

No. 35505

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

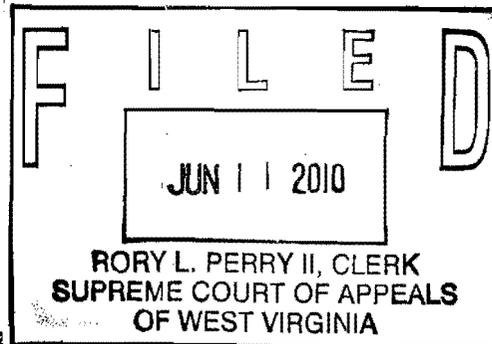
E.H. et al.,

Petitioners Below,
Appellees,

v.

KHAN MATIN, M.D., et al.

Respondents Below,
Appellant.



BRIEF OF APPELLANT, WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES

FROM THE CIRCUIT COURT OF KANAWHA COUNTY
CIVIL ACTION NO. 81-MISC-585

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I.

INTRODUCTION

Appellant, West Virginia Department of Health and Human Resources ("DHHR") (Respondents Below, Khan Matin *et al.*), appeals from the Circuit Court's Order directing it to apply for a federal Medicaid Traumatic Brain Injury ("TBI") waiver. The Circuit Court has violated the separation of powers doctrine found in Article V, Section 1 of the West Virginia Constitution, as well as the Supremacy Clause of the United States Constitution.

II.

KIND OF PROCEEDING, NATURE OF RULING OF LOWER TRIBUNAL, AND STATEMENT OF FACTS OF THE CASE

This mandamus action was filed in this Court in 1981 by patients at Mildred Mitchell-Bateman Hospital, formerly known as Huntington State Hospital, alleging that they were being confined as mental patients under conditions violating West Virginia Code § 27-5-9 which gives all patients a right to both humane conditions of custody and therapeutic treatment. The only issue decided by the Court was that the State had failed to comply with W. Va. Code § 27-5-9 in operating its hospitals, and directed the State to formulate a court-supervised plan to conform its institutional care to the legislative mandate. *E.H. v. Matin*, 168 W. Va. 248, 284 S.E.2d 232 (1981) (*Matin I*). Specifically, the Court held that: (1) the action in mandamus could be maintained against responsible state officials to enforce statutory rights; (2) care and treatment provided by the state hospital to mental patients was below standards established by the legislature; (3) it was for the Department of Health and not the Supreme Court of

Appeals to develop an appropriate plan for the entire reorganization of the mental health care delivery system in West Virginia in accordance with legislative standards; and (4) the case would be transferred to the Circuit Court of Kanawha County, and the Petitioner would be required to submit a plan to that court within 90 days from service of the Order. *Id.*

The Circuit Court, on remand, ruled that "based upon the foregoing opinion, it would preside only over the development of a plan to assure proper levels of care and appropriate conditions in the state institutions." In order to properly care for individuals who were in jeopardy of being inappropriately committed to state institutions when non-institutional care was warranted, the court also undertook to ensure that non-institutional care was provided in proper settings and at proper levels to prevent unnecessary institutionalization. The Circuit Court stated:

The foregoing conclusion does not mean that the Respondents are at liberty to ignore the practical necessity of a continuum of services[.]To this end, I will require that the plan developed to govern care and treatment at the state hospitals be entirely compatible with principles of de-institutionalization and normalization. I am of the opinion that if this mandate is followed, a definitive system of regulating the community mental health centers (Community Mental Health Center) will necessarily follow. The particulars of that system will be left to the discretion of the Director of Health.

Appellant, along with Appellees and other interested parties, jointly developed the *WV Behavioral Health Plan*, which has become known as the *Hartley Plan*. The *Hartley Plan* was accepted by the Circuit Court in an Order entered November 15, 1983. As the decades have passed, the parties have worked to resolve issues related to implementation of the *Hartley Plan*.

The Traumatic Brain Injury Act of 1996 amended the United States Department of Health and Human Services ("HHS") Public Health Services Act to "provide for the conduct of expanded studies and the establishment of innovative programs with respect to traumatic brain injury[.]" Traumatic Brain Injury Act, Pub. L. No. 104-166 (1996). In summary, the Act authorized funding for prevention, surveillance, research, and state grant programs to improve service delivery and access for individuals with TBI. The Act defined the term "traumatic brain injury" as "an acquired injury to the brain." The Traumatic Brain Injury Act Amendments of 2000 are the reauthorization legislation of the federal TBI Act, labeled as Title XIII of the Children's Health Act of 2000. Children's Health Act, Pub. L. No. 106-310 (2000). The TBI Act was further amended in 2008. Traumatic Brain Injury Act, Pub. L. No. 110-206 (2008).

