

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA  
ex rel. D.L. and K.P.,

PETITIONERS,

V.

CASE NO.: 12-MISC-312

STEPHANIE BOND, Acting Director,  
Division of Juvenile Services,  
and DAVID JONES, Superintendent  
of the West Virginia Industrial Home for Youth,

RESPONDENTS.

**ORDER**

On October 29, 2013, came the parties all for an evidentiary hearing concerning a few remaining unresolved issues alleged in the Petitioners' *Petition for Writ of Mandamus*. The Petitioners appeared via counsel, Lydia C. Milnes, Esq. and Daniel F. Hedges, Esq., and Martin J. Wright, Jr., Esq. appeared on behalf of the Respondents.

The issues that have continued to present problems in this matter were addressed by the parties through witness testimonies: frequent staff turnover; facilities still short-staffed due to the high turnover rate; lack of post graduate programming for some of the residents who have already obtained their high school diploma or GED; lack of decent meal choices for residents; unequal programming for female versus male residents; lack of physical exercise opportunities for residents at the Sam Perdue facility; and violations of due process procedures.

**I. INTRODUCTION**

Originally filed as a Petition to rectify conditions and practices at the West Virginia Industrial Home for Youth ("WVIHY"), this matter has permeated into an overall assessment of the Division of Juvenile Services ("DJS" or "Division") and its facilities, policies, and staff. While the expansion of the matter has in many cases been a natural extension of the questions

presented to the Court, the expansion has also been the result of agreements reached between the parties and proactive changes made by the Executive and Legislative Branches.

The net result of these changes is a dramatically altered landscape than that presented to the Court in June 2012. The WVIHY (Building A and the Harriet B. Jones Treatment Center (“HBJTC”)) has been closed, and transferred to the Division of Corrections for use as adult correctional facilities. Other DJS facilities, and their respective missions, have also changed to accommodate differing resident populations as a result of the closures. Finally, the DJS has enacted new policies and practices to address the myriad allegations raised in the Petition, including changes relating to room confinement, strip searches, disciplinary procedures, grievances, recreation, and programming.

While the issues underlying the Petition have largely been mooted as result of the closure of the WVIHY and HBJTC, allegations of systemic problems (many of which have been resolved by agreement of the parties) have become *sui generis* and perpetuated this matter past that which was procedurally contemplated. Notwithstanding, the matter has reached a procedural point where the Court must assess the viability of this matter under the confines of the original Petition. The Court must also address how the changes that have been adopted and agreed upon by the parties are to be treated in the context of this litigation. Finally, the Court must balance the necessary finality of this Petition with the needed monitoring the implementation of the Respondents’ changes.

Following the evidentiary hearing, the Court directed the parties to submit their proposed findings of fact and conclusions of law to assist the Court in its entry of a final order in this proceeding. Having received the parties’ respective proposals, it is clear to the Court that the parties continue to disagree with the implementation of the orders entered by the Court thus far:

The Petitioners contend that “agreed” orders, which had been entered in this proceeding, carry as much weight even if the procedural posture of this case has changed, wherein the original petitions for habeas and mandamus relief have become moot. The Respondents, on the other hand, argue that the Court’s final order in this matter has the potential to exceed the scope of the mandamus action.<sup>1</sup> Specifically, the Respondents and the Petitioners differ in opinion over the specific terms of the agreed orders are mandatory terms and whether same would constitute an improper prescription of the Respondent’s discretionary duties.

While the Court agrees with the Respondents that the use of improper mandates are to be avoided pursuant to the action in mandamus, the Court finds merit in the Petitioners’ argument that the parties’ consent orders entered by this Court, are therefore enforceable by this Court.<sup>2</sup> This is no different than a court’s entry and enforcement of an agreed order between two parties in a domestic relations proceeding: Generally, a court has no authority to dictate how and when parties are to visit with their own children, but once such matters are brought to a court’s attention, and further, a shared visitation schedule is agreed upon by the parties and ratified by the court, the terms therein become enforceable court orders. Further, these consent orders can deviate from the precise written terms, as may be necessary by the parties without court intervention, so long as the parties therein can agree to modification themselves. However, in order to avoid further re-litigation of this matter, the Court acknowledges that the parties have worked hard to change the policies previously followed by the Division of Juvenile Services, and indeed, have managed to overhaul an antiquated juvenile justice system in a very short period of time. The parties are aware that the changes to which they were able to agree have taken time to

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<sup>1</sup> The Respondents rely heavily upon Syl. Pt. 8 & 9, *Nobles v. Duncil*, 202 W.Va. 523, 505 S.E.2d 442 (1998)(mandamus is a proper remedy to compel performance of discretionary duties, but not to prescribe the manner in which they must be carried out).

<sup>2</sup> The Petitioners rely upon *State ex. rel. E.H. v. Martin*, No. 35505 (W. Va. Apr. 1, 2011)(mem. op.)(consent orders prescribing specific remedies entered in mandamus action held enforceable).

implement and will continue to experience the growing pains that typically follow such a major transition.

**ACCORDINGLY**, the foregoing Final Order attempts to set forth the findings and conclusions as to the legal duties to be performed for those remaining contested issues argued before the Court at the most recent hearing. The previous orders concerning issues that have since been resolved by the parties' prior agreements requires no further action by this Court; the agreed orders speak for themselves.

## **II. STANDARD GOVERNING WRIT OF MANDAMUS**

While originally styled as both a *Petition for Writ of Habeas Corpus* and a *Petition for Writ for Mandamus*, the Court procedurally converted the matter to only a *Petition for Writ of Mandamus* and denied the *Writ of Habeas Corpus*.<sup>3</sup> Hence, as the Court contemplates resolution of this matter, it is guided by the law overseeing issuance of a writ of mandamus. "The function of a writ of mandamus is to enforce the performance of official duties arising from the discharge of some public function, or imposed by statute." Syl. Pt. 2, *Hickman v. Epstein*, 192 W.Va. 42, 450 S.E.2d 406 (1994).

In West Virginia, the oft-cited standard for issuance of a writ of mandamus was enunciated in Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969):

A writ of mandamus will not issue unless three elements coexist-(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

The Respondents would have the Court be mindful that:

Mandamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse so to do, in violation of their duty, but it is

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<sup>3</sup> See December 21, 2012, Order and Memorandum Opinion.

never employed to prescribe in what manner they shall act, or to correct errors they have made.

Syl. Pt. 8, *Nobles v. Duncil*, *supra*, citing Syl. Pt. 1, *State ex rel. Buxton v. O'Brien*, 97 W.Va. 343, 125 S.E. 154 (1924). The Court agrees that the *Nobles* Court found portions of the circuit court's order exceeded the powers of a mandamus, however, the Court notes that the final order on appeal therein did not pertain to an agreed order entered by the parties. The previous orders entered by this Court were the product of the parties' willing and knowing negotiations, which will be upheld by this Court, irrespective of the original mandamus petition, therefore, application of *Nobles* with regard to those prior agreed orders is slight.

### III. TESTIMONIAL EVIDENCE

#### Stacy Rauer<sup>4</sup>

Ms. Rauer is the Facility Director at the Vicki V. Douglas Juvenile Center. She confirmed that there were many positions available at various juvenile facilities due to constant turnover of staff. She testified that the high turnover rate was likely due to employees seeking higher paying jobs with other employers and that others sought career changes due to the unpleasant nature of shift work. Ms. Rauer testified that she did not believe that the high turnover rate had a negative effect on facilities' programming, however. Through teamwork and overtime, she believes that the needs of the residents are met.

Additionally, as soon as a position becomes available due to an employee leaving for other work, the facility's practice is to advertise that position, which has proven to work well in attracting potential employees. Her facility fills job vacancies as soon as possible in order to ensure there are enough personnel to cover security and safety concerns. With regard to

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<sup>4</sup> Ms. Rauer testified via telephone.

recreational activities, Ms. Rauer stated that her facility has a calendar that provides a schedule for same.

S.Y.<sup>5 6</sup>

S.Y. has been under Division of Juvenile Services (DJS) custody for approximately one and a half years. With regard to post-graduate programming, S.Y. testified that there was nothing for residents in his situation to do. He testified that he was told that there was simply not enough staff to provide additional programming beyond graduating high school, and that there is no money to afford such programming. However, he does receive a life skills class, which focuses on anger management and fostering healthy relationships, it is only one hour long.

One time he and other residents were placed on lock down for about an hour and a half, although he had no idea why, but supposedly for another resident's disruptive behavior and due to lack of staff, this was the only method in which to secure the facility. Generally, however, S.Y. testified that he and other residents are allowed outside of their rooms throughout the day, but when there is security or safety concerns, they must remain in their rooms. With regard to the grievance system, S.Y. testified that he is satisfied; problems are addressed. He initially was housed at the former WVIHY, but has since resided at the Donald R. Kuhn Juvenile Diagnostic and Detention Center for the last several months. There is marked improvement in the facilities with regard to access to bathrooms, telephones and writing materials, although he is subjected to random strip searches sometimes, again, however, those are due to security breaches. He testified that although he and other residents do get physical exercise both indoors and outdoors, it is usually not a full hour each time.

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<sup>5</sup> This witness is a resident, accordingly, the Court adheres to the common practice of using initials instead of the names of witnesses in sensitive matters such as the case *sub judice*.

<sup>6</sup> The Petitioners' expert witness, Paul DeMuro, appeared by telephone to listen to resident testimonies during this hearing.

Stephanie Bond

Ms. Bond testified that with regard to the DJS system for meals, they are accredited by Child Nutrition, which inspects menus and the daily meals for the facilities. Though unsure whether there is written policy per se, Ms. Bond stated that typically meals requiring utensils will be served with utensils, and those that do not, such as finger foods, will not be served with utensils. There was no policy that she was aware of concerning the use of Styrofoam plates. Ms. Bond testified that dinner served at 5:00 p.m. and that breakfast served at 7:00 a.m. meets standards for food service and the times said service occurs.

Concerning the lack of a basketball gymnasium at Northern Regional Juvenile Detention Center (hereinafter “Northern”), Ms. Bond testified that the facility has a work-out room instead, which also has treadmills. Ms. Bond stated that the room meets standards requiring large muscle activity, despite the lack of facilities providing for group physical activity, such as basketball. Ms. Bond agreed that since female residents have been moved to Northern, they no longer enjoy the vocational programming opportunities that were once available to them while at the former WVIHY. Further, Ms. Bond admitted that the female residents at Northern do not enjoy the vocational programs enjoyed by their male counterparts at the Kenneth Honey Rubenstein Juvenile Center.

