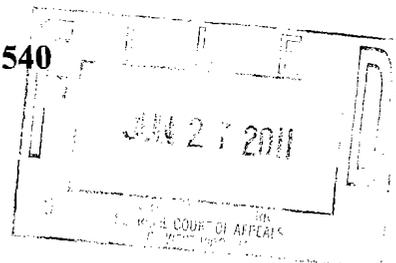


STATE OF WEST VIRGINIA
IN THE SUPREME COURT OF APPEALS

SUPREME COURT DOCKET No. 101540



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

REPLY BRIEF OF THE
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

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PETITIONER'S ASSIGNMENTS OF ERROR

The Department of Health and Human Resources ("Department") reiterates the assignments of error originally set out in its *Petition for Appeal*:

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 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.
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 OF THE CASE

This is a Medicaid claim in which the Department found that the recipient was not eligible for the Mentally Retarded/Developmentally Delayed ("MR/DD") Waiver Program, the Board of Review affirmed the termination of eligibility, and Judge James Stucky of the Kanawha County Circuit Court reversed the *Decision of State Hearing Officer*. The Department filed a *Petition for Appeal* and Benjamin H., the recipient, filed a *Response to Petition for Appeal*. The Supreme Court granted the Department's petition for appeal by Order dated April 14, 2011.

The Department asked the Court to consider the Department's *Petition for Appeal* in lieu of a Petitioner's Brief rather than reiterating the arguments and authority previously set out in its *Petition for Appeal*. Benjamin H. filed a Response Brief. The Department offers this *Reply Brief* to respond to arguments not included in Benjamin H.'s *Response to Petition for Appeal*.

The Department agrees with the facts recited by Judge Stucky in the order reversing the *Decision of State Hearing Officer*. The Department specifically agrees with Judge Stucky's finding that Benjamin H. has substantial limitations in two major life areas, "[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. The Department does not dispute the information contained in Statement of the Case section of Benjamin H.'s *Response Brief*, most of which was contained in the *Response to Petition for Appeal*. Lastly, the Department relies on the procedural history and statement of facts contained in pages 6 through 11 of its *Petition for Appeal*, and incorporates that information by reference.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

By Order dated April 14, 2011, the Supreme Court of Appeals ordered this matter be scheduled for oral argument under Rule 20 of the Revised Rules of Appellate Procedure. The Department asks the Court to decide the case on the merits and issue an Opinion after considering the written and oral arguments of the parties.

DEPARTMENT'S REPLY

The Department relies on the arguments contained in its *Petition for Appeal*, and incorporates those arguments by reference. The Department's *Reply Brief* will focus on the arguments advanced by Benjamin H. that were not included in his *Response to Petition for Appeal*.

I. THE CIRCUIT COURT COMMITTED ERROR OF LAW IN REQUIRING THE DEPARTMENT TO PROVE A SIGNIFICANT CHANGE IN CIRCUMSTANCES TO TERMINATE ELIGIBILITY.

Benjamin H. argues that due process requires a showing of significant change in circumstances to sustain a termination of eligibility for the MR/DD Waiver Program. *Response Brief* at pp. 5, 6. This responds indirectly to the Department's argument that Judge Stucky committed error of law in placing the burden of proof on the Department rather than on the Claimant, and reiterates the arguments Benjamin H. advanced in his *Response to Petition for Appeal*.

Benjamin H. argues, "Medicaid recipients have a property interest protected by due process guarantees." *Response Brief* at p. 6. This argument does not respond to the assignments of error set out in the Department's *Petition for Appeal*. The Department does not assert that Benjamin H. is not entitled to procedural due process when the Department proposes to terminate his Medicaid benefits. He is. *Goldberg v. Kelly*, 397 U.S. 254, 261-63 (1970).

This Court held, “while there is no absolute right to the receipt of cash assistance payments in the presence of other meaningful support, once the State has established a scheme for making such payments, the State’s scheme must provide the program participants with adequate due process protections.” *State ex rel. K.M. v. West Virginia Dept. of Health and Human Resources*, 212 W.Va. 783, 800, 575 S.E.2d 393, 410 (2002). The Department understands it is charged with protecting the due process rights of Medicaid applicants and recipients. Although the Department cannot guarantee an applicant will be found eligible or a recipient will remain eligible, the Department provides notice of its decisions to applicants and recipients, and fair hearings if an applicant or recipient disagrees with the Department’s decision.

