

SUPREME COURT OF APPEALS OF WEST VIRGINIA

MATTHEW WYSONG,
by his mother, Mary L. Ramsey,

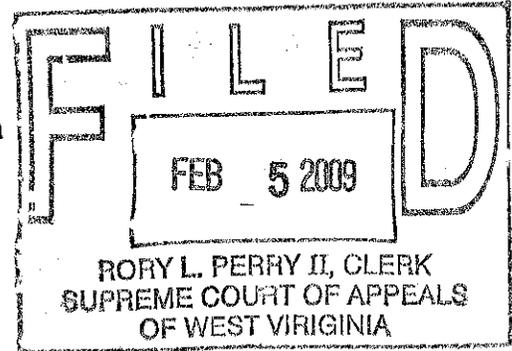
Petitioner Below, Appellee,

Vs.)

Supreme Court No. 34594
(Kanawha Co. Civil Action 07-AA-152 Below)

MARTHA WALKER, in her official capacity as
Secretary of the West Virginia Department of
Health and Human Resources; and Ray Burl Woods,
in his capacity as State Hearing Officer for the West Virginia
Department of Health and Human Resources,

Respondents Below, Appellants.



REPLY BRIEF OF APPELLANT MARTHA WALKER, SECRETARY,
WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES

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COMES now the Appellant, Martha Walker, Secretary of the West Virginia Department of Health and Human Resources, by her counsel, Darrell V. McGraw, Jr., Attorney General, and Mary McQuain, Assistant Attorney General, Office of The West Virginia Attorney General, pursuant to the November 12, 2008 Order of this Court and Rule 10 (c) of the West Virginia Rules of Appellate Procedure, state that she is compelled to file this Reply Brief because the Brief of the Appellee is nonresponsive to the most egregious assignment of error and makes statements of law and fact that are not true, as explained below. In trying to get a result from this Court, the Appellee is presenting a case he wishes he had rather than the case that is before this Court.

1. Appellee's brief is nonresponsive to the most egregious error committed by the Circuit Court--to wit, its finding that Appellee met the medical eligibility requirements for the MR/DD Waiver Program despite the fact that the evaluating psychologist (Sandi-Kiser Griffith),

clearly and unequivocally testified that the training she recommended for Appellee “doesn’t” translate into a need for ICF/MR services at an ICF/MR level of care, BOR 8-01-0 TR 46, and she” did not recommend” “active treatment” [as defined in 42 C.F.R. §§ 435, 1010 (2006) and 440.483 (a)] for Appellee at the ICF/MR level of care and services. *Id.* at 45 -47.

These are essential requirements for continued participation in the MR/DD Waiver Program. 42 C.F.R. § 435.1010 (2005); *see also*, 42 C.F.R. § 441.302 (c)(2)(iii) (reevaluation required at least annually of each recipient receiving home and community-based services “to determine if the recipient continues to need the level of care provided and would, “but for” the provision of waiver services, otherwise be institutionalized in an ICF/MR”).

2. Appellee's Brief does not accurately set out the Statutory Framework for Medicaid and the West Virginia Home and Community-Based Waiver Program. It overstates the breadth of the Program. Moreover, Appellee's brief unnecessarily complicates the issues in this case.

Medicaid is a complex statute but it is not complicated if the reviewer focuses on the provisions that are *relevant and material* to the issues presented. It is very important to have a clear understanding of the statutory framework because this not only defines the issues, it defines the role of a reviewing court in this matter. It is repeated below:

Medicaid is purely a creature of statute. *Grayam v. Department of Health and Human Resources*, 201 W.Va. 444, 498 S.E.2d 12 (1997).

The Federal Regulation describing the statutory framework for the West Virginia MR/DD Waiver Program is succinctly set out at 42 C.F.R. § 430.0 (“...Within broad federal rules, each State decides eligible groups, type and range of services, and administrative and operating procedures...”)

Federal Regulation 42 C.F.R. § 430.10 (1979) requires that the State "assure" the Federal Medicaid Agency in its State Plan that the Medicaid Program will be "administered in conformity with the specific requirements of title XIX, Chapter IV, and other applicable official issuance of the Department [of Health and Human Services]."

