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### **ASSIGNMENTS OF ERROR**

The Department of Health and Human Resources (“Department” or “DHHR”) respectfully submits: 1) Judge Kaufman was clearly wrong in finding that Mr. Shumbera is a “young man with mental retardation” despite the unequivocal and unrefuted testimony of Mr. Shumbera’s treating psychologist that Mr. Shumbera is *not* mentally retarded; 2) Judge Kaufman was clearly wrong in his implicit factual finding that Mr. Shumbera is substantially limited in at least three major life areas without addressing any of those major life areas; 3) Judge Kaufman was clearly wrong in his implicit factual finding that Mr. Shumbera requires active treatment and needs the level of care provided in intermediate care facilities for persons with mental retardation; and 4) Judge Kaufman abused his discretion in granting Mr. Shumbera injunctive relief to “enable him to receive [Mentally Retarded/Developmentally Delayed ] Waiver services” despite the absence of evidence showing he meets the eligibility criteria.

### **STATEMENT REGARDING ORAL ARGUMENT**

The Department requests the opportunity to present oral argument before the Supreme Court of Appeals. The Department wishes to provide any additional information or answer any questions that would assist the Court. The Department believes the issue of whether the circuit court exceeded its authority in issuing an injunction requiring the Department to place a claimant into the Mentally Retarded/Developmentally Delayed (“MR/DD”) Waiver Program in the absence of evidence that he meets the eligibility criteria is an issue of first

impression, and believes the circuit court's finding is inconsistent with decisions by other circuit courts.

### **PROCEDURAL HISTORY AND STATEMENT OF FACTS**

This is an appeal by the Department from an order of the Kanawha County Circuit Court denying the Department's Rule 59(e) *Motion to Alter or Amend Judgment*. The order the Department asked the circuit court to amend found that Shawn Shumbera was a "young man with mental retardation," and was "entitled to injunctive relief" to enable him to receive MR/DD Waiver services despite the absence of evidence showing he meets the eligibility criteria.

The Department relies on the procedural history and statement of facts at pages 1 through 4 of its *Petition for Appeal* and the procedural history and statement of facts at pages 1 through 8 of its *Brief of Appellant*, and incorporates that information by reference.

The Nature of Proceedings and Ruling Below section of Mr. Shumbera's *Brief of Appellee* reiterates the procedural history and confirms that this is not a case in which a State Hearing Officer issued an eligibility determination that was reviewed by the Kanawha County Circuit Court. It was an action for declaratory and injunctive relief on behalf of applicants and recipients of MR/DD Waiver Services. The Plaintiffs alleged that DHHR had a pattern and practice of denying due process of law to Medicaid MR/DD Waiver Program recipients and applicants by failing to follow its own policies, ignoring circuit court decisions, failing to provide an impartial decision maker to hear appeals of denials and

terminations, and making eligibility determinations based on unarticulated standards. *Brief of Appellee* at pp. 1-2.

The Statement of Facts section of the *Brief of Appellee* contains several inaccuracies to which the Department replies here.

Mr. Shumbera refers to the “Oldstead decision.” *Brief of Appellee* at p. 2. The correct citation is *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999). In *Olmstead*, the Supreme Court held that patients were qualified for community-based treatment, but the state could take into account the available resources in determining whether patients were entitled to immediate community placement. *Olmstead v. L.C.* at 581.

Mr. Shumbera alleges he is an individual with mental retardation. *Brief of Appellee* at p. 3. This issue has been discussed by the Department and Mr. Shumbera in all documents filed with this Court. The Department relies on the opinion of Mr. Shumbera’s treating psychologist, who testified that he had previously diagnosed mental retardation based on a lack of evidence and incorrect assumptions, but that the correct diagnosis is low to average intelligence instead of mental retardation. Mr. Shumbera relies on the previous diagnosis of mental retardation despite the unequivocal testimony of his treating psychologist that the previous diagnosis of mental retardation was incorrect. As discussed more fully below, the record does not support Mr. Shumbera’s allegation that he has mental retardation.

Mr. Shumbera asserts, “[t]he 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.” *Brief of Appellee* at p. 4. This is a patent legal conclusion that has no place in a statement of facts.

The Department does not dispute Mr. Shumbera’s description of the Medicaid MR/DD Waiver Program on pages 4 through 6 of the *Brief of Appellee*. But pages 6 through 11 of the *Brief of Appellee* contain a discussion of general eligibility determination procedures and hearing procedures that is immaterial to the issues on appeal before this Court.

