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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
IN THE SUPREME COURT OF APPEALS

PATSY A. HARDY,
SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
PETITIONER,

V.

SHAWN SHUMBERA,
RESPONDENT.

SUPREME COURT NO. 35671

CIVIL ACTION NO. 07-C-1807
KANAWHA COUNTY CIRCUIT COURT

BRIEF OF APPELLANT DEPARTMENT OF HEALTH AND HUMAN RESOURCES

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NATURE OF PROCEEDINGS AND RULINGS BELOW

This is an appeal by the West Virginia Department of Health and Human Resources (hereinafter "DHHR" or "Department"). Appellant Patsy A. Hardy, Secretary of the West Virginia Department of Health and Human Resources, appeals from a Final Order issued by the Honorable Tod J. Kaufman of the Kanawha County Circuit Court dated December 4, 2009, which denied the Department's Rule 59(e) *Motion to Alter or Amend Judgment*. Judge Kaufman's prior Order, entered October 30, 2009, found that Shawn Shumbera was a "young man with mental retardation," and was "entitled to injunctive relief" to enable him to receive Mentally Retarded/Developmentally Delayed ("MR/DD") Waiver services despite the absence of evidence showing he meets the eligibility criteria.

This is not a case in which a State Hearing Officer held an administrative hearing and issued a Decision that was subsequently reviewed by a circuit court. It is a case that began as a class action in the Kanawha County Circuit Court. Shawn Shumbera ("Mr. Shumbera") "on behalf of a class of individuals similarly situated" sought injunctive and declaratory relief. The Plaintiffs alleged that the Department had implemented new and impermissible standards to deny individuals access to MR/DD Waiver services and alleged that the Department had a pattern and practice of denying due process to Medicaid MR/DD Waiver Program recipients and applicants by: failing to follow its own policies; failing to provide an impartial decision maker to hear denied applicant appeals;

ignoring circuit court precedent; and making program eligibility determinations based on unarticulated standards.

Judge Kaufman held an evidentiary hearing on December 11, 2007. Judge Kaufman effectively denied injunctive relief to the Plaintiff Class, finding that individual plaintiffs should re-apply for benefits and follow the administrative process of eligibility determination. *Final Order* dated October 30, 2009. But Judge Kaufman granted injunctive relief to Mr. Shumbera, finding he is a person with mental retardation and is eligible for the MR/DD Waiver program. *Id.* The Secretary filed a Rule 59(e) *Motion to Alter or Amend Judgment*, arguing that Judge Kaufman erred in finding Mr. Shumbera is a person with mental retardation and is eligible for the MR/DD Waiver Program where the evidence shows that he is not mentally retarded. As noted above, Judge Kaufman denied the *Motion to Alter or Amend Judgment* by *Order* dated December 4, 2009.

The Plaintiffs did not appeal from the denial of injunctive relief to the Plaintiff Class. The Secretary appeals now from the *Order* denying the Secretary's Rule 59(e) *Motion to Alter or Amend Judgment* and from the *Final Order* finding that Mr. Shumbera is a person with mental retardation and is eligible for the MR/DD Waiver program.

STATEMENT OF FACTS

The Department adopts by reference the Statement of Facts in the Department's *Petition for Appeal*, and offers the following additional summary:

Mr. Shumbera is a young man with a hearing impairment, mental illness, and borderline to average intellectual functioning. His mental illness diagnoses include bipolar disorder, intermittent explosive disorder, and impulse control disorder. Circuit Court Defendant's Exhibit 3, Psychological Evaluation at p. 22; Transcript of December 11, 2007, Injunction Hearing ("Hearing Transcript") at pp. 135-36. Mr. Shumbera was committed to Mildred Mitchell-Bateman Psychiatric Hospital ("Bateman Hospital" or "Bateman") in 2001, and has remained at Bateman Hospital since then.

The record shows that Mr. Shumbera's level of intellectual functioning is not that of an individual with mental retardation, but is in the average range when hearing impaired norms are used and is in the low average or "borderline intellectual functioning" range when hearing impaired norms are not used. Hearing Transcript at pp. 127-142. When hearing impaired norms were used to evaluate Mr. Shumbera, his IQ scores were 91 and 84. *Id.* at pp. 129-131. The Pictorial Test of Intelligence yielded an IQ score of 86. *Id.* at p. 130. The other IQ score of record, which was obtained without using hearing impaired norms, is 72. *Id.* at p. 124. Charles Painter, Mr. Shumbera's treating psychologist, previously diagnosed mental retardation, but acknowledged that his previous diagnosis of mental retardation was incorrect because it was based on incorrect

assumptions that Mr. Shumbera had been diagnosed with mental retardation during the developmental period and that Mr. Shumbera had received MR/DD Waiver services in Florida. *Id.* at pp. 134-35, 139.