Benjamin H. next argues, “[d]ue process requires a showing of significant change in circumstances to sustain a termination of eligibility based on medical condition,” and cites several Social Security Disability cases and unpublished Medicaid cases from different states. *Response Brief* at pp. 6-10. Most of this argument responds to the Department’s assignments of error and reiterates the arguments Benjamin H. advanced in his *Response to Petition for Appeal* at pp. 4-7.

In the conclusion of the first section of the *Response Brief*, Benjamin H. asserts that his case is distinguishable from *Lavine v. Milne*, 424 U.S. 577 (1976), the only cited United States Supreme Court case that addresses a presumption of entitlement to government benefits, because he has a prior agency decision establishing his eligibility and the plaintiffs in *Lavine v. Milne* were initial applicants. *Response Brief* at p. 10. That

assertion is inaccurate. The New York statute at issue in *Lavine v. Milne*, N. Y. Soc. Serv. Law § 131(11) (Supp.1975), provided:

Any person who voluntarily terminated his employment or voluntarily reduced his earning capacity for the purpose of qualifying for home relief or aid to dependent children *or a larger amount thereof* shall be disqualified from receiving such assistance for seventy-five days from such termination or reduction, unless otherwise required by federal law or regulation. Any person who applies for home relief or aid to dependent children *or requests an increase in his grant* within seventy-five days after voluntarily terminating his employment or reducing his earning capacity shall, unless otherwise required by federal law or regulation, be deemed to have voluntarily terminated his employment or reduced his earning capacity for the purpose of qualifying for such assistance *or a larger amount thereof*, in the absence of evidence to the contrary supplied by such person.

Lavine v. Milne, 424 U.S. 577, 579-580 (1976) (emphasis added). In *Lavine v. Milne*, the statute at issue applied to initial applicants and to established recipients who were requesting benefit increases. Established recipients who were requesting benefit increases were subject to termination if they did not prove they left employment for a purpose other than qualifying for increased benefits.

Some states differentiate between an agency decision to deny an initial application for benefits, and agency decisions to revoke, suspend or non-renew benefits previously in place, or to demand re-payment of previously issued benefits. In appeals of denials of new applications for benefits, such states assign the burden of persuasion to the applicant. But in appeals of benefit revocations, suspensions, non-renewals, or demand for re-payment of benefits, these states assign the burden of persuasion to the agency. This is similar to the evidentiary standard in a civil trial that assigns the burden of persuasion to

the party that wishes to change the *status quo*; “[t]he burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion.” *McCormick on Evidence* § 337 at p. 570 (John W. Strong et al. eds., 4th ed. 1992).¹

Other states assign the burden of persuasion to the applicant in all public benefit appeals, not just appeals of denials of new applications. *Andrews v. Div. of Medical Assistance*, 861 N.E.2d 483, 485 (Mass. App. 2007) (“the burden is on the appealing party to demonstrate invalidity of the administrative determination”); *Brewer v. Schalansky*, 102 P.3d 1145, 1153 (Kan. 2004) (“Generally, the applicant has the burden of proof to establish eligibility for Medicaid”); *Greely v. Department of Human Services*, 748 A.2d 472, 474 (Me. 2000) (“[T]he party seeking review of agency action has the burden of proof to show that the decision of the agency is not supported by competent evidence”); *Alford v. Somerset County Welfare Board, Department of*

