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Supreme Court No. _____

STATE OF WEST VIRGINIA
BEFORE THE SUPREME COURT OF APPEALS

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CATHY S. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT

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

v.)

BENJAMIN H.,)
A MINOR, BY HIS NEXT FRIEND AND)
MOTHER, GEORGANN H,)
RESPONDENT.)

CIVIL ACTION No. 09-AA-2
KANAWHA COUNTY CIRCUIT COURT

AGENCY ACTION No. 07-BOR-2509

DEPARTMENT OF HEALTH AND HUMAN RESOURCES BOARD OF REVIEW

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SUPREME COURT OF WEST VIRGINIA

PETITION FOR APPEAL OF THE
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

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PETITIONER'S ASSIGNMENTS OF ERROR

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The Department of Health and Human Resources ("Department of Health and Human Resources") respectfully submits: 1) the circuit court committed error of law in placing the burden of proof on the Department rather than on the Claimant, 2) the circuit court was clearly wrong in disregarding the uncontroverted evidence that since the Claimant does not have an eligible diagnosis of mental retardation or related developmental condition, the correct normative group with which to compare the Claimant's test scores is the non mental retardation group, and 3) the circuit court was clearly wrong in disregarding the evidence of record showing that the Claimant does not have substantial deficits in the required number of major life areas.

STATEMENT REGARDING ORAL ARGUMENT

The Secretary of the Department of Health and Human Resources requests the opportunity to present oral argument before the Supreme Court of Appeals. The Secretary wishes to provide any additional information or answer any questions that would assist the Court. The Secretary believes the issue of whether the circuit court erred in placing the burden of proof on the Department rather than on the Claimant is an issue of first impression, and believes the circuit court's finding is inconsistent with decisions by other circuit courts.

STATUTORY AND REGULATORY FRAMEWORK

The West Virginia Mentally Retarded/Developmentally Delayed ("MR/DD") Waiver Program is a Medicaid program. Medicaid is a joint federal-state program established by Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.* (2000). The program provides health

care to financially and medically needy individuals. *Prestera v. Lawton*, 111 F. Supp. 2d 768, 773 (S.D. W. Va. 2000) (citing *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990)). Beneficiaries include low-income adults and children, the elderly, and mentally and physically disabled individuals. *Id.*

State participation in Medicaid is voluntary. *Prestera v. Lawton*, 111 F. Supp. 2d 768 (S.D. W. Va. 2000). Each participating state has some flexibility in devising its Medicaid program, but the state's plan must be approved by the federal Centers for Medicare and Medicaid Services ("CMS"). 42 U.S.C. § 1396a; 42 C.F.R., Subpart A, § 430.0 ("Within broad Federal rules, each State decides eligible groups, types and range of services, payment levels for services, and administrative and operating procedures"); 42 C.F.R. § 430.10 (the State plan is a comprehensive written statement submitted by the agency describing to the nature and scope of the state's Medicaid program). If a state participates in the Medicaid Program, some services are mandatory and the state must provide them. 42 U.S.C. § 1396(a)(10)(A). "If the state plan does not meet Federal Requirements or if the program is not administered in compliance with the Federal Requirements, the state may lose federal funds for the program." 42 U.S.C. § 1396c; *Prestera*, 111 F. Supp. 2d at 773.

Title XIX affords the states great latitude in determining the scope and extent of coverage of medical assistance. *See Roe v. Norton*, 522 F.2d 928, 933 (2d Cir. 1975). That latitude is limited by federal law. Title XIX requires that the plan "include reasonable standards ... for determining eligibility for ... medical assistance under the plan which ... are consistent with the objectives of this subchapter." 42 U.S.C. § 1396a(a)(17).

West Virginia has elected to participate in Medicaid. The West Virginia Legislature agreed to accept federal appropriations and other assistance by DHHR “in accordance with the provisions of this Chapter and the conditions imposed by applicable federal laws, rules and regulations.” *West Virginia Code* § 9-2-3 (1970). The Legislature gave the Secretary of DHHR the sole authority to decide eligibility groups, types and range of services, payment levels for services, and administrative and operating procedures:

Within limits of state appropriations and federal grants and subject to provisions of federal and state laws and regulations, the Secretary [of DHHR], in addition to all other powers, duties and responsibilities granted and assigned to that office in this chapter and elsewhere by law, is authorized and empowered to:

....

(2) Promulgate, amend, revise and rescind department rules and regulations respecting qualifications for receiving the different classes welfare assistance consistent with or permitted by federal laws, rules and regulations, but not inconsistent with state law...

....

(12) Provide by rules such review and appeal procedures within the Department of Health and Human Resources as may be required by applicable federal laws and rules respecting state assistance, federal-state assistance and federal assistance and as will provide applicants for, and recipients of all, classes of welfare assistance an opportunity to be heard by the Board of Review, a member thereof, or individuals designated by the Board, upon claims involving denial, reduction, closure, delay or other action or inaction pertaining to public assistance.