Mr. Shumbera was a member of the *Medley* class. The *Medley* class certified by U.S. District Court for the Southern District of West Virginia includes "all persons under the age of 23 years who suffer from mental retardation, who are citizens of the State of West Virginia, who are unable to live in their homes due to lack of resources in their homes or home communities to fulfill their special needs arising from their mental retardation, and who are now or will in the future be institutionalized." *Medley v. Ginsberg*, Civil Action No. 78-2099 (S.D.W.V. 1981).

Mr. Shumbera also completed the eleventh grade at the Barboursville School. Defendant's Exhibit 3, *Decision of State Hearing Officer* at p. 4. The Barboursville School limits its admissions to students without developmental disabilities who were institutionalized because of mental illness, and specifically excludes individuals diagnosed with mental retardation. *Id.*

Before the injunction hearing in Kanawha County Circuit Court, the Plaintiff class sought to remove Mr. Shumbera as the class representative and replace him with Linda Judd. *Plaintiffs' Amended Motion for Class Certification.* The only reason the Plaintiff class offered for the attempt to remove Mr. Shumbera as class representative was that considerable time and expense would be required to resolve the issues specific to Mr.

Shumbera's case. *Id.* Although both Linda Judd and Shawn Shumbera were found to be ineligible for the MR/DD Waiver program, their circumstances were different. Ms. Judd had diagnoses of mental illness and mild mental retardation, but Mr. Shumbera had a diagnosis of mental illness with *no* diagnosis of mental retardation. Judge Kaufman added Linda Judd as a class representative, but did not remove Mr. Shumbera. *Order* dated November 6, 2007.

Mr. Shumbera has never established eligibility for the MR/DD Waiver Program. Hearing Transcript at 75; Circuit Court Plaintiffs' Exhibit 9. He first applied for the MR/DD Waiver program in 2001. The Department denied the application. Mr. Shumbera appealed and requested an administrative hearing. The State Hearing Officer found that Mr. Shumbera had limitations that were attributable to mental illness rather than mental retardation and affirmed the denial of eligibility. Defendant's Exhibit 3, *Decision of State Hearing Officer* at p. 9. Mr. Shumbera did not appeal from the *Decision of State Hearing Officer.*

Mr. Shumbera applied again for the MR/DD Waiver program in 2006. The Bureau for Medical Services ("Bureau" or "BMS"), the State Medicaid agency, obtained early school and psychological records that showed that Mr. Shumbera had never been diagnosed as mentally retarded before age twenty-two (22) and that Mr. Shumbera's IQ was in fact ninety-one (91), which is in the *average range* of intelligence. Transcript at p. 129. The Department denied the application by Notice dated May 15, 2007. Mr.

Shumbera requested an administrative hearing on that decision, but later withdrew the hearing request and filed the class action for injunction in Kanawha County Circuit Court instead. *See* Transcript at 77-78.

Charles Painter, who was Mr. Shumbera's treating psychologist at Bateman Hospital, is the only psychologist who testified about Mr. Shumbera at the injunction hearing. Mr. Painter testified that he had previously diagnosed Mr. Shumbera as having mental retardation, but that his previous diagnosis was wrong. He explained that the IQ tests using hearing impaired norms and the Pictorial Test of Intelligence yielded scores in the average and low average range, which would rule out a diagnosis of mental retardation. Transcript at pp. 129-131.

Mr. Painter testified that the treatment team at Bateman initially diagnosed Mr. Shumbera with "borderline intellectual functioning with a primary diagnosis of impulse control disorder" in January 1999. Transcript at p. 124. The psychological evaluation report included IQ testing which, according to F. Wayne Johnson, the evaluating psychologist, showed that Mr. Shumbera was below average and did not "qualify for mental retardation, placing him within the borderline range for intellectual functioning." Plaintiffs' Exhibit 6. Two weeks later, however, the treatment team changed the diagnosis to "mild mental retardation" in an effort to get Mr. Shumbera MR/DD Waiver services. Transcript at 124-127; Defendant's Exhibits 7-10. No IQ testing was performed to support the change to mild mental retardation.

At the injunction hearing, Mr. Painter testified that, in view of Mr. Shumbera's psychological and school records before the age of 22, the treatment team's previous diagnosis of "mild mental retardation" in January 1999 was a "misdiagnosis." Transcript at pp. 134-135, 139 ("misdiagnosed with mental retardation for six years"). Mr. Painter testified that at the time of his 1999 diagnosis, he had no records of Mr. Shumbera prior to the age of 22; that "mental retardation" is not a correct diagnosis if information shows, as in Mr. Shumbera's case, that the individual has consistently tested higher than mild mental retardation; that there was no evidence of a significant head trauma or some major disease that would cause cognitive impairment; and that he was told that Mr. Shumbera had received some type of waiver services in Florida and had assumed incorrectly that Mr. Shumbera received such services based on low intellectual functioning. Transcript at pp. 133-34, 136-37.