Ms. Bond testified that sleeping hours, particularly those at the Sam Perdue Juvenile Center (hereinafter “Sam Perdue”), can be as long as thirteen hours, however, the range depends on the resident’s phase level. When presented with several Petitioners’ Exhibits<sup>7</sup>, Ms. Bond testified that she agreed that the pay grades concerning juvenile correctional officers and counselors were represented accurately, and agreed with one of the three recommendations

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<sup>7</sup> Exhibit #1 concerned the pay grades for juvenile correctional officers and counselors; Exhibit #2 concerned Mr. DeMuro’s recommendations for programming at the Sam Perdue facility; Exhibit #3 concerned the site plan for the Sam Perdue facility; and Exhibit #4 was a copy of an Informal Resolution Form concerning a resident.

outlined by Mr. DeMuro, namely, that the number of residents committed to Sam Perdue be limited to twenty. Further, Ms. Bond agreed that a resident's perception of being treated fairly would be beneficial to his or her rehabilitation, and that for some residents, perceived unfairness could breed resentment.

Regarding the procedure and practice of when and under what circumstances a resident may be written up for insubordination, Ms. Bond testified that a resident can be written up for rule infractions where such rules would have been published in the resident handbook. However, where there have been changes to the rules, or new rules added, they are published to residents via memorandum, posted on a common area wall, until those changes are reflected in a revised resident's handbook. Ms. Bond testified that she understood that due process requires facilities to provide at least twenty-four hours' notice to a resident of a write-up for rules infractions, further, that a resident is entitled to a copy of whatever sanctions may be imposed. Ms. Bond testified that in one such case, a resident did not receive a copy of a hearing examiner's decision due to computer malfunction, however, she testified that under the circumstances of that particular infraction and sanction, she upheld the decision on appeal because the resident had committed a dangerous and serious infraction that merited the decision being upheld, regardless of the resident's complaint that he did not receive a copy of his write-up and the decision.

Ms. Bond testified that she recognized the right of a resident to seek confidential communications with his or her attorney, whether the attorney represented the resident for the reasons the residents was committed to DJS custody or whether the resident sought confidential communications with Petitioner's counsel to discuss matters pertinent to this proceeding.

During cross examination, Ms. Bond testified that she was unaware of complaints involving residents being refused to use utensils for meals. Ms. Bond did not believe there were

any violations to the Court's Order allowing residents to eat potato chips with their hands, as opposed to utensils. Regarding Styrofoam plates, Ms. Bond testified that for occasions such as cookouts, where residents would be eating outside, or in the event that a facility dishwasher is broken, Styrofoam plates would be used, but otherwise, facilities regularly used normal plates and bowls for meals. Ms. Bond asserted that it would be an incorrect assumption that residents typically ate with their hands off Styrofoam plates. Further, residents are afforded at least three meals per day, which complies with current standards promulgated by the American Correctional Association, which is espoused by the State as well. Additionally, residents are often given at least one, sometimes two snacks per day.

With regard to the informal resolution, Ms. Bond testified that that is a means by which an officer and a resident can resolve a minor infraction, such as not maintaining a tucked in shirt, without having a hearing. Such informal resolutions can involve going to bed earlier or performing an hour of work detail. Before the informal resolution method, Ms. Bond agreed that there were numerous write-ups involving minor infractions, and this method has helped reduce the multitude of write-ups and has encouraged more communication between counselors and residents by resolving minor issues. In order to ward off the possibility of major infractions being resolved in this manner by bypassing due process rights, the Informal Resolution Form was created in order to provide a resident with a hard copy of the alleged infraction and the proposed resolution or sanction. There is no obligation of the resident to accept the proposed informal resolution. The confusion concerning Petitioner's Exhibit #5 was that it was prepared incorrectly: the resident was not written up for refusing to sign the informal resolution, but for the underlying act, refusing to tuck in his shirt, thus triggering the more formal due process

procedures of having a hearing for the underlying action. In that particular case, Ms. Bond testified that the resident appealed the matter up to her, and the error was corrected.

Ms. Bond provided testimony concerning differences between an incident report, which is the initial write-up, and a notice of charges<sup>8</sup>; residents are typically provided copies of the notice of charges, but Ms. Bond testified that DJS is working on ensuring that residents are also provided copies of the incident reports as well. Further, concerning the incident where one resident voiced a complaint that he did not receive a copy of his write-up<sup>9</sup> and the prospect that the resident was not apprised of his charges or possible sanctions, Ms. Bond testified that the resident had been informed of both during his hearing, but did not receive a written copy of such information due to system failure. However, due to collaboration with Petitioners counsel, Ms. Bond testified that the DJS intends to provide copies of actual incident reports to residents; however, this procedure has not been implemented for all facilities just yet since it had only recently been agreed upon by the parties herein. There have also been changes in policies in how appeal procedures are implemented; those policy changes were also made with the assistance of Petitioners' counsel. Each facility has its own handbook, and each handbook may undergo revisions to rules that may be particular to each facility. Rule changes are posted to inform residents before same can be published in a revised handbook.

With regard to hearing examiners, Ms. Bond testified that DJS has requested permission to hire five additional persons at a higher pay grade to perform the due process hearings. Some examiners will travel among the smaller facility to conduct the hearings, where others may be stationed at the larger facilities due to the greater number of hearings held. The request for hiring additional hearing examiners is to create an independent party directly

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<sup>8</sup> Petitioners' Exhibit #5

<sup>9</sup> Petitioners' Exhibit #6

responsible for these hearings. The reason why a maintenance mechanic had been acting as a hearing examiner is because DJS wanted a non-direct care staff to conduct hearings, for the appearance of impropriety and because this individual exhibits the most fairness according to resident feedback. Should additional positions be permitted with respect to hearing examiners, a maintenance mechanic will not have the additional task of acting as a hearing examiner.

B.M.

B.M. has been a resident at Sam Perdue for about a month and a half. With respect to the meal for the week schedule<sup>10</sup>, B.M. testified that the meal schedule is followed approximately 60% of the time. For instance, for dinner the menu schedule provides that meatloaf, mashed potatoes, green beans, bread, ice cream and a milk choice, however, in actuality, the residents received pre-packaged pepperoni rolls, a bag of chips, carrot pieces, and a pre-packed apple cake with no utensils. Compared to his previous placement, B.M. complains that the meal portions are small. Further, the pepperoni roll meal was provided at least two or three times in the last few days. B.M. testified that dinner is served at 5:00 p.m. and breakfast is served at 7:00 a.m.<sup>11</sup> and that between those times, he often feels hungry.

Some residents have bedtimes at 7:00 p.m. and other residents have bedtimes at 8:00 p.m., depending upon their phase level, and are locked in their rooms from bedtime, until the time they are let out in the morning, between 6:45 a.m. and 7:00 a.m. B.M. testified that typically, he and other residents only sleep around six and a half or seven hours, though.

B.M. testified that he and other residents usually do not receive indoor or outdoor recreation time; the gym is too small to accommodate everyone, therefore about half of the

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<sup>10</sup> Petitioner's Exhibit #9

<sup>11</sup> Petitioners Exhibit #12

residents sit in the dining hall and talk. Further, B.M. testified that residents only have a cardboard box in their rooms to store their personal belongings.

During cross examination, B.M. admitted that he was unaware of a new federal initiative that reduces portion size and that state law follows those guidelines resulting in smaller meal portions. B.M. agreed that he received breakfast, lunch and dinner, with a snack between breakfast and lunch and a snack in the evening. Concerning the pepperoni roll meal, B.M. was unaware that the cook was not at work that day and had been placed on an indefinite sick leave.

B.M. testified that each day he is given an opportunity to participate in recreational activity time, indoor or outdoor, depending upon the weather. For indoor recreation time, the residents are split into two groups, where one group participates at a time. Further, B.M. testified that residents are permitted to opt out of recreation time and remain in their rooms; these residents sign their names on a sheet of paper indicating their desire to opt out of an activity.

#### Paul DeMuro

Having previously been found by the Court as an expert in the field of juvenile correctional facilities, Mr. DeMuro had opinions concerning the challenges presently facing the West Virginia juvenile justice system. Mr. DeMuro recognized that recently, West Virginia began the transition from a correctional (adult) based model to a community-based model, with smaller facilities, greater focus on therapy and counseling. However, in that transition, with the still comparatively low rate of pay for entry level employees at DJS, this present system will have difficulties retaining quality employees and furthering the goals to which the DJS aspires. For instance, Mr. DeMuro opined that entry level officers, given the present pay grade, those bordering other states may be inclined to seek employment across state lines after receiving some experience in West Virginia simply because salaries are greater elsewhere. Further, with the

focus on therapy and counseling, and working with youthful offenders, West Virginia is challenged with recruiting those who would have the qualities required to fill these positions. Renaming the job titles could be of some benefit, as it has been done in other states. The training necessary for these positions will need to include familiarity with communication skills, adolescent development issues, brain development issues, the effects of medications and myriad other subjects. However, due to the close proximity with the young charges, some training in security would be common for each employee.

With regard to the Sam Perdue staffing issues, Mr. DeMuro testified that for the evening shift, the facility should have at least four officers, instead of three, in order to better maintain safety and security for everyone. Further, due to the swift changes made to the program at the end of summer, Mr. DeMuro recommended that a thorough baseline review should be done of the facilities, including the parties herein, and perhaps the Court as well, in order to ensure compliance with the previous Court Order and that the needs and rights of the residents are being met, and that both residents and employees are safe.

On cross examination, Mr. DeMuro recognized the challenges DJS faced in transitioning from the institutional model to the community-based model as well as the staff transitioning in the mindset from one model to another, however, Mr. DeMuro praised DJS for the transition and believed the residents in the program benefit more from the changes. Mr. DeMuro recognized that change is difficult and that it does not always go perfectly, further, he did not recommend sudden changes altogether, lest both residents and staff can acclimate better with gradual change. However, Mr. DeMuro cautioned against changing certain routines, such as making bedtimes too early, as young persons locked in their rooms for longer than not tend to act out inappropriately.

With regard to square footage of recreational areas or rooms, Mr. DeMuro would accept the Respondents' contention that they meet ACA standards, however, Mr. DeMuro testified that such standards are based on institutional models, which is what DJS has strived to move from during the recent changes. In sum, though, greater floor space would better accommodate the needs of the residents, particularly in the twenty-bed facility at Sam Perdue. Of the standards available to structure the DJS system, Mr. DeMuro recognized that West Virginia considered adopting the Performance-based Standards, which he believed to be a good idea.

Concerning his recommendations for entry level employment, Mr. DeMuro testified that higher salaries of the CO1 and CO2 level positions would be better, with a reclassification of the job titles, as those employees tend to have prolonged contact with their youthful charges. Mr. DeMuro believed that unless well trained individuals were placed in these positions, then the educational and counseling programs offered by the system would suffer, as these are the staff members who assist in carrying out those good programs. Mr. DeMuro recognized that the issue regarding salary is entirely up to the State, however. Although Mr. DeMuro has not compared other entry-level state positions within West Virginia, he testified that DJS made the move to the community-based model, which in and of itself has created a work force issue of creating former detention type workers to counseling and therapeutic type workers, striving for long term treatment and reentry into the community, versus simply incarcerating residents. The workers themselves are going to have more or different responsibilities upon them due to the transition from an institution-based to a community-based juvenile justice system. Due to those changes, the job description has changed, and employees need to be trained and paid accordingly in order for the transition to succeed. Mr. DeMuro based his recommendations from what he learned

from DJS through its department heads outline of the plan for its facilities and programming, which is more of a clinical treatment orientation than its previous model.