West Virginia Code § 9-2-6 (2005). The Bureau for Medical Services within DHHR is the single state agency administering the West Virginia State Medicaid Program. 42 C.F.R. § 431.10(b).

The West Virginia MR/DD Waiver Program provides an alternative to services available in Intermediate Care Facilities for individuals with Mental Retardation or related conditions (“ICF/MR”). The primary purpose of an ICF/MR facility is to provide health and rehabilitative

services. An ICF/MR provides services to persons who need and who are receiving active treatment.

The MR/DD Waiver Program provides for eligible individuals who need an ICF/MR level of care to receive certain services in a home and/or community-based setting to help them achieve the highest attainable level of independence, self-sufficiency, personal growth, and community inclusion. 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). The medical eligibility criteria for the MR/DD Waiver Program are the same criteria for placement in an ICF/MR facility. See 42 U.S.C. § 1396A(c)(1); 42 C.F.R. § 435.1010; 42 C.F.R. § 441.301(b)(1)(iii); 42 C.F.R. § 483.440; *West Virginia State Medicaid MR/DD Waiver Program Policy Manual* (“MR/DD Waiver Manual”) Chapter 513 § 513.3.1. The *MR/DD Waiver Manual* is available at www.wvdhhr.org/bms/Manuals/Common_Chapters/bms_manuals_Chapter_500_MRDD.pdf.

Not all individuals with a diagnosis of mental retardation or a related condition are eligible for the MR/DD Waiver Program. The eligible diagnosis must be severe and chronic. The applicant must demonstrate “substantial limited functioning” in *three or more* major life areas caused by the eligible diagnosis and must require the services and level of care provided in an ICF/MR. 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. 42 C.F.R. § 435.1010 (“persons with related conditions”); 42 C.F.R. § 483.440 (active treatment standard).

“Persons with related conditions” are individuals who have a severe, chronic, disability that meets *all* of the following conditions:

- (a) It is attributable to—
 - (1) Cerebral palsy or epilepsy; or
 - (2) Any other condition other than mental illness, found to be closely related to mental retardation because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons, and requires treatment or services similar to those required for these persons.
- (b) It is manifested before the person reaches age 22.
- (c) It is likely to continue indefinitely.
- (d) It results in substantial functional limitations in *three or more* of the following areas of major life activity:
 - (1) Self-care.
 - (2) Understanding and use of language.
 - (3) Learning.
 - (4) Mobility.
 - (5) Self-direction.
 - (6) Capacity for Independent living.

42 C.F.R. § 435.1010 (emphasis added).

The Code of Federal Regulations does not define “substantial functional limitations.”

This is reserved to the States. 42 U.S.C. § 1396a; 42 C.F.R. § 430.0. West Virginia defines

“substantially limited functioning” as:

“substantially limited” is defined on standardized measures of adaptive behavior scores as three (3) standard deviations below the mean or less than one (1) percentile when derived from non MR normative populations or in the average range or equal to or below the seventy-fifth (75) percentile when derived from MR normative populations. The presence of substantial deficits must be supported not only by the relevant test scores, but also by the narrative descriptions contained in the documentation submitted for review, i.e., psychological, the IEP, Occupational Therapy evaluation, etc.).

MR/DD Waiver Manual Chapter 513 § 513.3.1.

Annual re-certification for participation in the program is required by federal and state law, and it must be based on documentation of current evaluations. Unless the Medicaid agency provides satisfactory assurances to CMS that the Medicaid Agency will perform reevaluations, at least annually, of each recipient receiving home or community based services to determine if the recipient continues to need the level of care provided and would, but for the provision of waiver services, otherwise be institutionalized in an ICF/MR, CMS will not grant the Medicaid Agency a Waiver for Home and Community Based Services, and may terminate a waiver already granted. 42 C.F.R. § 441.302(c)(2).

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Patsy A. Hardy, Secretary of the West Virginia Department of Health and Human Resources (“Secretary”) appeals from the Order of the Circuit Court of Kanawha County entered by Judge James C. Stucky on July 6, 2010, which reversed the *Decision of State Hearing Officer*. Judge Stucky concluded that Benjamin H., the Claimant, is eligible for the MR/DD Waiver Program and ordered that he be restored to participation in the Waiver program. *Order Reversing the Board of Review Decision* at p. 4.¹

The Secretary agrees with and adopts the Findings of Fact set out in the *Decision of State Hearing Officer*. The Secretary does not dispute the facts recited by Judge Stucky in the order reversing the *Decision of State Hearing Office*, and specifically agrees with Judge Stucky’s acknowledgment that “[Benjamin H.] has substantial limitations in the areas of Self-care and Capacity for Independent Living.” *Order Reversing the Board of Review Decision* at p. 2. As

¹ The Claimant is a minor. This *Petition for Appeal* will refer to him as “Benjamin H.” in an effort to protect his identity and privacy interest.

noted in the previous section, an individual must have substantial limitations in *three or more* major life areas to qualify for eligibility. 42 C.F.R. § 435.1010(d).

