

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 101420

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

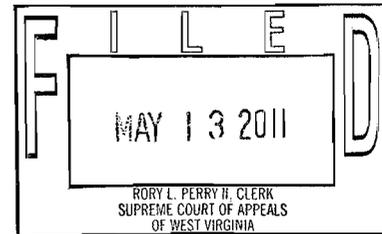
Petitioner,

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 REPLY BRIEF

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INTRODUCTION

The most remarkable aspect of the Brief of Respondent Department Health and Human Resources (“DHHR Response Brief”) is that it does not address the issue raised by petitioner, that the Department of Health and Human Resources Bureau of Medical Services (“Medicaid”) does not have a discernible standard for determining eligibility for the Title XIX MR/DD Waiver Medicaid program. The DHHR Response Brief makes broad generalities but does not address the issue raised.¹ The DHHR Response Brief uses a similar approach to the substance of petitioner’s argument about how Mental Retardation is diagnosed simply dismissing as “irrelevant” the American Psychiatric Association.²

As to Petitioner’s first assignment of error, DHHR now concedes that the Court below used an incorrect Standard of Review, but argues it was “harmless error” because the Circuit Court was correct anyway. Due to the absence of a Discernible standard, however, it is now virtually impossible to conclude that the Circuit Court was correct.³

This case demonstrates a failure by DHHR to implement discernible standards. The regulations of the federally designated “single state agency” charged with implementing the Medicaid program fail to state how to apply functional testing results to each of the major life function areas resulting in arbitrary and capricious decisions due to a lack of a reasonable standard and violates the Medicaid Act.

¹ See, DHHR Response Brief at 25-27.

² See, DHHR Response Brief at 24.

³ See, DHHR Response Brief at 17-23.

STATEMENT OF THE CASE

I. Evidence Of Record Supports Michael's Functional Limitations.

In its Response Brief, DHHR mischaracterizes the testimony and evidence about Michael's limitations. It states that testimony by Elizabeth Hicks, Michael's evaluating psychologist, supported DHHR's witness Richard Workman; that she "testified that Mr. Bills has functional academics and is on track to receive a regular diploma. Response Brief at 8. At the administrative hearing DHHR counsel questioned Ms. Hicks about Michael's Cabell County Schools Individualized Education Plan ("IEP") when Michael was 16 years old asking if he demonstrates functional academics. Hearing Ex No. 35 at 98 -99. Ms. Hicks testified:

A. On their testing it looks like his academics are about at the third or fourth grade level.

Q. So he does demonstrate functional academics?

A. Well, not for a – he doesn't demonstrate appropriate academics for a 16 year-old child.

The questioning of Ms. Hicks by DHHR about a diploma at Hearing Ex No 35 at 103-104:

Q. Then would you look at the first page of the IEP?

A. Yes, ma'am.

Q. Halfway down where it says, "The Student's Educational Programs will lead to a – "Do you see there what kind of diploma?..."

Q Part 3B, and then you go down and then there's a section that says "Educational Programs will lead to a – "

A. Yes.

Q. Do you see the box?

A. Uh-huh (yes). They are going for a standard diploma.

Ms. Hicks read in to the record the contents of a document, not that it was her opinion of his functioning level. Her opinion about Michael's limits are in her written report:

He attends high school with a 1:1 aide, and requires constant supervision at home and in the community. Cognitively, he scored in the Borderline Range of intellectual abilities on the WISC-IV; there has been some variability among previous evaluations, with his scores ranging from average to mildly mentally retarded. His adaptive behavior scores, as compared to those of typically developing children, are poor to very poor, with marked deficits in independent functioning, economic activity, **self-direction**, socialization, and stereotyped and hyperactive behavior.

Hearing Ex 10 at 8. Ms. Hicks concludes that Michael requires the ICF/MR level of care at all times. Id.

The DHHR Response brief similarly misstates the testimony by Petitioner's other witnesses. These witnesses gave detailed descriptions about Michael's functioning at school, at home and in the community and specifically his inability to self-direct functionally.⁴

ARGUMENT

I. **The Circuit Court Applied An Erroneous Standard of Review**

This Court has repeatedly made clear that the Certiorari statute requires a court to make "an independent review of both law and fact in order to render judgment as law and justice may require." Syl. Pt. 3, *Harrison v Ginsberg*, 169 W.Va. 162, 286 S.E.2d 276 (1982). Most recently, in *Wysong v. Walker*, ___ W.Va. ___, 686 S.E.2d 219, 224, this Court has said "the circuit court was not required to give deference to the decision of the hearing officer."