L.B.

L.B. is a nineteen year old resident at the Northern Regional Juvenile Detention Center. She testified that there is no gymnasium at this facility, but there is an exercise room containing about seven different machines for exercise, however, only three of those machines operate. She already graduated high school; she has not been offered college courses, vocational type courses or any other post-graduate courses, though she would like to be able to participate in some post-graduate course work. During meal times, L.B. testified that the procedure is for residents to line up to receive their meals, during which they are prohibited from speaking, and still not permitted to talk until everyone has been served. The meals are good, although L.B. would like to see vegetables served more often. L.B. likes the officers employed at the Northern facility.

On cross examination, L.B. admitted she liked the facility, and that there is some organized physical activity on a daily basis; residents have one hour of recreation time per day during the week and two hours on weekends. Recreation can be indoors or outdoors. L.B. acknowledged that she was aware that new classrooms are being built for post-graduate courses and that new teachers would be hired.

Linda Louise Scott

Ms. Scott is the Director of the Northern facility. She is employed by Youth Services and contracted by DJS; because the employees under her are not state employees, they are called security officers, but act in accordance with DJS regulations. The Northern facility is located in Wheeling, West Virginia, and is a depressed area. Ms. Scott would turn a garage that is located

on the facility grounds into a gym, if the decision were hers to make, however, they do have physical activities for the residents in the exercise room. Further, Ms. Scott testified that there were more than seven machines in that room.

On cross examination, Ms. Scott testified that the exercise room has more than seven machines in it, and that more than three of them are operational. However, if she were made aware of certain machines being inoperable, she would have them fixed directly. She understood that additional course work will be available to her residents by Lisa Hoskins and the Department of Education, and that the process for hiring has already begun. Northern has two classrooms that are already completed. There will be vocational opportunities for those residents who have already graduated high school or equivalent. The availability of those post-graduate classes to residents may depend upon their status of having a GED or high school diploma. Further, there have already been attempts to provide post-graduate residents opportunities to engage in online college courses or other vocational courses, particularly for those residents who will be leaving the facility soon.

With regard to physical activities, Ms. Scott testified that the residents are afforded opportunities to engage in many kinds of activities, which is organized by counseling staff. These activities can take place outside or inside, and that they have been creative with the organized activities, such as dancing.

Ms. Scott answered a few questions from the bench, where she described that the changes made to her facility were very recent, and that certain changes were not made until a decision was made by the Governor's office. Northern is both a co-educational detention center and a female resident community-based treatment program. With regard to post-graduate programming, Ms. Scott testified that opportunities are available for those female residents

desiring certain courses, however, not until the Governor's office made the decision that Northern was to be a female treatment facility were the opportunities able to be offered. Ms. Scott has been very impressed with the assistance from the Department of Education on this issue.

Frances Warsing

Dr. Warsing is the superintendent of institutional educational programs for the Department of Education. Her responsibilities include providing the educational programs for each DJS facility, all correctional facilities and regional jails, including many Department of Health and Human Resources (DHHR) facilities and numerous juvenile and adult facilities throughout West Virginia. This includes the educational and vocational programming at DJS facilities. The types of programs offered depends on the facilities' intent and how long residents are to remain at that facility for treatment. Due to the recent changes at DJS, Dr. Warsing's department had to wait until the Governor decided where juveniles would be placed before she could begin exploring the kinds of educational and vocational programming at the various facilities. This was different because with the exception of the Rubenstein Center, all DJS facilities were intended to be short-term; therefore the programming had to be changed in all the other facilities once the decision was made where a particular population would be housed and for what intended purpose.

Several teachers have already been hired for the new long-term residential facilities, and Dr. Warsing testified that several positions at a variety of facilities are in the interviewing and hiring process. There are several positions that Dr. Warsing's department is planning to fill with regard to vocational programming for post-graduate residents of DJS. All these positions will be filled and paid for by the Department of Education. Currently, at the Northern facility,

the plans are to begin offering multiple vocational programs, as well as a College 101 program to determine a resident's readiness for college. In several DJS facilities, the Department of Education is interviewing candidates for vocational training for the residents as well as other post-graduate educational opportunities, such as being able to pursue a high school diploma in addition to a GED certificate. These changes are anticipated to be made very soon, within several weeks.

On cross examination, Dr. Warsing admitted that the College 101 course may not be credited towards a college degree, but it helps students prepare for college, to determine whether they can handle college classes. Although presently the females transferred out of Salem no longer enjoy the vocational programming opportunities enjoyed by the male residents, Dr. Warsing testified within a month or several weeks, the female residents will be afforded the same opportunities after hiring new teaching staff. With regard to certain program offerings to particular residents, Dr. Warsing testified that her department attempts to offer courses of study to those residents at a particular facility, however, it is not the Department of Education's decision to transfer a resident in order to receive a particular course of study.

Although Dr. Warsing does not believe virtual courses of study to be as worthwhile as hands-on study, sometimes, that is the only type of programming available. When choosing a variety of vocational programs, Dr. Warsing testified that her department looks at a facilities' space availability, and available job market, so that the residents could find employment with the respective vocational study. Further, Dr. Warsing testified that although her department attempts to make certain courses of study available to residents, it is simply not possible to cater to each individual resident's preference. Further, although her department offered non-traditional vocational courses at Lakin Correctional Center, Dr. Warsing testified that none of the female

residents enrolled in those courses, because they simply were not interested. Dr. Warsing testified that she is able to pick and choose which educational programming and vocational programming to offer to DJS facilities, which is not much different from the normal educational system. Dr. Warsing testified that committed individuals are given the same treatment with regard to their educational and vocational programming as those in the public school system, although committed individuals may actually receive more individualized instruction and can participate in a class for a longer period of time.

Dr. Warsing has quarterly meetings with DJS, and has frequent contact and a good working relationship with Acting Director Stephanie Bond. They have worked together often to implement the changes to the educational and vocational programming at DJS facilities. Dr. Warsing explores different programs offered in other states for ideas concerning West Virginia's facilities, particularly with regard to the change from short-term detention to long-term treatment programs. Dr. Warsing testified that she believes West Virginia to be a leader in terms of the vocational offerings at DJS facilities. The decision as to whether to transport residents to participate in certain programs available at local community centers would be a determination made by DJS, and not entirely up to the Department of Education. Such accommodations have been made for a variety of DHHR facilities, however, those residents have not been adjudicated, which complicates the transport of residents back and forth from non-DJS facilities for vocational instruction.

#### **IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Court has divided the remaining contested issues into categories as determined by the evidence given during the hearing<sup>12</sup>.

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<sup>12</sup> The Court's findings of fact are listed below as "numbered paragraphs" while the relevant discussion and conclusions of law are contained below as "unnumbered paragraphs".

## MEALS<sup>13</sup>

1. DJS residents are served three meals daily, as well as at least one or two snacks per day. Dinner is typically served at 5:00 p.m. and breakfast is served at 7:00 a.m., although exact times at the various facilities may vary.
2. Meal portions have decreased, leaving some residents feeling hungry frequently throughout the week, although meal portions are now dictated via new federal guidelines and standard throughout the State.
3. Residents of Northern are not permitted to talk while meals are served, which lasts around twenty minutes; talking is only permitted after everyone has been served.

In consideration of the matter, the Court notes W.Va.C.S.R. § 101-1-11 states:

11.1. The Director shall issue written policy requiring food services to comply with the applicable sanitation and health codes promulgated by federal, state, and local authorities, as may be amended from time to time, and with health protection relating to food handlers and juveniles working in food services.

11.2. The food services supervisor of each facility shall comply with nationally recommended food allowances for basic nutritional needs of the juveniles in care.

11.3. The Division may contract for food services in compliance with federal, state, and local standards.

11.4. The Director's written policy will adopt, at a minimum, the American Correctional Association's Standards for Juvenile Detention Facilities, as amended from time to time.

Further, § 4A-04 of the American Correctional Association's Standards for Juvenile Detention Facilities states in pertinent part:

Written policy, procedure, and practice require that food service staff develop advanced, planned menus and substantially follow the schedule; and that in the

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<sup>13</sup> Although not expressly contained in their Petition, Petitioners raised an issue during the last evidentiary hearing as to certain issues relating to meals and meal time.

planning and preparation of all meals, food flavor, texture, temperature, appearance, and palatability are taken into consideration.

Pursuant to paragraph forty-eight (48) of the Order entered into by the parties on November 27, 2012, the parties agreed that “[y]outh will be permitted to talk with tablemates in a reasonable tone of voice while eating meals.”

As an initial starting point, the Court hereby **FINDS** that the Division owes a duty to provide an appropriate, nutritious meal that complies with all relevant governmental regulations and standards. With this duty in mind, and based upon the evidence and information presented to the Court on this matter, the Court hereby **FINDS** and **CONCLUDES** as a matter of law that the Petitioners have failed to establish or prove that the Division/Respondents are failing to perform a public duty. Rather, the Court **FINDS** that:

- a. The Division establishes and posts a meal schedule;
- b. There is no evidence of routine substantial abandonment of the meal schedule;
- c. The lag time between dinner and breakfast is not contrary to law or standard;  
and
- d. The Division has a built-in snack in the evening as part of its meal schedule.

However, given the uncontroverted testimony that the policy at Northern needlessly postpones the ability of residents to engage in conversation with tablemates by requiring silence for approximately twenty minutes at each meal while residents and staff are served their food undermines the spirit or intent of paragraph forty-eight of the November 27, 2012 Order. The Court hereby **FINDS** and **CONCLUDES** that the Respondents herein, including, and particularly, those in charge of the Northern facility with regard to the meal time policy to remain silent until everyone is served, is inconsistent with the Respondents’ mandate of rehabilitation and treatment to which the Respondents agreed to enforce in the prior Order.

While this issue is one of the more minor issues in the scheme of this litigation, it is still yet significant that the Respondents agreed to revise the system-wide policy of denying the right of residents to speak at mealtime but yet over a year later there is still lack of uniformity at all DJS facilities regarding this issue. The uncontroverted testimony by Petitioner's expert, Mr. DeMuro, indicated that the norm in the juvenile justice system is to teach residents "normative" behaviors so that, when they are released back into society, they have the skills and ability to act within the "norms" that society expects. With that said, this Court surmises that in nearly every household, restaurant, school, and adult prison around the country, the norm is for people to talk at mealtime. Obviously the Respondents recognized the need to change this policy and agreed to do so. Yet as of this Order, not all DJS facilities have complied with one of the easiest matters that the Division had **agreed** to change. **ACCORDINGLY**, the Division is **ORDERED** to ensure that all DJS facilities are in compliance with the Division's own agreement to allow mealtime conversation "with tablemates in a reasonable tone of voice."

