

STATE OF WEST VIRGINIA  
BEFORE THE SUPREME COURT OF APPEALS

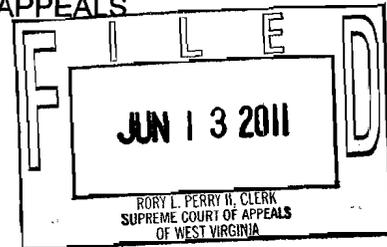
PATSY A. HARDY,  
Secretary of the Department of  
Health and Human Resources,

Petitioner,

vs.

BENJAMIN H.,  
A Minor, by his next friend and  
mother, GEORGEANN H.

Respondent.



Case No. 101540

RESPONSE BRIEF ON BEHALF OF BENJAMIN H.

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## STATEMENT OF THE CASE

Benjamin Holbrook, born October 23, 1993 (now 17 years old) was diagnosed with Autism at an early age and began receiving early intervention services. On the standardized "Childhood Autism Rating Scale (CARS) Benjamin is assessed in the "severe range of Autistic behaviors and symptoms." Circuit Court Exhibit 7, at page 4. He has received MRDD Medicaid Waiver Program services since 1999 to help him achieve his highest possible functioning.

Benjamin was initially approved for eligibility in the Medicaid MRDD Waiver Program in 1998 (at age 5). He began receiving services in 1999 (at age 6). Respondents' Answer at page 2. Benjamin H. was re-approved in 1999 (age 7), 2000 (age 8), 2001 (age 9), 2002 (age 10), 2003 (age 11), 2004 (age 12), 2005 (age 13), and 2006 (age 14).<sup>1</sup> The present case arises from a termination notice issued in 2007 and again in 2008.

Benjamin Holbrook has a lifelong history of severe behavioral issues consistent with Autistic Disorder. This includes self-injurious behavior in the form of hitting himself, biting himself, and clawing or picking at his skin until it bleeds. He has extensive scarring of the legs and arms as a result. He engages in a lot of stereotypical behavior such as rubbing and twisting his hair. He has poor safety skills and must be closely monitored at all times. He will jump from a moving car, walk into traffic, and climb up on furniture and buildings if not closely monitored. He can become physically aggressive, especially when prompted to do things he doesn't want to do. He is very resistant to personal care, especially combing his hair. He will refuse to eat due to texture and taste aversions. Benjamin is not typically able to provide detail regarding events, and he has a difficult time with dates. His overall judgment and insight are

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<sup>1</sup> Following the 2006 annual assessment DHHR issued a Notice of Termination to Benjamin Holbrook. After appeal and administrative hearing the termination was reversed by the Department, by administrative decision dated August 13, 2007. The previous Notice of Termination, and the administrative decision to reverse the termination, are not included in the record below as that decision is not subject to further review.

limited, consistent with Autism. His attention span is limited for structured activities. Circuit Court Exhibit 13, Psychological Assessment of August 8, 2008, at page 2-3.

Benjamin is able to engage in some forms of personal care, but requires verbal reminders and some physical assistance. He would not wash, comb his hair, or wear clean clothing without reminders. He sometimes needs assistance in going to the bathroom. He will step into traffic without looking. He will not choose appropriate clothing without help. He is not able to access any type of community resource on his own. He needs help with his medications; and will lick ointments and creams off his skin unless closely monitored. He does not like going out of the home, and tends to prefer solitary activities such as playing computer games and playing with action figures. Circuit Court Ex. 13, page 3. The State Hearing Officer described "convincing evidence ... of the Claimant's weakness" regarding the area of Self-Direction, finding that Benjamin has to be prompted to initiate homework, chores, and personal hygiene" and that he will "self-direct with regard to toys, but his obsessive tendencies in this area can prevent him from choosing to focus on anything else." Circuit Court Exhibit 1, State Hearing Officer Decision of November, 3, 2008, Fact Finding 17, at page 16.

Benjamin's overall ability to engage in social types of conversation is limited. He exhibits some echolalia responses.<sup>2</sup> He is not able to use a phone without assistance. He will say things which are out of context at times. Circuit Court Exhibit 13, Psychological Assessment of August 8, 2008, at page 3.

After assessment in August 2007, and again after assessment in August 2008 the DHHR issued Notices of Termination to Benjamin Holbrook. Eventually the two cases were combined for one administrative hearing, held on September 26, 2008. On November 3, 2008,

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<sup>2</sup> Defined by the National Institutes of Health, US National Library of Medicine, as "the often pathological repetition of what is said by other people as if echoing them." Available on line at: <http://www.merriam-webster.com/medlineplus/echolalia>

the State Hearing Officer decision affirmed the termination of program participation by Benjamin Holbrook. MRDD Waiver Program services ceased in late 2008.

Benjamin H. appealed the termination of services to the Circuit Court of Kanawha County. By decision rendered July 6, 2010 the Circuit Court reversed the termination of services. MRDD Waiver Program services resumed in March 2011. The Circuit Court found as fact that there had been "no real change in Petitioner's condition" from prior years when Benjamin's eligibility was approved. The Circuit Court concluded as a matter of law that "the fairness concepts of Due Process require a showing of change in circumstances where the Petitioner's condition has improved," Circuit Court Decision of July 6, 2010 at 4, and reversed the termination of benefits.