Federal law requires the State to designate a single State Agency to administer and supervise the Medicaid Program. *Id.*

42 C.F.R. § 431.10(e) further provides that, "... In order for an agency to qualify as the Medicaid agency--

(1) The agency **must not delegate**, to other than its own officials, authority to--

(i) *exercise administrative discretion* in the administration or supervision of the plan, or

(ii) *Issue policies, rules and regulations on program matters.*

(2) The authority of the agency must not be impaired if any of its rules, regulations or decisions are subject to review, or similar action by other offices or agencies of the State.

(3) If other State or local agencies or offices perform services for the Medicaid agency, *they must not have the authority to change or disapprove any administrative decision of that agency, or otherwise substitute their judgment for that of the Medicaid agency with respect to the application of policies, rules and regulations issued by the Medicaid agency. (emphasis added).*

The West Virginia Legislature designated the West Virginia Department of Health and Human Resources to administer and supervise the Medicaid Program and empowered the Secretary of the DHHR to carry out this mandate. *W.Va. Code* §§ 9-2-3(1970); 9-2-6 (2005).

The Bureau for Medical Services ("BMS") within the DHHR is the single state agency that is authorized by statute to "promote, amend, revise and rescind department rules and regulations *respecting qualifications for receiving the different classes of welfare assistance with or permitted by federal laws, rules and regulations*, but not inconsistent with state law..." *W.Va. Code* § 9-2-6 (2)(2005). (emphasis added).

Federal law provides that Home and Community-Based ICF/MR Waiver Services be furnished "*only to* recipients who the agency determines would, in the absence of these services require the Medicaid covered level of care provided in an ICF/MR (as defined in § 440.150 of this Chapter)." 42 C.F.R. § 331.301(b)(1)(iii). (emphasis added).

Federal law requires the State Medicaid Agency, on "at least an annual basis, to re-evaluate a recipient of MR/DD Waiver Services "to determine whether the recipient continues to need the level of care provided and would, *but for* the provision of waiver services, otherwise be institutionalized in an ICF/MR." 42 C.F.R. § 441.302 (c)(2)(iii).

The Bureau for Medical Services ("BMS"), in its State Medicaid Policy Manual, defines the medical eligibility group, payment and level of services for the MR/DD Waiver Program within broad federal rules.¹ Specifically, "persons with related condition," "active treatment in intermediate care facility for the mentally retarded," "institution for the mentally retarded or persons with related conditions," are defined in 42 C.F.R. § 435.1010 (2006).² The State Medicaid Policy further defines what constitutes "substantial limited functioning" in the six major life activities (listed in 42 C.F.R. §435.1010) and specifies the type of documentation required that would establish "substantial limited functioning" in the major life areas and require "active treatment" in an intermediate care facility for individuals diagnosed with mental retardation or "related condition."

The State Policy defines "substantial limited functioning" as follows:

Substantial limits is defined on standardized measures of adaptive behavior scores three (3) standard deviations below the mean or less than 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

¹ At the bottom of every page of the MR/DD Policy Manual is the statement: "DISCLAIMER: This manual does not address all complexities of Medicaid policies and procedures and must be supplemented with State and Federal laws and regulations."

² 42 C.F.R. § 435.1010 (2006) was previously designated as 42 C.F.R. §435.1009.

populations. *The presence of substantial deficits must be supported not only by the relevant test scores but by the documentation submitted for review, i.e., the IEP, Occupational Therapy evaluation, narrative descriptions, etc.*

WV Medicaid MR/DD Waiver Policy Program Manual, §513.3.1.³ (emphasis added).

As noted above, the Medicaid-covered level of care and services for the MR/DD Home and Community-Based Waiver Program is defined in 42 C.F.R. § 440.150.

42 C.F.R. § 435.1010 defines the "active treatment in intermediate care facilities for the mentally retarded" as "the treatment that meets the requirements specified in the standard concerning active treatment for intermediate care facilities *for persons with mental retardation* under § 483.440 (a) of this subchapter." (emphasis added).