¹ See *Assily v. Dep't of Children and Family Servs.*, 985 So. 2d 600 (Fla. 2008) (hearing officer erred by verbally assigning the burden to the applicant in Food Stamps reduction case, but correctly affirmed reduction in benefits); *Webb v. Florida Dep't of Children and Family Servs.*, 939 So. 2d 1182, 1185 (Fla. 2006) (citing Fla. Admin Code R. 65-2.060, applicant has burden where agency denies application for Medicaid benefits); *In Re Estate of Pierce v. Dep't of Social Servs.*, 969 S.W. 2d 814 (Mo. 1998) (affirm trial court finding that agency sustained burden of proof seeking reimbursement of Medicaid benefits paid out); *Kegel v. New Mexico Human Servs. Dep't*, 830 P.2d 563, 565 (N.M. 1992) (burden on agency seeking to terminate Medicaid benefits after applicant won a personal injury settlement); *Collins v. Eichler*, 1991 Del. Super. LEXIS 105 (Del. 1991) (citing DES Fair Hearing Procedural Manual, § 5405(C)3, burden on agency in Medicaid termination case); *Simmons v. Alstyne*, 65 A.D. 869, 872 (N.Y. App. Div. 1978) (agency has burden when it discontinues benefits); *Balino v. Dep't of Health and Rehabilitative Servs.*, 348 So. 2d 349 (Fla. 1977) (reversed agency, held that agency has burden in benefit termination cases); *L.P. v. District of Columbia Department of Human Services*, 2009 WL 1170434 (D.C. Dept. of Employment Services, January 5, 2009) (party seeking to change status quo bears the burden of persuasion).

Institutions and Agencies, 385 A.2d 1275, 1279 (N.J. 1978) (“As in all welfare eligibility determinations, the Medical Special applicant bears the burden of establishing program eligibility,” citing *Lavine v. Milne*, 424 U.S. 577 (1976); *Lavine v. Milne*, 424 U.S. 577, 585-586) (“Despite the rebuttable presumption aura that the second sentence of [N. Y. Soc. Serv. Law § 131(11) (Supp.1975)] 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*”)(emphasis added).

West Virginia falls into the latter group of states. There is no presumption of continued eligibility for MR/DD Waiver benefits. The applicable regulations require the Department to reevaluate MR/DD Waiver participants each year. Unless the Department’s 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 Intermediate Care Facility for Mental Retardation, West Virginia’s Waiver Program is subject to termination. 42 C.F.R. § 441.302(c)(2)(iii). The West Virginia *Medicaid MR/DD Waiver Program Policy Manual* (“*MR/DD Waiver Manual*”) expressly provides, “Pursuant to federal law, an individual must qualify for recertification at least annually. Eligibility determination must be made on current eligibility criteria, not on past Waiver eligibility. The fact that a recipient had previously received waiver services *shall have no bearing.*” *MR/DD Waiver Manual* § 513.3.4 (emphasis added).

Benjamin H.'s *Response Brief* contains the following citation, "*Cherry v. Tompkins*, 1995 U. S. Dist. LEXIS 21989 (S.D. OH. 1995) (Medicaid waiver for in-home services rather than be institutionalized) ('This Court agrees with *Weaver* that the Due Process protections and the reasoning in social service benefits cases apply equally to Medicaid cases.' *Id.* at 5.)." *Response Brief* at p. 9. The Department has carefully reviewed *Cherry v. Tompkins* and has been unable to find the sentence Benjamin H. asserts was drawn from that opinion.

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

Benjamin H. argues that the evidence of record was so clear that the circuit court never discussed the burden of proof, that the Department has assumed the burden of proof, and that there are policy reasons for placing the burden of proof on the Department. *Response Brief* at pp. 10-11.

Section II.A of Benjamin H.'s *Response Brief* discusses the evidence and restates the argument that Benjamin H. qualified previously and should continue to qualify because the Department did not show medical improvement or a change in circumstances. *Response Brief* at pp. 11-13. Benjamin H. does not provide authority defining medical improvement or a change in circumstances or suggest who would define them. In reply, the Department restates its position that a claimant bears the burden of proving he is eligible to receive benefits and bears the burden of proving he is eligible to

continue receiving benefits. The Department relies on the arguments and authority set out in its *Petition for Appeal* at pp. 14-17.