#### **SUMMARY OF ARGUMENT**

The Court below correctly held that Due Process considerations and principles of finality of decision making require a showing of significant change in circumstance to sustain a termination of benefits for a person who has been previously found eligible. Having found as fact that there had been "no real change," the Court correctly reversed the agency's termination of benefits.

The petitioner's first assignment of error was that the lower court improperly placed the burden of proof upon the Department on the element of changed circumstance. In fact the court below did not address a Burden of Proof issue, because the evidence established that there had been "no real change." Had the court chosen to consider Burden of Proof, the issue would have been resolved by DHHR's regulation placing upon itself the burden "to prove, by a preponderance of the evidence, that its adverse action was correct." Section 710.20.F., DHHR Common Chapters Manual. There are strong policy reasons for placing the burden upon the Department.

Petitioner's second assignment of error asserted that the lower court improperly "disregarded" the Department's argument that only "non-MR (mental retardation) norms" could be used to assess Benjamin H.'s eligibility. The Court did not reach or discuss the Department's argument on this point because, having found as fact that there had been no improvement or change of condition, it properly concluded that the termination decision could not be sustained because that required element was not satisfied. Should this Court wish to address the Department's argument, however, respondent Benjamin H. asserts that the use of "MR norms" to assess his eligibility is fully consistent with federal Medical law assessing whether "adaptive behavior" is "similar to that of mentally retarded persons, and requires treatment or services similar to those required for these persons." 42 C.F.R. § 435.1010.

Petitioner's third assignment of error asserted that the lower court improperly disregarded the Department's argument that use of "non-MR norms" demonstrated that Benjamin H. was not eligible. Again respondent asserts that the lower court was entirely proper in resting its decision upon the finding of fact that there had been no improvement or change of condition, thus establishing that one required element for termination of benefits was not present. Further analysis was not necessary. As argued in response to the second assignment, though, respondent also believes that use of "MR norms" is appropriate, and when reviewed under this standard Benjamin H.'s eligibility for continued benefits is established by the record.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Respondent Benjamin H. believes that oral argument is appropriate under Rule 18. Respondent further agrees with appellant that the case presents issues of first impression, so that argument pursuant to Rule 20 is appropriate.

## STANDARD OF REVIEW

### A. Review by the Supreme Court

The WV Administrative Procedure Act does not apply to DHHR actions involving the receipt of public assistance, or contested cases arising from DHHR actions involving the receipt of public assistance. WV Code 29A-1-3(c). Certiorari is the proper means to obtain judicial review of a decision by a state agency not covered by the Administrative Procedures Act. *Ginsburg, State ex rel., v. Watt*, 168 W.Va. 503, 505, 285 S.E.2d 367, 369 (1981); *Harrison v. Ginsburg*, 169 W.Va. 162, 286 S.E.2d 276 (1982).

Respondent agrees that Appellant's Petition correctly states that this Court reviews questions of law *de novo*; and applies an abuse of discretion standard in reviewing a Circuit Court's certiorari judgment. See Petition at page 12.

### B. Certiorari Review by the Circuit Court

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." *Harrison v. Ginsburg*, 169 W.Va. 162, 286 S.E.2d 276 (1982). As this Court stated in a recent case also involving the MRDD Medicaid Waiver Program, "in other words, unless otherwise provided by law, the standard of review by a circuit court in a writ of certiorari proceeding ... is *de novo*. [citation omitted]. Therefore the circuit court was not required to give deference to the decision of the hearing officer." *Wysong v. Walker*, 224 W.Va. 437, 686 W.Va. 219, 223-223 (2009).

## ARGUMENT

### I DUE PROCESS REQUIRES A SHOWING OF SIGNIFICANT CHANGE IN CIRCUMSTANCES TO SUSTAIN A TERMINATION OF ELIGIBILITY BASED ON MEDICAL CONDITION

#### A. RECIPIENTS OF MEDICAID BENEFITS HAVE A PROPERTY INTEREST PROTECTED BY DUE PROCESS GUARANTEES

The Medicaid Program is a defined entitlement program, under which any applicant

meeting defined criteria for eligibility is entitled to receipt of benefits. This system of rules of entitlement creates a property interest for purposes of the application of the due process clause of the Fourteenth Amendment to the US Constitution. See *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970) (welfare benefits prior to 1996 Welfare Reform Act); *Matthews v. Eldridge*, 424 U.S. 319 (1976) (Social Security Disability benefits); *Stenson v. Blum*, 476 F.Supp. 1331, 1342 (S.D.N.Y. 1979) *aff'd* 628 F.2d 1345 (2d Cir. 1980), *cert.denied* 449 U.S. 883 (1980) (Medicaid benefits); *Salazar v. District of Columbia*, 954 F.Supp. 278 (D.D.C. 1996) (Medicaid).