#### **INDOOR RECREATION SPACE/EXERCISE**

4. The Northern and the Sam Perdue facilities do not possess indoor gymnasiums large enough for organized physical activity (i.e. basketball games) for their residents; however, those facilities have stationary exercise equipment in order to comply with correctional standards in providing residents opportunities for large muscle activity.

5. Northern currently houses the committed female population as well as detention residents of both sexes. Although Northern has been used as a detention facility for approximately twenty-five years, it has only housed long-term committed females since April 2013.

6. Northern has an exercise room with several machines for exercise, sometimes not all of the machines are operational, however, once it is known if a machine is defective, the facility director would ensure that such machines were fixed and operational as soon as feasible.
7. Staff members at Northern have been creative in providing different opportunities for physical activity where space is limited, such as allowing for residents to dance.
8. Ideally, the Northern and Sam Perdue facilities could use existing buildings or features of their physical plan or make better use of their space in order to construct a gymnasium for its residents' recreational activities.
9. Some residents enjoy full one hour recreational time for large muscle exercise, whereas some residents are permitted to opt out of physical exercise altogether.
10. At both the Northern and Sam Perdue facilities, residents are afforded physical activities for large muscle exercise on a daily basis.

While raised as a central point relating to the lack of meaningful exercise and facilities at the WVIHY, the Petitioners have sought to expand the scope of the Petition to address this as a larger systemic issue affecting some facilities, specifically, the Northern and Sam Perdue facilities. In particular, Petitioners maintain that the Respondents fail to provide the Petitioners with an opportunity to engage in meaningful physical exercise each day, including access to outdoor facilities. In opposition to the Petition, Respondents maintain that residents are afforded meaningful opportunities for exercise, that facilities have both indoor and outdoor areas for exercise, and that the resident exercise schedule can be amended to provide for an appropriate number of residents per square footage.

The Court notes that W.Va. Code § 49-5-16a(2) states, in pertinent part:  
A juvenile shall be afforded an opportunity to participate in physical exercise each day.

Relatedly, W.Va.C.S.R. § 101-1-14 provides:

14.1. Juveniles shall have access to recreational opportunities and equipment for indoor exercise and outdoor exercise, as weather permits.

14.2. A facility of fifty or more juveniles shall have a full-time recreation director responsible for planning and supervising all recreation programs. A facility of less than fifty juveniles shall have a staff member who has received training in recreation.

14.3. The Director's written policy will adopt, at a minimum, the American Correctional Association's Standards for Juvenile Detention Facilities, as amended from time to time.

Section 5E of the American Correctional Association's Standards for Juvenile Detention

Facilities states, in pertinent part:

5E-01. A facility of 50 or more juveniles has a full-time, qualified recreation director who plans and supervises all recreation programs. Facilities of less than 50 juveniles have a staff member trained in recreation or a related field.

5E-02. Written policy, procedure, and practice grant juveniles access to recreational opportunities and equipment, including outdoor exercise when the climate permits.

\* \* \*

5E-04. Written policy, procedure, and practice provide a recreation and leisure time plan that includes at a minimum at least one hour per day of large muscle activity and one hour of structured leisure time activities.

“Equal protection of the law is implicated when a classification treats similarly situated persons in a disadvantageous manner. The claimed discrimination must be a product of state action as distinguished from a purely private activity.” Syl. Pt. 2, *Israel by Israel v. W. Va. Secondary Sch. Activities Comm'n*, 182 W. Va. 454, 458, 388 S.E.2d 480, 484 (1989).

Based upon the clear reading of the foregoing, the Court **FINDS** that the Division owes juvenile residents placed in its custody a duty to provide daily exercise opportunities, both indoor and outdoor as weather permits. The Court further **FINDS** that the exercise opportunity should

be meaningful and include scheduled activities as well as opportunities for large muscle activities. There has been significant change in this matter since the matter was first presented. As the Court noted in its December 21, 2012 *Order and Memorandum Opinion*, the conditions and practices at the WVIHY were not compliant with the duty owed and therefore the Court granted mandamus. However, the Petitioners' expansion of this issue into other facilities has not merited the same proof or demonstration of a failure to comply with this duty insofar as the opportunity for large muscle exercise has been disregarded: Specifically, the Court would note that during the October 29, 2013 evidentiary hearing the evidence demonstrated that each of the facilities raised by Petitioners had an established activity schedule; had someone on staff that developed and oversaw the activities; and reflected opportunities for exercise both indoor and outdoor.

While these points go unchallenged by Petitioners, they instead direct the Court to the size of the gym or outdoor area, and state that the numbers of residents at the facility require dividing the residents into two separate exercise times. Petitioners further maintain this does not afford sufficient compliance with W.Va.C.S.R. § 101-1-14.1. The Court disagrees with Petitioners' argument that dividing residents into separate groups in order to take advantage of the indoor exercise equipment violates the provisions of law affording residents the opportunity to participate in physical exercise daily. Further, the Court disagrees with the Petitioners that the lack of a full gymnasium constitutes disparate treatment of long-term committed females housed at Northern versus their counterparts at other DJS facilities. There has been no evidence shown that indicates that the Northern residents are somehow treated in a disadvantageous manner simply because there is not a gym present on the grounds. In other words, the lack of a full scale gymnasium for those female residents does not trigger equal protection because those residents

are afforded an indoor recreation space for physical activities. There is no evidence in the law requiring the Respondents to provide a gymnasium for its charges; there is no constitutional or statutory right to specific facilities for exercise – only that the residents be afforded opportunities for large muscle exercise for both indoor and outdoor, weather permitting. From the evidence gleaned during the hearing, it is apparent to the Court that the Northern facility has complied with its statutorily imposed duties. Additionally, it is apparent to the Court that the Sam Perdue facility has also complied with its public duty to its residents.

Based upon the evidence and information presented to the Court on this matter, the Court hereby **FINDS** and **CONCLUDES** as a matter of law that the Petitioners have not established or proven that the Division/Respondents are failing to perform a legal duty insofar as the Court notes that the record supports that the Respondents are affording meaningful exercise opportunities at the non-WVIHY facilities, specifically, the Northern Regional Juvenile Detention Center and the Sam Perdue Juvenile Center. While Petitioners understandably desire greater exercise opportunities, the record reflects that the Respondents have shown that DJS is performing and meeting the duty imposed by law upon it, to wit: providing daily large muscle exercise opportunities, and with the rapid transitioning of the physical plants under DJS authority and having to follow the chain of command in order to obtain approval for the construction of new buildings or to repurpose existing buildings for new uses (read: gymnasiums), the Respondents have represented to this Court that changes are still forthcoming to many DJS facilities, particularly Northern and Sam Perdue.

As with many of the issues raised herein, the decision to construct or to repurpose an existing building as a gymnasium is a policy decision left to the discretion of the Division. It is simply inappropriate for the Court to make such decisions; those are specifically within the

auspices of the Legislative and Executive Branches. Based upon the evidence before it, the Court does not find a constitutional or statutory deprivation of law in manner in which the Division is performing this duty. **ACCORDINGLY**, inasmuch as this issue is asserted to non-WVIHY facilities, namely the Northern Regional Juvenile Detention Center and the Sam Perdue Juvenile Center, as a part of Petitioner's Writ of Mandamus, it is **DENIED**.

The Court is mindful that the decision to house females for the long term at the Northern facility is fairly recent, and that that the Division is in the process of constructing the needed space for classrooms and the like and the hiring of personnel to staff them. As such is the case, the Court is hopeful that the issues raised concerning this facility will be resolved soon.

While the Court is denying this aspect of the mandamus, it does recommend the Division continue the points it agreed upon prior to the evidentiary hearing in this matter, notably:

- a. Staff-organized and directed activities should be a meaningful part of indoor and outdoor physical exercise/recreation.
- b. The Division will continue the recently instituted practice of requiring the daily outdoor recreation logs be kept and maintained.

While the Court has denied the relief sought by the Petitioners on this issue, the Respondents need to be mindful that vastly different rehabilitative treatment between males and females within DJS could give rise to a justiciable equal protection action. The Rubenstein Center has been very successful in its dedication to the rehabilitation of its male residents. That is not to say that all residents succeed there; nor is it to say that residents at other DJS facilities fail to succeed. Every DJS facility has residents who succeed and residents who fail to take advantage of the rehabilitative opportunities. However, by and large, this particular jurist has had very positive outcomes from residents committed to Rubenstein. DJS is now trying to address the female population by consolidating them for the most part at the Northern facility

and providing the female population with programming and rehabilitation that will hopefully mirror the success of the program at Rubenstein.

### **EDUCATION AND PROGRAMMING**

11. As of the date of the hearing, there was disparate treatment with regard to post-graduate opportunities for female residents versus male residents. Female residents at the Northern facility were not afforded the same educational post-graduate opportunities as male residents at Rubenstein because it was a recent decision by the Governor's office to make Northern a female-only long-term treatment facility as well as a co-educational detention center. Until the Governor's office made a decision on where to place certain juveniles committed to DJS, the respective programming could not be implemented.

12. The Sexual Offender Treatment Program has only recently been transferred to the Sam Perdue facility, after being given a short time frame for the transition.

13. More post-graduate programming opportunities will be implemented very soon as the configuration of the various DJS facilities are or have reached final form.

14. As of the date of the hearing, the structural changes have not been completed and some programming is in a procedural lag due to construction.

15. The decision concerning courses of study offered to post-graduate residents of the various DJS facilities is dependent upon market availability, space availability, and even interest among the residents at the particular facilities.

Although the Court is concerned about the current pace of construction, the Court is mindful of the duty imposed herein, and recognizes the significant changes, in a short time frame, that the Division has made as a result of closure of the WVIHY. Hence, while the timing

has been less than desirable, the Division is seeking to comply with its legal duty of providing access and space for educational and vocational programming.

Petitioners alleged the lack of meaningful education and programming at the WVIHY. Specifically, the Petitioners alleged that the Respondents were (1) curtailing petitioners' access to education for substantial periods of time, and (2) limiting the education opportunities of those residents who have completed the secondary school educational offerings at the WVIHY. In light of the closure of the WVIHY, the Petitioners have sought to expand the scope of the Petition to address this as a larger systemic issue affecting all facilities, again, specifically at Northern. In particular, the Petitioners allege a lack of availability of educational opportunities for those residents who have completed secondary school. In opposition to the Petition, Respondents maintain that residents are afforded meaningful opportunities for education, and that appropriate vocational opportunities are available for the residents, including those who have obtained a G.E.D. or high school diploma.

The Court initially notes that portions of this allegation exceed the jurisdiction of the Respondents. Pursuant to W.Va. Code § 49-5-16a(2), “[a] juvenile in a juvenile detention facility or juvenile corrections facility **shall be provided access** to education, including teaching, educational materials and books[.]” (emphasis added)

Relatedly, W.Va.C.S.R. § 101-1-12 provides, in pertinent part:

12.1. The Director will issue written policy in collaboration with Division of Institutional Education, Department of Education, which makes available academic, vocational, and work programs that are related to the individual needs of the juveniles placed in the Division's custody.