The Board of Review within the DHHR ("BOR") was organized to hear, *inter alia*, appeals regarding denials of Medicaid services. W.Va. Code § 9-2-6 (12). In conformity with federal law, the Board of Review does not have authority to exercise discretion in the administration or supervision of the State Plan. Nor does it have authority to issue policies, rules and regulations on program matters. Chapter 700, § 710.19 D, *Common Chapters Manual*. The Rules of Evidence applied in courts in this jurisdiction apply to the evidence at BOR hearings. *Id.* at § 720 I.⁴

The medical eligibility requirements for participation in the MR/DD Waiver Program are found in the MR/DD Waiver Services Policy Manual. It was subjected to a public notice and comment period before it was finally adopted by BMS. Thus, Appellee's allegation that DHHR does not engage in public rulemaking is not true. *See* Appellee's Brief at 27, fn. 26.⁵ The

³ The State Medicaid Policy, in its entirety, can be viewed at www.wvdhhr.org/bms/Manuals (scroll to Chapter 513 MR/DD Waiver Services and follow links).

⁴ The Common Chapters Manual can be viewed in its entirety at www.wvdhhr.org/oig (scroll to Board of review and follow links). Appellee's allegations regarding the handling of Hearsay is not correct. Moreover, it is not relevant or material to the issue before this Court. Nor was it raised by Appellee below.

⁵ *LAWV v. Walker* cited in fn. 26, was settled. This Court should not place form over substance.

MR/DD Waiver Service Policy Manual (as well as Policy manuals for other Medicaid Services) is publicly accessible at the DHHR's home page.

Appellant contends that the Circuit Court must take judicial notice of the Federal Medicaid Regulations and the written and defined State Policy and must follow them. *See* 44 U.S.C. § 1507 (1968) (“The contents of the Federal Register are required to be judicially noticed”); 44 U.S.C. § 1510 (1968) (“The Code of Federal Regulations is *prima facie* evidence of the text of the original documents”). Appellant contends that the Circuit Court, in this case, failed to follow the law; specifically, it failed to apply the correct legal standards to the evidence it was reviewing.

Appellant also contends that an understanding of and familiarity with the complexities of Medicaid is critical; therefore, deference should be given to those in the DHHR who have more expertise and work with these issues every day.⁶ *Hobbs ex rel. Hobbs v. Zenderman*, 542 F.Supp. 2d 1220 (2008). The bulk of the evidence in a MR/DD Waiver case involves review of medical, psychological, educational and therapeutic reports submitted by or on behalf of a claimant and expert testimony from licensed psychologists, then applying the information to established criteria.⁷

Appellant contends that, inasmuch as the Secretary of the WV DHHR, pursuant to State and Federal laws and regulations, has the sole discretion to create, administer and interpret the Medicaid Program, and because the Circuit Court decided this case upon the administrative record without taking any new evidence, the standard of review should be *de novo* for questions of law and the findings of fact by the State Hearing Officer should be upheld unless clearly

⁶ Failing all else, Appellee, on p. 27 fn. 26, attacks the integrity of the State Hearing Officers because many are not lawyers. The Hearing Officers do receive training in Medicaid Law and the Rules of Evidence. Also, BOR has its own General Counsel to advise Hearing Officers on legal issues.

⁷ The reports from claimant's experts are admissible in evidence even if the claimant's expert does not testify at the hearing. DHHR's consulting experts, on the other hand, are required to appear at the hearing.

erroneous. Otherwise, the court would violate the Separation of Powers Doctrine, *W.Va. Const., Art. V, § 1. Frymier-Halloran v. Paige*, 193 W.Va. 687, 458 S.E.2d 780 (1995); *Danielley v. City of Princeton*, 113 W.Va. 252, 167 S.E. 620 (1933). *Accord, State ex rel. Prosecuting Attorney of Kanawha County, West Virginia*, 2008 WL 4867218 at 9, fn. 17, (W.Va. November 5, 2008).

In the present case, the State Hearing Officer specifically found that the "Licensed Psychologist" (Sandi Kiser-Griffith) did not recommend the Appellee for ICF/MR level of care, and that the Appellee's ABS scores, the narrative information in the Licensed Psychologist's report and her testimony do not indicate a need for "active treatment." *See* BOR Hrg. Exh. 1 at 7-9, findings numbered "33 – 38." These findings are more than amply supported by the record. They lead to the inescapable conclusion that Appellee does not meet the medical eligibility requirements for the Program.