### **DEPARTMENT’S REPLY**

It is not the role of the circuit court to diagnose mental retardation or any other mental condition. The record does not support the circuit court’s diagnosis of mental retardation or the finding that Mr. Shumbera is eligible for MR/DD Waiver services. The circuit court’s findings should be reversed on appeal.

### **I. STANDARD OF REVIEW**

The Department relies on its discussion of the applicable standard of review at pages 11 and 12 of its *Petition for Appeal* and pages 9 and 10 of its *Brief of Appellant*. Curiously, Mr. Shumbera asserts:

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.

*Brief of Appellee* at p. 11. This assertion appears to be directed at Judge Kaufman rather than at this Court.

## II. APPLICABLE LAW AND REGULATIONS

The Department relies on the "Statutory and Regulatory Framework" section at pages 4 through 11 of its *Petition for Appeal* and the "Applicable Law and Regulations" section at pages 10 through 15 of its *Brief of Appellant*, and incorporates that information by reference. Also, for a succinct description of the medical eligibility requirements for participation in the MR/DD Waiver Program, see *Wysong ex rel. Ramsey v. Walker*, 224 W. Va. 437, 439, 686 S.E.2d 219, 221 (2009).

As previously noted in the Department's *Petition for Appeal* and *Brief of Appellant*, the medical eligibility criteria for the MR/DD Waiver Program are the same criteria as the criteria for placement in an Intermediate Care Facility for Persons with Mental Retardation or Related Conditions ("ICF/MR"). See 42 U.S.C. § 1396n(c)(1); 42 C.F.R. § 435.1010; 42 C.F.R. § 441.301(b)(1)(iii); 42 C.F.R. § 483.440; see also *West Virginia State Medicaid MR/DD Waiver Program Policy Manual* Chapter 513 § 513.3.1, which is published online at [www.wvdhhr.org/bms/Manuals/Common\\_Chapters/bms\\_manuals\\_Chapter\\_500\\_MRDD.pdf](http://www.wvdhhr.org/bms/Manuals/Common_Chapters/bms_manuals_Chapter_500_MRDD.pdf).

III. MR. SHUMBERA PRESENTED NO EXPERT TESTIMONY, PSYCHOLOGICAL REPORTS, OR MEDICAL REPORTS SUPPORTING A DIAGNOSIS OF MENTAL RETARDATION OR THE NEED FOR ACTIVE TREATMENT.

Judge Kaufman's finding that Mr. Shumbera is a "young man with mental retardation" is not supported by the record. The *Brief of Appellee* alleges that the record contains ample support for Judge Kaufman's finding that Shawn Shumbera is a young man with mental retardation, and refers to several items of evidence that purportedly support Judge Kaufman's finding. This Reply Brief will attempt to address Mr. Shumbera's allegations in order.

Mr. Shumbera asserts that he is a Medley class member based on a previous diagnosis of mental retardation. *Brief of Appellee* at pp. 3, 11. This assertion is correct. But that does not mean that his previous diagnosis of mental retardation is correct. Charles Painter, Mr. Shumbera's treating psychologist at Bateman Hospital, was a member of the treatment team at Bateman that initially diagnosed Mr. Shumbera with "pervasive developmental disorder and borderline intellectual functioning with a primary diagnosis of impulse control disorder" in January 1999. Mr. Painter testified that the treatment team changed the diagnosis to "mild mental retardation" two weeks later to obtain MR/DD Waiver services. Hearing Transcript at pp. 124-127. Mr. Painter testified that, in view of Mr. Shumbera's psychological and school records prior to age 22, the diagnosis of mental retardation in January 1999 was a "misdiagnosis." Hearing Transcript at pp. 134-136, 139. The Department acknowledges that MR/DD Waiver Program is open to *Medley* class members who meet the eligibility criteria of the MR/DD Waiver Program. Hearing Transcript at pp. 13-14, 44, 54, 158, 161. But just

because an individual is a *Medley* Class member does not automatically mean that individual is medically eligible for MR/DD Waiver Services. Hearing Transcript at pp. 16-17.