12.2. Space and equipment needs of academic and vocational programs shall be in compliance with School Building Authority standards set out in \_\_\_ CSR \_\_\_ (sic) and state and federal education law.

12.3. All academic and vocational training personnel must be certified by a state department of education or other comparable authority.

12.4. Education staff shall determine the need for and provide remedial education services.

As further reflected in the State Rule, the Department of Education controls the nature and scope of the education to be provided.

Based upon the clear reading of the foregoing, the Court **FINDS** that the Division owes juvenile residents placed in its custody a duty to provide access to educational or programming opportunities. The Court further **FINDS** that Division shall provide appropriate and adequate space for the education and vocational programming. However, the Court **FINDS** that the Division has no legal duty to establish unilaterally or create unilaterally an educational or vocational programming for its residents. Rather, that discretion and duty lies with the Department of Education.

As the Court previously noted, there has been significant change in this Petition since the matter was first presented. As the Court noted in its December 21, 2012 *Order and Memorandum Opinion*, the conditions and practices at the WVIHY were not compliant with the duty owed and therefore the Court granted mandamus. However, the Petitioners expansion of this issue into other facilities has not merited the same proof or demonstration of a failure to comply with this duty to provide access or adequate space. Therefore, based upon the evidence and information presented to the Court on this matter, the Court hereby **FINDS** and **CONCLUDES** as a matter of law that the Petitioners have failed to establish or prove that the Division/Respondents are failing to perform a public duty. In particular, the Court notes that the record supports that the Respondents are performing its public duty by currently providing access and space and some facilities, and by building and structurally altering the facility to

provide access and space. While Petitioners understandably desire greater programming, the Division is performing and meeting the duty imposed by law upon it.

As with many of the issues raised herein, this is a policy decision left to the discretion of the Division and with the State Department of Education. Based upon the evidence before it, the Court does not find the Division is depriving residents of a constitutional or statutory obligation.

**ACCORDINGLY**, inasmuch as this issue is asserted to non-WVIHY facilities, again, specifically with regard to the Northern and Sam Perdue facilities, as a part of Petitioner's Writ of Mandamus, it is **DENIED**.

While the Court is denying this aspect of the mandamus, it does recommend the Division continue the points it agreed upon prior to the evidentiary hearing in this matter, notably:

- a. The Division will work with the proper agencies and entities to afford the female residents committed to DJS facilities appropriate and meaningful vocational and educational opportunities.<sup>14</sup>
- b. The Division will work with the proper agencies and entities to afford the residents who have completed their high school diplomas/GEDs appropriate and engaging post-diploma/GED programmatic opportunities.<sup>15</sup>

### **STAFFING**

16. The DJS entry level correctional officers and counselors positions experience high turn-over rates, causing several DJS facilities to be short staffed at certain periods.

17. Due to the staff shortages, residents may remain locked in their rooms in order to preserve some measure of safety and security.

18. The DJS offers entry level positions with compensation packages that are less competitive than those in neighboring states for similar positions.

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<sup>14</sup> See paragraph E. 9 of the Supplemental Order entered on December 19, 2013.

<sup>15</sup> See paragraph E. 10 of the Supplemental Order entered on December 19, 2013.

19. The DJS replenishes vacant positions as quickly as possible in order to preserve adequate staffing for their facilities.
20. In order to hire additional staff, DJS must seek approval from the Governor's office first.
21. A resident testifying during the hearing who was previously housed at Salem noted marked improvement with regard to access to bathrooms, telephone calls and writing materials.
22. The sexual offender treatment program recently installed at Sam Perdue is limited to twenty individuals only.
23. There are three staff members employed at Sam Perdue during the "third shift" or overnight shift; ideally, four staff members should be employed during this third shift in order to better handle emergency situations.
24. The transition from the correctional model to the community-based model has been done quickly, but not without its challenges: The frequent turnover and vacancies among correctional officer positions is detrimental to the DJS twin goals of rehabilitation and treatment. These staff members are in more contact with residents, in positions of trust with residents, which can foster more successful treatment for residents. The high turnover rate can unduly denigrate these rehabilitative goals.
25. In order to attract trained counselors for the new therapeutic or rehabilitation model DJS has since adopted for its facilities, and in order to retain those employees, a higher salary base could stave off the frequent turn-over rate, and can also further support the treatment and programming goals for the residents.

While not expressly stated as an allegation in the Petition, Petitioners raised a final issue relating to staffing within the Division. Specifically, Petitioners alleged that DJS is understaffed

and that the understaffing is a result of, *inter alia*, low compensation. Petitioners further state that the job title and classification should be changed in order to better conform to the rehabilitative mission of the Division. In opposition to the allegation, Respondents maintain they have no independent authority over the job classification and salary. Rather, those determinations are made by the Division of Personnel. Further, Respondents maintain that they are actively recruiting potential hires and working to increase staffing Division-wide. Hence, there is no Duty that the Division is failing to perform.

The Court recognizes the difficulties being experienced across the Division as a result of staff shortages. The Court has also heard examples of overuse of room confinement when short-staffed, and other challenges being faced with the implementation of these changes as a result of understaffing. While these are problematic, the Court has not been presented evidence during the hearing that the staff shortages has risen to the level that the DJS is unable to adequately and safely perform their mission. Notwithstanding, the allegation as to job classification and salary are outside the duties imposed upon the Division. As stated previously, these decisions are inappropriate for this Court to make on behalf of the Division, as they are within the exclusive authority of the Legislative and Executive Branches.

There is absolutely no question that the lack of sufficient staffing issue could be resolved by increasing the pay of Correctional Officers or, for example, by the reclassification of some correctional officers as youth counselors. While the undersigned would desire to raise wages for correctional officers, doing so is purely within the scope of the Executive and Legislative Branches. This Court does not have the expertise that the other two branches of government has in making those decisions.

Therefore, based upon the evidence and information presented to the Court on this matter, the Court hereby **FINDS** and **CONCLUDES** as a matter of law that the Petitioners have failed to establish or prove that the Division/Respondents are failing to perform a public duty. As a result, the second element required under *Kucera* has not been met and mandamus is not warranted. **ACCORDINGLY**, inasmuch as this issue is asserted as part of Petitioner's Writ of Mandamus, it is **DENIED**.

#### **V. CONTINUED MONITORING**

The Court recognizes that circuit courts in this State maintain a special relationship with juveniles under their jurisdiction. "A person under the age of eighteen years who appears before the circuit court in proceedings under this article shall be considered a ward of the court and protected accordingly." W. Va. Code § 49-5-4. Unlike the adult correctional system, courts continue to be informed about the juveniles under their jurisdiction, both while the juvenile is committed to the Division of Juvenile Services, and even after the juvenile has been discharged from DJS custody<sup>16</sup>. See, W. Va. Code §§ 49-5D-1 to -8 and 49-5-20 respectively.

Consistent with the role and duty of the courts in the juvenile justice system is the need for information regarding the conditions at the various juvenile facilities, as well as the programming and services being provided by the Respondents to promote the rehabilitation of juveniles. While many positive policy changes have resulted from the instant litigation, there continues to be setbacks and, at times, even resistance to the changes, despite the Respondents' implementation of those new policies. Many changes have occurred over a relatively short period of time (in great measure due to the cooperative spirit of all involved) but many of these improvements are not yet fully ingrained into the practices of the facilities. Further, due to the

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<sup>16</sup> For example, routinely many courts around the state, including the undersigned, will hold review hearings on juveniles placed in DJS custody every 90 days to check on the progress of a juvenile's rehabilitation and education.

continued transitioning within DJS and its facilities, it is apparent to the Court that there is a need for continued monitoring to ensure that the changes as agreed to by the parties continue to progress, to oversee the practices by the Respondents herein, and to work towards improving the potential outcomes of youths committed to facilities operated by the Respondents. Fortunately for the Court and the parties herein, the Court has had the services of Cindy Largent-Hill, and her staff who have provided the monitoring to the Court and the parties. As the parties are aware, Ms. Largent-Hill also works for the Supreme Court's Adjudicated Juvenile Justice Rehabilitation Commission. By having Ms. Largent-Hill as the Court's monitor, this Court has saved the parties tens of thousands of dollars in additional costs by not having to pay for monitoring services since Ms. Largent-Hill and her staff is already paid by the Administrative Office of the Supreme Court of Appeals. Ms. Largent-Hill and her staff have proved instrumental and helpful to this Court during these proceedings. Furthermore, while this case is coming to an end, the Supreme Court's Adjudicated Juvenile Justice Rehabilitation Commission work is not. While the Commission's goals and work are much larger than the issues that were before this Court, there is no question that the issues before this Court are matters within which the scope of the work that the Commission is undertaking, Therefore, this Court hereby **ORDERS** that monitoring that has been undertaken by Ms. Largent-Hill and her staff for this litigation continue under the direction and control of the Supreme Court's Adjudicated Juvenile Justice Rehabilitation Commission. While the Commission does not have the ability to litigate disputes as a Circuit Court would have, the cooperative atmosphere that the parties have operated under during this litigation, will allow parties to have a mechanism to work through the Commission to hopefully resolve any issues that may arise in the future. By utilizing the Supreme Court's Adjudicated Juvenile Justice Rehabilitation Commission to continue the monitoring, once again

this Court is saving the parties untold tens of thousands of dollars versus the cost to the parties of having a different monitor selected to continue the monitoring contemplated by this Court's Order herein. Of course there is nothing that prevents the parties from going back to Court should either or both feel it necessary to reopen this litigation in the future. The duration and scope of the monitoring shall continue for as long as the Supreme Court's Adjudicated Juvenile Justice Rehabilitation Commission deems such monitoring necessary.

The Court cannot commend the parties enough of their cooperative rapport shown throughout this case has led to quick resolution of many of the issues initially brought to the Court's attention and has further led to greatly needed improvements to the juvenile justice system in a short period of time. Based on the rapport that has developed over the last several months during the litigation of this case, the Court recommends that the parties should continue to exchange information and updates concerning the development of the Division's transitioning evident in this case. These issues continue to be addressed by the Commission which may prevent further litigation or the reopening of this case, so long as the parties maintain the course that they have taken since the beginning of this proceeding. For example, the parties have been exchanging emails regarding room detentions that have occurred. This Court believes that those emails should continue as they are helpful to the parties, to the monitor and also reflect well upon DJS that they are complying with the procedures agreed to by the parties.<sup>17</sup>

## **VI. ATTORNEYS FEES AND COSTS**

The Petitioners have filed their motion for attorneys' fees and costs in this action, which to date totals \$286,084.12.<sup>18</sup> Petitioners also seek a twenty percent enhancement of the fees incurred in this action, for an additional \$57,216.82. The Petitioners have claimed attorney

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<sup>17</sup> However, DJS will no longer have to send those notices to the Court, but should continue to send them to Petitioners' counsel and to Ms. Largent-Hill, the Court's monitor.