Section II.B of Benjamin H.'s *Response Brief* argues that the Board of Review's Common Chapters Manual places the burden of proof on the Department, which forecloses any argument that the claimant bears the burden of proof. *Response Brief* at pp. 13-14. The Department disagrees. The Bureau for Medical Services is the single state agency administering the West Virginia State Medicaid Program. 42 C.F.R. § 431.10(b). The Bureau for Medical Services determines the eligibility criteria for the West Virginia Medicaid programs. The West Virginia Legislature agreed to accept federal appropriations and other assistance "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 Department 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 of welfare assistance consistent with or permitted by federal laws, rules and regulations, but not inconsistent with state law ...

West Virginia Code § 9-2-6 (2005).

The Board of Review has the authority to determine whether the Bureau for Medical Services is following Medicaid statutes, regulations, and policy in its eligibility findings. The Board of Review has the authority to conduct its fair hearings in the most administratively efficient manner, which means it may determine the order in which the parties present their cases. But the Board of Review is not authorized to dictate substantive law through its procedural rules. It may not overrule the United States Supreme Court's holding in *Lavine v. Milne* that an applicant or recipient of public assistance benefits bears the burden of proof on all issues. *Lavine v. Milne*, 424 U.S. 577, 585-586 (1976).

Section II.C of Benjamin H.'s *Response Brief* argues that placing the burden of proof on the Department is appropriate to assure a "fair and balanced hearing." *Response Brief* at p. 14. The Department agrees with Benjamin H.'s assertion that most claimants do not choose to be represented by attorneys, but the Department informs every claimant that he or she is entitled to have an attorney provided to them at no cost. *Response Brief* at p. 14. The Department also agrees with Benjamin H.'s assertion that Department workers are more familiar with Medicaid policies and procedures than claimants are. *Response Brief* at p. 15. The Department does not disagree with Benjamin H.'s assertion that "[t]he only way to give claimants any fair chance in a hearing is for [the Department] to go first and explain what the law requires." *Response Brief* at p. 15. That is what the Department does. But a party presenting its case first and explaining the law does not mean that party has the burden of proof.

The circuit court committed error of law in placing the burden of proof on the Department rather than on the Claimant.

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

Benjamin H. argued below that his test scores show substantial deficits if MR norms are used, asserted in his *Response to Petition for Appeal* that his test scores show substantial deficits if MR norms are used, and continues to assert that the MR norms should be used. *Response Brief* at pp. 15-19. The Department reiterates its argument that the MR norms are inapplicable. *See Petition for Appeal* at pp. 18-20.

Benjamin H. has a diagnosis of autism. He does not have a diagnosis of mental retardation. Autism is a related developmental condition, but it is not mental retardation.

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 a 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 testified unequivocally 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. 65-66.²

Ms. Kiser-Griffith, Benjamin H.'s psychologist, testified that Benjamin H. has substantial adaptive deficits in 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.

Benjamin H. has autism, but he has an IQ of 78. He does not have a diagnosis of mental retardation. He has offered no evidence that refutes or contradicts Mr. Workman's testimony that MR norms should only be used when an individual has a diagnosis of mental retardation. The only evidence he has offered is Ms. Kiser Griffith's testimony 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.

² This *Reply Brief* 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.

Benjamin H.'s argument that since his behavior is similar to that of a person with mental retardation, MR norms should be used lacks merit.

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

Benjamin H. argues that he has substantial deficits in three or more life areas if MR norms are used. *Response Brief* at pp. 19-20. Benjamin H. has a diagnosis of autism. He does not have a diagnosis of mental retardation. The Department reiterates its argument that the MR norms are inapplicable. *See Petition for Appeal* at pp. 18-20 and Section III above.

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.

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. is eligible with no reliable evidence of substantial functional limitations in three or more of the major life areas.

CONCLUSION

The Circuit Court's order finding that Benjamin H. is eligible for the MR/DD Waiver Program should be REVERSED.

RESPECTFULLY SUBMITTED,

MICHAEL J. LEWIS,
Successor to PATSY A. HARDY,
in his capacity as Secretary of the West Virginia
Department of Health and Human Resources,

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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 *Reply Brief* with the Clerk of the Supreme Court of Appeals of West Virginia, on this, the 27th day of June, 2011, by hand delivery. True and accurate copies have been served upon all counsel for all parties of record by depositing those copies in the United States Mail, properly addressed and first-class postage prepaid, as follows:

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