Benjamin H., the Respondent, was born on October 23, 1993. He is now seventeen years old. His IQ is 78. Psychoeducational Assessment Integrated Report (Administrative Record Exhibit 12) at p. 3 of 7; Hearing Transcript (Administrative Record Exhibit 28) at pp. 19-20.²

Benjamin H. has been diagnosed with Autism with obsessive compulsive disorder traits and ADHD traits, but has not been diagnosed with Mental Retardation. Exhibit 6 at p. 3, Exhibit 7 at p. 10. The parties agree, and Judge Stucky noted, that Benjamin H. has substantial limitations in two of the major life activity areas - Self-care and Capacity for Independent Living. Hearing Transcript (Exhibit 28) at pp. 23, 169. The parties disagree on whether Benjamin H. has substantial limitations in the remaining daily living areas of mobility, learning, language, and self-direction.

Benjamin H. has an IQ of 78, which is not within the mental retardation range. Psychoeducational Assessment Integrated Report (Exhibit 12) at p. 3 of 7; Hearing Transcript (Exhibit 28) at pp. 19-20. The psychological expert witnesses for both the Department and Benjamin H. testified that Benjamin H. does not have a diagnosis of mental retardation. *See* Hearing Transcript (Exhibit 28); *see also Decision of State Hearing Officer* (Exhibit 1) at p. 12 of 16.

Eric A. King administered the Wechsler Intelligence Scale for Children-IV (WISC-IV) and issued a Psychoeducational Assessment Integrated Report dated June 5, 2008. Exhibit 12.

² This *Petition for Appeal* refers to the Exhibits in the complete administrative record by the exhibit numbers assigned in the affidavit of Erika H. Young, Chairman of the Board of Review, dated October 5, 2009.

This report shows a Full Scale IQ (FSIQ) of “60 +/- 3,” and a General Ability Index (GAI) of “78.” Psychoeducational Assessment Integrated Report at p. 3 of 7. Mr. King explained that GAI was a better measure of cognitive functioning than the FSIQ:

Due to the statistical difference between the FSIQ and the GAL of 18 points, the GAI is the best measure of cognition that should be used when describing his cognitive functioning and when making comparisons to his achievement and can thus be described as being *in the borderline range*.

Psychoeducational Assessment Integrated Report (Exhibit 12) at p. 3 of 7 (emphasis added).

The psychological tests submitted on behalf of Benjamin H., including the ABS-S:2, are norm-referenced tests. A norm-referenced test is a type of test, assessment, or evaluation that yields an estimate of the position of the tested individual in a predefined population, with respect to the trait being measured. This estimate is derived from the analysis of test scores and possibly other relevant data from a sample drawn from the population. The term "normative assessment" refers to the process of comparing one test-taker to his or her peers. Hearing Transcript (Exhibit 28) at pp. 44-49.

Richard L. Workman, Licensed Psychologist, testified that Benjamin H. has a potential eligible diagnosis of Autism, which is severe and chronic with concurrent adaptive deficits which were manifest prior to the age of 22; however, the documentation submitted on his behalf does not demonstrate “substantial limited functioning,” as defined in the MR/DD Waiver Manual, in at least three of the six major life areas. Mr. Workman testified that based upon the documentation in the record, Benjamin H. is not “substantially limited” in the life areas of mobility, learning, expressive and receptive language, or self-direction. As such, he does not meet the functionality criteria and does not meet the level of care requirement.

Relying on the “Normative Procedures” (Exhibit 14), Mr. Workman testified that non-MR norms should be used to assess Benjamin H.’s ABS-S:2 scores because he is not an individual with mental retardation. Hearing Transcript (Exhibit 28) at pp. 44-45. Mr. Workman explained that the individual must be compared to other similar individuals, such as those in the same age group with similar diagnostic assignments. When Benjamin H.’s ABS scores are assessed using non-MR norms, he does not meet the functionality requirements for the MR/DD Waiver Program. Hearing Transcript (Exhibit 28) at pp. 31-32.

Sandi Kiser-Griffith, Benjamin H.’s psychologist, on the other hand, testified that Benjamin H. has substantial adaptive deficits in all the disputed life areas. She arrived at this opinion by applying the MR norms. Her report includes the statement, “[t]he ABS:S:2 and AAMR [a different test inapplicable to this case] can also be scored in a manner which compares the adaptive skills of one child with that of other children who DO NOT have similar disabilities.” Exhibit 7 at p. 7 of 12. But Ms. Kiser-Griffith was unable to cite any authority in the field of psychometrics to support such a statement. Hearing Transcript (Exhibit 28) at pp. 129-130. That statement does not appear in Ms. Kiser-Griffith’s earlier report. The Psychological Update dated August 31, 2007, states, “The ABS:S:2 is designed to compare the adaptive skills of one child with that of other children who have similar disabilities.” Exhibit 11 at p. 4 of 12.

