Supreme Court No. _____

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
BEFORE THE SUPREME COURT OF APPEALS

PATSY A. HARDY, Secretary of the Department of Health and Human Resources, Petitioner, v. BENJAMIN H., A Minor, by his next friend and mother, Georgann H., Respondent	)))))))))))))	Civil Action No. 09-AA-2 Kanawha County Circuit Court Agency Action No. 07-BOR-2509 DHHR Board of Review

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RESPONSE TO PETITION FOR APPEAL OF THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES

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I. INTRODUCTION

The decision below by the Circuit Court is firmly grounded on similar rulings since 1975, in both federal and state courts, involving both Medicaid and other benefit programs requiring proof of medical condition.[1] Those authorities were presented on behalf of Benjamin H. in briefing to the Circuit Court. In response, DHHR did not present the Circuit Court with *any* contradictory court decision on point.[2] In the present Petition for Appeal DHHR still does not identify any decision in the nation rebutting the authorities cited to the Circuit Court.

Benjamin H. is a 17 year old child with Autism.[3] He has received in-home services through the MR/DD Medicaid Waiver Program since he was six years old. His condition was reviewed every year and he was approved for continuing eligibility, until 2007. The Department's present Petition for Appeal arises from the August 2007 annual review.[4]

During the time Benjamin H. has been on the MR/DD Waiver Program, the eligibility criteria used by DHHR have not changed in substance. The Circuit Court found as fact there was "no real change in Petitioner's condition" after reviewing the annual assessments in the record.[5] *Order Reversing the Board of Review Decision*, Cir. Ct. Kanawha County, July 7, 2010, at page 4.[6]

Based on the extensive authority from other jurisdictions, the court below ruled that

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[1] See authorities cited at Section IV, pages 4-7.

[2] In fact, DHHR did not even respond to this "Medical Improvement" argument in its brief to the Circuit Court.

[3] See Section II below at pages 2-3, for further factual detail about Benjamin H.'s condition.

[4] By the August 2008 review, the administrative appeal hearing over the August 2007 review still had not been held. Both reviews were combined for a single administrative hearing, from which the judicial appeal arose. See Section III below at pages 3-4 for the procedural history of this case.

[5] See Section V below at pages 7-8, and Attachment A, for a review of the annual assessments for 2006, 2007 & 2008, which are the only ones contained in the record below.

[6] Hereafter referred to as "Circuit Court Order."

"there needs to be proof of changed medical circumstances 'to avoid relitigating the evidence presented in support of the initial administrative decision,' i.e., the decision to award benefits." Therefore the Circuit Court concluded that the DHHR termination of services to Benjamin H. could not stand. Circuit Court Order at page 4. This principle is a simple matter of finality of decisions and fundamental Due Process. If the person's medical condition has not changed, and the medical eligibility criteria have not changed, then a new decision different from the previous decision is nothing more than the proverbial second bite at the apple. That, the Circuit Court would not permit.

Therefore, respondent Benjamin H. urges this Court to reject the Petition for Appeal and affirm the decision of the Circuit Court.

II. FACTS REGARDING MEDICAL CONDITION

Benjamin H. was born October 23, 1993. He was diagnosed with Autism at an early age and began receiving early intervention services. Upon beginning school he began receiving special education support services. Exhibit 7, Psychological update of Aug. 2, 2006 at p.1; *see also* Ex. 11, Psychological Update of Aug. 31, 2007 at p. 1, *and* Ex. 13, Psychological Update of Aug. 8, 2008, at p. 1. On the standardized "Childhood Autism Rating Scale (CARS) Benjamin is assessed in the "moderate-severe range of Autistic behaviors and symptoms." Ex. 11, Psychological Update of Aug. 31, 2007 at p. 4.

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

texture and taste aversions. Benjamin is not typically able to provide detail regarding events, and he has a difficult time with dates. His overall judgment and insight are limited, consistent with Autism. His attention span is limited for structured activities. Exhibit 13, Psychological Update of Aug. 8, 2008, at page 2-3.

