

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 101420

**MICHAEL BILLS, a minor by his next friend
and mother, ELLEN BILLS,**

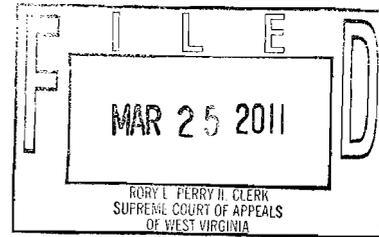
Petitioner,

v.

**Appeal from a final order
of the Circuit Court of
Kanawha County (09-AA-182)**

**PATSY A. HARDY, in her official capacity as
Secretary of the West Virginia Department of
Health and Human Resources; and
TODD THORNTON, in his official capacity as
State Hearing Officer for the West Virginia
Department of Health and Human Resources,**

Respondents.



PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

- I. The Circuit Court Applied An Erroneous Standard of Review.
- II. The Circuit Court Erred By Upholding The Finding That Michael No Longer Has Mild Mental Retardation.
- III. The Circuit Court Erred By Upholding The Finding That Michael Did Not Have Substantially Limited Functioning In Self-direction Because DHHR Has No Discernible Standard For Making that Determination.

STATEMENT OF THE CASE

A. Introduction

Petitioner Michael Bills (hereafter "Michael") was diagnosed around age 5 with autism, mild mental retardation, and ADHD. In 2000 at age 7 he was approved for in-home care services through the MRDD Medicaid Waiver Program, upon findings that he had mild mental retardation and "substantially limited functioning" in three "major life areas." He had periodic re-evaluations from 2002 until the current evaluation, all of which re-affirmed that he had mild mental retardation and substantially limited functioning in three major life areas.¹

In 2009 Michael was reviewed again. This time his IQ tested at 75, slightly above the usual threshold of 70 for a finding of mild mental retardation. DHHR therefore applied a different set of MRDD Waiver eligibility standards, those appropriate for persons without mental retardation, and decided that Michael was no longer qualified for the MRDD Medicaid

¹ In the 2005 review DHHR agreed that Michael was diagnosed with mild mental retardation but recommended termination of his benefits on other grounds. During the administrative hearing the DHHR consulting psychologist testified that he had mild mental retardation. Hearing Transcript at 9-10. The decision to terminate MR/DD Medicaid Waiver benefits was reversed in *Bills v. Walker*, 05-AA-177 (Cir. Ct. Kanawha County, WV, May 17, 2006).

Waiver program. DHHR acknowledged that he continued to have “substantially limited functioning” in two major life areas. However, DHHR determined that he did not have “substantially limited functioning” in a necessary third major life area because he was rated at the “first percentile” of abilities in that life area instead of “below the first percentile,” when compared to similar age children without mental retardation.² Had the Mental Retardation eligibility rules been applied to Michael in 2009, he would have continued to be eligible for the program.

The Circuit Court upheld the finding that Michael does not have mild mental retardation, applying an erroneous standard of review and deferring to the findings of the State Hearing Officer. In this appeal petitioner asserts that (1) the Circuit Court applied the wrong Standard of Review; (2) in fact the overwhelming weight of evidence is that Michael has been and continues to be mildly mentally retarded; (3) that DHHR has no “discernible standard” for determining whether Michael has “substantially limited functioning” in the major life area of Self Direction, regardless of whether the MR or non-MR eligibility rules are applied.

B. Facts Relevant To Petitioner and Procedural History.

² “At the first percentile” would mean that 99% of similar age children demonstrated higher abilities than Michael. “Below the first percentile” would mean that more than 99% of similar age children demonstrated higher abilities than Michael.

Michael Bills ("Michael") was 16 years old in 2009.³ He was adopted from an orphanage when he was approximately 3 ½ years old. Hr Ex. 35 at 189-190. Around the age of five Michael was first diagnosed with autism, mild mental retardation and ADHD. Hr Ex. 35 at 188. Later he was diagnosed with Pervasive Developmental Delays. Hr Ex. 6 at 3. Michael applied for Title XIX MR/DD Medicaid Waiver ("MR/DD") and was found medically eligible on August 30, 2000⁴ and has subsequently received this program benefit for approximately nine years.⁵

In the MR/DD Program Michael is reviewed annually for continued eligibility. For the 2009 review Michael was found to meet all the medical eligibility requirements except for one - he needed to be substantially limited functionally in one additional major life area. Hr Ex. 5, Hr Ex 35 at 39. Michael contends that he is substantially limited in the major life area of "Self-direction."

³ Michael Bills' nickname is "Misho" and some documents and testimony refer to him as "Misho."

⁴ DHHR Memorandum from Paul Warder, Program Operations Coordinator MR/DD Waiver Program, Division of Developmental Disabilities to Tom Napier, MR/DD Waiver Contact Person, Autism Services Center dated November 8, 2000. Document can be found in DHHR MR/DD Waiver file on Michael Bills.

⁵ DHHR in its Response Of Department Of Health and Human Resources To Claimant's Petition For Appeal at page 6 asserts that Michael was last "certified as medically eligible" in 2003. DHHR disregards the fact that on May 17, 2006, the Circuit Court of Kanawha County in Civil Action No. 05-AA-177 reversed a January 17, 2005 DHHR proposed termination of MR/DD benefits finding that Michael met the MR/DD eligibility standards from January 17, 2005. Thereafter, DHHR did not issue a new review decision until the one at issue in this case on January 13, 2009.

The written reports and testimony of treating professionals and his mother at the administrative hearing documented Michael's current functioning.⁶ He cannot be left alone at home or at school. He is met at the school bus by his Special Education teacher who walks with Michael to meet his one-on-one aide. The aide is with Michael throughout the school day. Hr Ex. 8, Hr Ex. 35 at 131-152. At home and in the community Michael is with his mother or an Autism Services staff person. Michael undergoes Speech Therapy and Occupational Therapy once a week, sees a psychiatrist, and takes several medications each day. Hr Ex 10 at 3-5.

Michael needs assistance with parts of bathing, self cleaning and other aspects of self care. Hr Ex 10 at 3-4. Michael cannot cross a street by himself. He got lost in a Wal-Mart store. Michael cannot make meals for himself and it is not safe to leave him home alone. Michael cannot handle money. Hr Ex 35 at 39

Michael does not independently direct himself to have a conversation with someone. Hr Ex 35 at 152. He has shown no interest in school activities. Hr Ex. 35 at 145. Michael needs constant support to function in school. Hr Ex. 35 at 144-145. Michael is in a co-taught classroom at Huntington High School. In all of his classes there is a subject teacher and a special education teacher. In addition Michael's one-on-one aide is with him in these classes. Hr Ex 35 at 133-143. Michael's mother testified that Michael has no self-direction, that she plans his activities and 95 percent of the time she sees half completed tasks in the home. What he spends time on is what he perseverates on. Hr Ex 35 at 202 - 212.

⁶ See Argument Section II, p 18 - 23 for a fuller summary of this testimony.