Ms. Kiser-Griffith acknowledged that Benjamin H. is not an individual with mental retardation and not representative of the normative sample of persons with mental retardation. Hearing Transcript (Exhibit 28) at p. 130. She conceded that “[t]he manual does not provide that it is appropriate to use MR norms to rate a child who does not have MR.” Hearing Transcript (Exhibit 28) at pp. 131-132. She also testified that she did not know what norms to

use to assess functionality in an autistic child who does not have a diagnosis of mental retardation. *Id.* at p. 136. The use of MR norms to assess an individual who is not MR is contrary to the design, intent and purpose of the ABS-S:2. See “Normative Procedures” (Exhibit 14).

State Hearing Officer J. Todd Thornton issued the *Decision of State Hearing Officer* dated November 3, 2008. Exhibit 1. Mr. Thornton considered the documents of record and the testimony presented at the Fair Hearing, and concluded that Benjamin H. does not qualify for eligibility because based on the appropriate normative procedures and comparisons, he does not have substantial deficits in three or more of the major life areas. Mr. Thornton concluded:

- 1) Medical eligibility for the MR/DD Waiver Program requires, in the area of functionality, that there must be substantial limitations in at least three (3) of the six (6) major life areas defined by policy. The presence of substantial limitations must be supported by both the test scores and the narratives.
- 2) The policy definition of “substantially limited” does not suggest that a person may make an arbitrary choice between using MR or non-MR norms; it provides a choice to be made by professionals based on the appropriate classification of the person being tested. With testimony from the Department that it is correct to use non-MR norms when assessing the Claimant, testimony from the Claimant’s Psychologist that she primarily used both norms because of limited guidance from the policy and because of her understanding of the DD-2A procedures, and testimony and evidence that the Claimant does not have a diagnosis of mental retardation, it was correct for the Department to assess the Claimant based on non-MR norms.
- 3) Adaptive behavior scores for the Claimant from three different psychological reports spanning three years fail to show any area with a percentile rank less than one (1) percentile when compared with non-MR normative populations.
- 4) While testimony and narratives indicated the presence of substantial limitations in other major life areas, policy clearly dictates that both test scores and narratives are required to support this. Without test scores to support the presence of substantial limitations, functionality was not met, and the Department was correct to deny medical eligibility for the program.

Decision of State Hearing Officer (Exhibit 1) at p. 13 of 16.

Benjamin H. filed a *Writ of Certiorari* in the Circuit Court of Kanawha County. Judge Stucky reversed the *Decision of State Hearing Officer*, finding that Benjamin H. is eligible for the MR/DD Waiver Program. *Order Reversing the Board of Review Decision* at p. 4. The Order does not address any of the major life areas and makes no findings of fact that Benjamin H. has any substantial limitations. The Order concludes:

There needs to be proof of changed medical circumstances “to avoid relitigating the evidence presented in support of the initial administrative decision,” i.e., the decision to award benefits. *Vaughan v. Heckler*, 727 F.2d 1040 (11th Cir. 1984). Courts have also held that benefits should not be terminated unless substantial evidence is brought forth to show a claimant has improved. *Miranda v. Secretary*, 514 F.2d 996, 998 (1st Cir. 1975); *Byron v. Heckler*, 742 F.2d 1232, 1236 (10th Cir. 1984); *Torres v. Schweiker*, 682 F.2d 109 (3rd Cir. 1982); *Hayes v. Secretary of Health, Education and Welfare*, 656 F.2d 204 (6th Cir. 1981); *Weber v. Harris*, 640 F.2d 176 (8th Cir. 1981); *Finnegan v. Matthews*, 641 F.2d 1340 (9th Cir. 1981); and *Simpson v. Schweiker*, 691 F.2d 966, 969 (11th Cir. 1982).

Here, the Department has failed to present any evidence that [Benjamin H.’s] condition had improved since he first began receiving program benefits. The fairness concepts of Due Process require a showing of change in circumstances where [Benjamin H.’s] condition has improved. *Byron v. Heckler*, 742 F.2d 1232, 1236 (10th Cir. 1984).

[Benjamin H.’s] record contains annual assessments performed in 2006, along with the 2007 and 2008 assessments. The Court's review of these assessments shows no real change in [Benjamin H.]'s condition.