Mr. Shumbera continues to allege that he received MR/DD Waiver services in Florida. *Brief of Appellee* at pp. 3, 11. The record does not support this allegation. Mr. Shumbera received services for mental illness through the Severely Emotionally Disturbed program. The only documents of record showing the services Mr. Shumbera received in Florida are Defendant's Exhibits 8 and 9, which show Mr. Shumbera received services for mental illness through the Severely Emotionally Disturbed program. Charles Painter, Mr. Shumbera's treating psychologist, testified that he had been told Mr. Shumbera had received some type of Waiver services in Florida, had incorrectly assumed those services were based on low intellectual functioning, that his assumption was a "misunderstanding," and that he "missed the diagnosis." Hearing Transcript at pp. 136-137. Inexplicably, Mr. Shumbera cites that very testimony for the proposition that he received MR/DD Waiver services in Florida. *Brief of Appellee* at p. 11. When asked by the Court if Mr. Shumbera had been classified as mildly mentally retarded, Mr. Painter explained, "Apparently at that time he wasn't. I am looking at the Osceola [Florida] stuff, *they didn't consider him MR.*" Hearing Transcript at p. 137 (emphasis added). The record contains *no evidence* that supports Mr. Shumbera's allegation that he received MR/DD Waiver services in Florida, only the allegation itself.

Mr. Shumbera notes that Mr. Painter evaluated Mr. Shumbera and diagnosed him with mental retardation in January 1999. *Brief of Appellee* at pp. 3, 12. This is not disputed. But as noted above, Mr. Painter acknowledged that when he diagnosed mental retardation, he

“missed the diagnosis.” Hearing Transcript at p. 137. He specifically testified that at the time he diagnosed Mr. Shumbera with mental retardation he had no school records of Mr. Shumbera during the developmental period. Hearing Transcript at pp. 127, 130. In fact, Mr. Painter had no documents of Mr. Shumbera prior to age eighteen. Hearing Transcript at p. 131. Mr. Painter testified that based on the psychological and educational evidence in Mr. Shumbera’s entire record, his level of intellectual functioning is “borderline intellectual functioning” without the use of hearing-impaired norms. Hearing Transcript at pp. 127-142. When hearing based norms were used to evaluate Mr. Shumbera, he was within the *average range of intelligence*, with scores of 91, 86, and 84. *Id.* at pp. 129-31.

Mr. Shumbera asserts that “every evaluation of Mr. Shumbera recommends an ICF/MR level of care for Mr. Shumbera with aggressive training in basic life skills,” citing Defendant’s Exhibit 3 with no document descriptions or page numbers. *Brief of Appellee* at p. 12. Defendant’s Exhibit 3 is the complete administrative record from Mr. Shumbera’s 2003 application for MR/DD Waiver services; it consists of 253 pages. Without document descriptions or page numbers, it is not possible to know on what Mr. Shumbera relies to support his assertion. Even if he could support his assertion, the assertion is immaterial. Mr. Shumbera is not and has never been eligible for the MR/DD Waiver Program. He does not meet the target eligibility criteria for the program. He is not mentally retarded. Hearing Transcript at pp. 123-142, 160. His diagnosis is mental illness - i.e., “impulse control disorder.” Federal regulations expressly exclude mental illness as a “related developmental disability.” 42 C.F.R. § 435.1010. Mr. Shumbera’s primary condition is an “impulse control disorder” and described as an “explosive personality

disorder.” Hearing Transcript at pp. 76, 124, 142. Mr. Shumbera is not mentally retarded, and since the MR/DD Waiver Program is an alternative to an ICF/MR that requires the same level of care and services as an ICF/MR, Mr. Shumbera does not belong in an ICF/MR. See 42 U.S.C. § 1396n(c)(1); 42 CFR § 441.301(b)(1)(iii); 42 C.F.R. § 440.150(a); *Medicaid MR/DD Waiver Policy Program Manual* § 513.3.1.

Mr. Shumbera asserts that he appeared before the circuit court and testified about his strong desire to live outside an institution and that the court could observe his limited functional capacity. *Brief of Appellee* at p. 12. Aside from being immaterial, this assertion is tenuous at best. The extent of Mr. Shumbera’s testimony was:

Q [By Ms. Stacy] Shawn, can you tell the judge what your name is?

A Shawn Shumbera.

Q And Shawn would you like to leave Bateman and live in the community?

A Yes, I would. I also, I can’t cook, I can’t clean the house, I can’t do anything, all I can do is cut grass.

Q Shawn, would you like to have staff to help you live in the community?