S. Elizabeth Hicks, M.A., a licensed psychologist, performed an evaluation of Michael and submitted a report dated June 24, 2009. Hr Ex 10. She interviewed Michael and his mother. She administered the WISC-IV intelligence test which resulted in a Full Scale IQ score of 75. Id at 5. She also administered a functional test, Adaptive Behavior Scale - School, Second Edition (ABS-S:2). Hr Ex 10 at 5-7. Ms. Hicks concluded that Michael continued to require an ICF/MR level of care at all times and recommended continuation of Michael's Title XIX MR/DD Waiver services. Hr Ex 10 at 8. Ms. Hicks testified that she has consulted with and helped with some of the ICF/MR group homes. Hr Ex 35 at 92.

Richard Workman, M.A., a DHHR contract psychologist who reviews the paper renewal packet submitted by Petitioner for his annual re-certification, testified as a witness for DHHr⁷. His testimony about Michael's ability in the area of Self-direction referred to Michael's psychological evaluation and Michael's IEP. Workman concluded that these narratives showed that Michael "has some degree of self-direction, albeit inappropriate at times." Hr Ex. 1 at p. 10.

Fair Hearing

In the 2009 annual review, Respondent terminated Michael's Title XIX MR/DD Waiver Medicaid relying upon a policy standard for non-mental retardation recipients, finding that he did not have functional test scores showing limitations in three major life areas. Respondent found that he met all the other eligibility requirements. Hr Ex. 5. Petitioner appealed. Prior

⁷ See footnote 26

to the administrative hearing before Todd Thornton, State Hearing Officer, DHHR Board of Review, DHHR acknowledged that Petitioner had limitations in two major life areas, Self Care and Capacity for independent living. Hr Ex. 35 at 39. Petitioner asserted during the fair hearing that he was also limited in and met the standard for a third major life area, Self-direction. During the review for 2009, Michael submitted a report of evaluation by psychologist S. Elizabeth Hicks, M.A. with IQ testing reporting a Full Scale IQ of 75. Hr Tr. Ex. 10 at 5. There was also functional testing submitted and witnesses testified about Michael's functioning.⁸

The Decision of State Hearing Officer Todd Thornton upheld DHHR's decision to terminate MR/DD Waiver Medicaid benefits. As the basis for his decision, Mr. Thornton concluded as follows:

1) The regulations that govern the MR/DD Waiver Program require eligible individuals to have a diagnosis of Mental Retardation (and/or a related condition), which must be severe and chronic, in conjunction with substantial deficits. Substantially limited functioning in three or more of the major life areas is required. Substantial limits is defined on standardized measures of adaptive behavior scores three standard deviations below the mean or equal to or below the 75th percentile when derived from MR normative populations. Substantially limited functioning must be supported by not only test scores, but by narrative descriptions contained in the documentation provided by the Claimant.

2) The Claimant established a qualifying diagnosis and functionality in two major life areas - *self-care* and the *capacity for independent living* - prior to this hearing. The major life area in question is *self-direction*. Extensive testimony and documentary evidence clearly show that the Claimant is limited with regard to

⁸ See Argument Section II, p. 18-23 for summary of witnesses at the Fair Hearing.

self-direction. However, policy requires narrative in addition to test scores to quantify the extent of limitation in major life areas, so that functionality can be measured against the required standard of "substantially limited functioning." Against this standard, the Claimant clearly fails to meet functionality in the area of *self-direction*. With only two of the required three major life areas met, the Claimant has failed to meet the functionality requirement of medical eligibility for the MR/DD Waiver Program. The Department's proposed action to terminate services is correct.

Hr Ex 1 at 10-11.

Appeal to Circuit Court

Michael appealed the State Hearing Officer's Decision by Writ of Certiorari to the Circuit Court of Kanawha County on November 10, 2009. By decision entered June 24, 2010, the Honorable Todd Kaufmann upheld the termination of Title XIX MR/DD Waiver Medicaid and denied the writ of certiorari.

C. Description of the Medicaid Act and the Title XIX MR/DD Waiver Medicaid Program.

1. Structure of the Medicaid Program

Medicaid is a cooperative federal-state medical assistance program through which the federal government provides financial aid to states that furnish medical assistance to low income and disabled persons. 42 U.S.C. §§ 1396-1396v. The ordinary federal matching percentage for West Virginia in April 2010 at the time of the administrative decision was 74.04%, enhanced by the Recovery Act to 81.83%. The state pays the

remaining percentage of covered costs.⁹ While a state's participation in the Medicaid program is voluntary, once a state chooses to participate—as West Virginia has done—it is obligated to comply with Federal Medicaid law. *See e.g. Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 110 S.Ct. 2510 (1990). To participate in the Medicaid program states must have an approved state plan which outlines the scope of the state's program and the types of medical assistance the state will provide. 42 U.S.C. §1396(a); 42 C.F.R. § 430.10.

“Medical assistance” provided under the Medicaid Act is defined as “payment of part or all of the cost of...care and services or the care and services themselves” for an enumerated list of general health care categories, including but not limited to inpatient hospital services, outpatient hospital services, nursing services, physician's services. 42 U.S.C. § 1396d(a)(2010). Some of those services are mandatory, and must be included in the state's Medicaid Plan if the state chooses to participate in Medicaid at all. 42 U.S.C. § 1396a(a)(10). Other categories of services are optional, which a state may choose to cover or not as it wishes for adults.

2. The “ICF/MR” Medicaid Option

The “Intermediate Care Facility/Mentally Retarded” (ICF/MR) Program is an optional Medicaid service authorized by Title XIX of the Social Security Act, 42 U.S.C. § 1396d(a)(15). ICF/MRs are institutions which provide residential, health, and rehabilitative services for individuals with mental retardation, developmental disabilities, or “related

⁹ 73 F. R. 72051 (November 26, 2008), online <http://aspe.hhs.gov/health/fmap10.pdf>

conditions.” West Virginia has chosen to include institutional ICF/MR services in its Medicaid state plan.

A person with a “related condition” is defined in federal regulations as follows:

Persons with related conditions means 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. 435.1009.

2. Title XIX MR/DD Waiver: The Home & Community Based Waiver Program Alternative.

a. The Home & Community Based Waiver Program Alternative

The Home and Community-Based Waiver program was adopted by Congress in order to allow individuals who would otherwise require care in an institution, (i.e., ICF/MR), to receive needed services in their own homes and in home-like settings, if the in-home care can be provided at lower cost than the institutional care. 42 U.S.C. §1396n. See Senate Report No. 97-139 and House Conference Report No. 97-208, 1981 U.S. Code Cong. & Admin. News 396. It is called a “waiver” because ordinary medicaid rules are waived in two general aspects: (1) somewhat higher financial eligibility limits are used than in regular Medicaid; and, (2) In-home services are provided to the defined waiver group that are not otherwise covered by regular Medicaid. These services include an in home aide to work with the person receiving services through MR/DD Waiver.

b. West Virginia’s MRDD Medicaid Waiver Eligibility Requirements

The Title XIX MR/DD Home & Community-Based Waiver Program, Revised Operations Manual, Chapter 513, November 1, 2007, [hereafter cited as “Manual”] contains the state regulations defining all aspects of the MR/DD Waiver Program. In general, an individual must “have a diagnosis of mental retardation and/or a related condition” AND “require the level of care and services provided in an ICF/MR (Intermediate Care Facility for the Mentally Retarded)....” Hr Ex.3.