Order Reversing the Board of Review Decision at p. 4. None of the cases on which Judge Stucky relies are Medicaid cases; they are all either Social Security Disability cases or Supplemental Security Income cases. The medical eligibility criteria and standards for entitlement to Social Security Disability benefits and Supplemental Security Income benefits are different from the medical eligibility criteria and standards for entitlement to the Medicaid MR/DD Waiver Program.

SUMMARY OF THE ARGUMENT

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CATHY S. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT

The Claimant bears the burden of proof. The Claimant does not have a diagnosis of mental retardation or related developmental condition, so the correct normative group with which to compare his test scores is the non mental retardation group. The Claimant does not qualify for continued eligibility because he does not have substantial deficits in the required number of major life areas. The circuit court's findings should be reversed.

STANDARD OF REVIEW

The Supreme Court reviews questions of law *de novo*. Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995); Syllabus Point 1, *University of West Virginia Bd. of Trustees on Behalf of West Virginia University v. Fox*, 197 W. Va. 91, 475 S.E.2d 91 (1996); *Conley v. Workers' Comp. Div.*, 199 W. Va. 196, 199, 483 S.E.2d 542, 545 (1997).

The Supreme Court applies an abuse of discretion standard in reviewing a circuit court's certiorari judgment. Syllabus Point 2, *Jefferson Orchards, Inc. v. Jefferson County Zoning Board of Appeals, et al.*, 225 W. Va. 416, 693 S.E.2d 781 (2010) (quoting *State ex rel. Kanawha County Prosecuting Attorney v. Bayer Corporation*, 223 W. Va. 146, 672 S.E.2d 282 (2008)). As this Court held long ago, "the circuit court has a large discretion in awarding [a writ of certiorari] ... and, unless such discretion is plainly abused, this Court cannot interfere there with." Syllabus Point 1, in part, *Michaelson v. Cautley*, 45 W. Va. 533, 32 S.E. 170 (1898). See also Syllabus, in part, *Snodgrass v. Board of Educ. of Elizabeth Indep. Dist.*, 114 W. Va. 305, 171 S.E. 742 (1933) ("When, after judgment on certiorari in the circuit court, a writ of error is

prosecuted in this court to that judgment, a decision of the circuit court on the evidence will not be set aside unless it clearly appears to have been wrong”).

In cases where the circuit court has amended the result before the administrative agency, the Supreme Court of Appeals reviews the final order of the circuit court under an abuse of discretion standard and reviews questions of law *de novo*. Syllabus Point 1, *Helton v. REM Community Options, Inc.*, 218 W. Va. 165, 624 S.E.2d 512 (2005) (citing Syllabus Point 2, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996)).

On certiorari, the circuit court is required to make an independent review of both law and fact in order to render judgment as law and justice may require. Syllabus Point 2, *Wysong ex rel. Ramsey v. Walker*, 224 W. Va. 437, 686 S.E.2d 219 (2009); Syllabus Point 3, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982); *see also* Syllabus Point 5, *Humphreys v. Monroe County Court*, 90 W. Va. 315, 110 S.E.701 (1922) (indicating that, upon certiorari from the action of a county court, the circuit court has jurisdiction to hear and determine the matter in controversy, “upon the record made in the county court,” and enter such judgment as the county court should have entered).

The Secretary respectfully submits that in reversing the *Decision of State Hearing Officer*, Judge Stucky abused his discretion, exceeded his statutory authority, and committed legal error.

ARGUMENT

I. THE CIRCUIT COURT COMMITTED ERROR OF LAW IN PLACING THE BURDEN OF PROOF ON THE DEPARTMENT RATHER THAN ON THE CLAIMANT

The circuit court committed error of law in placing the burden of proof on the Department rather than on the Claimant. The burden of proof is the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a cause. It is the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the finder of fact or the court. *Black's Law Dictionary*, Sixth Edition, at p. 196.

Burden of proof is a term which describes two different concepts; first, the "burden of persuasion," which under traditional view never shifts from one party to the other at any stage of the proceeding, and second, the "burden of going forward with the evidence," which may shift back and forth between the parties as the trial progresses. *Ambrose v. Wheatley*, 321 F.Supp. 1220, 1222 (D.C.Del., 1971). The term has been used to mean either the necessity of establishing a fact, that is, the burden of persuasion, or the necessity of making a prima facie showing, that is, the burden of going forward. *State Farm Life Insurance Co. v. Smith*, 29 Ill.App.3d 942, 331 N.E.2d 275, 278 (Ill. App. Ct. 1975) (*rev'd in part on other grounds*).

The burden of persuasion is defined as the onus on the party with the burden of proof to convince the trier of fact of all elements of his case. In a criminal case, the government bears the burden to produce evidence of all the necessary elements of the crime beyond a reasonable

doubt. *In re Winship*, 397 U.S. 358, 364 (1970). *Black's Law Dictionary*, Sixth Edition, at p. 196.