A Yes,

Q That’s all I have for you.

THE COURT: Any cross?

MS. VAUGHAN: No, sir.

Hearing Transcript at pp. 191-192. It appears that Judge Kaufman had approximately 30 seconds to observe Mr. Shumbera on the witness stand. Notwithstanding the brevity of Mr. Shumbera’s testimony, Mr. Shumbera’s desire to leave Bateman does not show that he has

mental retardation and does not make him eligible for the MR/DD Waiver Program. The MR/DD Waiver Program is open to individuals who meet the eligibility criteria. Mr. Shumbera does not meet the eligibility criteria.

Mr. Shumbera asserts that Mr. Painter admitted that diagnosing mental retardation based on IQ tests involves discretion, and Mr. Painter had diagnosed mental retardation in order to make more services available to Mr. Shumbera. *Brief of Appellee* at p. 12. This assertion is correct. But it does not support Mr. Shumbera's assertion that he has mental retardation. Mr. Painter testified unequivocally that his diagnosis of mental retardation was incorrect and that if he had known about the school evaluations that showed IQ scores of 91, 86, and 84, he would not have diagnosed mental retardation. He testified that the correct diagnosis is borderline intellectual functioning, *not mental retardation*. Hearing Transcript at p. 133.

Mr. Shumbera asserts that Mr. Painter testified that Mr. Shumbera is in need of therapeutic services, whether at Bateman, or in the community. *Brief of Appellee* at p. 12. This assertion is correct, but is irrelevant. It is undisputed that Mr. Shumbera needs therapeutic services. Mr. Painter testified, "I think what has changed is basically the reason why he needs those services. Whether it's the psychiatric issue or the developmental disability issue. We know Shawn needs those services. Now, *why he needs those services* is what became the issue apparently. I still feel Shawn needs the services." Hearing Transcript at p. 141 (emphasis added). Mr. Shumbera is institutionalized because of his mental illness.

Mr. Shumbera alleges, “Mr. Painter has testified on numerous occasions that Mr. Shumbera is qualified to receive Waiver services.” *Brief of Appellee* at p. 13. This allegation is based on a misreading of the transcript. Mr. Painter stated that he had answered the question of whether he previously thought Mr. Shumbera was eligible for Waiver services “multiple times.” Hearing Transcript at p. 142. The question was asked and answered several times. When asked directly if Mr. Shumbera qualified for waiver services, Mr. Painter stated, “[a]pparently not, he didn’t receive them.” *Id.*

Mr. Shumbera alleges that DHHR had “denied Mr. Shumbera’s application for the MR/DD Waiver Program despite there being absolutely no dispute of his mental retardation diagnosis.” *Brief of Appellee* at p. 13. This allegation is false. Mr. Painter testified unequivocally that his previous diagnosis of mental retardation was incorrect. He testified that if he had been privy to the three school evaluations that showed Mr. Shumbera was functioning in the low to average range of intelligence, he would *not* have diagnosed mental retardation. He testified that the correct diagnosis is borderline intellectual functioning and *not mental retardation*. Hearing Transcript at p. 133.

Mr. Shumbera argues that the Department’s petition for appeal should be denied. *Brief of Appellee* at p. 13. Whether the Department’s petition for appeal should be accepted or denied is no longer at issue. This Court granted the Department’s petition for appeal by Order dated September 9, 2010.

Mr. Shumbera’s treating psychologist acknowledged that he misdiagnosed mental retardation. The unrefuted testimony of Mr. Shumbera’s treating psychologist is that the

correct diagnosis is borderline intellectual functioning, not mental retardation. Hearing Transcript at p. 133. Mr. Shumbera presented *no* testimony from a psychologist supporting his assertion that he is mentally retarded. Absent a reliable diagnosis of mental retardation, the circuit court's finding that Mr. Shumbera is a "young man with mental retardation" is clearly erroneous. It is not the role of the circuit court to diagnose mental conditions. *See Gough v. Metropolitan Life Insurance Co.*, 2003 WL 23411993 at p. 3 (M.D. Tenn. 2003).

IV. MR. SHUMBERA PRESENTED NO TESTIMONY OR DOCUMENTARY EVIDENCE SHOWING THAT HE MEETS THE MEDICAL ELIGIBILITY CRITERIA FOR THE MR/DD WAIVER PROGRAM.