B. DUE PROCESS REQUIRES A SHOWING OF SIGNIFICANT CHANGE IN CIRCUMSTANCES TO SUSTAIN A TERMINATION OF ELIGIBILITY BASED ON MEDICAL CONDITION

1. Social Security Disability Benefit Cases

The federal Social Security Act established two systems of income benefits for disabled persons, commonly referred to as Social Security Disability<sup>3</sup> (SSD), 42 U.S.C. § 401 to 434, and Supplemental Security Income,<sup>4</sup> (SSI) 42 U.S.C. § 1381 to 1385. Both SSD and SSI require evidence of medical condition meeting the required definition of "disability." In both programs recipients who are approved may be subject to periodic review and re-examination, to assure that the recipients continue to meet the eligibility requirements.

As early as 1975, the federal courts held in the context of Social Security Disability benefits that the agency "may not terminate the benefits without substantial evidence to justify so doing. This will normally consist of current evidence showing that a claimant has improved...." *Miranda v. Secretary*, 514 F.2d 996, 998 (1st Cir. 1975). Subsequent cases

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<sup>3</sup> SSD is an insurance program. Upon proof of disability, the SSD payment amount is determined by prior earnings history. SSD has neither an asset limit nor an income limit for eligibility.

<sup>4</sup> SSI is an income assistance program. Upon proof of disability, the beneficiary receives whatever amount is necessary to supplement other sources of income to bring the person to a floor monthly income (currently \$674 for an individual). SSI has both asset limitations and income limitations for eligibility.

phrased this obligation by saying "in termination of benefits cases, benefits may not be discontinued without a showing that the claimant's condition has improved." *Byron v. Heckler*, 742 F.2d 1232, 1236 (10th Cir. 1984). See also *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); *Van Natter v. Secretary of Health, Education and Welfare*, #79-1439 (10th Cir. 1981) (Not for Routine Publication); and *Simpson v. Schweiker*, 691 F.2d 966, 969 (11th Cir.1982).

This stance is based both on notions of Due Process fairness in the administrative proceedings, avoidance of arbitrary and capricious decision making, and notions of finality of decisions. "This presumption [that the prior decision was valid] is necessary to avoid re-litigating the evidence presented in support of the initial administrative decision." *Vaughn v. Heckler*, 727 F.2d 1040, 1043 (11th Cir. 1984). See also *Shaw v. Schweiker*, 536 F. Supp. 79, 83 (E.D.Pa.1982) ("After a final determination of disability, if a termination of benefits were effected without a showing either of improvement or newly-discovered evidence, such a termination would of necessity be based on whim or caprice or would constitute an impermissible relitigation of facts and determination already finally decided").

Inherent in this approach is that the evidence must address both the condition at the time of the decision(s) awarding benefits, and the condition at the time of the decision to terminate benefits. A termination decision which "focused only on current evidence of whether appellant was disabled" was held to be erroneous.

In order for evidence of improvement to be present, there must also be an evaluation of the medical evidence for the original finding.... "Without such a comparison, no adequate finding of improvement could be rendered." *Vaughn v. Heckler*, 727 F.2d 1040 (11th Cir. 1984).

*Byron v. Heckler*, 742 F.2d 1232, 1236 (10th Cir. 1984) (emphasis added).

DHHR's Petition at page 15 suggested that the Circuit Court's reliance on the Social

Security decisions was "misplaced" because Social Security disability cases requiring medical evidence for eligibility were somehow different and distinguishable from Medicaid cases requiring medical evidence for eligibility. While the Social Security Act's disability income programs have different specific eligibility rules than the Social Security Act's Medicaid Program, both types of programs require medical evidence; both require evidence establishing that defined criteria are met; and both have periodic review to assure that a recipient continues to be eligible. A number of courts around the nation have held there is no relevant difference when considering the application of Due Process finality principles.

## 2. Medicaid Benefit Cases

Since 1990, a variety of state courts have applied the rulings from the Social Security Disability context to the Medicaid context, both for "Home and Community Based Waiver Programs" like West Virginia's MRDD Medicaid Waiver Program, and for Medicaid programs serving disabled children in the community. The first of these was *Weaver v. Colorado DSS*, 791 P.2d 1230 (Ct. of Apps., Div. Three, 1990), which addressed the termination of Medicaid Waiver benefits for an individual who had been on the waiver program for two years before the proposed termination of services.<sup>5</sup> Based upon the Social Security Disability decisions cited above, the *Weaver* court stated:

[T]he courts have concluded that, if an individual has once been determined to be eligible for social service benefits, due process prevents a termination of those benefits absent a demonstration of a change in circumstances, or other good cause. The presumption that a condition, once shown to exist, continues to exist, as well as the considerations that underlie the doctrines of res judicata and collateral estoppel, require a showing of some change in circumstances if the termination of benefits is not to be deemed arbitrary. See *Byron v. Heckler*, 742 F.2d 1232 (10th Cir.

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<sup>5</sup> The *Weaver* Medicaid recipient was approved for the program based on a 1984 assessment. A 1985 reassessment resulted in a continuation of benefits. A reassessment another year later concluded he was no longer eligible for benefits. *Weaver v. Colorado DSS*, 791 P.2d at 1232.