The November 1, 2007, MRDD Waiver Program Policy Manual, included in the record at Hr Ex. 3, sets forth the following requirements for eligibility:¹⁰

1. Diagnosis of mental retardation and/or a related condition; and
2. manifested prior to age 22; and
3. likely to continue indefinitely, and
4. must be "severe and chronic, in conjunction with substantial deficits (substantial limitations associated with the presence of mental retardation)" in three or more of the following "major life areas:"
 - 1 - Self-care
 - 2 - Receptive or expressive language (communication)
 - 3 - Learning (functional Academics)
 - 4 - Mobility
 - 5 - Self-Direction
 - 6 - Capacity for independent living (home living, social skills, employment, health and safety, community use, leisure); and
5. "Requires and would benefit from continuous active treatment."
6. Meets requirements for ICF/MR level of care.

The regulation at Hr Ex. 3, gives a non-exclusive list of conditions that would be considered as "related conditions."

The term "substantial limitations" of functioning (as required in the fourth element) is defined as:

Substantially limited functioning in three (3) or more of the following major life areas; ("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)

¹⁰ The listing set forth in this Memorandum of Law is a synthesis of the various requirements set out in the Policy Manual.

percentile when derived from MR normative populations. The presence of substantial deficits must be supported not only by the relevant test scores, but also the narrative descriptions contained in the documentation submitted for review, i.e., psychological, the IEP, Occupational Therapy evaluation, etc.). Applicable categories regarding general functioning include:

Self-Care

Receptive or expressive language (communication)

Learning (functional academics)

Mobility

Self-Direction

Capacity for independent living (home living, social skills, employment, health and safety, community and leisure activities).

For applicable major life functioning areas, refer to Code of Federal Regulation (CFR): 42 CFR 435.1009.

Hr Ex 3.

SUMMARY OF ARGUMENT

The decision of the Circuit Court is based upon three legal errors, each of which each provide a sufficient basis for reversal.

First, the Circuit Court applied an unduly deferential standard of review that it must give deference to the hearing officer's factual findings and review those findings under a clearly wrong standard. Instead, under *Ginsburg, State ex Rel., v. Watt*, 168 W.Va. 503, 505 285 S.E.2d 367, 369 (1981) and *Wysong v. Walker*, ___ W.Va. ___, 686 S.E.2d 219 (2009), this Court has made clear that the circuit court is not required to give deference to the decision of the hearing officer upon certiorari review of a DHHR decision and should perform an "independent review of both law and fact."¹¹

¹¹ See Argument Section I, at pages 13-15 below.

Second, because the Circuit Court did not “render an independent review of both law and fact,” *Harrison v. Ginsberg*, 169 W.Va. 162, 286 S.E.2d 276 (1982), the Circuit Court erred by upholding the finding that Michael no longer has mild mental retardation even though the clear weight of the evidence is that Michael has been and continues to be mildly mentally retarded.¹²

Third, regardless of whether Michael should be considered mildly mentally retarded or not, the Circuit Court erred by upholding the DHHR determination that Michael did not have substantially limited functioning in the activity of Self Direction, because DHHR has no “discernible standard” for making that determination.¹³

ARGUMENT

I. The Circuit Court Applied an Erroneous Standard of Review

Contested cases involving “the receipt of public assistance” are statutorily exempted from the state Administrative Procedures Act. W.Va. Code § 29A-1-3©). Certiorari is the proper means for obtaining judicial review of a decision made 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). This Court has long made clear, as directed by W.Va. Code § 53-3-3, that the circuit court, on certiorari review of a decision by DHHR, is to make “an independent review of both law and fact in order to render judgment as law and justice may require,”

¹² See Argument Section II at pages 15-25 below.

¹³ See Section III at pages 25-36 below.

Syl. Pt. 3, *Harrison v. Ginsberg*, 169 W.Va. 162, 286 S.E.2d 276 (1982). More specifically, in a recent case involving Circuit Court review of a DHHR decision regarding Medicaid services, this Court stated:

In other words, “unless otherwise provided by law, the standard of review by a circuit court in a writ of certiorari proceeding under W. Va. Code § 53-3-3 (1923) (Repl.Vol.2000) is de novo.” Syllabus Point 2, *Bayer, supra*. Therefore, the circuit court was not required to give deference to the decision of the hearing officer. See *West Virginia Div. of Env'tl. Prot. v. Kingwood Coal Co.*, 200 W. Va. 734, 745, 490 S.E.2d 823, 834 (1997), quoting *Fall River County v. S.D. Dept. of Rev.*, 552 N.W.2d 620, 624 (S.D.1996) (“De novo refers to a plenary form of review that affords no deference to the previous decisionmaker.”).

Wysong v. Walker, ___ W.Va. ___, 686 S.E.2d 219, 223-224 (2009) (emphasis added).

The Circuit Court in this case erred by instead stating:

This Court’s review is governed by the West Virginia Administrative Procedures Act, W.Va. Code § 29A-5-1 et seq. West Virginia Code § 29A-5-4(g) states

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The Court must give deference to the administrative agency's factual findings and reviews those findings under a clearly wrong standard. Further, the Court applies a *de novo* standard of review to the agency's conclusions of law. *Muscatell v. Cline*, 474 S.E.2d. 518, 525 (W.Va. 1996).

Circuit Court Final Order at 9.

Thus the Circuit Court erred by limiting its review of the evidence, mistakenly deferring to the findings of the State hearing Officer and upholding those findings merely because the record contained "substantial evidence" to support them.¹⁴ But the Circuit Court was not limited to that standard of review. Instead, it should have "made an independent review of both law and fact," *Ginsburg, State ex rel., v. Watt, id.*, to determine whether it "would have reached a different conclusion on the same set of facts." Petitioner now turns to a review of the facts of record.

II. The Circuit Court Erred by Upholding the Finding That Michael No Longer Has Mild Mental Retardation

At the most recent review in 2009, DHHR found that Michael met all requirements for continued eligibility in the MRDD Waiver Program, *except* that he was considered substantially limited in only two instead of three "major life areas." DHHR acknowledged that Michael had "substantially limited functioning" in the two areas of Self Care and

¹⁴ Under the law the Circuit Court wrongly applied, "substantial evidence" only means "evidence on the record as a whole to support the agency's decision ... regardless of whether the court would have reached a different conclusion on the same set of facts." Syl.Pt. 1, *Walker v. West Virginia Ethics Comm'n*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

Capacity for Independent Living. Although Michael asserted that he also had substantially limited functioning in the area of Self Direction, DHHR did not agree.