Mr. Painter testified that, based on the psychological and educational evidence in Mr. Shumbera's entire record, his level of intellectual functioning is "borderline intellectual functioning" without the use of hearing-impaired norms. Transcript at pp. at 127-42. But when hearing impaired norms or a pictorial intelligence test were used, Mr. Shumbera performed within the *average range* of intelligence, with scores of 91, 86, and 84. *Id.* at pp. 129-131. Mr. Shumbera's primary diagnosis of "impulse control disorder" is why Mr. Shumbera is in Bateman Hospital. *See id.* at 124.

Mr. Shumbera presented no documentary evidence or testimony at the hearing showing that the previous diagnosis of mental retardation was correct. Mr. Shumbera presented no documentary evidence or testimony at the hearing showing that he has substantial functional limitations in three or more of the major life areas, as is required for MR/DD Waiver eligibility. He presented no documentary evidence or testimony at the hearing showing that he requires active treatment or the level of care provided in an Intermediate Care Facility for Persons with Mental Retardation, as is required for MR/DD Waiver eligibility. He presented *no* documentary evidence or testimony at the hearing showing that he meets any of the eligibility criteria for the MR/DD Waiver program.

ASSIGNMENTS OF ERROR

Judge Kaufman clearly erred in finding that Mr. Shumbera is a "young man with mental retardation" despite the unequivocal and unrefuted testimony of Mr. Shumbera's treating psychologist that Mr. Shumbera is not mentally retarded. Judge Kaufman abused his discretion in granting Mr. Shumbera injunctive relief to "enable him to receive MR/DD Waiver services" in the absence of evidence showing that Mr. Shumbera meets any of the eligibility criteria for the MR/DD Waiver program.

SUMMARY OF THE ARGUMENT

It is not the role of the circuit court to diagnose mental retardation or any other mental condition. The evidence of record does not support the circuit court's diagnosis of mental retardation or the finding that Mr. Shumbera is eligible to receive MR/DD Waiver services. The circuit court's findings should be reversed on appeal.

ARGUMENT

I. STANDARD OF REVIEW

In reviewing the exceptions to the findings of fact and conclusions of law supporting the granting of a temporary injunction, the Supreme Court applies a three-pronged deferential standard of review. The Supreme Court reviews the final order granting the temporary injunction and the ultimate disposition under an abuse of discretion standard. *West v. National Mines Corp.,* 168 W. Va. 578, 590, 285 S.E.2d 670, 678 (1981); *Associated Press v. Canterbury*, 224 W. Va. 708, 688 S.E.2d 319 (2009). The Supreme Court reviews the circuit court's underlying factual findings under a clearly erroneous standard, and reviews questions of law *de novo*. Syllabus Point 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996); Syllabus Point 3, *State ex rel. McGraw v. Telecheck Services, Inc.*, 213 W. Va. 438, 582 S.E.2d 885 (2003); Syllabus Point 1, *State v. Imperial Marketing*, 196 W. Va. 346, 472 S.E.2d 792 (1996).

The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to *West Virginia Rules of Civil Procedure* Rule 59(e) is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed. Syllabus point 1, *Alden v. Harpers Ferry Police Civil Service Commission*, 209 W. Va. 83, 543 S.E.2d 364 (2001); *Wickland v. American Travellers Life Insurance Co.*, 204 W. Va. 430, 513 S.E.2d 657 (1998); Syllabus point 2, *Bowers v. Wurzburg*, 205 W. Va. 450, 519 S.E.2d 148 (1999).

II. APPLICABLE LAW AND REGULATIONS

The West Virginia MR/DD Waiver Program provides an alternative to services available in Intermediate Care Facilities for persons with Mental Retardation or related conditions. The primary purpose of an Intermediate Care Facility for persons with Mental Retardation or related conditions ("ICF/MR") is to provide health and rehabilitative services. An ICF/MR is:

> An institution. . . that - (a) is primarily for the diagnosis, treatment, or rehabilitation of the mentally retarded or persons with related conditions; and (b) provides, in a protected residential setting, ongoing evaluation, planning, 24-hour supervision, coordination, and integration of health or rehabilitative services to help each individual function at his greatest ability.

42 C.F.R. § 435.1010. An ICF/MR provides services to persons with mental retardation or developmental disabilities who need and who are receiving active treatment.