Benjamin is able to engage in some forms of personal care, but requires verbal reminders and some physical assistance. He would not wash, comb his hair or wear clean clothing without reminders. He will go to the restroom on his own, but still needs some assistance once there. He will step into traffic without looking. He will not choose appropriate clothing without help. He is not able to access any type of community resource on his own. He needs help with his medications; and will lick ointments and creams off his skin unless closely monitored. He does not like going out of the home, and tends to prefer solitary activities such as playing computer games and playing with action figures. Additional concerns include spitting, frequent pacing, touching himself inappropriately, and whispering. Ex. 13, Psychological Update of Aug. 8, 2008, at pages 2-3.

III. PROCEDURAL HISTORY

Benjamin H. was initially approved for the MR/DD Waiver Program in 1998. After a waiting period he began actually receiving services in 1999. DHHR Answer to Petition to Circuit Court, at page 2. He was reviewed annually, and approved each year until 2006.

Following the August 2006 annual assessment DHHR issued a proposed Notice of Termination. Benjamin H. requested an administrative appeal. After administrative hearing the proposed termination (based upon the August 2006 review) was reversed by a DHHR State Hearing Officer by administrative decision dated August 13, 2007.[7]

Also in August 2007 another annual assessment of Benjamin H.'s condition was conducted. DHHR again issued a proposed Notice of Termination. Benjamin H. again

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[7] The Notice of Termination from the 2006 review, and the final administrative decision to reverse that termination, were not included in the record below.

requested an administrative appeal hearing.

A year later, no administrative hearing had been held on the 2007 proposed termination. In August 2008 another annual review was conducted, after which DHHR issued another proposed Notice of Termination, and Benjamin H. again requested administrative appeal.

The 2007 denial case and the 2008 denial case were combined for one administrative hearing, held on September 26, 2008. The decision, by a different Hearing Officer than had presided in the 2006 appeal, was issued on November 3, 2008, affirming the termination of program participation by Benjamin H. MR/DD Waiver services to Benjamin H. were then stopped.

Respondent Benjamin H. filed his Petition for Certiorari review in the Circuit Court of Kanawha County, on Jan. 6, 2009. The decision below was issued July 7, 2010, reversing the DHHR termination of benefits. In-home services have not yet resumed.[8]

The DHHR Petition for Appeal to this Court followed.

IV. EVIDENCE OF 'MEDICAL IMPROVEMENT' IS REQUIRED BEFORE BENEFITS CAN BE TERMINATED

A. Social Security Disability Context

Beginning in 1975, federal courts have held in the context of Social Security Disability benefits that the agency "may not terminate the benefits without substantial evidence to justify so doing. This will normally consist of current evidence showing that a claimant has improved...." *Miranda v. Secretary*, 514 F.2d 996, 998 (1st Cir. 1975). Subsequent cases phrased this obligation by saying "in termination of benefits cases, benefits may not be discontinued without a showing that the claimant's condition has improved." *Byron v. Heckler*, 742 F.2d 1232, 1236 (10th Cir.

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[8] Following the Circuit Court decision, Benjamin's Medicaid card was reinstated as of August 2010. He has been able to have his medications covered by the Medicaid card since that time. However, actual MRDD Waiver services to Benjamin H. have not yet been put in place as the Department is still going through various bureaucratic preliminary requirements, such as to "establish a service budget," have a physical examination, etc.

1984). See also *Torres v. Schweiker*, 682 F.2d 109 (3rd Cir. 1982); *Hayes v. Secretary of Health, Education and Welfare*, 656 F.2d 204 (6th Cir. 1981); *Weber v. Harris*, 640 F.2d 176 (8th Cir. 1981); *Finnegan v. Matthews*, 641 F.2d 1340 (9th Cir. 1981); *Van Natter v. Secretary of Health, Education and Welfare*, #79-1439 (10th Cir. 1981) (Not for Routine Publication); and *Simpson v. Schweiker*, 691 F.2d 966, 969 (11th Cir.1982).