1984) (relying upon decisions from the First, Second, Third, Sixth, Eighth, and Ninth Circuits); *Trujillo v. Heckler*, 569 F. Supp. 631 (D. Colo. 1983).

While the foregoing decisions did not involve the same type of benefits being provided to petitioner, their common rationale is based upon those broad concepts of fairness and reasonableness that naturally inhere in the concept of due process of law. Consequently, we determine that that rationale applies to the benefits at issue here.

*Weaver v. Colorado DSS*, 791 P.2d 1230, 1232 (Ct. of Apps., Div. Three, 1990). See also *Shannon v. Meconi*, 2006 Del.Super. LEXIS 25 (Super.Ct. Del., New Castle, 2006) (Medicaid in-home services for child with cystic rather than be institutionalized) (“the concepts of fairness and reasonableness inherent in due process require that those benefits not be terminated without a demonstration of a change in circumstances or other good cause.” *Id.* at 6); *Bridge v. Department of Health & Social Services*, 2005 Del.Super. LEXIS 36 (Super.Ct. Del., New Castle, 2005) (Children’s Community Alternative Disability Program) (“the record supports a finding that the child has experienced a change in circumstances or other good cause, as is required for a termination of benefits.” *Id.* at 7-8); *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.); and *Collins v. Eichler*, 1991 Del.Super. LEXIS 105 (Super.Ct. Del. 1991) (Medicaid waiver for in-home services rather than be institutionalized) (“The [*Weaver*] court determined that the broad concepts of fairness and reasonableness inhering in due process require that such benefits cannot be terminated absent a demonstration of a change in circumstances or other good cause. I adopt that holding here; Appellants benefits cannot be terminated absent a change in circumstances.” *Id.* at 10).

### 3. Conclusion

All of these cases were cited in respondent’s briefing to the Circuit Court. DHHR did

not cite any contrary authority in its response to the Circuit Court or in its petition for appeal. DHHR refers to cases stating that there is no "presumption of entitlement to public assistance benefits," such as *Lavine v. Milne*, 424 U.S. 577 (1976) and *DeSario v. Thomas*, 139 F.3d 80 (2d Cir. 1998). Petition at 16. But in those cases the petitioners were new applicants for benefits, who did not have prior agency decisions establishing their eligibility as part of the record. Thus those cases did not discuss how Due Process and finality considerations should be applied in the context of benefit termination cases. In the present case Benjamin H. was not a new applicant. He was a recipient who had been on the program for approximately nine years, with nine previous annual agency decisions.

The Circuit Court ruled that Due Process principles of finality of decision making and avoidance of arbitrary and capricious decisions required evidence of Improvement since the last favorable decision, and that the record established there was "no real change in Petitioner's condition." Without that element, going forward with further analysis of the unchanged condition would have amounted only to re-litigation of the previous decision.

## II. THE CIRCUIT COURT DID NOT ERR WITH REGARD TO BURDEN OF PROOF

Unable to muster an argument that the law does not require a showing of changed circumstances since the prior favorable decision, DHHR tries to shift the ground in its first assignment of error. The Department suggests that the lower court inappropriately placed the burden of proof upon DHHR on Change of Condition. The truth, however, is that the evidence was so clear (that there had been "no real change") that analysis of which party had the "burden of proof" on the point was never discussed by the circuit court. Had the court below considered the Burden of Proof question, DHHR's own regulation imposing upon itself the burden "to prove, by a preponderance of the evidence, that its adverse action was correct" would have

disposed of the issue.<sup>6</sup> There are strong policy reasons for placing that burden upon the Department.<sup>7</sup> If this Court chooses to address the issue, respondent urges it to confirm that DHHR has the burden of proving that its action was correct on all required elements.

A. THE EVIDENCE OF RECORD CLEARLY ESTABLISHED THE MATERIAL FACT AT ISSUE WITHOUT REGARD TO WHICH PARTY HAD THE BURDEN OF PROOF ON THAT ISSUE

In this certiorari case the Circuit Court had the obligation to make an “independent review of both law and fact in order to render judgment as law and justice may require.”

Syllabus Pt. 3, *Harrison v. Ginsburg*, 169 W.Va. 162, 286 S.E.2d 276 (1982). The court below reviewed the factual evidence, and wrote:

Petitioner’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 Petitioner’s condition.

Circuit Court decision at 4. This Court of course reviews a circuit court’s decision to award a writ of certiorari under an Abuse of Discretion standard. Syllabus Pt. 2, *Jefferson Orchards, Inc. v. Jefferson County Zoning Board of Appeals*, 225 W.Va. 416, 693 S.E.2d 781 (2010).