3. The focus of Appellee's Brief is on the **false** allegation that the State Medicaid Medical Eligibility requirements for MR/DD Waiver Services are "vague and undefined" and that he was denied Waiver services because of "vague and undefined" medical eligibility requirements. *See* Appellee's Brief at 3, §II.

The only requirement that is not defined, except within the context of the underlying federal regulation defining "persons with related conditions," 42 C.F.R. §435.1010 (2006), is the requirement that the mental retardation and/or "related condition" be "severe."

Appellee's focus on the definition of "severe" is a "tempest in a tea pot."

The *Writ of Certiorari* filed by Appellee was appealed from the Decision of the State Hearing Officer. Hearing Officer Woods **did not** make a finding that Appellee's "related

condition," which he determined to be cerebral palsy, was "not severe." Nor did he base his conclusion on such a finding. Rather, he determined that Appellee was medically ineligible because he failed to demonstrate "substantial limited functioning" in at least three of the six major life areas and failed to demonstrate that his condition requires "active treatment" at the institutional level of care and services provided in an ICF/MR. *See* BOR Hrg. Exh. 1.

The Medicaid Agency's determination was also based on consideration of all of the statutory medical eligibility requirements. *See* BOR Hrg. Exh. 5.⁸

That the "related condition" must be "severe," is only one of several requirements that must be demonstrated by appropriate documentation under Federal Medicaid Regulations and State Policy. 42 C.F.R. §435.1010 (2006). Failure to meet *any* of the essential requirements renders the claimant ineligible.

In the present action, it was **undisputed** by the evaluating psychologist (Sandi-Kiser Griffith) that the training she recommended for Appellee was **not equivalent** to a need for ICF/MR services at the ICF/MR level of care. BOR 8-01-07 TR 46. Moreover, it was undisputed by Kiser-Griffith that she **did not** recommend "active treatment" (as defined in federal regulations) at the ICF/MR level of care and services, as required by State and Federal law. *Id.* at 45 -47. Appellee's claim fails on these facts alone, *as a matter of law*. 42 C.F.R. § 441.302 (c)(2) (iii).

It is pointed out that the Circuit Court **did not** find that Appellee's cerebral palsy resulted in substantial limitations in the life activity of mobility – the life activity most-closely associated

⁸ Appellee's allegation that Linda Workman, the State's consulting expert, testified that a claimant must resemble individuals in an ICF/MR misstates her testimony. *See* Appellee's Brief at 13- 14. Ms. Workman's opinion that Wysong failed to meet the medical eligibility requirements of the Program was based on relevant test scores on tests of intelligence and adaptive behavior, school records, the narrative notes of the treating physician and evaluating psychologist and, importantly, the fact that the evaluating psychologist did not recommend ICF/MR services for Appellee at the ICF/MR level of care. *See* 5-31-07 TR 10 -14.

with severe cerebral palsy. The treating physician did not diagnose "severe cerebral palsy" and his narrative notes do not support such a conclusion. Also, Appellee's ABS scores do not indicate "substantial limited functioning" in mobility. In addition, the evaluating psychologist testified that Appellee's impairment in the life area of mobility was "not severe." BOR 8-01-07 TR 34.

Thus, the finding by the Circuit Court that Appellee's cerebral palsy is "severe," is not supported by the evidence of record.

4. Appellee alleges that "the Circuit Court ascribed meaning to the term "severe" equivalent to that term's usage in other Social Security Act Programs." *See* Appellee's Brief at 28; 15 -18 (Appellee discusses "severe" within the context of the definition of "disability" under the Social Security Disability Insurance ("SSDI") and Supplemental Security Insurance ("SSI") Programs, which are under Title XX of the Social Security Act; 20 C.F.R. §§ 404.1520(a) (SSDI); 416.920(a)(4)(SSI)).

The Circuit's Order **does not** make any reference to the Social Security Act provisions cited in Appellee's Brief. State Court judges do not have jurisdiction to hear Social Security cases. There is no indication in the record that the Circuit Court was even aware of the SSA regulations cited by Appellee.