Judge Kaufman abused his discretion in granting Mr. Shumbera injunctive relief to "enable him to receive MR/DD Waiver services." Final Order at p. 12. As discussed above, the record contains no testimony or documentary evidence that Mr. Shumbera meets the medical eligibility criteria for the MR/DD Waiver Program. Without evidence to support the implicit finding that Mr. Shumbera satisfied the criteria for medical eligibility, Judge Kaufman circumvented the requirement that Mr. Shumbera prove that he meets the eligibility criteria for participation in the MR/DD Waiver program.

Mr. Shumbera alleges, "[f]or 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." This allegation is patently false. The principal basis of the Department's Rule 59(e) Motion to Alter or Amend Judgment was Mr.

Shumbera's lack of an eligible diagnosis of mental retardation or related condition. The Department's Rule 59(e) Motion concludes:

Federal and state Medicaid law requires that an applicant demonstrate his or her eligibility for the program. 42 C.F.R. §§ 441.301(b), 441.302(c)(1), 441.302(c)(2)(iii). Mr. Shumbera is not – and has never been – eligible to participate in the MR/DD Waiver Program. Federal regulations expressly exclude mental illness as a “related developmental disability.” 42 C.F.R. § 435.1010.

Rule 59(e) Motion at p. 7.

This is not a case in which a circuit court reviewed an administrative agency's eligibility determination. It was an action for declaratory and injunctive relief in which the circuit court considered whether applicants and recipients of MR/DD Waiver services were afforded due process.

Mr. Shumbera's most recent application for MR/DD Waiver services was denied in May 2007. Mr. Shumbera appealed from that decision and requested an administrative hearing, but later withdrew his hearing request. Transcript at pp. 77-78. No administrative hearing was held. No administrative decision was issued. Mr. Shumbera never proved the case that he meets the eligibility criteria for participation in the MR/DD Waiver program.

Contrary to Mr. Shumbera's assertion, the Department was not required to prove that Mr. Shumbera is ineligible for the MR/DD Waiver Program. The burden of proving entitlement to public assistance benefits rests with the claimant. There is *no* presumption of entitlement to public assistance benefits. The only presumption is that an applicant is *not* entitled to benefits unless and until the applicant proves his or her eligibility. *Lavine v.*

*Milne*, 424 U.S. 577, 584 (1976); *see also De Sario v. Thomas*, 139 F.3d 80, 96 (2d Cir. 1998) (*quoting Lavine v. Milne, supra*) (*vacated on other grounds by Slekis v. Thomas*, 525 U.S. 1098 (1999)).

To qualify for the MR/DD Waiver program, a claimant must show substantial functional limitations in three or more of the major life areas and the need for active treatment for mental retardation. The record contains no evidence showing substantial functional limitations in *any* of the major life activities. The eligibility criteria for the MR/DD Waiver Program are clear:

In order to be eligible for the Waiver Program, an applicant must satisfy certain medical eligibility criteria. First, the applicant must have a medical diagnosis of mental retardation and/or a related condition. Related conditions include autism, cerebral palsy, epilepsy, or any condition, other than mental illness, found to be closely related to mental retardation because the condition results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons. If the applicant has an eligible medical diagnosis, he or she must demonstrate that the medical diagnosis is a severe chronic disability that manifested before the applicant reached twenty-two years of age and is likely to continue indefinitely. Next, the applicant must show that the medical diagnosis substantially limits functioning in three or more major life areas. The major life areas are: self-care; receptive and express language (communication); learning (functional academics); mobility; self-direction; and capacity for independent living. The applicant must also show that he or she requires active treatment. Finally, the applicant must qualify for a level of care that similarly diagnosed persons would have in an ICF/MR.

*Wysong ex rel. Ramsey v. Walker*, 224 W. Va. 437, 439, 686 S.E.2d 219, 221 (2009).

Despite Mr. Shumbera's assertion that the record shows he is eligible, there was no expert testimony or other evidence presented showing that Mr. Shumbera has substantial functional limitations in three or more of the major life areas. The circuit court committed

error of law in finding Mr. Shumbera is eligible for the MR/DD Waiver program with no evidence that Mr. Shumbera has substantial functional limitations in three or more of the major life areas.