The MR/DD Waiver Program provides for eligible individuals who need an ICF/MR level of care to receive certain services in a home and/or community-based setting to help them achieve the highest attainable level of independence, self-sufficiency, personal growth, and community inclusion. The medical eligibility criteria for the MR/DD Waiver Program are the same criteria for placement in an ICF/MR facility. *See* 42 U.S.C. § 1396A(c)(1); 42 C.F.R. § 441.301(b)(1)(iii), 42 C.F.R. §§ 435.1010, 483.440; *West Virginia State Medicaid MR/DD Waiver Program Policy Manual* (*"MR/DD Waiver Manual"*) Chapter 513 § 513.3.1.

Federal law places conditions on States that choose to participate in Medicaid. Each participating state is given some flexibility in devising its Medicaid program, but the State's plan must be approved by the federal Centers for Medicare and Medicaid Services. 42 U.S.C. §§ 1396a, 1396a(1); 42 C.F.R. Subpart A, §430.0; 42 C.F.R. § 430.10. "If the state plan does not meet Federal Requirements or if the program is not administered in compliance with the Federal Requirements, the state may lose federal funds for the program." 42 U.S.C. § 1396c; *see also Prestera v. Lawton*, 111 F. Supp. 2d 768, 773 (S.D. W.Va. 2000).

The West Virginia Legislature agreed to accept federal appropriations and other assistance by DHHR "in accordance with the provisions of this Chapter and the conditions imposed by applicable federal laws, rules and regulations." *West Virginia Code* § 9-2-3 (1970). The Secretary of DHHR has the sole authority to decide eligibility

groups, types and range of services, payment levels for services, and administrative and operating procedures. *West Virginia Code* § 9-2-6 (2005).

To establish eligibility for the West Virginia MR/DD Waiver program, an applicant must have a diagnosis of mental retardation in conjunction with substantial deficits (substantial limitations associated with the presence of mental retardation), or must have a related developmental condition that constitutes a severe and chronic disability with concurrent substantial deficits. *MR/DD Waiver Manual Chapter 513 - Covered Services, Limitations, and Exclusions for MR/DD Waiver Services.* Not all individuals with a diagnosis of mental retardation or a related condition are eligible for the MR/DD Waiver Program. The mental retardation or related condition must be severe and chronic. *MR/DD Waiver Manual* Chapter 513 § 513.3.1. The individual must demonstrate "substantial limited functioning" in three or more major life areas caused by the eligible diagnosis and which requires the services and level of care provided in an ICF/MR. *MR/DD Waiver Manual* Chapter 513 § 513.1 (defines "active treatment"); 42 C.F.R. § 435.1010 ("persons with related conditions"); 42 C.F.R. § 483.440 (active treatment standard).

Importantly, the diagnosis of mental retardation and/or a related condition, the resulting functional limitations, and the need for an ICF/MR level of care must be documented and substantiated on the most recent medical and psychological evaluations

and other documentation submitted. *MR/DD Waiver Manual* Chapter 513 § 513.3.1; 42 C.F.R. § 441.302(c)(2).

"Persons with related conditions" are 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. § 435.1010 (emphasis added).

The Code of Federal Regulations does not define "substantial functional limitations;" that definition is reserved to the States. 42 U.S.C. § 1396a; 42 C.F.R. Subpart A, § 430.0. In West Virginia, "substantially limited functioning" is defined as:

> "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. The presence of substantial deficits must be supported not only by the relevant test scores, but also by the narrative descriptions contained in the documentation submitted for review, i.e., psychological, the IEP, Occupational Therapy evaluation, etc.).

MR/DD Waiver Manual Chapter 513 § 513.3.1.

"Active treatment" in an ICF/MR is treatment which "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." 42 C.F.R. § 435.1010. Any recipient admitted to an ICF/MR must "be in need of and receiving active treatment services." 42 C.F.R. § 483.440(b)(1); *see also* Medicaid Letter Number 97-10, *Guidelines Regarding What Constitutes and ICF/MR Level of Care Under a Home and Community-Based Services Waiver:* "For purposes of the waiver, an evaluation of whether the individual requires an ICF/MR [level of care] under the State plan is made by using <u>the same</u> [level of care] assessment criteria used to determine the need for ICF/MR care in an institution." Plaintiffs' Exhibit 3.

The standard for active treatment is:

> (a) Standard: Active treatment.
>
> (1) Each client must receive a continuous active treatment program, which includes aggressive, consistent implementation of a program of specialized and generic training, treatment, health services and related services described in this subpart, that is directed toward—

(i) The acquisition of the behaviors necessary for the client to function with as much self determination and independence as possible; and
(ii) The prevention or deceleration of regression or loss of current optimal functional status.

(2) Active treatment *does not* include services to maintain generally independent clients who are able to function with little supervision or in the absence of a continuous active treatment program.