The Circuit Court **would have committed error** if it had relied on provisions of the Social Security Act governing the administration of the Social Security Disability Insurance (SSDI) and Supplemental Security Income Programs in the present case. SSDI, SSI and Medicaid -- in particular, the MR/DD Waiver Program-- are separate and distinct programs with

different purposes. They are separately funded programs. The eligible groups for each program are different.

The definition of "disability" for purposes of SSDI/SSI requires an assessment of whether the individual, in consideration of all of his exertional and non-exertional impairments, his age, education, training, work experience, has residual functional capacity to engage in substantial gainful employment.

The Medicaid MR/DD Waiver Program is specifically for individuals with a diagnosis of mental retardation and/or a condition closely related to mental retardation with concurrent substantial adaptive deficits who require the services and level of care provided to individuals in an intermediate care facility for the mentally retarded.

SSI/SSDI are wholly Federal Programs. Medicaid is a joint, federal-state program. It is not an insurance program. In Medicaid, within broad Federal Rules, the State Medicaid Agency "defines the eligible groups, types and ranges of services, and administrative and operating procedures." 42 C.F.R. § 430.0. That may be why there is no definition of "severe" in the Federal Medicaid Regulations. As noted above, within the context of 42 C.F.R. § 435.1010 (2006), the State Medicaid agency defines the eligible group in its definition of "substantial limited functioning" in at least three of the six major life activities.

The West Virginia Supreme Court of Appeals has recognized that statutory provisions concerning the same subject matter should be read in *pari materia*. See Syl. Pt. 5, in part, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W.Va. 14, 217 S.E.2d 907 (1975) (holding that "[s]tatutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent").

In the present case, "severe" should be read in the context of the Federal Medicaid regulations noted above (Statutory Framework) and the definition of "substantial limited functioning" in the State Medicaid Policy.

5. The Appellee's allegation that "active treatment" is not defined in the State Medicaid MR/DD Waiver Policy is **not true**. See Appellee's brief at 22 -23. Not only does the Policy Manual define "active treatment," at the bottom of every page it states: "This manual does not address all the complexities of Medicaid policies and procedures and must be supplemented with State and Federal laws and regulations.

As noted above, 42 C.F.R. §§ 435.1010, 483.440 (a) ("active treatment standard"), 440.150 (ICF/MR Services), corroborate and supplement the State Medicaid Policy definition.

6. Appellee's allegations that "only mental illness conditions are excluded from the potential scope of "related conditions," **overstates** the medical eligibility group. See Appellee's Brief at 8 -10, Part A.

42 C.F.R. § 435.1010 clearly and unambiguously defines the eligible group as, "persons with related conditions" as

individuals who have a severe, chronic disability that meets *all* of the following conditions:

- (1) *Is attributable to –*
 - (a) Cerebral palsy or epilepsy; or
 - (b) 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.
- (2) It is manifested before the person reaches age 22.

- (3) It is likely to continue indefinitely.
- (4) *It results in* substantial 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.”

See also, WV Medicaid MR/DD Waiver Manual §513.3.1.

The statutory focus is on the need for “active treatment in an intermediate care facility for the *mentally retarded*.” *Id.*; 42 C.F.R. § 441.302 (c)(2)(iii) (reevaluation required at least annually of each recipient receiving home and community-based services “to determine if the recipient continues to need the level of care provided and would, “but for” the provision of waiver services, otherwise be institutionalized in an ICF/MR”). ICF/MR services and ICF/MR level of care would not be appropriate treatment for an individual who is not diagnosed with mental retardation and/or does not have a condition closely-related to mental retardation.

7. Similarly, Appellee's allegation that a nexus between the "related condition" and functional limitations is not required **is contrary** to the plain statutory language that the "related condition" must meet *all* of the statutory conditions, including, that it be "*attributed to*" an eligible diagnosis and that "it [i.e., the eligible diagnosis] *results in* substantial limitations..."

The State Medicaid Policy also defines "substantial adaptive deficits" as substantial adaptive deficits attributed to mental retardation and/or a closely related condition.⁹

⁹ An individual with a dual diagnosis (i.e., an eligible diagnosis and mental illness or condition not related to mental retardation) can participate in the program if he meets the eligibility requirements. Many such persons participate in the Program.