The burden of going forward is defined as the onus on a party to a case to refute or to explain. In a case of one who is charged with possession of stolen goods after the government has introduced evidence of the defendant's recent possession of such goods, the inference is that the defendant knew the goods were stolen, so the defendant must refute that inference. *Barnes v. U.S.*, 412 U.S. 837, 846 (1973). *Black's Law Dictionary*, Sixth Edition, at p. 196.

Judge Stucky's reliance on Social Security Disability and Supplemental Security Income cases for the proposition that the Department must show that the Claimant's condition had improved since he first began receiving program benefits is misplaced. The burden of proof, medical eligibility criteria, and standards for entitlement to Social Security Disability benefits and Supplemental Security Income benefits are different from the burden of proof, medical eligibility criteria, and standards for entitlement to the Medicaid MR/DD Waiver Program.

In Social Security cases, the burden of proof rests with the plaintiff to establish entitlement to Social Security Disability benefits under the Social Security Act, e. g., *Davis v. Califano*, 605 F.2d 1067, 1071 (8th Cir. 1979), and it remains the plaintiff's burden to show the disability continued and that he or she remains entitled to benefits, e.g., *Alvarado v. Weinberger*, 511 F.2d 1046, 1049 (1st Cir. 1975). If the plaintiff establishes that he or she cannot perform a previous employment, the burden shifts to the Secretary of Health and Human Services to show that the plaintiff can perform some other type of substantial gainful activity. *Davis v. Califano*, *supra*, 605 F.2d at 1071. The decision of the Secretary must be affirmed if

supported by substantial evidence on the record as a whole. 42 U.S.C. § 405(g); *Richardson v. Perales*, 402 U.S. 389 (1971).

No presumption of continued eligibility for MR/DD Waiver benefits exists. The applicable regulations require the Department to reevaluate MR/DD Waiver participants each year. Unless the Medicaid agency performs reevaluations, at least annually, of each recipient receiving home or community-based services to determine if the recipient continues to need the level of care provided and would, but for the provision of waiver services, otherwise be institutionalized in an ICF/MR, CMS may terminate the Medicaid Agency's Waiver for Home and Community Based Services. 42 C.F.R. § 441.302(c)(2).

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)).

Lavine v. Milne is a public welfare case involving Aid to Families with Dependent Children ("AFDC") and New York Home Relief, a welfare statute. The Supreme Court explained that there is no rebuttable presumption that that applicants and recipients of public assistance are entitled to receive benefits. The Court held, "[a]s with any other welfare scheme, [the New York welfare statute] imposes a host of requirements; and as is the case when applying for most governmental benefits, applicants for Home Relief bear the burden of showing their eligibility *in all respects*." *Lavine v. Milne*, 424 U.S. 577, 582-83 (1976) (emphasis added). "The only 'rebuttable presumption' if, indeed, it can be so called at work here is the normal

assumption that an applicant is *not* entitled to benefits unless and until he proves his eligibility.” *Id.* at 584 (emphasis added). The Court concluded that despite the rebuttable presumption aura that the New York welfare statute radiates, “it merely makes absolutely clear the fact that the applicant bears the burden of proof on this issue, *as he does on all others.*” *Id.* (emphasis added).

In *DeSario v. Thomas*, a Medicaid case involving Connecticut’s durable medical equipment coverage, the Second Circuit explained that the plaintiffs had the burden of proving that Connecticut’s DME coverage did not comply with federal law and that “the normal assumption [is] that an applicant is not entitled to benefits unless and until he proves his eligibility.” *DeSario 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)). Similarly, the Fifth Circuit held that a presumption of validity attaches to agency action, and the burden of proof rests with the party challenging such action. *Mississippi Hospital Association, Inc. v. Heckler*, 701 F.2d 511, 516 (5th Cir. 1983).

The person seeking MR/DD Waiver services has the burden of proving medical necessity for the requested services. The case at bar is not a criminal case in which the burden of proof rests on the government to convince the finder of fact of all elements of its case. This is a public assistance case in which the burden of proof rests on the applicant to prove his eligibility. Whether the term chosen is burden of proof, burden of persuasion, or burden of going forward, an applicant is not entitled to public assistance benefits unless and until the applicant proves his or her eligibility. The ultimate burden of showing that services should be approved or covered rests with the person or entity seeking payment. *Lavine v. Milne, supra; De Sario v. Thomas, supra.*

II. THE NON MENTAL RETARDATION NORMS ARE APPLICABLE WHEN AN INDIVIDUAL DOES NOT HAVE A DIAGNOSIS OF MENTAL RETARDATION.

Benjamin H. argued below that his ABS scores show substantial deficits if MR norms are used. The circuit court did not address this issue, but implicitly accepted the argument by finding Benjamin H. to be eligible for the MR/DD Waiver Program.