42 C.F.R. §483.440 (emphasis added); *MR/DD Waiver Manual* Chapter 513 § 513.3.1 (an individual must show that he/she has a need for the "intensive instruction, services, assistance, and supervision in order to learn new skills and increase independence in activities of daily living" and must show that he or she requires the same level of care and services which is provided in an ICF/MR institutional setting).

III. MR. SHUMBERA PRESENTED NO EXPERT TESTIMONY, PSYCHOLOGICAL REPORTS, OR MEDICAL REPORTS SUPPORTING A DIAGNOSIS OF MENTAL RETARDATION.

The diagnosis of mental retardation by Judge Kaufman is clearly erroneous. It is not supported by substantial evidence.

Judge Kaufman found that Mr. Shumbera is a "young man with mental retardation." *Final Order* at p. 3. Judge Kaufman made this finding despite the unrefuted testimony of Charles Painter, Mr. Shumbera's treating psychologist, that Mr. Shumbera is *not* mentally retarded. Hearing Transcript at 137. Mr. Painter testified unequivocally that Mr. Shumbera is not mentally retarded and that the previous diagnosis of mental retardation by Mr. Painter was a "misdiagnosis." *Id.* at 134-136, 139.

Judge Kaufman noted that Mr. Shumbera was a *Medley* class member and that at "some point in the past, the DHHR recognized that Mr. Shumbera suffered from mental retardation." *Order* dated December 4, 2009. Nobody disputes that Mr. Shumbera was a *Medley* class member. But that does not mean that the previous diagnosis of mental retardation is correct. Charles Painter, Mr. Shumbera's treating psychologist, testified that the treatment team at Bateman initially diagnosed Mr. Shumbera with "pervasive developmental disorder and borderline intellectual functioning with a primary diagnosis of impulse control disorder" in January 1999, a diagnosis that was based on IQ testing. The treatment team changed its diagnosis to "mild mental retardation" two (2) weeks later to obtain MR/DD Waiver services. Transcript at pp. 124-127. The change in diagnosis, however, was not based on IQ testing. When presented with evidence that Mr. Shumbera's IQ was as high as 91 before he reached age 22, Mr. Painter testified that his diagnosis of mild mental retardation in January 1999 was a "misdiagnosis." *Id.* at pp. 134-136, 139.

Judge Kaufman's reliance on the fact that Mr. Shumbera was a *Medley* class member is misplaced. It is undisputed that the MR/DD Waiver Program is open to *Medley* class members who meet the eligibility criteria of the MR/DD Waiver Program. Transcript at pp. 13-14, 44, 54, 158, 161. But just because an individual is a *Medley* Class member does not automatically make that individual eligible for MR/DD Waiver Services. *Medley* only means the individual was previously diagnosed with mental

retardation. *Id.* at pp. 16-17. It does not mean that the previous diagnosis of mental retardation was correct.

Judge Kaufman also noted that Mr. Shumbera received MR/DD Waiver services in Florida. *Final Order* at p. 3. This is incorrect. The record shows that Mr. Shumbera received services for mental illness through the severely emotionally disturbed program. Defendant's Exhibit 8. Mr. Painter testified that he had been told Mr. Shumbera had received some type of waiver services in Florida and had assumed those services were based on low intellectual functioning. He stated that his assumption was a "misunderstanding," and that he had "missed the diagnosis" when he diagnosed mental retardation. Transcript at pp. 136-137. When asked by the Court if Mr. Shumbera had been classified as mildly mentally retarded before he reached age 22, Mr. Painter explained, "Apparently at that time he wasn't. I am looking at the Osceola [Florida] stuff, *they didn't consider him MR.*" *Id.* at p. 137 (emphasis added). The only other testimony about waiver services in Florida was by Kelly Williamson, the plaintiffs' witness, who testified that she did not know what type of services Mr. Shumbera received. *Id.* at p. 80.

The record contains no evidence that supports Judge Kaufman's statement that Mr. Shumbera had received MR/DD Waiver services in Florida. That statement is based on a misunderstanding and an incorrect assumption. Transcript at pp. 136-137. Judge Kaufman's reliance on the assumption that Mr. Shumbera had received MR/DD Waiver

services in Florida in concluding that Mr. Shumbera is a person with mental retardation is misplaced.