8. Appellee's allegation that the State Medicaid Agency only considered the diagnosis of cerebral palsy is **not true**. See Appellee's brief at 8.

The State Medicaid Agency did treat Appellee's seizure disorder, as well as the diagnosis of Cerebral Palsy, as potential diagnoses. See BOR Hrg. Exh. 5 and 5-31-07 TR. The diagnoses of Borderline Intellectual Functioning, Attention Deficit Disorder (ADD), and personality disorder not otherwise specified (PD/NOS), are not eligible diagnoses for purposes of the MR/DD Waiver Program.

Moreover, Appellee's relevant test scores did not demonstrate "substantial limited functioning" resulting from his Borderline Intellectual Functioning and Cognitive Disorder. Appellee is not mentally retarded. His school records indicate that he has an 11th grade education and attended WV Rehab "with some success."

Appellant does not dispute that Appellee has limitations in functioning resulting from his Cerebral Palsy and Seizure Disorder; however, the relevant test scores and narrative notes in the documentation submitted for review, and the reliable and admissible expert testimony, do not demonstrate that he has "substantial limited functioning", as defined in the State Policy, in at least three of the six major life activities and requires "active treatment" for "ICF/MR services", as defined in the federal regulations, at the ICF/MR level of care.

9. Appellee's argument that he demonstrated that he meets the medical eligibility requirements relies extensively on the evaluating psychologist's (Sandi Kiser-Griffith) assessment and her testimony based on the use of *mental retardation norms*-- i.e., norms Kiser-Griffith **admitted** are **not relevant** to Appellee. See Appellee's Brief at 3, 21; BOR 8-01-07 TR

at 38 -39 (Kiser – Griffith stating, “I don’t know what good it does to compare one person with mental retardation to another [without mental retardation]”).

This is a violation of the standard of practice in the use of norm-referenced tests. *See* Rebecca J. McCauley and Linda Swisher, *Use and Misuse of Norm-Referenced Tests in Clinical Assessment: A Hypothetical Case*, *Journal of Speech and Hearing Disorders*, Vol. 49, 338 (November 1984)[“The clinician decides whether a norm-referenced instrument is appropriate for a particular assessment purpose, and then which specific test or group of tests of the skill being assessed is psychometrically most acceptable (Buros, 1972, 1978; Darley, 1979; Kilburg, 1982; Launer & Lahey, 1981; McCauley & Swisher, 1984; Weiner & Hoock, 1973), and which reports norms relevant to the client. Next, the clinician administers and scores each test in accordance with the procedures outlined by the test developer”].

In the present case, because Appellee is not mentally retarded, the norms relevant to him are non-mental retardation norms. The developer of the ABS: S-2 does not authorize the use of mental retardation norms to assess an individual who is not mentally retarded. *See AAMR Adaptive Behavior Scale – School, Examiner’s Manual, Chp. 4, Normative Procedures, 25 -32* (2nd Ed. 1993).

The allegation that the State Medicaid Policy authorizes such practice is not well-taken. *See* Appellee’s Brief at 21. Appellee is asking this Court to read the policy in a manner that would violate well-established standards of practice in the use of norm-referenced tests. Also, the DHHR does not regulate the practice of psychology in West Virginia.

Appellee also relies upon testimony of Kiser - Griffith that is not based on the correct legal standard. *See* Appellee’s Brief at 17 (quoting Kiser-Griffith that she would not characterize

his [unspecified] limitations only as a minimum effect on his abilities”); 22 (reference to Kiser-Griffith’s testimony that Appellee would benefit from some type of treatment).

The correct legal standard is set forth in the State Medicaid Policy in the definition of "substantial limited functioning," the requirement of the type of documentation needed to establish "substantial limited functioning" in a major life activity, and the requirement for “active treatment” (as defined in 42 C.F.R. §§ 435.1010 (2006) and 440.483(a)). That her earlier testimony was not based on the correct legal standards became evident when Kiser - Griffith acknowledged to the Hearing Officer that she **did not** recommend "active treatment" for Appellant at the ICF/MR level of care and services. BOR 8-01-07. TR 46.