<sup>18</sup> This figure also includes \$5,690.00 for paralegal fees, billed at \$100 per hour, for a total of 56.90 hours.

billable rates from \$250.00 per hour to \$475.00 per hour.<sup>19</sup> The Respondents initially objected to the Petitioners' initial motion for attorney's fees and costs, which was partially granted by this Court because there was no objection to the costs incurred at that time, however, the Respondents proposed that the Petitioners' counsel could be compensated in accordance to the statutory scheme for any appointed counsel, to-wit: \$45 per hour for out of court work and \$65 per hour for in court work. The Court, from the onset, announced to the parties that it determined that those current statutory rates are far too low for the type of work performed by the Petitioners' counsel herein, and ordered the parties to mediation, which proved unsuccessful.

As a result, the Court instructed Petitioners to submit their final statement for services rendered at the end of these proceedings so that the Court can make a final determination of all issues pending before it. Since that submission, the Respondents have objected to the attorneys' fees in their entirety, or as an alternative, requests the Court to dramatically reduce the award for attorneys' fees and costs incurred in this matter.

**Applicable Law:**

This action began as a proceeding in both habeas corpus and mandamus. *Meadows v. Lewis*, 172 W. Va. 457 (1983) and its progeny provides for reasonable attorney's fees and costs expended in prosecuting mandamus proceedings. This Court refers to Rule 1.5 of the West Virginia Rules of Professional Conduct, which governs attorney's fees in general, and dictates what elements comprise a reasonable fee for the provision of professional legal services:

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and skill requisite to perform the legal service properly;

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<sup>19</sup> According to the affidavits attached to their motion, the senior attorney in this case, Dan Hedges, bills at \$475.00 per hour; Lydia Milnes at \$250.00; Jennifer Wagner, \$275.00; Jacklyn Gonzales, \$200.00; and Deborah Weston, \$250.00.

- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

Also available to this Court is the typical ‘lodestar’ list of considerations for determining the reasonableness of an award of attorney’s fees:

Where attorney’s fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney’s fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

See, Syl. Pt. 4, *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986).

A circuit court is vested with a wide discretion in determining the amount of costs and counsel fees, and such determinations will not be disturbed upon appeal unless it clearly appears that the court abused its discretion. See, generally, *Bond v. Bond*, 144 W. Va. 478, 109 S.E.2d 16 (1959); *Cummings v. Cummings*, 170 W. Va. 712, 296 S.E.2d 542 (1982); *Daily Gazette Co., Inc. v. West Virginia Dev. Office*, 206 W. Va. 51, 521 S.E.2d 543 (1999).

The Court would also note that although most authority concerning awards for attorneys' fees pertain to actual offers of judgment or statutory authority providing for recovery of such fees and costs, the case *sub judice* is different because the Respondents (Division) herein agreed to pay "reasonable costs and counsel fees", pursuant to paragraph forty-two (42) and paragraph fifty-seven (57) in the Orders entered on September 17, 2012 and November 27, 2012, respectively. The parties' agreed orders, however, do not provide for the payment of reasonable paralegal or secretarial fees.

Since the initial motion for attorneys' fees and costs, the Petitioners have also requested that this Court award them a twenty percent enhancement of their attorneys' fees based on Mountain State Justice's status as a unique entity that survives on fees collected in undesirable cases.

### **Reasonable Attorneys' Fees**

The Court is assisted in arriving at a reasonable fee for the work performed by Petitioners' counsel by the guidelines espoused by the *Pitrolo* case cited above:

#### 1. Time and Labor Required

The Court has reviewed the timesheets submitted by the Petitioners' counsel. There appears to be several billing entries that are duplicative, with instances of double billing (two or three attorneys billing for the same event, etc.). The Court notes from the timesheets that there are some billing areas that appear to be clerical work (i.e. "organizing file") done by lawyers or entries that offer little detail of the work actually provided. Such entries do not, in the Court's mind, appear to be reasonable fees under the law.

## 2. Novelty and Difficulty of the Questions

This case began as a habeas/mandamus proceeding in which the Petitioners requested that the Respondents simply abide by its own imposed laws. During litigation, however, major changes were made to the juvenile justice system, which basically made new law or at least ushered in an improved system that ostensibly curries greater rehabilitation and treatment for youths committed to the Division's care. This case **did** result in the Legislature and Executive Branches decision to close the WVIHY.<sup>20</sup> Changes continue to be seen in the West Virginia juvenile justice system. In short, this case is novel; the effort expended by the Petitioners' counsel (as well as by the Respondents' counsel) was and continues to be difficult if only because these waters are uncharted.

## 3. Skill Requisite to Perform the Legal Services Properly

No doubt Mountain State Justice is THE agency for prosecuting civil actions such as the case herein, as well as other public interest matters. In this matter, Petitioners counsel sought to bring about positive change where needed. There appear to be very few firms, let alone individual lawyers, that necessarily do this kind of work, or which would have had the wherewithal to effectively cause reform of the DJS. Again, the skills in these matters are necessarily specialized in this area, and the experience of lead counsel, Mr. Hedges, appears unparalleled.

## 4. The Preclusion of Other Employment by the Attorney Due to Acceptance of the Case

This does appear to have been a grave issue for the Petitioners' counsel in this matter. There were five different Mountain State Justice attorneys working on this case from the

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<sup>20</sup> The closure of the WVIHY included the closure of the former Harriet B. Jones sex offender program located on the grounds of the former WVIHY as stated above.

beginning. The Petitioners have not provided information concerning Mountain State Justice's caseload or whether this particular case detracted it from assisting other clients or caused a reduction of other work. There is no evidence that this was the case. This proceeding has been pending for nearly two years; there is no evidence that Mountain State Justice turned away other clients or other work as a result. The Court is also reminded that most of the major issues originally brought in the Petition were resolved without litigation, and the parties, both Petitioners and Respondents, continued to work together to bring about a swift resolution to all matters alleged in the Petition, including those that went beyond the original allegations in the Petition, effectively causing changes to the juvenile justice system across the board. These changes could not have been affected without the Legislature and Executive Branches, however.

#### 5. Customary Fee

This began as a proceeding requesting habeas and mandamus relief. The Petitioners' counsels' affidavits provide that the claimed hourly rates are typical in their community, and have recently bolstered their position by submitting affidavits of private counsel in the area who affirm that the rates requested by Petitioners counsel are customary and reasonable.

Unfortunately, the only other 'customary rate' proffered to the Court is that these kind of proceedings continue to be compensated at \$45 per hour for out of court work and \$65 per hour for in court, payable by the Public Defender Services to private appointed counsel. The only other rate is that proposed by the Respondents from the Federal Prison Reform Act, *infra*. It is notable, however, that typically habeas or mandamus appointments generally do not cover all similarly situated individuals such as the Petitioners herein. In that regard, this case is far different from the typical habeas appointment.

6. Whether Fee is Fixed or Contingent

There is no evidence that there was a fee agreement between Mountain State Justice and the Petitioners herein. There is no evidence concerning the contractual nature of the attorney-client relationship between the Petitioners and Mountain State Justice. However, it is evident that the Petitioners and like-situated individuals are without funds to pay for a lawyer, being incarcerated minors. Petitioners' counsel attest that Mountain State Justice survives on public funds, and where appropriate, fee-shifting, as a means to continue the type of work it does. Moreover, the Petitioners provide fixed billable hours in support of its Motion, which arguably depends upon community market rate. Again, this case is unique insofar as the litigants herein are not private, but are both wholly funded by public monies.

7. Time Limitations Imposed by the Client or the Circumstances

One of the original Petitioners, or Mountain State Justice client, was released from DJS custody early on in this proceeding. The Petitioners in this case simply have time to serve as a result of other juvenile proceedings that placed them under DJS authority; such matters are not before this Court. Although there is no evidence of time limitations imposed by the clients or the circumstances in this case, these proceedings caused changes to the juvenile justice system which caused the transformation at many levels within DJS initiated by the Legislative and Executive Branches. It appears that most of the time limitations were self-imposed by the Respondents, in order to implement the changes brought on by authorities outside of this Court's jurisdiction and control.

#### 8. The Amount Involved and the Results Obtained

This is not particularly helpful in this case as there was no money involved or even a request for release from DJS custody; this action involved not just a prosecution to enforce statutory rights of committed juveniles, this proceeding caused widespread changes to the juvenile justice system, where an entire building was transferred from DJS to DOC. It appears to the Court that the results obtained in this matter were extremely beneficial for the Petitioners, including the recognition by the other branches of government that providing more opportunities for rehabilitation and post-graduate programming at the various DJS facilities enhances the public good. The Court has heard testimonies of residents who noted marked improvement over the conditions of their confinement since closure of the WVIHY. Understandably, there are growing pains that come with such transitions, however, it appears that the Respondents/Division have been committed to positively change the manner of housing and treatment of juveniles, and have been receptive of the suggestions and recommendations made by the Petitioners.

#### 9. Experience, Reputation and Ability of the Attorneys

There is no evidence disputing the fact that the Petitioners' counsel are each highly educated, knowledgeable, accomplished, and experienced in these civil matters. Again, Mountain State Justice is a unique entity that typically litigates these specialized actions, and clearly succeeded in affecting the major overhaul of the West Virginia juvenile justice system. The Court notes that Mr. Dan Hedges is the most experienced attorney in this case, having prosecuted many such cases for the bulk of his legal career.

#### 10. The Undesirability of the Case

The Court is mindful that many private attorneys do not engage in habeas matters, however, those that do are often compensated via Public Defender Services. However, these types of cases tend to be the specialty of Mountain State Justice. This was a civil proceeding involving the conditions of confinement and the treatment of juveniles. There was no evidence regarding the undesirability of this case. The Court recognizes that typically private attorneys that may be appointed to such cases would be compensated at the lower hourly rate than what they could typically bill for other civil actions.

#### 11. The Nature and Length of the Professional Relationship with Client

Again, this proceeding has not been pending for several years, and the 'client' is not necessarily the same as the original Petitioners in this case because the issues presented affect all juveniles committed to DJS. In that vein, the relationship between the Petitioners and their counsel is not as intimate as a traditional attorney-client relationship. However, even those residents confined in the various DJS facilities who had never encountered Petitioners' counsel were affected as a result of this case. There is a lack of evidence concerning the contractual nature of the relationship between the client(s) and Petitioners' counsel. The relationship in this case also differs because the committed juveniles ostensibly have other counsel appointed or retained by them with regard to the proceedings that resulted in their incarceration to begin with, which may or may not have impacted the relationship herein. Again, there is not much evidence concerning this factor before this Court.

## 12. Awards in Similar Cases

There is no evidence of awards in similar cases before this Court, with the exception of persuasive authority to aid this Court in its determination of what a reasonable attorney fee, and/or enhancement, should be in this case. Although each case is different on its face, including the type of work and the source of the funds towards this prosecution, this Court is mindful that this case posed different questions than the average habeas/mandamus action.