B. Medicaid Context

The DHHR Petition for Appeal attempts to distinguish these federal Court of Appeals rulings in the Social Security Disability context, as somehow different from the Medicaid context. *See* Petition for Appeal at pages 15-16.

But the DHHR Petition for Appeal fails to disclose to this Court the numerous decisions around the country which have in fact adopted the same principle in the Medicaid context, including the Medicaid Waiver context. Medicaid-specific cases were cited by Benjamin H. in the briefing below, and were neither rebutted nor even responded to by DHHR in the briefing below.

In 1990, the Colorado Court of Appeals addressed a termination of Medicaid Waiver benefits for an individual who had been on a waiver program for two years.[9] Based upon the Social Security Disability decisions cited above, that court stated:

> [T]he courts have concluded that, if an individual has once been determined to be eligible for social service benefits, due process prevents a termination of those benefits absent a demonstration of a change in circumstances, or other good cause. The presumption that a condition, once shown to exist, continues to exist, as well as the considerations that underlie the doctrines of res judicata and collateral estoppel, require a showing of some change in circumstances if the termination of benefits is not to be deemed arbitrary. See *Byron v. Heckler*, 742 F.2d 1232 (10th Cir. 1984) (relying upon decisions from the First, Second, Third, Sixth, Eighth, and Ninth Circuits); *Trujillo v. Heckler*, 569 F. Supp. 631 (D. Colo. 1983).

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[9] The individual was approved for the program based on a 1984 assessment. A 1985 reassessment resulted in a continuation of benefits. A reassessment another year later concluded he was no longer eligible for benefits. *Weaver v. Colorado DSS*, 791 P.2d at 1232.

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

Weaver v. Colorado DSS, 791 P.2d 1230, 1232 (Ct. of Apps., Div. Three, 1990) (emphasis added).

Other state court decisions in the Medicaid context include:

- *Shannon v. Meconi*, 2006 Del.Super. LEXIS 25 (Super.Ct. Del., New Castle, 2006) (Medicaid for child with cystic fibrosis to be treated at home rather than be institutionalized) ("the concepts of fairness and reasonableness inherent in due process require that those benefits not be terminated without a demonstration of a change in circumstances or other good cause." *Id.* at 6);
- *Bridge v. Department of Health & Social Services*, 2005 Del.Super. LEXIS 36 (Super.Ct. Del., New Castle, 2005) (Children's Community Alternative Disability Program) ("the record supports a finding that the child has experienced a change in circumstances or other good cause, as is required for a termination of benefits." *Id.* at 7-8);
- *Cherry v. Tompkins*, 1995 U.S. Dist. LEXIS 21989 (S.D. OH. 1995) (Medicaid waiver for services at home rather than in nursing home) ("This Court agrees with *Weaver* that the Due Process protections and the reasoning in social service benefits cases apply equally to Medicaid cases." *Id.* at 5.); and
- *Collins v. Eichler*, 1991 Del.Super. LEXIS 105 (Super.Ct. Del. 1991) (Medicaid waiver for services at home rather than in nursing home) ("The [*Weaver*] court determined that the broad concepts of fairness and reasonableness inhering in due process require that such benefits cannot be terminated absent a demonstration of a change in circumstances or other good cause. I adopt that holding here; Appellants benefits cannot be terminated absent a change in circumstances." *Id.* at 10).

All of these rulings were presented to the Circuit Court in Benjamin H.'s initial brief. The DHHR Response Brief in the Circuit Court did not cite one contrary decision.[10] The DHHR Petition for Appeal to this Court does not cite one contrary decision. Counsel for respondent Benjamin H. is not aware of any contrary decision.

V. EVIDENTIARY RECORD SHOWING LACK OF MEDICAL IMPROVEMENT

The Department did not submit any evidence as to Benjamin H.'s condition at the time of his initial award of benefits, or any of the intervening years 1999, 2000, 2001, 2002, 2003, 2004 or 2005. Thus the court below could not assess any medical improvement or change of circumstances in Benjamin H.'s condition from his initial approval for the program in 1998 through 2005.