The West Virginia Supreme Court of Appeals has held that expert testimony based on facts that violate the standard of practice in a field of expertise is inadmissible and should be excluded under Rules 702 and 703 of the West Virginia Rules of Evidence. *Mayhorn v. Logan Medical Foundation*, 193 W.Va. 42, 454 S.E.2d 87 (1994). *See also, Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196, *certiorari denied*, 114 S.Ct. 2137, 511 U.S. 1129.

Thus, the bulk of Appellee's argument is based on inadmissible\ irrelevant evidence.

The Medicaid Policy makes it clear that “substantial functional limitations” in at least three of the six major life areas must be demonstrated by both, relevant test scores and the narrative notes in the reports. In Appellee’s case, his scores on the ABS and the narrative notes in the psychologist’s report, do not support such a finding. Ms. Kiser-Griffith eventually admitted that she did not recommend ICF/MR services for Appellee at the ICF/MR level of care. The State Hearing Officer’s Findings and Conclusions are correct *as a matter of law* and should be reinstated.¹⁰

¹⁰ Appellee makes other allegations that are untrue which Appellant does not address in view of the reasons stated above which Appellant contends amply supports her reversal of the Circuit Court’s Order.

CONCLUSION

Medicaid is purely a creature of statute. The medical eligibility requirements for the West Virginia MR/DD Home and Community-Based Waiver Program are set out in the State MR/DD Policy Manual and underlying Federal Regulations. The Circuit Court is required to take judicial notice of the Federal Medicaid Regulations. The Circuit Court failed to follow the Federal Medicaid Regulations. The Circuit Court, in setting aside the findings and conclusions of the State Hearing Officer, created its own medical eligibility standard (in violation of the Separation of Powers Doctrine) which would result in the liberal award of benefits to individuals who fail to meet the medical eligibility standard required by Federal and State law. By so erring, the Circuit Court's review of the evidence amounted not to an "independent review," but simply a reconsideration under erroneous criteria. The true fact-finder in this proceeding was the State Hearing Officer. He applied the correct legal standards and his findings and conclusions are amply supported by the evidence of record. The Circuit Court ignored the Hearing Officer's findings and conclusions and created his own medical diagnosis that was contradicted by the record. Therefore, the ruling of the Circuit Court constituted a substitution of judgment rather than an "independent review" as contemplated by the law. Inasmuch as the findings and conclusions of the Hearing Officer were amply supported by law and facts, the decision of the Hearing Officer should be re-instated under any standard of review. Accordingly, Secretary Walker prays that this Court reverse the April 7, 2008 Order of the Circuit Court, re-instate the decision of the State Hearing Officer and provide the DHHR such further relief as this Court deems appropriate.

Respectfully submitted,

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By Counsel

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SUPREME COURT OF APPEALS OF WEST VIRGINIA

MATTHEW WYSONG,
by his mother, Mary L. Ramsey,

Petitioner Below, Appellee,

Vs.)

Supreme Court No. 34594
(Civil Action 07-AA-152 Below)

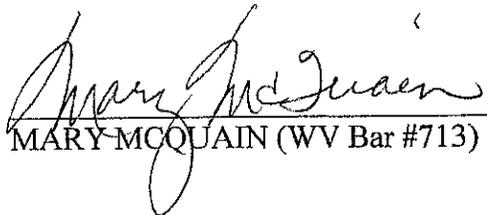
MARTHA WALKER, in her official capacity as
Secretary of the West Virginia Department of
Health and Human Resources; and Ray Burl Woods,
in his capacity as State Hearing Officer for the West Virginia
Department of Health and Human Resources,

Respondents Below, Appellants.

CERTIFICATE OF SERVICE

I, Mary McQuain, Assistant Attorney General, counsel for Martha Walker, Secretary, West Virginia Department of Health and Human Resources, Bureau for Medical Services, hereby certify that I have served a true and accurate copy of the foregoing **"Reply Brief of Appellant, Martha Walker, Secretary, West Virginia Department of Health and Human Resources"** by regular United States mail, first-class, postage prepaid this 4th day February, 2009 to the following:

Bruce Perrone, Esq.
Legal Aid of West Virginia
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Charleston, West Virginia 25301


MARY-MCQUAIN (WV Bar #713)