The record below included the 2006 Psychological Assessment which underlay the previous favorable decision on eligibility. See Exhibit 7, “Psychological Update” of August 2, 2006. This report was submitted to DHHR by the claimant as part of the “original packet” of information for the annual review. Statement of DHHR witness, transcript of administrative hearing held September 26, 2008, Exhibit 28 at page 16. The record also contained the annual assessments from 2007 (Exhibit 11, “Psychological Update” of August 31, 2007) and 2008 (Exhibit 13, “Psychological Evaluation” of August 8, 2008) which underlay the more recent unfavorable decision. All three assessments were discussed in detail in the State Hearing

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<sup>6</sup> See Section II.B. below.

<sup>7</sup> See Section II.C. below.

Officer's decision, where the particular scores from each year were summarized and compared.

Exhibit 1, Decision of November 3, 2008, at pages 8-11.

Attachment A to this brief is a table listing Benjamin's Adaptive Behavior Scores from Exhibits 7 (2006 Assessment), 11 (2007 Assessment) and 13 (2008 Assessment); for all nine of the "Part One Domains" into which the instrument groups behaviors. In summary:

- in five of the nine measured areas Benjamin's adaptive abilities worsened (Independent Functioning; Language Development; Pre-Vocational Activity; Self-Direction; and Socialization);
- in two of the nine measured areas Benjamin's adaptive abilities stayed the same (Economic Activity; Numbers & Time);
- in only two of the nine measured areas did Benjamin's abilities show any improvement. These were Physical Development (i.e., he grew some); and he developed a somewhat better sense of Responsibility (from 2nd percentile on non-MR norms to 9th percentile; from 16 percentile on MR [Mental Retardation] norms to 37th).

It is particularly important to examine Benjamin's abilities in two areas, "Self-Direction" and "Language," for which DHHR now asserts Benjamin does not have "substantially limited functioning." Section 513.3.1, DHHR MRDD Waiver Manual, Exhibit 3 at page 6.<sup>8</sup>

In the area of Self-Direction, Benjamin's ABS scores across the 3 years declined. His "raw score" dropped from 9 to 6. When compared to the non-MR population, his "standard score" dropped from 4 to 3, and his rating for adaptive ability levels dropped from the 2nd percentile to the 1st. When compared to the MR population, Benjamin's "standard score" dropped from 9 to 8, and his rating for adaptive ability dropped from 37th percentile to the 25th.

In the area of Language Development, the ABS scores across the 3 years also declined. His "raw score" dropped from 37 to 29. When compared to the non-MR population his "standard score" dropped from 7 to 4, and his rating for adaptive ability levels dropped from 16th percentile to the 2nd. When compared to the MR population, his "standard score"

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<sup>8</sup> DHHR acknowledges Benjamin met criteria for substantially limited functioning in the areas of "Independent Living" and "Self-Care." Respondents' Answer, at page 3.

dropped from 14 to 11, and his rating for adaptive ability levels dropped from 91st percentile to the 63rd.

The crucial evidence enabling a comparison of condition at the time of the prior decision to condition at time of the termination decision (i.e., the 2006 Assessment) was submitted *by the claimant* in the original annual review packet. The court below concluded on the basis of this evidence that there had been NO material change or improvement in Benjamin Holbrook's condition and eligibility for the MRDD Waiver program. That finding is fully supported by the evidence, and certainly is not "plainly wrong" or an abuse of discretion.

This was not merely a finding that evidence on the element of Improvement or change of circumstances was lacking or insufficient to reach a conclusion. There is a vast difference between "there is no evidence" and "the evidence establishes." This is not a case in which the winner/loser was determined by referring to which party had the burden of proof on an element where there was an absence of evidence either way.

The Court did not explicitly allocate the burden on this issue either to the claimant (to show the negative, that there had been no change) or to the agency (to show the positive, that there had been change). The circuit court used only the ambiguous passive tense to say that "there needs to be proof of changed medical circumstances" or that "courts have also held that benefits should not be terminated unless substantial evidence is brought forth to show a claimant has improved." Circuit Court decision at 4. If there is any doubt, however, DHHR's hearing regulations dispose of the issue.

**B. THE DEPARTMENT HAS CHOSEN BY REGULATION TO PLACE THE BURDEN OF PROOF UPON ITSELF**

DHHR has promulgated regulations governing "Fair Hearings for Applicants and

Recipients of Public Assistance Programs.”<sup>9</sup> DHHR Common Chapters Manual, §§ 710.10 to 710.25.<sup>10</sup> Section 710.20 addresses conduct of the hearing itself, and includes a sub-section specifically defining “Presentation of the Case:”

Presentation of the Case - The Department will present its case and then the applicant will present his or her case. *The burden of proof is first on the Department to prove, by a preponderance of the evidence, that its adverse action was correct, then shifts to the applicant or recipient to prove, again by a preponderance of the evidence, that the Department’s action was incorrect.*

DHHR Common Chapters Manual, Section 710.20.F. Thus the Department has, by its own regulation, foreclosed any argument that a burden of proof cannot be placed on DHHR.