Judge Kaufman also noted that Mr. Painter evaluated Mr. Shumbera and diagnosed him with mental retardation. Final Order at p. 7. This is correct, but as noted above, Mr. Painter testified unequivocally that he had "missed the diagnosis." Hearing Transcript at p. 137. He specifically testified that at the time he diagnosed Mr. Shumbera with mental retardation he had no school records of Mr. Shumbera during the developmental period. *Id.* at pp. 127, 130. In fact, Mr. Painter had no documents of Mr. Shumbera before the age of eighteen (18). *Id.* at p. 131. Mr. Painter testified that, based on the psychological and educational evidence in Mr. Shumbera's entire record, his level of intellectual functioning is "borderline intellectual functioning" without the use of hearing impaired norms. *Id.* at pp. 127-42. When hearing impaired norms or pictorial intelligence tests were used to evaluate Mr. Shumbera, he was within the *average range* of intelligence, with scores of 91, 86, and 84. *Id.* at pp. 129-31.

It is undisputed that at one point, Mr. Shumbera was diagnosed with mental retardation. Transcript at pp. 134-35, 139. But that diagnosis was wrong. The first diagnosis of mental retardation came two weeks after Mr. Shumbera had been diagnosed with borderline intellectual functioning and *not* mental retardation. Defendant's Exhibit 6; Defendant's Exhibit 7; Transcript at 124-127. The psychological evaluation dated January 4, 1999, stated that Mr. Shumbera was below average and "*does not*

qualify for mental retardation, placing him within the borderline range for intellectual functioning." Defendant's Exhibit 6 (emphasis added). The psychological evaluation dated January 18, 1999, contains no assessment of intelligence, but lists a diagnostic impression of mild mental retardation. Defendant's Exhibit 7. Transcript at 124-127. Significantly, the treatment team had none of Mr. Shumbera's earlier records available at the time of the diagnosis of mental retardation. Transcript at 127. In fact, Mr. Painter had no documents of Mr. Shumbera before the age of eighteen. Transcript at 131.

The documents that Mr. Painter did not have included an evaluation from the School Board of Osceola County, Florida, when Mr. Shumbera was six years old. This evaluation showed an IQ of 91. Defendant's Exhibit 8. The Leiter International Performance Scale test was used to test Mr. Shumbera at that time and Mr. Painter testified the Leiter International Performance Scale was "probably the best test on the market for evaluating hearing impaired for intellectual functioning." Transcript at 129. Mr. Painter testified that an IQ score of 91 is in the average range of intelligence and that Mr. Shumbera would *not* have been diagnosed with mental retardation. *Id.* at 129.

Mr. Painter also did not have a psychoeducational report from the Osceola District Schools when Mr. Shumbera was eight years old. This report included results from a pictorial intelligence test that showed an IQ of 86. Defendant's Exhibit 9. Again, Mr. Painter testified Mr. Shumbera would *not* have been diagnosed with mental retardation and, in fact, his intelligence was in the "low average range." Transcript at 130.

Finally, Mr. Painter did not have a Psychological Evaluation Report completed by Boone County Schools when Mr. Shumbera was eleven years old. This report included results from an IQ test using hearing impaired norms that showed an IQ of 84. Defendant's Exhibit 10. Mr. Painter testified that Mr. Shumbera did *not* have a diagnosis of mental retardation at that time, but had low average intelligence. Transcript at 131.

After reviewing these documents, Mr. Painter changed his earlier diagnosis from mild mental retardation to borderline intellectual functioning. Mr. Painter explained:

> The reason is simply that when we're given information during that early developmental period, that he's consistently tested higher then mild mental retardation, it kind of changes the view of how to use that, I guess, fudge factor, in there. If his scores have consistently been *that much higher* and there has been no evidence of a significant head trauma since then, or some major disease that would cause significant cognitive impairment, then [that] is not really what we would consider evidence that it was mental retardation during the developmental period.

Transcript at 133-34 (emphasis added).

The unrefuted testimony is that Mr. Shumbera's diagnosis is *not* mental retardation. It is borderline intellectual functioning. Transcript at 132- 33. When questioned by the Court, Mr. Painter explained:

> What information we had prior about him prior to the age of 18 when we made the initial diagnosis, we had been told that he had been special ed services throughout his life. We weren't told those special ed services were behavioral disorders, told they were special ed.
>
> We were also told at one point that he had received waiver services in Florida. And we used that as our basis for the belief that this – there was

> documentation of low intellectual functioning prior to the age of 18. So it was a misunderstanding on our part. *And yes, I missed the diagnosis.*
>
> THE COURT: What do you mean it was a misunderstanding?
>
> THE WITNESS: I – if I had known that they did not have actual IQ scores and documentation of assessment that indicated his cognitive functioning was that low prior to age 18, *we would not have had done – changed to mild MR to start with.*
>
> THE COURT: You wouldn't have?
>
> THE WITNESS: No, we would not have. Because there is enough evidence that *he was functioning in the low average range* prior to the – during his early developmental time.

Transcript at 136-37 (emphasis added).