### **Application of Law to the Facts and Circumstances in this Case**

The Petitioners request that the Court to examine *Koontz v. Wells Fargo, N.A.*, 2013 WL 1337260 (S.D.W. Va. 2013) in support of their Motion for attorneys' fees, as well as their request for the twenty percent enhancement. Notably, the Petitioners counsel were also counsel of record for the plaintiffs therein. This Court is persuaded by the *Koontz* case, also because that court did not find the usual lodestar criteria for determining an appropriate attorneys' fees award all that helpful. This Court is similarly challenged.

The Respondents direct the Court's attention the West Virginia Supreme Court of Appeals' treatment of attorneys' fees awards in the context of a mandamus action:

Attorney's fees may be awarded to a prevailing petitioner in a mandamus action in two general contexts: (1) where a public official has deliberately and knowingly refused to exercise a clear legal duty, and (2) where a public official has failed to exercise a clear legal duty, although the failure was not the result of a decision to knowingly disregard a legal command.

Syl. Pt. 2, *State ex rel. West Virginia Highlands Conservancy, Inc. v. West Virginia Division of Environmental Protection*, 193 W. Va. 650, 458 S.E.2d 88 (1995)(*Highlands II*). Further, the Respondents contend that the Court is guided in its determination with Justice Cleckley's clarification of the two aforementioned contexts:

Where a public official has deliberately and knowingly refused to exercise a clear legal duty, a presumption exists in favor of an award of attorney's fees; unless extraordinary circumstances indicate an award would be inappropriate, attorney's fees will be allowed.

Where a public official has failed to exercise a clear legal duty, although the failure was not the result of a decision to knowingly disregard a legal command, there is no presumption in favor of an award of attorney's fees. Rather, the court will weigh the following factors to determine whether it would be fairer to leave the costs of litigation with the private litigant or impose them on the taxpayers: (a) the relative clarity by which the legal duty was established; (b) whether the ruling promoted the general public interest or merely protected the private interest of the petitioner or a small group of individuals; and (c) whether the petitioner has adequate financial resources such that petitioner can afford to protect his or her own interests in court and as between the government and petitioner.

Syl. Pts. 3 and 4, *Id.*

Of interest here, the *Koontz* Court determined in its March 2013 decision that Mr. Hedges' fee at \$375.00 per hour was more reasonable than \$425.00, which is the same hourly rate he has claimed in this Court. It appears to the Court that in *Koontz*, all the attorney's fees were reduced by \$50 to \$75 based on the court's consideration of the years of experience, reasonableness of the hourly rates, the lack of affidavits attached to the motion for attorneys' fees, and the lack of peer review or other secondary source to justify the requested hourly fee. However, this Court is better assisted in its determination because Petitioners' counsel herein have attached supporting affidavits to their Motion, along with secondary sources and/or peer reviews justifying or corroborating the requested fee rates.

Without question, the original *Petition for Writ of Habeas Corpus* effectively settled, as the parties were able to reach an agreement resolving the issues contained therein. The outstanding *Petition for Writ of Mandamus* had for the most part been resolved via negotiations between the parties, with a few issues to be resolved by the Court after having conducted evidentiary hearings in this matter. The major changes to the policies and culture of DJS, and

especially in particular the wholesale reorganization of the buildings for the confinement of juveniles that was initiated by the Legislature and Executive Branches last summer were a result of this lawsuit. Clearly, the Petitioners substantially prevailed in this action. This is one of the reasons the Petitioners contend that pursuant to the *Highlands II* case, they are entitled to reasonable attorneys' fees, as the WVIHY was not abiding by its own rules and regulations, thus causing the Petitioners to file suit.

The *Koontz* Court determined administrative or secretarial type work to be non-compensable. It appears to this Court that *Koontz* also frowns upon multiple entries where some tasks were compensable and others were not (i.e. where it is difficult to divide up the time among or between the compensable and non-compensable tasks according to the attorney time sheet).

With regard to the Respondents' argument in opposition of an award for attorneys' fees, the evidence gleaned during the evidentiary hearings and throughout the proceedings herein indicated that for the most part, the Respondents themselves did not knowingly refuse to exercise its clear legal duties.<sup>21</sup> The Respondents contend that the Division merely failed to implement established policies or to establish policies in accordance to statutorily-imposed duties. Therefore, the factors this Court should consider in determination of an award for attorney's fees are best examined under the three criteria illustrated in *Highlands II, supra*. The Respondents agree that as a result of the Petitioners' litigation, the general public interest has been served. However, disputes that the Petitioners established that the Respondents had a clear legal duty to which they willfully ignored, that the impetus behind this proceeding was to change existing policy (albeit not illegal). Further, the Respondents contend that the Petitioners' counsel, as

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<sup>21</sup> The Court notes that this is for "the most part" only because the authorities comprising DJS did not appear to ignore statutory duties, however, there were some instances of its agents at various facilities who willfully ignored this Court's orders during this litigation, however, the Court notes that the attorneys and Respondents conducted themselves in a cooperative fashion which facilitated the resolution of this matter.

employees of Mountain State Justice, a public corporation, had the adequate funds to participate in this proceeding.

Petitioners counsel argue that they were not paid by the Petitioners themselves, and therefore the youthful clients were not responsible for any of the fees or costs incurred in this litigation. Petitioners counsel contend that without fee-shifting statutes (as was utilized in the *Koontz* case), Mountain State Justice, a non-profit law firm, would not be able to provide legal services for indigent West Virginians – this firm survives because of such fee awards.

The Respondents also propose that in the absence of the Petitioners' counsel's proof of a customary fee in this action, and that because of the subject matter in this case, the hourly rates are more appropriately aligned with the Federal Prison Reform Act<sup>22</sup>, as the nature of the petitions herein concerned the conditions of confinement.

In support of their argument that the attorney fees requested by the Petitioners are inflated, the Respondents assert that the timesheets reflect counsel billable hours for work done prior to the filing of the Emergency Petitions, which also reflected time spent with DJS to discuss the allegations that eventually became the talking points of the petitions in an attempt to resolve many of the issues at hand without the need for litigation. Indeed, the habeas petition was resolved through an agreed order and became a moot point without need for an evidentiary hearing thereon.<sup>23</sup> The Respondents further argue that the attorney fees should be limited to the two primary attorneys involved on behalf of the Petitioners, Mr. Hedges and Ms. Milnes, and

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<sup>22</sup> The Respondents cite 42 U.S.C. § 1997e(d)(3) which provides that such hourly rates should be no greater than 150% of the appointed attorney fee. Respondents further propose that applying this principle herein, the Public Defender Services appointed hourly rate of \$65 per hour for in court work would be \$165 per hour, whereas the \$45 per hour rate for out of court work would be \$115 per hour. In Mr. Hedges's case, Respondents proposed that a higher reasonable rate for his work would be \$200 per hour for out of court work and \$275 for in court work.

<sup>23</sup> The Court notes that the Respondents preserve their objection to the filing of these petitions on the basis that the Petitioners failed to abide by the thirty day notice of intent to sue, as required in such actions against the State pursuant to W. Va. Code § 55-17-3.

point out that a sizeable portion of the fees claimed involve discussions and meetings among staff attorneys, reviews of the file, and time billed for traveling to the various DJS facilities.<sup>24</sup>

Petitioners respond that though Ms. Milnes and Mr. Hedges were lead counsel, other staff attorneys were just as necessary, as they performed work during Ms. Milnes's maternity leave. Further, the Petitioners argue that the work performed prior to the filing of the petitions was also necessary in preparation of this lawsuit, and the thirty day written notice requirement had already been decided upon by the West Virginia Supreme Court of Appeals prior to this Court's appointment to the case.

Finally, the Respondents point out that pursuant to Syllabus Point 5 of *Highlands II*, this Court can reduce an attorney fee award if certain activity was needless or extraneous to the overall matter, to-wit:

Apportionment of attorney's fees is appropriate where some of the claims and efforts of the claimant were unsuccessful. Where part of the attorney's fees sought was expended on discrete efforts that achieved no appreciable advantage in the litigation, or where the claim for attorney's fees rests partly on a result to which the claimant made no significant contribution, a court may consider these circumstances and apportion the attorney's fees accordingly.

After the successful resolution of the habeas proceeding, the continued litigation concerned primarily with prescribing the manner in which the Respondents should implement their public duties.

The Petitioners also request a twenty percent enhancement of their total counsel fee on the basis that Mountain State Justice is a unique organization that takes on the undesirable cases. The Respondents oppose this enhancement altogether. The enhancement will need to be

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<sup>24</sup> The Court has also noticed the Respondents concern about billing for administrative actions, which ostensibly is non-compensable. Notably, the travel and meetings with other DJS facilities and its personnel and residents, are beyond the original scope of the petitions filed herein.

addressed based on whether this habeas/mandamus work is a “specialized area” of law and whether the attorneys involved have “specialized experience” in this area to justify their rates.

The Petitioners explain that Mountain State Justice’s “specialized area” concerns its ability to provide “free representation to indigent West Virginians on a variety of issues, including but not limited to, predatory lending and illegal debt collection, conditions of institutional confinement, special education, and mine worker health and safety.” Unlike the case law used to determine the “reasonableness” of Petitioners’ counsels’ fees, this case neither pertains to a specific statute where there are built-in fee-shifting code sections, nor any other traditional fee-shifting case or scheme. For this reason, this is a unique case, and representing a specialized area of law, further, the amount of work that went into this matter cannot be undermined and the fact that Mountain State Justice survives on tax payer dollars and on statutory fee-shifting is an important factor to be considered.

An opposing party’s misconduct is often a factor influencing an award of attorneys’ fees, however, this is a split issue: Although the Respondents did not conduct themselves poorly, and were obviously working diligently with Petitioners’ counsel to resolve issues without further litigation, there were obvious problems with the Respondents’ own staff members or other facilities’ administrators who flat out refused to comply with the Court Order(s) herein, thus garnering additional support for the Petitioners’ requests for attorney fees. These matters had been brought to the Court’s attention which had to be addressed.

This Court does have discretion for awarding attorneys’ fees in its equitable powers when violation of its orders has been shown by the proponent of such fees. Further, the alleged and subsequently admitted practice of mixing juveniles among sex offender residents and mixing of older residents with more impressionable younger residents (thus causing a potential new breed

of victimization of juveniles while under DJS authority) is “beyond the pale” as the Court has often decried during these proceedings. Understandably, these problems occurred during the rapid and wide-scale transitioning experienced by DJS, however, when it comes to the safety of juveniles committed to their charge, the Court cannot ignore the grave risks to which these young people were exposed.

As a result of these considerations, and after a review of the pertinent legal authority and the submissions of the parties, the Court is persuaded by the determination of the *Koontz* Court with respect to the Petitioners’ counsel fees. This Court faces the same difficulties as did the court in *Koontz*, insofar as certain instances of vague billing entries, duplicative billing entries, billing entries of non-legal work performed by attorneys. Where the attorneys’ hourly rates in *Koontz* were discounted across the board as an equitable solution to the aforementioned problems, this Court finds such a solution reasonable in this case.