Michael's 2009 evaluation included an IQ testing result indicating an Full Scale IQ of 75. Hr Ex. 10 at 5. Because this result was above the usual cutoff point of 70 for finding mental retardation, DHHR therefore determined that Michael was no longer "mildly mentally retarded" (contrary to all prior evaluations) and applied the "non-MR norms" to assess his scores on the ABS instrument.¹⁵ The ABS score in the domain of "Self Direction," using the norms for children *without* mental retardation, indicated that Michael was functioning at (but not "below") the 1st percentile. Hr Ex. 10 at 6. DHHR policy requires, for non-MR children, a functioning level "below the 1st percentile." Hr Ex 3.

The State Hearing Officer found, with regard to the major life area of Self Direction, that "extensive testimony and documentary evidence clearly show that Petitioner is limited with regard to self-direction." Hrg. Ex. 1 at 10-11. However, he found that because Michael did not also have a qualifying ABS score placing him *below* the 1st percentile compared to non-MR children of his age, he did not have substantially limited functioning

¹⁵ The ABS ("Adaptive Behavior Scales") consist of a series of questions asking what particular behaviors a person is performing. For example, "does not drink from cup or glass unassisted" or "drinks from cup or glass unassisted, considerable spilling." A numeric score is assigned to each answer. The sum total of those numbers for each "domain" of behavior is the person's "raw score."

The raw score is then compared to a database of scores obtained by other individuals of the same age and same retardation characteristic (i.e., MR or non-MR). The raw score is converted to a "standard score" to give a fair age-and-mental ability comparison. The raw score is also converted to a relative percentile ranking compared to others of the same age and mental ability.

The DHHR eligibility policy expresses that a child with mental retardation will be compared to other children with mental retardation, and will be eligible if she is in the "average" range (i.e., lower than 75th percentile) of abilities for MR children. A child who does not have mental retardation will be compared to non-MR children, and will be eligible if she is lower than the 1st percentile of children without MR.

in the area of Self Direction. The State Hearing Officer stated that DHHR policy “requires narrative *in addition to test scores...*” *Id.*, (emphasis added.) Hrg. Ex. 1 at 10-11.

The Circuit Court erroneously deferred to the finding of the State Hearing Officer and upheld this ruling. Had the Circuit Court properly performed an “independent review of both law and fact,” petitioner asserts that the great weight of evidence is that Michael has been and continues to be mildly mentally retarded. When the MR norms are applied to Michael’s ABS raw scores, he falls well within the eligibility criteria for the Self Direction domain.

First, the 2009 testing result is not necessarily inconsistent with the IQ results obtained in prior years documenting mild mental retardation. As noted by Kanawha Circuit Court Judge Louis H. Bloom in another MR/DD Waiver Medicaid case, Hendrickson v. Walker, 09-AA-115 (Cir. Ct. Kanawha County, WV, Oct. 27, 2009):

[T]he Diagnostic and Statistical Manual of Mental Disorders (“DSM-IV”), text Revision, states that “significantly sub average intellectual functioning is defined as an IQ of about 70 or below” *and that a Wechsler IQ of 70 is considered to represent a range IQ of 65-75.* [Cite added: DSM-IV, Text Revision, p. 41-42]

The science of IQ testing is not absolute. The results of any one testing procedure are subject to a statistical range of error, under which the specific number is given at a defined “confidence level,” along with the recognition that a person with that score may in fact be within a range of plus or minus 5 points. So it isn’t surprising that someone who has received prior IQ scores of 70 might turn up once with a result of 75. This would be within the statistical range of possibility.

Second, the DSM-IV goes on to state at page 42: “[I]t is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.”¹⁶ The record in Michael’s case is replete with testimony that Michael exhibits multiple and major significant deficits in adaptive behaviors. DHHR concedes that he has substantially limited functioning in the areas of Self Care and Capacity for Independent Living. DHHR concedes that in the area of Self Direction he is functioning only at the 1st percentile of *non-MR children* of his age.

All the witnesses who testified and interact with Michael testified that he has significant deficits in adaptive behaviors and particularly in self-direction:

1. James McElroy, M.A., Autism teacher at Huntington High School, for the school year 2008-2009 saw Michael every day. Hr Ex. 35 at 133. He would get Michael off the special education bus when it arrived at the school. McElroy testified that Michael needed help getting to the proper place in the school, which was the cafeteria. Michael has a one-on-one aide during the school day who stayed with Michael throughout the day. Michael’s support aide met him in the cafeteria and assisted Michael to his first period class and throughout the day. The aide sat next to Michael in his classes because Michael would have perseverations and he would need someone to calm him so that the class would not be disrupted. Hr Ex. 35 at 133-136.

¹⁶ American Psychiatric Association: *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition, Test Revision. Washington, DC, American Psychiatric Association, 2000. The DSM-IV was the product of 13 work groups composed of practitioners and researchers in the field and is relied upon by practitioners not only for diagnosis but also treatment planning.

McElroy explained that he was part of developing Michael's school IEP. Hr Ex. 35 at 133. He agreed that the IEP says Michael is in regular education 80% of the time. Id at 137. However, the regular classes Michael attends are co-taught classes, they have a regular education teacher and a special education teacher. This is in addition to Michael's one-on-one aide. Hr Ex. 35 at 138-139. The fact of the co-taught class is not written on the IEP. Hr Ex. 35 at 140. McElroy teaches Michael in a learning skills class once a day. McElroy explained that Michael's work is modified and that he is graded on the modified work.¹⁷ Hr Ex. 35 at 142. McElroy testified that if Michael expresses an interest in something like medicine it is documented in the IEP but that doesn't mean it is reality or an actual career path. McElroy stated that the medical field is an area about which Michael perseverates. Hr Ex. 35 at 143.

McElroy testified that Michael does not self-direct behavior or activity in school, not to the degree he could be independent. Id at 145. Michael has not shown any interest in participating in school activities. Id at 147. Michael does ask to see the school generators or to look at a computer, things about which he perseverates. Id at 147 -148.

McElroy wrote a letter dated October 6, 2008, based upon his observations and work with Michael which was submitted as part of the packet for annual review. Hr Ex. 13.

2. Susan McKinley, Director of Tangible Alternatives, an agency in Huntington, West Virginia for people with special needs. Her prior employment was with Cabell County Schools as a teacher for children with autism and severe profound mental impairment. Hr

¹⁷ DHHR misrepresented this testimony in its Response of Department of Health and Human Resources To claimant's Petition For Appeal at page 11 stating that "Mr. McElroy testified that Mr. Bills is doing all of the work and the same assignments as the other children in the general education classroom where he spends 94% of his time."

Ex. 35 at 159-160. McKinley taught Michael from kindergarten to fifth grade and was itinerant support for two years in middle school. Id at 161. Now Michael attends a yoga class which McKinley teaches. Michael comes to the class with his care provider who sits next to Michael during class. McKinley is on the other side of Michael. Michael cannot do the yoga class on his own, he needs redirection. During the class Michael talks about generators. Id at 163. He also talks about computers, like gigabytes, but McKinley is not sure Michael understands what that is because he uses the terms not in context. Id at 164. Michael's mother arranged for Michael to attend the yoga class. Id at 167. McKinley testified that in middle school Michael did not initiate participation in school activities. Id at 165 -166.

