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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

SHAWN SHUMBERA, on
behalf of a class of individuals
similarly situated,

Plaintiffs,

v.

CIVIL ACTION NO. 07-1807
Judge Kaufman

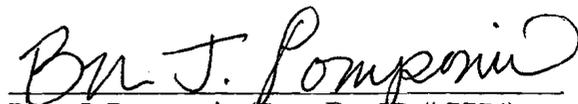
MARTHA WALKER, in her capacity as
Secretary, West Virginia Department of
Health and Human Resources,

Defendant.

CERTIFICATE OF SERVICE

I, Bren J. Pomponio, counsel for the Plaintiffs, do hereby certify that I have served a true and exact copy of the foregoing **Plaintiffs' Response to Defendant's Petition for Appeal** upon counsel of record as listed below, via hand delivery, on this the 10th day of November, 2010, addressed as follows:

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