Nevertheless, this Court has guidance where the *Koontz* court did not: There is a written agreement that the Respondents would pay for reasonable **attorneys’** fees.<sup>25</sup>

Accordingly, the Court **FINDS** and **CONCLUDES** the hourly rates submitted by the Petitioners’ counsel are not unreasonable. In order to accommodate the issues concerning duplicative billing or entries that were not immediately clear to the Court, but in order to compensate Petitioners’ counsel fairly, and reasonably, as agreed to by the Respondents, the Court hereby reduces the claimed attorneys’ fees by ten percent (10%), thus, the Court **GRANTS IN PART** the Petitioners’ Motion for attorney fees in the amount of \$252,354.71.

There was no agreement concerning the payment of paralegal fees. The parties submitted two agreed orders to this Court for entry, one dated September 17, 2012, another dated

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<sup>25</sup> See, page 10, paragraph 42 of Order entered September 17, 2012 and page 13, paragraph 57 of Order entered November 27, 2012.

November 27, 2012. In both Orders, prepared by the parties themselves, there is only mention that the Respondents (the “Division” as written in the Orders) would pay for “reasonable costs and **counsel** fees” (emphasis added). Accordingly, the Court **FINDS** and **CONCLUDES** that the paralegal fees provided to this Court for consideration of the Petitioners fee award are non-compensable. The Court’s determination concerning the paralegal fees is guided by the fact that the Respondents did not expressly agree to the payment of paralegal fees, and that upon review of the paralegal fees timesheets that the majority of the entries include non-billable work including “organization”, “copies”, “calendaring”, and “phone call”. The *Koontz* Court made the same determination for such entries, which provides further legal authority for this Court’s determination for same. Accordingly, the Petitioners’ request for \$5,690.00 in paralegal fees is **DENIED**.

### **The 20% Enhancement**

Petitioners argue that the *Koontz* case, a predatory lending action, provides guidance as to how this Court should rule on the request for the twenty percent enhancement. The Court has reviewed that case in light of the circumstances in this matter and notes that unlike the situation in the *Koontz* case, the Respondents **have** filed an objection to the Petitioners’ request for a twenty percent enhancement of its fees.

The justification of the twenty percent enhancement will be entirely based upon the circumstances in this case and this Court’s discretion.<sup>26</sup> The claimed hourly rates are based solely upon personal affidavits of the Petitioners’ attorneys herein and others practicing in the Charleston area. This habeas proceeding was not the most complex legal issue the Court has seen or that the Petitioners’ counsel have litigated, indeed, that aspect of the petition had been settled before the Court took evidence concerning those specific allegations. However, arguably

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<sup>26</sup> See, generally, *Bishop Coal Company v. Salyers*, 181 W. Va. 71, 380 S.E.2d 238 (1989).

this case made new law: Former DJS facilities are now DOC facilities and plans are being made to construct new facilities and/or programming that better suit the juveniles committed to DJS custody.

Although DJS already committed itself to the proper housing/programming/educating of its youthful wards to begin with pursuant to statutory authority, the changes affected by the parties herein does indicate the shift from the punitive or institutional culture of the West Virginia juvenile justice system to one centered on community and treatment. Indeed, the Court is impressed by the fact that the new law that was made during this proceeding where juvenile facilities were transferred to the Division of Corrections was directly influenced by this suit.

The *Koontz* Court approved of the twenty percent enhancement due to the particular facts therein, the absence of opposition to it by the respondents, and the fact that the lodestar analysis did not adequately address the true market value of the petitioner's counsel. However, the Respondents herein differ in one major aspect from those in *Koontz*: They are public entities; they are supported only by taxpayers, as are their counsel. The Respondents highlight an irony of the Petitioners position where they ask for higher salaries, new gymnasiums, instructors for post-graduate programs, additional post-graduate programs, better food, etc., which all understandably will have to be paid for by the Respondents, yet also request nearly \$350,000.00 in attorneys' fees and costs, which would undoubtedly have to come out of the Respondents' budget for the changes that have already been made, and for the changes that are coming soon. Again, the Respondents' budget is solely dependent upon the collection of public funds. That was not the case concerning the large private bank involved in a predatory lending case.

This Court **FINDS** and **CONCLUDES** that the case *sub judice* is unique, and though the Petitioners' counsel had invested much time and energy in this matter which ultimately improved

the condition and confinement not only for the original Petitioners, but for many others presently in custody of DJS and for those juveniles yet to be committed, this action was further assisted with the cooperation and hard work by the Respondents. It would not be difficult to imagine that the large award sought for counsel fees and costs could have a negative impact upon the relief sought by the Petitioners. Further, this Court cannot justify such an additional award to be borne by the taxpayers in this State. For those reasons stated above, the Court **DENIES** the Petitioners' Motion for the twenty percent (20%) enhancement of counsel fees in the amount of \$57,216.82.

### **Costs**

Though there was nothing else submitted by the Petitioners concerning the additional costs incurred since this Court's award of the costs incurred earlier on in this litigation, the Court has reviewed the remains of the Petitioners costs, illustrated in Exhibit B to their Motion. Most entries concern travel to other DJS facilities during this proceeding. The Respondents also object to the \$3,510.00 costs incurred for the expert report concerning Sam Perdue by Mr. Paul DeMuro; notably, his recommendations were for issues outside of the Respondents' jurisdiction, thus the primary basis for the Respondents objection to those expert costs.<sup>27</sup>

The Court finds that the Respondents' argument concerning apportionment of an attorney fee award persuasive,<sup>28</sup> as these costs, particularly those incurred for Mr. DeMuro more recently, were also incurred at the discretion of the Petitioners themselves. Further, the remaining issues concerning the mandamus actions were unsuccessful for the Petitioners, as pointed out above, as

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<sup>27</sup> The Court notes from the testimony provided by Mr. DeMuro, that he did not determine any breach of legal duty by the Respondents during the evidentiary hearing on October 29, 2013. His recommendation to reduce or eliminate the high turnover rate among correctional officers was to increase salaries and to also rename or retitle those positions to fit the more therapeutic, community based juvenile justice system as opposed to the outgoing institutional model. The Court found such recommendations were outside of the realm of this mandamus action, and certainly beyond any duties the Respondents owed to the Petitioners.

<sup>28</sup> See Syl. Pt. 5, *Highlands II*, *supra*.

such matters go beyond this Court's authority, and certainly do not pertain to any legal duty strictly imposed upon the Respondents. Accordingly, the Court **GRANTS IN PART** the Petitioners' *Motion* with regard to expert costs incurred herein, in the amount of \$3,510.00 as being unreasonable, and awards the remaining \$4,314.38 for reasonable costs expended by Petitioners' counsel since January 11, 2013.

## VII. CONCLUDING REMARKS

The Court will note that ideally, there would be no need for DJS or facilities to confine wayward youths, however, this Court is confident that with the changes brought by this proceeding, and continue to be improved upon by the Respondents herein, the future for those juveniles committed to DJS authority is much brighter than it had been prior to this proceeding.

DJS has made representations about future changes to various DJS facilities.<sup>29</sup> This Court expects that DJS will carry through on its obligations to make the necessary changes to the facilities as represented.

Quite frankly, this Court has questioned some of the proposed changes to the missions of some of the DJS facilities as announced by DJS. This Court is of the opinion that some of the changes may not be the most advantageous decisions.<sup>30</sup> However, this Court is mindful of the separation of powers between the Executive Branch and the Judicial Branches of government. The Executive Branch is charged with the responsibility of housing and rehabilitating juveniles in our system. The Judicial Branch, other than committing juveniles to detention, is charged with checking and balancing the Executive Branch by ensuring that the Executive Branch

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<sup>29</sup> DJS indicated that additions would be made to the Donald R. Kuhn facility and to the Sam Perdue facility. Furthermore, DJS represented that hardware changes would be made to Gene Spadaro facility to make it more conducive to holding detention residents. As of the date of this Order, none of those changes have been completed as represented.

<sup>30</sup> This particular jurist's opinions about what is advantageous or not, is, simply, this jurist's opinion and that just because this jurist questions or disagrees with a few of the decisions made by DJS and the Executive Branch such questions or disagreements have no bearing on what the law or the constitution requires.

complies with the law and is acting constitutionally. To that end, this Court can unequivocally state that none of the decisions made by DJS regarding the changing of the missions of the various DJS facilities comes even remotely close to violating any statute or being unconstitutional.

The Court wishes to commend Ms. Bond, the Acting Director of DJS for her efforts in bringing this matter to a resolution. She inherited this case at a crucial time where major decisions had to be made. As this Court has said, government does not move quickly. This Court compared the decisions that needed to be made quickly like asking a cruise ship to turn around on a dime. It is generally not possible. However, when called upon to act, Ms. Bond, and others within the chain of command in the Executive Branch, turned the ship around on a dime in many respects.

This Court is not unmindful of the pressure that this case placed upon the Governor and the Legislature. In response to this Court's initial Order regarding the former WVIHY, the Governor and Legislature acted decisively and made changes that eliminated the necessity for this Court to order changes that were best left to those branches of government.

Once again, this Court believes it is appropriate to commend counsel, particularly, Ms. Milnes and Mr. Hedges for the Petitioners, and Mr. Wright, Mr. Greear, and Mr. Compton for the Respondents. The civility that Counsel displayed throughout this litigation, in spite of their obvious differences of opinion on some issues, served their respective clients well. This litigation could have easily taken much more time and expense had it not been for the manner in which counsel conducted themselves throughout this civil proceeding.

### VIII. RULING

The Court **DENIES** the Petitioners' remaining issues of concern in their *Petition for Writ of Mandamus*, and **ORDERS** this matter is **DISMISSED** from the Court's docket. The Court **GRANTS IN PART** the Petitioners' Motion for Attorneys' Fees and Costs as provided above for a total of \$256,669.09.

The Circuit Clerk is directed to forward a copy of this Order to counsel for the parties at their respective addresses:

Daniel F. Hedges, Esq.  
Lydia C. Milnes, Esq.  
Mountain State Justice, Inc.  
1031 Quarrier Street, Suite 200  
Charleston, WV 25301  
*Counsel for Petitioners*

Steven R. Compton, Esq.  
WV Division of Juvenile Services  
1200 Quarrier Street, Floor 2  
Charleston, WV 25301  
*Counsel for Respondents*

Cindy Largent-Hill  
West Virginia Supreme Court of Appeals  
Administrative Office of the Courts  
1900 Kanawha Boulevard East  
East Wing, Room 100  
Charleston, WV 25305  
*Juvenile Justice Monitor*

Martin J. Wright, Esq.  
Daniel W. Greear, Esq.  
Office of the Attorney General  
Building 1, Room E-26  
1900 Kanawha Boulevard East  
Charleston, WV 25305  
*Counsel for Respondents*

**ENTER:** This the 21<sup>st</sup> day of January, 2014.



OMAR J. ABOULHOSN, JUDGE