The DHHR Response Brief concedes that the Circuit Court applied an erroneous standard of review in examining fact findings, but argues the error was "harmless." DHHR Response Brief at 5. In truth, it is impossible to determine whether the Circuit Court's fact

⁴ See, Petitioner's Brief at 18-23.

findings were reasonable because the Circuit Court made almost no specific findings of fact in the opinion below, and because the applications of law to fact were cloaked in the Circuit Court's erroneous deference.

Because the Circuit Court made only general and conclusory statements, such as it is impossible to determine from such generalities what fact findings the Circuit Court made and whether they were reasonable.

II. DHHR Has No Discernible Standard For Determining Whether Michael Has Substantially Limited Functioning In Self-direction .

DHHR's Response Brief at 14 in a conclusory statement says that "Petitioner's allegation that the Department has no discernible standard for substantially limited functioning in Self-direction does not withstand the amount of evidence in this case." DHHR does not address in any manor whatsoever that the DHHR policy has no definition for the major life area of Self-direction. DHHR does not address in any manor that its policy does not state how to apply functional testing to the major life areas. First there must be discernible standards, *Franklin v. Arkansas Dep't of Human Servs.*, 320 Ark. 501, 898 S.W. 2d 32 (1995), which are reasonable standards. 42 U.S.C. 1396a(a)(17). Then the evidence is analyzed using those standards.

What is the discernible standard for applying functional testing to Title XIX MR/DD major life areas? The DHHR psychologist in other cases has testified that the functional testing item called "Self-Direction" is not what DHHR means for the major life area of Self-direction. Petitioner's Brief at 29. Here, DHHR argues that only the functional testing area of Self-Direction is relied upon. Response Brief at 12-14. The DHHR

“Functionality” standard at Medicaid Provider Manual, Chapter 513.3.1 is silent. Hearing Ex 3 at 17.

The record is replete with evidence that Michael is functional limited in the area of self-direction, including the ABS functional test. Petitioner’s Brief at 18-25, 30-36. The evidence to the contrary is the testimony of Richard Workman, DHHR’s psychologist. The Circuit Court was clearly wrong in finding that Michael is no longer eligible for Title XIX MR/DD Waiver Medicaid benefits using the wrong standard of review by which the Circuit Court deferred to a non-standard.

III. DHHR Erred Upholding The Finding That Michael No Longer Has Mild Mental Retardation.

DHHR asks this Court to uphold the Department’s finding that the claimant does not have a diagnosis of mental retardation. Response Brief at 7. The State Hearing Officer made no finding about Michael’s diagnosis of mental retardation. Hearing Ex. No. 14-10. The State Hearing Officer summarized Richard Workman’s testimony about learning and referred to an older IQ test (Hearing Ex No. 1 at 8 referring to Hearing Ex. No. 7 at 1, 5). The State Hearing Officer ignoring completely the testimony by Elizabeth Hicks (Hearing Ex. No. 1 at 10) and the most recent IQ testing which reported a Full Scale Score of 75. Hearing Ex. No. 10 at 5.

Michael’s functioning as demonstrated by the testimony in the record and Ms. Hick’s summary in her written report support that Michael still functions in the Mild Mental Retardation range as explained by the American Psychiatric Association.⁵

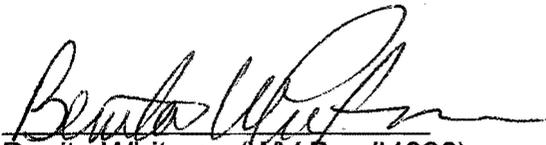
⁵ See, Petitioner’s Brief at 15 -25.

CONCLUSION

What is clear from the proceedings below is that DHHR has no discernible standard about applying functional testing to major life areas nor a definition of those major life areas. Further, no finding was made that Michael no longer functions in the mild mental retardation range.

The Circuit Court's decision below does not cure those defects. There was no independent review of the law and facts. Petitioner asks this Court to reverse the ruling below, award benefits, and return this matter to DHHR for implementation of the award.

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



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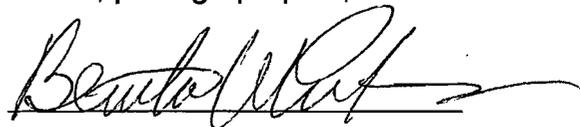
CERTIFICATE OF SERVICE

I, Benita Whitman, hereby certify that a true copy of the foregoing

PETITIONER'S REPLY 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 13th
day of May, 2011.



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