C. PLACING THE BURDEN OF PROOF UPON DHHR IS FULLY APPROPRIATE TO ASSURE A FAIR AND BALANCED HEARING

In 2007,<sup>11</sup> DHHR processed 2,739 requests for administrative hearings. Upon information and belief, the vast majority of these hearings involve unrepresented claimants contesting denials of food stamps, cash assistance, and various medicaid services. In MRDD Medicaid Waiver Program cases specifically, DHHR records available on line indicate that 95% of the MRDD Waiver Program claimants at hearings in 2010 and 2011 were not represented by attorneys.<sup>12</sup>

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<sup>9</sup> There are different rules for Social Services hearings, CCM Chapter 720; for Bureau for Child Support Enforcement hearings, CCM Chapter 730; and Administrative Disqualification hearings, Common Chapters Manual Chapter 740.

<sup>10</sup> Available on line at:  
[http://www.wvdhhr.org/oig/a%20-%20oig%20-%20common%20chapters/common\\_chapters\\_manual.htm](http://www.wvdhhr.org/oig/a%20-%20oig%20-%20common%20chapters/common_chapters_manual.htm)

<sup>11</sup> The last year for which statistics are available on line from DHHR. See DHHR Board of Review Annual Report 2007, at: <http://www.wvdhhr.org/oig/bor/default.asp>.

<sup>12</sup> By federal court consent decree, DHHR is required to make publicly available redacted versions of all administrative hearing decisions. These are posted on the DHHR Board of Review website at <http://www.wvdhhr.org/oig/bor/Decision%20Categories/Hearing%20Category%20Pages/BORdecisions.htm>.

For 2010, 19 decisions are posted. It appears from the decisions that claimants were

In most DHHR hearings involving food stamps, welfare benefits, or medicaid, on one side of the table sits a low-income person, often with low educational background, low literacy levels, limited confidence at speaking, who likely has never seen the text of a DHHR regulation and likely does not know what the regulations require, and who likely has never been through a contested hearing with a government agency. They can only try to answer questions, tell what happened, and hope for the best from the bureaucracy.

On the other side of the table sits a DHHR worker: a college graduate, who after being hired was trained by DHHR in the complexities of the eligibility regulations; who works with those regulations on a daily basis; and who is familiar with the hearing process.

The only way to give claimants any fair chance in a hearing is for DHHR to go first and explain what the law requires; why the Department took the action it did; and why its action was correct. To its credit, the Department has recognized this power imbalance in its regulations, and imposed upon itself the obligation "to prove, by a preponderance of the evidence, that its adverse action was correct...." Common Chapters Manual § 710.20.F.

This is not an undue hardship for the Department. It already has in its file the prior year assessments and other supporting documentation. It already has a consulting psychologist who testifies at every MRDD Waiver hearing to explain the Department's position. It should be no hardship for that psychologist to explain what has changed since the last favorable ruling.

### III. BENJAMIN H.'S ELIGIBILITY MAY BE ESTABLISHED BY COMPARING HIS "ADAPTIVE BEHAVIORS" TO THOSE OF MENTALLY RETARDED PERSONS

#### A. INTRODUCTION

Petitioner's second assignment of error asserted that the court below improperly "disregarded" the Department's argument that only "non-MR norms" could be used to assess

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represented by lawyers in two of those 19 cases. In 2011, 16 decisions have been posted. It appears that none of those claimants had the assistance of counsel. For the two years combined, then, claimants had lawyers in only 2 of 35 cases (5.7%).

Benjamin H.'s eligibility. Respondent believes the court below was correct, and urges this Court to affirm the ruling that in the absence of Improvement or Change any termination action by the agency must be reversed, without regard to arguments about why the unchanged condition should be considered not qualifying.

Should this Court decline to uphold that ruling, though, Respondent also asserts that use of MR norms is appropriate, and that the evidence establishes Benjamin's eligibility. Because federal law sets the foundation of comparing an individual's "adaptive behaviors" to those of mentally retarded persons, the use of MR norms is appropriate.

The MRDD Waiver Program covers only individuals with mental retardation, developmental disabilities, or a "related condition." Federal regulation defines the term "related condition" as encompassing either "general intellectual functioning or adaptive behavior" which is "similar to that of mentally retarded persons, and requires treatment or services similar to those required for these persons." 42 C.F.R. § 435.1010.<sup>13</sup> That definition evidences the intent of the federal Medicaid requirements to determine eligibility by comparison to individuals with mental retardation.

If an individual has a qualifying condition, the next step is to determine whether the severity of that condition is sufficient to meet eligibility criteria. The DHHR regulation sets the eligibility threshold of adaptive behaviors at a level of "average range or below" of persons with MR. The Psychological Assessments in all three years showed that Benjamin's "adaptive behaviors" scored in the average range or below when compared to persons with mental retardation.

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<sup>13</sup> The federal Medicaid statute excludes "mental illness" from the conditions that may be considered as a "related condition" for this program. 42 U.S.C. § 1396d(d)a)(2). There is no contention by any party that Benjamin's adaptive behavior limitations are caused by a "mental illness."