3. Marlow Edward Jeffries (Eddie), Community Manager with Autism Services, Huntington, West Virginia. Id at 168. He had worked with Michael for a year and nine months. Id at 170. Jeffries develops the plan for Michael's services provided by Autism Services and he observes Michael in the community when he is with the direct care staff in the community. The Autism Services direct care staff are with Michael six days a week. Jeffries plans the activities Michael does with the direct care staff, Michael does not initiate the activities. Id at 173. Michael is taken to the library where he looks at technology magazines. Jeffries testified that Michael focuses on that which he perseverates about, such as technology, but that there is not much understanding. Id at 174 -176.

4. Marc Ellison, Program Coordinator, Autism Training Center at Marshall University, Huntington, West Virginia. Id at 118. Since 1985 Ellison has worked with people with Autism Spectrum disorders, first providing community-based programming,

working with ICF/MR group homes, and now with Marshall University. Id at 119. He has presented at conferences and workshops about Autism nationally and in West Virginia. Ellison was asked to explain perseveration. Id at 120. He testified that perseveration is a term used to describe the fixation or obsessive interest in things which a person with Autism has. Id at 121. Ellison testified that it interferes with the ability to function, to follow through independently. Id at 121-123. A person with Autism generally cannot apply skills from place to place and often needs to be prompted. Id at 123 - 125. Ellison testified that the perseverative behavior and problems with generalization paralyze the person with Autism. These challenges “cause an individual with autism to become so anxious, so stressed, so uncomfortable with new surroundings, new situations, new expectations, that they just isolate themselves even more.” Id at 126.

On cross-examination Ellison was asked about his experience in ICF/MR group homes. He testified that the group home he ran was operated by Autism Services Center. Id at 128. The residents were moderately to severely affected by autism, some were verbal some were not, some were active in recreational and social activity in the community with the support of the staff, and some were in supported employment. Id at 129-130.

5. Ellen Bills, mother of Michael Bills. Id at 188. Ms. Bills testified that Michael was born premature and required oxygen at birth, that he was left at the hospital by his birth mother where he remained for several months, that Michael went from the hospital to an orphanage and Michael lived in the orphanage until he was adopted at age three years eight months. Id at 189-190. Michael was diagnosed with Autism at age five. Id at 191.

Ms. Bills testified that Michael cannot go to a store by himself, that he cannot stay at home by himself. Id at 196. Ms. Bills was asked if Michael can go to a store, think about what he wants to buy, go find it, buy it and come back to his mother. She explained an actual recent event in Wal-Mart. She said she was standing with Michael in the produce section of the store. She asked Michael if he remembered where was the bread isle, he said yes, she asked him to get hot dog buns and meet her back at the shopping cart in produce. She went to get an item in another isle and returned to the shopping cart but Michael was not there, nor was he in the bread section, nor in the surrounding area. Then there was an announcement asking for Michael's mother to come to the front of the store. Michael was there, tears streaming down his face hysterical with no hot dog buns, and he told Ms. Bills that he couldn't find her.¹⁸ Id at 197-199.

Ms. Bills testified specifically about Michael's self-direction abilities. She said that "he basically has no self-direction because I plan the activities for him. He doesn't ask to really do anything." Id at 202-203.

Ms. Bills testified about Michael's ability to focus, his attention span. She said "on one day it might be ten minutes, on one day it's fifteen." Id at 203. Michael obsesses about the things and spends time on those things. Id at 205 -206. These are not the productive activities.

Ms. Bills testified about Michael's focus on the medical field. She said that Michael's Grand-father had heart surgery, that she took a medical leave from work and she and

¹⁸ At the time of this event Michael was 16 years old.

Michael were with him at the hospital. This was around the time when Michael's IEP was completed which said that Michael expressed an interest in a medical career. Id at 206.

Ms. Bills explained that 95% of the time Michael cannot start a project, think about what he wants to do, take steps to complete the project, and finish the project. The activities Michael is involved in are not initiated by him but by others. Id at 211.

Finally, other evidence in the record shows that Michael's functioning has not changed from that measured in prior years when DHHR found him to be mentally retarded and qualified for the MRDD Waiver Program. As summarized in the chart below, Michael's ABS raw test scores in five of the ABS domains in prior evaluations have declined or remained the same. This does not suggest his abilities have emerged from MR levels:

	2000 Age 7	2006 Age 13	2008 Age 15	2009 Age 16
Independent Functioning	60	56	63	55
Physical Development	24	24	22	22
Economic Activity	1	2	3	3
Language Development	27	29	36	36
Numbers & Time	7	12	11	11
Pre-Vocational	3	2	3	3
Self-Direction	13	10	6	6
Responsibility	5	4	5	5
Socialization	13	13	11	11

When the raw scores are converted to MR-normed "standard scores,"¹⁹ the picture is even clearer. Seven of the nine domains decline:

	2000 Age 7	2006 Age 13	2008 Age 15	2009 Age 16
Independent Functioning	10	9	10	9
Physical Development	18	16	13	13
Economic Activity	7	6	6	5
Language Development	12	11	14	14
Numbers & Time	12	12	12	12
Pre-Vocational	8	6	7	7
Self-Direction	11	10	8	8
Responsibility	10	9	10	10
Socialization	9	8	7	7

Finally, when the raw scores are converted to MR-normed percentile rankings, the picture is equally clear. Seven of the nine domains decline, and in every one of those domains²⁰ Michael is at the 75th percentile or lower, which would qualify an MR person for the MRDD Waiver Program.

Table of Percentile MR Norms	2000	2006	2008	2009
Independent Functioning	50	37	50	37
Physical Development	99	98	84	84
Economic Activity	16	9	9	9

¹⁹ Because DHHR regarded Michael as mildly mentally retarded in prior evaluations, the data in the record expresses his ABS results with MR norms.

²⁰ The only exception to the "at or below 75 percentile is in Physical Development, meaning that Michael grew during these years.

Language Development	75	63	91	91
Numbers and Time	75	75	75	75
Pre-Vocational	25	9	16	16
Self-Direction	63	50	25	25
Responsibility	50	37	50	50
Socialization	37	25	16	16

Thus the vast weight of the evidence demonstrates that Michael remains as mildly mentally retarded as DHHR has regarded him in all previous reviews. Had the Circuit Court performed an independent review of the facts, rather than just looking for a scintilla of evidence in order to defer to the State Hearing Officer, it would have concluded that Michael has always been considered as mentally retarded and his eligibility for the MRDD Waiver Program should continue to be adjudicated on that basis. Had he been adjudicated using the MR norms, as in all prior reviews, for Self-direction he would be placed at the 25th percentile, far below the required 'at or below 75th percentile' level.

III. The Circuit Court Erred By Upholding The Finding That Michael Did Not Have Substantially Limited Functioning In Self-direction Because DHHR Has No Discernible Standard For Making that Determination.