The MR norms are inapplicable. Mr. Workman testified that it is incorrect to use MR norms for an individual who does not have a diagnosis of Mental Retardation. He testified that the matching of normative group to the corresponding diagnosis is standard practice of professionals in the field. Hearing Transcript (Exhibit 28) at pp. 65-66.

Mr. Workman testified that MR norms are applicable only when an individual has a diagnosis of mental retardation. Non-MR norms are applicable when an individual does not have a diagnosis of mental retardation. Mr. Workman verified that Benjamin H. does not have an eligible diagnosis of mental retardation and testified that Non-MR norms are applicable. Hearing Transcript (Exhibit 28) at pp. 19-20, 31-32, 44-49.

Mr. Workman's testimony is supported by the "Normative Procedures." See Exhibit 14 at p. 4 of 9, *Table 4.2, Demographic Characteristics of the Normative Sample (Mental Retardation)*. Table 4.2 shows that 100% of the normative sample consisted of individuals with IQ scores lower than 70. Eighty-two percent (82%) of the sample had the presence of other handicapping conditions (blind partially sighted, deaf hearing impaired, emotionally impaired, learning disabled, physically or health impaired, speech language impaired). Exhibit 14 at p. 4 of 9.

Ms. Kiser-Griffith, Benjamin H.'s psychologist, testified that Benjamin H. has substantial adaptive deficits all disputed life areas. But she reached this opinion by applying the MR norms. Ms. Kiser-Griffith reported, "[t]he ABS:S:2 and AAMR can also be scored in a manner which compares the adaptive skills of one child with that of other children who DO NOT have similar disabilities." Exhibit 7 at p. 7 of 12. At the hearing, however, she conceded that "[t]he manual does not provide that it is appropriate to use MR norms to rate a child who does not have MR." Hearing Transcript (Exhibit 28) at pp. 131-132. She also testified that she *did not know* what norms to use to assess functionality in an autistic child who does not have a diagnosis of mental retardation. *Id.* at p. 136.

Medicaid Policy cannot be interpreted in a manner that would violate the established standards of practice in the field of psychology. The standard practice in the field of psychology is that the psychologist determines which tests to administer and which norms are applicable. The psychologist then administers and scores each test according to the procedures outlined by the test developer.

The Adaptive Behavior Scale-School Second Edition Examiner's Manual describes the procedures used to norm the ABS-S:2. Exhibit 14 at p. 2 of 9. The ABS-S:2 was standardized on two (2) groups. For the MR sample, 2,074 students with mental retardation from forty (40) states were evaluated with the scale. For the Non-MR sample, a random sample of 1,254 students from forty-four (44) states and the District of Columbia were evaluated using the scale. Exhibit 14 at p. 2 of 9.

If testing a person with mental retardation, the applicable score tables would be derived from a sample of 2,074 persons with mental retardation who were given the same test. The

scores have been normally distributed and a typical numerical score corresponds to a certain standard score. If one tested an individual who did not have mental retardation and used the MR norms, the result would be invalid because the norms had not been standardized on that sample. Consequently, the standard scores would be meaningless because no person in the normative sample had an IQ above seventy (70).

Although Benjamin H. has autism, he has an IQ of 78 and does not have an eligible diagnosis of mental retardation. His assertion that MR norms should be used is without merit. He has offered *no evidence* that refutes or contradicts Mr. Workman's testimony, only the argument that since his behavior is similar to that of a person with mental retardation, MR norms should be applicable. This is insufficient.

III. THE CLAIMANT DOES NOT HAVE SUBSTANTIAL DEFICITS IN THE REQUIRED NUMBER OF MAJOR LIFE AREAS.

State Hearing Officer Thornton was correct in finding that the record does not support a diagnosis of mental retardation or related condition and that based on the appropriate normative procedures and comparisons, Benjamin H. does not have substantial deficits in three or more major life areas. Judge Stucky abused his discretion and committed error of law in reversing the *Decision of State Hearing Officer*.

The parties agree that Benjamin H. has substantial limitations in the areas of Self-care and Capacity for Independent Living. Hearing Transcript (Exhibit 28) at pp. 23, 169. Judge Stucky acknowledged “[Benjamin H.] has substantial limitations in the areas of Self-care and Capacity for Independent Living.” *Order Reversing the Board of Review Decision* at p. 2. When the correct norms are used to assess Benjamin H.'s functionality, the medical eligibility

requirements of the MR/DD Waiver Program are not met in any of the remaining major life areas of Learning, Language, or Self-direction. The eligibility criteria are clear:

The second requirement for participation in the Waiver Program is a limitation in functioning in at least three major life areas As previously noted, in order to determine whether an applicant has substantial limited functioning in a major life area, the ABS is administered during the psychological evaluation. The ABS determines how deficient an individual is in his or her major life activities as compared to other individuals with or without mental retardation or a related condition. In order for an applicant of the Waiver Program to be considered substantially limited in a major life area, his or her ABS score must be “three (3) standard deviations below the mean or less than one (1) percentile when derived from non-MR normative populations or in the average range or equal to or below the seventy-fifth (75) percentile when derived from MR normative populations.” DHHR Provider Manual, *supra*, § 503.1.