**B. FEDERAL EMPHASIS ON "FUNCTIONAL" DETERMINATION OF ELIGIBILITY BY REFERENCE TO ASSESSMENT OF ADAPTIVE BEHAVIORS**

The concept of Developmental Disability "related conditions" has been used in federal law addressing services for persons with developmental disabilities since 1970, with the adoption of the Developmental Disabilities Services and Facilities Construction Act (DDSFCA), Public Law 91-517. That act funded services for persons with mental retardation or "other neurological conditions," and utilized a diagnosis-based listing of specific medical diagnoses that would be included, such as Cerebral Palsy or Epilepsy.

In the 1975 Developmental Disabilities Assistance and Bill of Rights Act (DDABRA)], the term "neurological conditions" was broadened to cover any conditions closely related to mental retardation by virtue of a similar impairment or a requirement for similar treatment. Public Law 94-103, Developmental Disabilities Assistance and Bill of Rights Act.

The definition was amended further in the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Public Law 95-602. The 1978 revised definition included any mental or physical impairment that limits the person's functional ability in certain activities, and no longer included only specific diagnoses that previously had been used to limit the definition to those impairments closely resembling mental retardation.

The current definition in federal law was adopted by the federal agency<sup>14</sup> in 1986. This version explicitly expanded the term to include "any other condition, other than mental illness" which "results in impairment of general intellectual functions or *adaptive behavior* similar to that of mentally retarded persons, and requires treatment or services similar to those required for these persons." 42 C.F.R. 1010 [emphasis added].

The emphasis of this expansion over time was to compare the functional abilities of the

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<sup>14</sup> The federal agency, a sub-division of the federal Department of Health and Human Services, was then known as the Health Care Financing Agency (HCFA). It is now known as the Center for Medicare and Medicaid Services, or "CMS."

person, in order to provide services to individuals who (1) have limited adaptive behaviors "similar to" those of mentally retarded persons and (2) who need services "similar to" those required by mentally retarded persons.

C. ASSESSING ADAPTIVE BEHAVIORS BY COMPARISON TO BEHAVIORS OF INDIVIDUALS WITH MENTAL RETARDATION IS EXACTLY WHAT THE FEDERAL MEDICAID LAW REQUIRES

If the focus of the inquiry is to determine whether an individual has behaviors similar to those of the MR population and whether the individual needs services similar to those of the MR population, then what better way to do this than to compare their actual performance and behaviors to those of the MR population? The ordinary expectations for the two different populations would be entirely different. The behaviors expected of a 12 year old with MR would be different than those expected of a 12 year old without MR. The services needed to improve performance would be different for the individual with MR versus the individual without MR.

The "Adaptive Behavior Scales (ABS) instrument conducts a two-stage process. First, the instrument asks a series of questions to determine exactly what level of functioning an individual can carry out. The second stage is to assign scores to the responses, adjust them for age, and then compare the individual's adjusted scores to those of larger groups of people.

For example, one inquiry in the "Pre-Vocational Activity" domain of the ABS instrument asks whether the individual can perform at one of three different levels: job requiring use of tools or machinery; or only simple work such as mopping floors, emptying trash, etc; or no work at all. In the area of Self-Direction the instrument asks (among other inquiries) will he engage in assigned activities; will he engage in activities only if assigned; will he ask if there is something to do; or will he initiate most of his own activities.

The level of task a person can perform does not depend upon whether he has mental retardation or not. It is simply an evaluation of actual functioning. The level of task capability, once determined, can then be compared to the range of ability levels of the population of similar

age persons with mental retardation. The DHHR eligibility regulation contains two standards of eligibility: "In the average range or equal to or below the seventy fifth percentile when derived from MR normative populations" or "three standard deviations below the mean or less than one percentile when derived from non MR normative populations." Section 513.1, MRDD Waiver Manual, Exhibit 3 at page 6.

The facts of record establish that Benjamin H.'s ABS scores in 8 out of 9 domains<sup>15</sup> were beneath the 75th percentile of performance by similar age individuals with mental retardation. It is exactly this comparison to the mental retardation population that tells us Benjamin has "*adaptive behaviors* similar to those of mentally retarded persons and ... need[s] services similar to those required by mentally retarded persons" just like the definition of "related conditions." See 42 C.F.R. 1010. Even though his "general intellectual functioning" (ineffective as it may be due to his autism) is not similar to that of mentally retarded persons, his actual daily activities, or "*adaptive behaviors*," are similar to those of MR persons. Had the circuit court chosen to address the DHHR argument, however, respondent Benjamin H. asserts the use of MR norms is consistent with and required by federal Medicaid law.

IV. THE CIRCUIT COURT CORRECTLY DISREGARDED THE DEPARTMENT'S ARGUMENT THAT BENJAMIN H. WAS NOT CURRENTLY ELIGIBLE.

Petitioner's third assignment of error is that the circuit court was clearly wrong in "disregarding" DHHR's position that Benjamin H. was not eligible when applying non-MR norms. Again, as discussed in Section II above, respondent asserts the court was correct in determining that, if there had been no real change, then there was no reason to discuss whether the unchanged condition should have been considered not to qualify.

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<sup>15</sup> Only in the area of "Physical Development" was his score (99th percentile for that factor) higher than the 75th percentile threshold. His second-highest score was 63rd percentile in "Numbers and Time." All other scores were 25th percentile or lower. See Attachment A, summarizing data in Exhibits 7, 11 and 13.