A. Assessing Functionality of Behavior

The federal Medicaid Act requires that states develop "reasonable standards ... for determining eligibility for and the extent of medical assistance under the plan which ... are consistent with the objective of" the Medicaid Act. 42 U.S.C. 1396a(a)(17). Medicaid

eligibility and coverage decisions must be based on "discernible standards." *Franklin v. Arkansas Dep't of Human Servs.*, 320 Ark. 501, 898 S.W.2d 32 (1995).

One of the major criteria for establishing eligibility for the MRDD Waiver program is whether the individual's qualifying medical condition causes "substantial functional limitations" in at least three out of six "major life activities." 42 C.F.R. § 435.1010, definition of "persons with related conditions." The six federally defined groupings of major life activities are: Self-Care; Understanding and Use of Language; Learning; Mobility; Self-Direction; and Capacity for Independent Living." *Id.* Federal rules do not further define particular daily functions and abilities²¹ encompassed in each of the six "major life areas. That task is left to states as part of developing their own standards.

There are tools widely used by psychologists for measuring or assessing the extent of a developmentally disabled person's limitation of function.²² These assessments are typically used to plan a course of treatment or therapy, and to set goals for behavioral learning and improvement. These tools are commercial products, each built upon its own data and testing, with its own approach to grouping of behaviors.

²¹ Examples commonly found in psychological assessment tools are: eating, toileting, dressing, use of a telephone, handling of money, ability to respond when talked to, tells time by clock or watch, does not complete tasks, etc.

²² "The Scales of Independent Behavior - Revised (SIB-R), the Vineland Adaptive Behavior Scales, the AAMR Adaptive Behavior Scales (ABS) and the Inventory for Client and Agency Planning (ICAP) are the most widely used adaptive behavior assessments in the United States. Their popularity is owed largely to their usefulness and accuracy, derived from quality standardization and norming." *Quoted from "Assessment Psychology Online,"* available at <http://www.assessmentpsychology.com/adaptivebehavior.htm>.

Two of these instruments, the “Adaptive Behavior Scale - School: 2d Edition”²³ for children, published by the American Association on Mental Retardation, and the “Vineland Adaptive Behavior Scales,” published by American Guidance Service and Pearson Education, Inc.,²⁴ are probably the two most commonly used in West Virginia for assessing limitations for MRDD Waiver eligibility purposes. In devising their tests each have different groupings of daily functions and tasks, and neither of them group daily activities and behaviors in the same way as Medicaid’s listing of six “major life areas.”²⁵ Thus the task for the state in establishing “reasonable standards” is to define how the information from varying assessment tools may demonstrate “substantially limited functioning” in any one of the six “major life activities.”

West Virginia Medicaid policy defines “substantially limited functioning” as follows:

“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.

Medicaid Provider Services Manual § 513.3.1 at page 15. Hr Ex. 3. This provision establishes a level of severity by which to judge whether behaviors in a particular grouping

²³ Hereafter cited as “ABS-S2”

²⁴ Hereafter cited as “VABS.” See web site information about the publisher at <http://www.pearsonassessments.com/pai/>. For information specifically about the VABS instrument, see <http://www.pearsonassessments.com/HAIWEB/Cultures/en-us/Productdetail.htm?Pid=Vineland-II&Mode=summary>

²⁵ For example, the ABS-S:2 has nine “domains” of daily behaviors, while the Vineland has four. See <http://www.assessmentpsychology.com/adaptivebehavior.htm> summarizing the aspects of the different major tools.

constitute “substantially limited.” And if the assessment of behaviors in the standardized instruments were substantially identical to the federal listing of Major Life Activities, this definition would be a “reasonable standard” for determination of MRDD Waiver eligibility.

But the standardized instruments are not substantially identical to the MRDD criteria. What is then needed is some guidance as to how the groupings and data from the standardized instruments relate to the Major Life Areas. In this regard, the definition of “substantially limited” is totally lacking.

Worse, the failing is not just in this definition; there is no written DHHR policy at all which sets forth a “standard” against which the scores and results from a psychological instrument can be compared.

DHHR contracts with a husband-and-wife private psychological practice to perform virtually all of its MRDD Waiver Program eligibility reviews.²⁶ Either Linda or Richard Workman review virtually every MRDD Waiver application and annual renewal, and testify as psychologists on behalf of DHHR in virtually every MRDD Waiver Program hearing (including the present case). Ms. Workman has testified that there is no necessary correlation between an ABS-S2 grouping of behaviors and a Major Life Activity grouping with the same name, stressing the difference between “what this test measures” and “what we

²⁶ Psychologists Linda O. Workman, M.A. and Richard L. Workman, M.A., own Psychological Consultation & Assessment, Inc., which contracts with the DHHR Bureau for Medical Services to determine medical eligibility for MR/DD Waiver. The contract specifies that “Eligibility process will be in compliance with state or federal requirements.” BMS90002 Purchase Order No., section 2.3.2.1 and 2.3.2.2, renewed July 1, 2009, available for review at the State of West Virginia, Department of Administration, Purchasing Division.

consider."²⁷ Ms. Workman made clear that there is no direct correlation between the ABS-S2 Domain of Self-direction and the DHHR major life area called Self-direction.²⁸

In various cases Linda Workman has referred to "our criteria," but acknowledged that "our criteria" do not exist in written policy.²⁹ There is no written policy promulgated

²⁷ In a different case (now pending before this Court), *Patsy A. Hardy v. Shawn Shumbera*, Supreme Court of West Virginia No. 25671 (Circuit Court of Kanawha County, WV Civil Action No. 07-C-1807) Ms. Workman testified in the Circuit Court proceeding about one of the class members. Ms. Workman stated:

And partly the reason she scores lower here is a difference in what this test measures versus self - -*what we consider to be self-direction....*"
Hardy v. Shumbera, id., Circuit Court Hearing Transcript page 155 (emphasis added).

²⁸ In her Circuit Court testimony in *Hardy v. Shumbera, id.*, continuing to discuss the named plaintiff's assessment, Ms. Workman stated:

For program self-direction it has to do with whether you initiate activities, make decisions, engage, you know, in making choices about what you will do or not do, and that type of thing. The ABS is very heavily loaded in this domain about - - for questions that are about that relate to whether or not stay focused on an activity or whether you see tasks through to the completion..."
Hardy v. Shumbera, id., Circuit Court Hearing Transcript page 155. While noting that "if you had ADHD, for example, you would score very low on this domain," Ms. Workman then said that she would not rely on the resulting low ABS score because of the person's particular ADHD diagnosis. Hearing Transcript page 155-156. Why exactly a person who has ADHD, who would be expected to score low in this area, and did score low in this area, should have the low score disregarded was not explained.

²⁹ At the administrative hearing level of a case previously decided by this Court, *Wysong ex rel Ramsey v. Walker*, 686 S.E.2d 219 (2009), Ms. Workman stated that "Self Direction for our program means whether or not an individual would choose to live an active lifestyle or just sit and do nothing for hours at a time." In follow up questioning, Ms. Workman then testified as follows:

Q: Similarly when you talked about the major life area of self-definition to survive [sic] and stated "for our program this means", and so forth and so on, is this in the manual?