The record below did contain Benjamin's Psychological Assessments conducted in August of 2006,[11] 2007, and 2008. *See* Exhibits 7, 11, and 13, respectively. Contained in each year's assessment are the scores and results from the "Adaptive Behavior Scales" (ABS) performed by the psychologist to assess Benjamin's limitations and abilities.[12]

Benjamin's ABS scores across the three year period 2006-2008, in the nine "domains" of behavior assessed, are summarized in Attachment A to this Response.[13] In five of nine categories of behavior, Benjamin's non-MR Standard Scores declined over the three year

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[10] Remarkably, the DHHR Response Brief in Circuit Court did not address Benjamin H.'s "Medical Improvement" argument at all. There was not one mention in the DHHR brief below contesting or disputing Section IV.B.1. of Benjamin H.'s initial brief, titled "Evidence of Change of Circumstances Is Required to Sustain a Termination from Medicaid Waiver Benefits."

[11] Upon which continued benefits were confirmed after administrative appeal hearing.

[12] These are the "standardized measures of adaptive behavior scores" which are required by the regulation to establish the "Functionality" component of the eligibility criteria. *See* MRDD Waiver Manual, Section 513.3.1 at page 14.

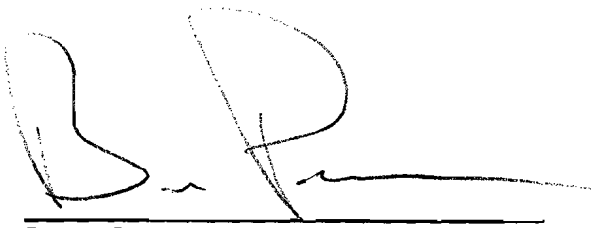
[13] This Attachment also was attached to Benjamin H.'s initial brief to the Circuit Court. DDHHR did not dispute below the accuracy of the information summarized in the table.

period.[14] In two categories his non-MR Standard Scores remained the same.[15] In two categories his non-MR Standard Scores rose (one of which was "Physical Development," meaning that he grew between the ages 12 and 14).[16]

It was on this record that the Circuit Court found as fact there was "no real change in petitioner's condition." Circuit Court Order, p. 4. In the Petition for Appeal to this Court, DHHR did not assert that the Circuit Court's fact finding of "no real change in petitioner's condition" was erroneous.

VI. CONCLUSION

The Circuit Court's legal ruling, that evidence of Medical Improvement is required, followed many decisions across the nation which have addressed the precise issue. DHHR has failed to present ANY contrary authority, either to the Circuit Court or to this Court. The Circuit Court's fact finding, as to the lack of improvement in Benjamin's condition, is amply supported by the record. Therefore respondent Benjamin H. urges this Court not to accept the appeal from the ruling below.



Benjamin H.
Respondent/Petitioner Below
By Counsel.

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[14] Independent Functioning; Language Development; Pre-Vocational Activity; Self-Direction; and Socialization.

[15] Economic Activity; and Numbers & Time.

[16] Physical Development, meaning that he grew; and Responsibility, where is performance rose from the 2nd Percentile (lower than 98% of the age-equivalent population) to 9th Percentile (lower than 91% of the age-equivalent population).

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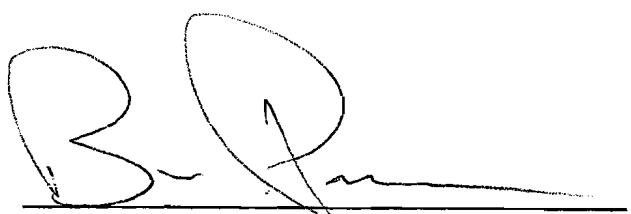
Certificate of Service

The undersigned hereby certifies that a true and accurate copy of the foregoing Response to Petition for Appeal was served upon the parties, by depositing the same in the United States mail, first class postage prepaid, to the following address:

Michael Bevers
Assistant Attorney General
350 Capitol Street, Room 251
Charleston, WV 25301

All of which was done on November 23, 2010.



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