Petitioner's third assignment of error is simply a review of the facts using the "non-MR standard" asserted in the second assignment of error to be required. As demonstrated in Section III above, respondent believes that use of "MR norms" is not only appropriate but necessary. Therefore review of facts under a different standard is not appropriate. Respondent's position is that the third assignment of error is flawed because both the first and second assignments upon which it depends are erroneous. Respondent's arguments articulated regarding the first and second assignments of error are a sufficient response to the third assignment also.

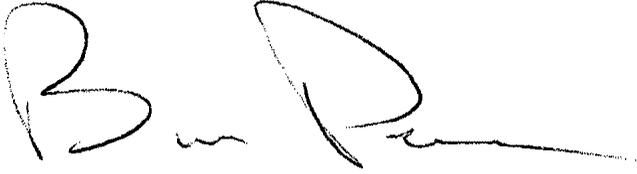
#### V. CONCLUSION

The court below properly ruled that the law requires a showing of Improvement or change of circumstances since the prior favorable decision, to sustain a termination of benefits. The court then found as fact that there had been "no real change" in condition. Upon the failure of that element, the court reversed the termination of benefits.

The evidence submitted by the claimant, as well as evidence from the Department, was fully sufficient to establish the fact that there had been "no real change." The Department's own regulation places upon DHHR the burden to prove "that its adverse action was correct." Common Chapters Manual § 710.20.F. There was no error regarding Burden of Proof.

Had the court below reached DHHR's arguments about why the unchanged condition should nevertheless be found to not meet eligibility criteria, respondent asserts that use of MR-norms is appropriate, and that he is eligible under that standard.

BENJAMIN H.  
Respondent,  
By Counsel.

A handwritten signature in black ink, appearing to read 'Bruce Perrone', with a long horizontal flourish extending to the right.

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## Attachment A

	Aug 2006 Age 12	Aug 2007 Age 13	Aug 2008 Age 14
<b>Independent. Functioning</b>			
Raw Score	64	65	51
Standard Score (Non-MR)	2	3	1
Percentile (Non-MR)	1 (<1)	1 (<1)	1 (<1)
Standard Score (MR)	10	10	8
Percentile (MR)	50	50	25
<b>Physical Development</b>			
Raw Score	22	20	25
Standard Score (Non-MR)	9	8	11
Percentile (Non-MR)	37	25	63
Standard Score (MR)	14	12	17
Percentile (MR)	91	75	99
<b>Economic Activity</b>			
Raw Score	3	2	3
Standard Score (Non-MR)	1	1	1
Percentile (Non-MR)	1 (<1)	1 (<1)	1 (<1)
Standard Score (MR)	6	6	6
Percentile (MR)	9	9	9

<b>Language Development</b>			
Raw Score	37	35	29
Standard Score (Non-MR)	7	6	4
Percentile (Non-MR)	16	9	2
Standard Score (MR)	14	13	11
Percentile (MR)	91	84	63
<b>Numbers &amp; Time</b>			
Raw Score	9	9	9
Standard Score (Non-MR)	7	7	7
Percentile (Non-MR)	16	16	16
Standard Score (MR)	11	11	11
Percentile (MR)	63	63	63
<b>Pre-Vocational Activity</b>			
Raw Score	3	2	0
Standard Score (Non-MR)	5	4	3
Percentile (Non-MR)	5	2	1 (lowest possible)
Standard Score (MR)	7	6	4
Percentile (MR)	16	9	2
<b>Self-Direction</b>			
Raw Score	9	9	6
Standard Score (Non-MR)	4	4	3
Percentile (Non-MR)	2	2	1
Standard Score (MR)	9	9	8
Percentile (MR)	37	37	25

<b>Responsibility</b>			
Raw Score	2	2	4
Standard Score (Non-MR)	4	4	6
Percentile (Non-MR)	2	2	9
Standard Score (MR)	7	7	9
Percentile (MR)	16	16	37
<b>Socialization</b>			
Raw Score	9	9	7
Standard Score (Non-MR)	2	2	1
Percentile (Non-MR)	1 (<1)	1 (<1)	1 (<1)
Standard Score (MR)	6	6	6
Percentile (MR)	9	9	9

STATE OF WEST VIRGINIA  
BEFORE THE SUPREME COURT OF APPEALS

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

Petitioner,

vs.

Case No. 101540

BENJAMIN H.,  
A Minor, by his next friend and  
mother, GEORGEANN H.

Respondent.

Certificate of Service

The undersigned hereby certifies that a true and accurate copy of the foregoing  
RESPONSE BRIEF ON BEHALF OF BENJAMIN H. was served upon the parties, by hand-  
delivering the same to the following address:

Michael R. Bevers  
Assistant Attorney General  
Bureau for Medical Services  
350 Capitol Street, Room 251  
Charleston, WV 25301

All of which was done on June 13, 2011.

A handwritten signature in black ink, appearing to read "Bruce Perrone", written over a horizontal line.

Bruce Perrone (WVSB #2865)