A: I guess it's not.

Q: Is there some other written statement of law that defines what self-direction means?

A: Not that I'm aware of.

Q: That would set forth a standard of 'if you sit in your chair and do nothing all day, you apply, but if you somehow if you don't, you don't.

A: Not that I'm aware of.

Transcript of May 31, 2007 administrative hearing in *Wysong v. Walker* at page16-17.

defining major life areas including Self-direction nor defining which test area scores are used to meet which major life areas.

B. Application to the Present Case

In Petitioner's case the lack of a standard outlined above resulted in the termination of his MR/DD Waiver benefits. In 2009 when Michael was re-evaluated for continued MR/DD Waiver benefits, DHHR found that he met all eligibility requirements to continue receiving MR/DD benefits, except that he was "substantially limited" in only two major life areas ('Self Care' and 'Capacity for Independent Living'). Hr Ex. 5, Hr Ex. 35 at 39. The issue contested before the State Hearing Officer and the Circuit Court was whether Michael met a third major life area of 'Self Direction.'

The Circuit Court ruled³⁰ that the evidence supported the DHHR decision that Michael did not meet the DHHR standard for Self-direction, because the decision "is based upon detailed procedures and policies that are used to evaluate a participant's eligibility." Circuit Court Final Order at 11.

The Circuit Court summarized the evidence supporting the conclusion of no substantial limitations in Self-direction as follows:

The DHHR's Psychologist Consultant testified that Petitioner did not meet the requirement for substantially limited functioning the area of *self-direction*. The September 30, 2008 DD-3 stated, in pertinent part:

He enjoys discussions related to his perseverative topics. He enjoys playing with pets. He will engage in leisure activities when arranged for him and participates in group activities if encouraged to do so at times.

Narrative descriptions of Petitioner from his April 22, 2008 IEP stated, in pertinent part,:

³⁰ Applying an improper standard of review, see discussion at Argument Section I above.

Mischo has demonstrated that he is interested in a career involving medical services. He is very interest in hearing about details concerning operations, stitches and emergencies. His interest will take over and he is known to avoid school work by continuing in conversation about his interest. When he becomes behind in his school assignments he will often state that the current class his is taking des [sic] not apply to his future in medicine or work in an ambulance.

Testimony from DHHR's Psychologist Consultant opined that these narratives indicated that Petitioner has some degree of self-direction, albeit inappropriate at times.

Circuit Court Final Order at 8 and Hr Ex. 1 at 9-10. Petitioner asserts that DHHR does not in fact have reasonable standards for determining eligibility, or even any discernable standard at all, so that the Circuit Court erred in its holding.

The DHHR policy states the term "Self Direction," but gives no definition of it.³¹ Hr Ex. 3. The DHHR policy refers to the federal standard, saying "for applicable major life functioning areas, refer to Code of Federal Regulation (CFR): 42 CFR 435.2009."³² Id. However, the federal regulation also does not provide any definition of the term 'Self Direction.'³³ 42 C.F.R. § 435.1010.

³¹ Three of the major life areas do have very brief parenthetical description in DHHR policy: "receptive or expressive language (communication)," or "Learning (functional academics)," or "Capacity for independent living (home living, social skills, employment, health and safety, community and leisure activities.)" But Self-direction does not even that much. Hr Ex 3.

³² The actual regulation is now found at 42 CFR 435.1010, after being re-numbered from § 435.2009.

³³ "*Persons with related conditions* means...(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 CFR 435.1010

As discussed previously,³⁴ there is no other DHHR written policy defining “Self-direction” in the MR/DD Waiver Program. Linda Workman, one of the two DHHR contract psychologists,³⁵ testified at the administrative hearing in *Wysong ex rel Ramsey v. Walker*,³⁶ that there is no additional definition beyond the text of the Manual.³⁷ So the sum and substance of the DHHR standard defining the major life area of “Self Direction” is that single term: Self Direction.³⁸

DHHR policy further muddies the concept of “standard” by stating that individuals must meet the criteria “not only by relevant test scores, but also the narrative descriptions contained in the documentation submitted for review.” Hr Ex 3. Of course, no explanation is provided as to how the review of narrative descriptions is to be performed, or against what standards it is to be measured.

³⁴ See discussion at pages 28 -30 above.

³⁵ See footnote 26 above.

³⁶ Later decided by this Court on other grounds, 686 S.E.2d 219 (2009).

³⁷ See footnote 29 above. Linda Workman testified at the *Wysong* administrative hearing on cross-examination: “Q: Is there some other written statement of law that defines what self-direction means? A: Not that I’m aware of. Q: That would set forth a standard of ‘if you sit in your chair and do nothing all day, you apply, but if you somehow if you don’t, you don’t? A: Not that I’m aware of.” See page 16-17 of transcript of May 31, 2007 hearing.

³⁸ In contrast, other states offer examples of detailed standard. The Alabama Department of MH/MR defines Self-direction as “managing one’s social and personal life and ability to make decisions necessary to protect one’s self.” Plaintiff’s Initial Brief Circuit Court, Attachment A. The Ohio Department of Mental Retardation and Development Disabilities administers the MR/DD Waiver and does a functional assessment asking the question “Can the individual perform the task independently, safely, consistently, without undue effort and in a reasonable amount of time?” Ohio also asks whether the person can: “Foresee the outcome of one’s action, Make informed choices that are unlikely to result in harm to self or other, Initiate appropriate activities, and Exercise self-control in daily life.” Plaintiff’s Initial Brief Circuit Court, Attachment B.

The DHHR policy does not specify any particular standardized adaptive behavior test to be used. The testing instrument used in Michael's case was the ABS-S2.³⁹ DHHR policy does not state which ABS Domain grouping would relate to which "major life area" grouping. Hr Ex 3. There are ABS Domain groupings with the same name as in the DHHR policy. One of these is "Self-direction," the Major Life Area at issue in Michael's case. However, one of the DHHR psychologists has testified elsewhere that the Self Direction domain on the ABS test does not measure the same thing "as what we consider to be Self Direction".⁴⁰ Of course, "what we consider to be Self Direction" is not stated in writing anywhere in DHHR policy.

During Michael's administrative hearing his counsel suggested that all parts of the ABS test as a whole should be looked at, to consider specific questions that relate to the ability to self-act or self-direct, regardless of the "domain" in which they were listed.⁴¹ Hr Ex. 35 at 77. See also Circuit Court Plaintiff's Initial Brief at 12 -13. The ABS Socialization domain asks five questions about initiative and passivity. The ABS Economic Activity Domain asks about ability to initiate activities like shopping or eating in a restaurant, or deciding how to use money such as budgeting. These seem to fit psychologist Workman's

³⁹ The ABS Examination Booklet is Attachment C to Plaintiff's Initial Brief Circuit Court.

⁴⁰ See footnote 28 above.