Mr. Painter testified unequivocally that his previous diagnosis of mental retardation was incorrect. He testified that if the three school evaluations showing Mr. Shumbera was functioning in the low to average range of intelligence had been available when he first evaluated Mr. Shumbera, he would not have diagnosed mental retardation. He testified that the correct diagnosis is borderline intellectual functioning. Transcript at p. 133. His testimony is unrefuted.

Mr. Shumbera's treating psychologist acknowledged that his diagnosis of mental retardation was wrong. No other psychologist testified about Mr. Shumbera. The unrefuted testimony of Mr. Shumbera's treating psychologist is that the correct diagnosis is borderline intellectual functioning. No psychologist testified that Mr. Shumbera is a person with mental retardation. Absent a reliable diagnosis of mental retardation, Judge

Kaufman's finding that Mr. Shumbera is a "young man with mental retardation" is clearly erroneous. It is *not* the role of a circuit court to diagnose mental conditions. *See Gough v. Metropolitan Life Insurance Co.*, 2003 WL 23411993 at p. 3 (M.D. Tenn. 2003).

IV. MR. SHUMBERA PRESENTED NO TESTIMONY OR DOCUMENTARY EVIDENCE SHOWING THAT HE MEETS THE MEDICAL ELIGIBILITY CRITERIA FOR THE MR/DD WAIVER PROGRAM.

Judge Kaufman abused his discretion in granting Mr. Shumbera injunctive relief to "enable him to receive MR/DD Waiver services." Final Order at p. 12. The record contains no testimony or documentary evidence that Mr. Shumbera meets any of the medical eligibility criteria for the MR/DD Waiver Program. Without evidence to support its implicit findings that Mr. Shumbera satisfied all criteria for medical eligibility, Judge Kaufman circumvented the requirement that Mr. Shumbera prove that he meets the eligibility criteria for participation in the MR/DD Waiver program.

Injunctive relief, like other equitable or extraordinary relief, is appropriate only when there is no adequate remedy at law. *City of Bluefield v. Taylor*, 179 W. Va. 6, 365 S.E.2d 51 (1987); *Accord, Truby v. Broadwater*, 175 W. Va. 270, 332 S.E.2d 284 (1985) (proceeding in equity for injunction cannot be maintained where there is an administrative remedy provided by statute which is adequate and will furnish proper

remedy). An extraordinary remedy is not a substitute for an appeal. *State ex rel. National Auto Insurance Company v. The Honorable Thomas A. Bedell,* 223 W. Va. 22, 672 S.E.2d 358 (2008). An extraordinary remedy should not be used to circumvent the administrative process. Mr. Shumbera has a legal remedy through the administrative process, but the circuit court allowed him to circumvent that process.

Federal and state Medicaid law requires that an applicant demonstrate his eligibility for the program. There is no presumption of eligibility or continuing eligibility. An applicant must be re-evaluated and certified on "at least an annual basis." 42 C.F.R. §§ 441.301(b), 441.302(c)(1), (c)(2)(iii).

To qualify for the MR/DD Waiver program, an applicant must show substantial functional limitations in three or more of the major life areas. The major life areas are self-care, receptive or expressive language (communication), learning (functional academics), mobility, self-direction, and capacity for independent living, which involves (home living, social skills, employment, health and safety, community use, and leisure). 42 C.F.R. § 435.1010. Here, the record contains no testimony or documentary evidence that Mr. Shumbera meets the eligibility requirements for substantial limitation in self-care, receptive or expressive language, learning, mobility, self-direction, or capacity for independent living.

The record contains no evidence showing substantial functional limitations in any of the major life areas. The eligibility criteria for the MR/DD Waiver Program are clear:

> The second requirement for participation in the Waiver Program is a limitation in functioning in at least three major life areas .... As previously noted, in order to determine whether an applicant has substantial limited functioning in a major life area, the ABS is administered during the psychological evaluation. The ABS determines how deficient an individual is in his or her major life activities as compared to other individuals with or without mental retardation or a related condition. In order for an applicant of the Waiver Program to be considered substantially limited in a major life area, his or her ABS score must be "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." DHHR Provider Manual, *supra,* § 503.1.

Wysong ex rel. Ramsey v. Walker, 224 W. Va. 437, 686 S.E.2d 219, 224-25 (2009).

No psychologist or other witness testified that Mr. Shumbera has substantial functional limitations in three or more major life areas. Judge Kaufman did not address any of the major life areas and made no findings of fact that Mr. Shumbera has any substantial limitations. Judge Kaufman committed error of law in finding Mr. Shumbera is eligible for the MR/DD Waiver program with no evidence that Mr. Shumbera has substantial functional limitations in three or more of the major life areas.