Wysong ex rel. Ramsey v. Walker, 224 W. Va. 437, 686 S.E.2d 219, 224-25 (2009). The only evidence of substantial adaptive deficits in the disputed life areas is the opinion of Ms. Kiser-Griffith, which was based on the *wrong norms*. The circuit court committed error of law in finding Benjamin H. a is eligible for the MR/DD Waiver program with no reliable evidence of substantial functional limitations in three or more of the major life areas.

Mr. Workman further testified that the August 8, 2008, “Psychological Evaluation” was discrepant with other documentation in the record; namely, the psychoeducational assessment and other school records. The Wechsler Intelligence Scale for Children showed a GAI of 78, at the borderline range of Wechsler’s intellectual categories. Benjamin H.’s language development and processing of defining words were reported to be a strength for him. His performance on the Woodcock Johnson Tests of Achievement-III Edition Standard Battery (“WJ-III”) reflects academic scores that are much above expected potential given his GAI of 78. No academic weaknesses were identified on that test. Benjamin H.’s scores on the Vineland are above his intellectual functioning and are in the low average to average range, consistent with earlier

testing. Other school records indicate that Benjamin H. is in regular classrooms 80% of the time and is on track to earn a regular diploma. Hearing Transcript (Exhibit 28) at pp. 24-30.

Ms. Kiser-Griffith reached her opinion that Benjamin H. has substantial adaptive deficits in the disputed life areas by using the *wrong norms*. The basis of her opinion is Benjamin H.'s scores on the ABS-S:2, when compared to MR norms. But she was unable to cite any authority to support her statement that the ABS:S:2 and AAMR can also be scored in a manner which compares the adaptive skills of one child with that of other children who DO NOT have similar disabilities. Hearing Transcript (Exhibit 28) at pp. 131-132.

As noted above, the use of MR norms to assess an individual who is not MR is contrary to the design, intent and purpose of the ABS-S:2 . See "Normative Procedures." Ms. Kiser-Griffith acknowledged that Benjamin H. is not representative of the normative sample of persons with mental retardation. Accordingly, Ms. Kiser-Griffith's report, her opinion regarding Benjamin H.'s functional assessment based on MR norms, and her recommendation for an ICF/MR level of care which is based on that assessment, is entitled to little or no weight.

Although the Policy does not specify which norms to use for a particular test, evaluation or assessment for a given individual, the person administering the test should use the norms that are consistent with the design, intent and purpose of the test, evaluation or assessment. The Policy should not be read in a manner that would be contrary to the design, intent and purpose of the test, evaluation or assessment. To do so would render standardized tests meaningless and would not serve the purpose and intent of the Policy.

CONCLUSION

Federal and state Medicaid law requires that an applicant demonstrate his eligibility for the MR/DD Waiver program each year. There is *no* presumption of eligibility or continuing eligibility. An applicant must be re-evaluated and certified on "at least an annual basis." 42 C.F.R. §§ 441.301(b), 441.302(c)(1), (c)(2)(iii).

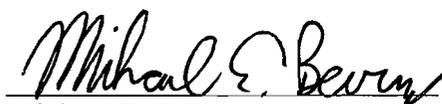
The Secretary respectfully submits that the Circuit Court erred and asks that the Circuit Court's erroneous finding that Benjamin H. is eligible for the MR/DD Waiver Program be REVERSED. The Secretary respectfully requests that her Petition for Appeal be GRANTED, and that an appropriate Order issue.

RESPECTFULLY SUBMITTED,

PATSY A. HARDY, Secretary of the West Virginia
Department of Health and Human Resources,

By Counsel

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Supreme Court No. _____

FILED

STATE OF WEST VIRGINIA
BEFORE THE SUPREME COURT OF APPEALS

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CATHY S. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT

PATSY A. HARDY,)
SECRETARY OF THE DEPARTMENT OF)
HEALTH AND HUMAN RESOURCES,)
PETITIONER,)
)
v.)
)
BENJAMIN H.,)
A MINOR, BY HIS NEXT FRIEND AND)
MOTHER, GEORGANN H,)
RESPONDENT.)

CIVIL ACTION NO. 09-AA-2
KANAWHA COUNTY CIRCUIT COURT
AGENCY ACTION No. 07-BOR-2509
DHHR BOARD OF REVIEW

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 nine (9) copies of the foregoing *Petition for Appeal* with the Clerk of the Circuit Court of Kanawha County, West Virginia, on this, the fifth day of November, 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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