⁴¹ Counsel identified a list of specific questions for consideration, in Petitioner's Closing Argument to the State Hearing Officer. That Closing Argument was also attached to Petitioner's Initial Brief to the Circuit Court.

description of “what we consider to be self direction.”⁴² For all of these inquiries the ABS scores for Michael indicated very low to non-existent functioning.⁴³

Finally, in the specific ABS domain of Self Direction, the scored responses to all but one of the individual inquiries demonstrated extremely limited functioning.⁴⁴ The one inquiry which resulted in an apparently higher level of functioning asked how long Michael could pay attention to purposeful activities. Circuit Court Plaintiff’s Initial Brief, Attachment G. Here he was given the second highest score for the ability to “pay attention” for at least 15 minutes.

⁴² That is “it has to do with whether you initiate activities, make decisions, engage, you know, in making choices about what you will do or not do, and that type of thing.” See Workman testimony at footnote 28 above.

⁴³ See Attachment D, Circuit Court Plaintiff’s Initial Brief, Socialization questions: Cooperation: Offer assistance to others; Consideration for Others: Shows interest in the affairs of others, Takes care of other’s belongings, Directs or manages the affairs of others when needed; Interaction with others: Interacts with others in group games or activities; **Participation in Group Activities: Initiate group activities (leader or organizer), Participates in group activities spontaneously and eagerly (active participation)** Michael had a score of zero for these questions. Michael’s scored below the 1st percentile on this Domain. Hr Ex. 10 at 6.

See Attachment F, Circuit Court Plaintiff’s Initial Brief, Economic Activity questions: Money Handling: takes complete care of own money; Budgeting: Saves money or tokens for a particular purpose, Budgets fares, meals, etc; Errands: Goes to several shops and specifies different items, Goes to one shop and specifies one item, Goes on errands for simple purchasing without a note, Goes on errands for simple purchasing with a note. Michael was marked as unable to do any of these. Michael scored below the 1st percentile on this Domain. Hr Ex. at 6.

⁴⁴ See Attachment G, Circuit Court Plaintiff’s Initial Brief, Self-Direction questions: Initiative: “Initiates most of own activities, e.g., tasks, games, etc.”, “Asks if there is something to do or explores surroundings, e.g., home, yard, school, classroom, etc.” (Michael was marked as unable to do these.) He will engage in activities only if assigned or directed; Passivity: Circle if apply: “Needs constant encouragement to complete task, Has to be made to do things, Has no ambition, Seems to have no interest in things, finishes task last because of wasted time, Is unnecessarily dependent on others for help, Movement is slow and sluggish.” Test was marked all of these apply to Michael. Persistence: “Cannot organize task, Becomes easily discouraged, Fails to carry out tasks, Jumps from one activity to another, Needs constant encouragement to complete tasks.” Test was marked all of these apply to Michael.

But because of his Autism, Michael fixates or “perseverates” on things.⁴⁵ Hr Ex. 35 at 133-136, 143, 164, 174-176, 205-206. A person with Autism cannot apply to general usage the information about which he fixates, as explained in Michael’s administrative hearing by Mark Ellison, Program Coordinator of the Autism Training Center at Marshall University. Hr Ex 35 at 120-126. Petitioner therefore asked to have this particular question discounted in light of the effect of his impairment. If this single question had been discounted by just one point of raw score, in recognition of his Autism, then Michael would have qualified with a percentile ranking “below the 1st percentile” instead of being “at the first percentile” even using the non-MR norms. This request was consistent with the approach described by Linda Workman, contract psychologist employed by DHHR, of considering the effect of the medical condition with weighing the use of a particular ABS score in making MR/DD eligibility determinations.⁴⁶

Without explanation, DHHR declined this approach for Michael. Psychologist Richard Workman testified that Michael did not have “substantially limited functioning” in the Major Life Area of Self Direction, because the non-MR normed ABS score for the domain called Self-Direction was too high to meet the DHHR policy. Hr Ex 35 at 51-52. He did not look to other parts of the ABS test. No explanation was given for why in some cases the ABS result

⁴⁵ Perseveration: “continual involuntary repetition of a mental act usually exhibited by speech or by some other form of overt behavior.” Merriam-Webster Medical Dictionary, found online at <http://www.merriam-webster.com/medical/perseveration?show=0&t=1300911155>

The MedLine Plus web site, published by the National Institutes of Health, includes the following statement in a listing of behaviors that may be exhibited by persons with Autism: “Gets stuck on a single topic or task (perseveration).”
<http://www.nlm.nih.gov/medlineplus/ency/article/001526.htm>

See discussion at footnote 28 above, under which Ms. Workman described “not relying upon” a low score for ‘paying attention’ where the individual was diagnosed with ADHD.

for the Self Direction domain may be disregarded,⁴⁷ while in Michael's case it was binding. Petitioner argues that a "standard" which may fluctuate from one case to another, without explanation, and without written guidance, is no standard at all. The Medicaid requirement that decisions must be based on "discernible standards," *Franklin v. Arkansas Dep't of Human Servs.*, 320 Ark. 501, 898 S.W.2d 32 (1995), is not met. Medicaid Provider Services Manual § 513.3.1 lacks "reasonable standards" and therefore violates 42 U.S.C. 1396a(a)(17) .

⁴⁷ See discussion at footnote 28 above.

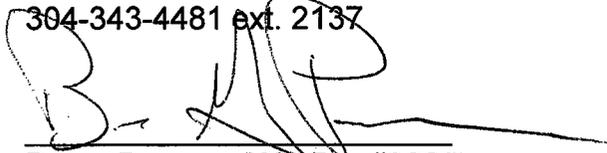
CONCLUSION

The Circuit Court was clearly wrong in its judgment on this certorari writ and its decision on the evidence should be set aside and Michael Bills found eligible for continued Title XIX MR/DD Waiver Medicaid. *Snodgrass v. Board of Educ. Of Elizabeth Indep. Dist.*, 141 W.Va. 305, 171 S.E. 742 (1933).

Michael Bills, by his next friend
and mother, Ellen Bills,
Petitioner,
By Counsel.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 101420

**MICHAEL BILLS, a minor by his next friend
and mother, ELLEN BILLS,**

Petitioner,

v.

**Appeal from a final order
of the Circuit Court of
Kanawha County (09-AA-182)**

**PATSY A. HARDY, in her official capacity as
Secretary of the West Virginia Department of
Health and Human Resources; and
TODD THORNTON, in his official capacity as
State Hearing Officer for the West Virginia
Department of Health and Human Resources,**

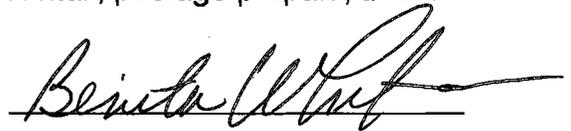
Respondents.

CERTIFICATE OF SERVICE

I, Benita Whitman, hereby certify that a true copy of the foregoing
PETITIONER'S BRIEF was served upon the following:

Michael Bevers
Assistant Attorney General
Bureau for Medical Services
350 Capital St., Room 251
Charleston, WV 25301

by depositing a true copy of the same in the U.S. Mail, postage prepaid, this 24th
day of March, 2011.



Benita Whitman (WVSB # 4026)
Counsel for Petitioner