The record does not support a finding that intense training and support equivalent to ICF/MR institutional care is necessary. The applicable regulations define active treatment in an ICF/MR as treatment which “meets the requirements specified in the standard concerning active treatment for intermediate care facilities for persons with mental retardation under § 483.440(a) of the subchapter.” 42 C.F.R. § 435.1010. Any recipient admitted to ICF/MR must “be in need of and receiving active treatment services.” 42 C.F.R. § 483.440(b)(1). *See also Wysong ex rel. Ramsey v. Walker*, 224 W. Va. 437, 443, 686 S.E.2d 219, 225 (2009).

The record contains no testimony or documentary evidence showing that Mr. Shumbera requires active treatment and needs intensive instruction, services, assistance, and supervision in order to learn new skills and increase independence in activities of daily living. The record does not show that Mr. Shumbera requires aggressive training to acquire new skills. Accordingly, the record does not show that Mr. Shumbera requires active treatment or needs the level of care provided in an ICF/MR facility.

Nobody disputes that Mr. Shumbera needs therapeutic services. Mr. Shumbera is institutionalized because of his mental illness. Mr. Shumbera asserts that he has a strong desire to live outside an institution, but his desire to live outside the institution does not show that he has mental retardation and does not make him eligible for the MR/DD Waiver Program. The MR/DD Waiver Program is open to individuals who meet the eligibility

criteria. Eligible individuals are those who have a severe, chronic, disability that is attributable to mental; retardation, a related condition like cerebral palsy or epilepsy, or any other condition *other than mental illness* found to be closely related to mental retardation. 42 C.F.R. § 435.1010. Mr. Shumbera does not meet the eligibility criteria.

The circuit court committed error of law in finding Mr. Shumbera is eligible for the MR/DD Waiver program. The evidence presented at the injunction hearing was relevant to whether DHHR afforded Medicaid MR/DD Waiver recipients and applicants due process. But it was not relevant to whether Mr. Shumbera meets the eligibility criteria for the MR/DD Waiver Program. The record contains no evidence that Mr. Shumbera has substantial functional limitations in three or more of the major life areas, requires active treatment for mental retardation or related condition, or needs the level of care provided in an ICF/MR facility because of mental retardation or related condition.

### **CONCLUSION**

The record does not support the circuit court's diagnosis of mental retardation or the finding that Mr. Shumbera is eligible for MR/DD Waiver services. The Department respectfully submits that the circuit court's finding that the Claimant "is a young man with mental retardation," all of the circuit court's findings and conclusions that stem from that finding, and the Circuit Court's ultimate determination that the Claimant is eligible for the MR/DD Waiver Program should be REVERSED. In the alternative, the Department asks that the Claimant be afforded the same remedy the circuit court afforded the other plaintiff

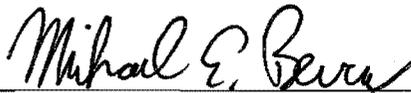
class members. The Claimant should reapply for benefits and follow the administrative process for a determination of eligibility.

RESPECTFULLY SUBMITTED,

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

By Counsel

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**STATE OF WEST VIRGINIA  
IN THE SUPREME COURT OF APPEALS**

**SHAWN SHUMBERA, LINDA JUDD,** )  
INDIVIDUALLY, AND ON BEHALF OF ALL )  
OTHERS SIMILARLY SITUATED, AND BY )  
HER NEXT FRIEND, **CAROLE JUDD,** )  
PLAINTIFFS BELOW, )  
                  **APPELLEES,** )

**SUPREME COURT No. 35671**

v. )

**CIVIL ACTION No. 07-C-1807**  
**KANAWHA COUNTY CIRCUIT COURT**

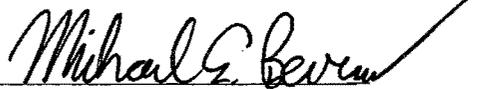
**PATSY A. HARDY,** )  
SECRETARY OF THE DEPARTMENT OF )  
HEALTH AND HUMAN RESOURCES, )  
                  **APPELLANT.** )

**CERTIFICATE OF SERVICE**

I, Michael E. Bevers, Assistant Attorney General, Attorney for the Bureau for Medical Services, hereby certify that this office has filed the original and ten (10) copies of the foregoing *Reply Brief of Department of Health and Human Resources* with the Clerk of the Supreme Court of Appeals of West Virginia, on this, the third day of December, 2010, either by hand delivery or by first-class mail, properly addressed and postage prepaid. True and correct copies have been served upon all parties of record by depositing same in the United States Mail, properly addressed and first-class postage prepaid, as follows:

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