The record contains no testimony or documentary evidence showing the need of active treatment for mental retardation. The record does not support a finding that intense training and support with twenty-four hour supervision equivalent to ICF/MR institutional care is necessary. The applicable regulations define active treatment in an

ICF/MR as treatment which "meets the requirements specified in the standard concerning active treatment for intermediate care facilities for persons with mental retardation under § 483.440(a) of the subchapter." 42 C.F.R. § 435.1010. The standard for active treatment under 42 C.F.R. § 483.440(a) is:

> (a) *Standard: Active treatment.* (1) Each client must receive a continuous active treatment program, which includes aggressive, consistent implementation of a program of specialized and generic training, treatment, health services and related services described in this subpart, that is directed toward —
>
> (i) The acquisition of the behaviors necessary for the client to function with as much self determination and independence as possible; and
>
> (ii) The prevention or deceleration of regression or loss of current optimal functional status.
>
> (2) Active treatment does not include services to maintain generally independent clients who are able to function with little supervision or in the absence of a continuous active treatment program.

42 C.F.R. § 483.440(a). Any recipient admitted to ICF/MR must "be in need of and receiving active treatment services." 42 C.F.R. § 483.440(b)(1). *See also Wysong ex rel. Ramsey v. Walker*, 224 W. Va. 437, 686 S.E.2d 219, 225 (2009).

The record contains no testimony or documentary evidence showing that Mr. Shumbera requires active treatment and needs intensive instruction, services, assistance, and supervision in order to learn new skills and increase independence in activities of daily living. The record does not show that Mr. Shumbera requires aggressive training to

acquire new skills. Accordingly, the record does not show that Mr. Shumbera requires active treatment nor the level of care provided in an ICF/MR facility.

It is undisputed that Mr. Shumbera needs the therapeutic services he receives at Bateman Hospital. Mr. Shumbera is institutionalized at Bateman to receive those services. But Mr. Shumbera is at Bateman because of his mental illness, not because of mental retardation.

Mr. Shumbera testified that he wants to leave Bateman. Transcript at 191. But Mr. Shumbera's desire to leave Bateman does not show that he has mental retardation and does not make him eligible for the MR/DD Waiver Program. The MR/DD Waiver Program is open to individuals who meet the eligibility criteria. Eligible individuals are those who have a severe, chronic, disability that is attributable to mental retardation, a related condition like cerebral palsy or epilepsy, or any other condition *other than mental illness* found to be closely related to mental retardation. 42 C.F.R. § 435.1010. Mr. Shumbera does not meet the eligibility criteria.

RELIEF REQUESTED

The Secretary respectfully submits that the circuit court erred and asks that the circuit court's finding that the Claimant "is a young man with mental retardation" be REVERSED, that all of the circuit court's Findings of Fact and Conclusions of Law that stem from that finding, be REVERSED, and that the circuit court's finding that the

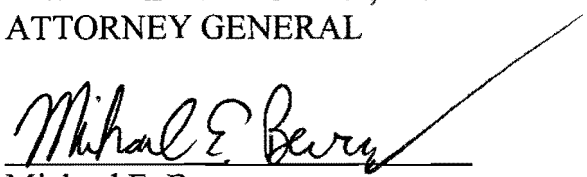
Claimant is eligible for the MR/DD Waiver Program be REVERSED. In the alternative, the Secretary asks that the Claimant be afforded the same remedy the circuit court afforded the other plaintiff class members. The Claimant should reapply for benefits and follow the administrative process for a determination of eligibility.

RESPECTFULLY SUBMITTED,

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

By Counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



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STATE OF WEST VIRGINIA
IN THE SUPREME COURT OF APPEALS

PATSY A. HARDY,
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
PETITIONER,

SUPREME COURT NO. 35671

V.

CIVIL ACTION NO. 07-C-1807
KANAWHA COUNTY CIRCUIT COURT

SHAWN SHUMBERA,
RESPONDENT.

CERTIFICATE OF SERVICE

I, Michael E. Bevers, Assistant Attorney General, Attorney for the Bureau for Medical Services, hereby certify that this office has filed the original and nine (9) copies of the foregoing *Brief of Appellant Department of Health and Human Resources* with the Clerk of the Supreme Court of Appeals of West Virginia, on this, the eighth day of October, 2010, either by hand delivery or by first-class mail, properly addressed and postage prepaid. True and correct copies have been served upon all parties of record by depositing same in the United States Mail, properly addressed and first-class postage prepaid, as follows:

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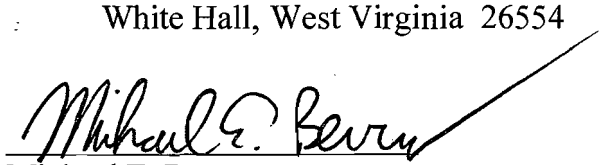

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