Originally enacted in 1998, the West Virginia Legislature established the West Virginia Traumatic Brain and Spinal Cord Injury Rehabilitation Fund Board ("TBI Board") pursuant to the federal TBI Act, to "investigate the needs of citizens with traumatic brain injuries and spinal cord injuries, identify the gaps in services to these citizens, and issue an annual report to the Legislature each year with recommendations for meeting the identified needs, improving coordination of services and summarizing its actions during the preceding year. W.Va. Code § 18-10K-6(b) (2010). The West Virginia University Center for Excellence in Disabilities ("WVU CED") was authorized to maintain a TBI Registry. The Registry currently reports 4,063 individuals who meet legislative reporting criteria. This number does not include returning military personnel. The Circuit Court has taken issue with this fact. See January 25, 2008 Status Conf. Tr., pp. 7-8.

The Circuit Court Monitors' Tracking Document at Issue # 38 reflects the filing by Appellees of a Request for Resolution on July 9, 1998 alleging the failure of Appellant to meet the behavioral health needs of those who have a "developmental disability, but not necessarily mental retardation, and who have been disabled as a result of an acquired brain injury." The Court Monitor's Formal Recommendations made several suggestions for resolving this issue. See March 5, 1999 "Monitors Formal Recommendations - Traumatic Brain Injury," pp. 15-21. A TBI Plan, developed by the WV Division of Rehabilitative Services was put into place in December, 1998, and entered into evidence during the Request for Resolution Hearing before the Circuit Court. See August 31, 1999 Hrg. Tr., DHHR Ex. 3;¹ See also March 16, 2001 Appellant's (Respondent's Below) Plan of Resolution (Circuit Court Docketing Statement line 851).

By motion filed in 1999, Appellant requested that the Circuit Court vacate or amend the 1983 Order, arguing that changed conditions warranted relief. The Circuit Court denied the motion, but in its November 9, 2001 Order, identified thirteen goals which remained to be settled, and indicated a desire to encourage settlement of those issues within a year. Goal Number Nine related to TBI.

In 1999, the Circuit Court held hearings regarding Appellants' Motion to Vacate and the TBI issue. The TBI issue was ordered by the Circuit Court into mediation on July 3, 2001. The results of the mediation were accepted by the Circuit Court and reflected in its Order entered August 6, 2001. See Petition for Appeal, Ex. B. The parties agreed that they, along with the Court Monitor, in conjunction with the TBI Board

¹ In October, 1996, the Governor of West Virginia, pursuant to the 1996 Federal TBI Act, issued Executive Order No. 6-96, designating the Division of Rehabilitation Services as the lead agency for TBI services in West Virginia, and established a Traumatic Brain Injury Advisory Board.

would make good faith efforts to assure funding for the victims of TBI either through a waiver or other appropriate funding mechanisms. *Id.* at ¶ 3. The parties further agreed that upon receipt of such appropriation, Appellant would file for a Medicaid TBI waiver. *Id.* at ¶ 4. Finally, the parties agreed that should the Legislature fail to provide an appropriation, the parties reserved the right to take appropriate action as they deemed necessary to *secure* funding for services to TBI victims.² *Id.* at ¶ 6.

In 2004, the Circuit Court Monitor, then Appellant's Ombudsman for Behavioral Health, caused the execution of a Memorandum of Understanding among Executive branch agencies who all agreed to collaborate to ensure "systemic accountability for the provision of behavioral health and support services to individuals with TBI in West Virginia." See Appx. pp. 6-11. Appellant continues to believe this is an appropriate means for determining the method of funding TBI services. Appellant has never withdrawn as a partner in the collaboration.

On January 29, 2007, the Circuit Court held a status conference on several issues including TBI. Appellant reported that it was continuing to look at methods of funding additional services for TBI, including a TBI waiver, in view of changes in Medicaid regulations as a result of the Deficit Reduction Act.³ See January 29, 2007 Status Conf. Tr., pp. 6-14.

² The words "out of state dollars" were added to the Order, and the word "secure" was replaced with the word "enforce". Counsel for Appellees signed off on the changes; however counsel for the Appellant did not.

³ The Deficit Reduction Act of 2005 affected many aspects of domestic entitlement programs, including both Medicare and Medicaid. Section 6081 authorized new grant funds to States for the adoption of innovative methods to improve effectiveness and efficiency in providing medical assistance under Medicaid. Through the use of Transformation Grants, States could work with CMS to create programs that are more aligned with modern Medicaid populations and health care environment. See Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006).

On May 10, 2007, the Circuit Court held a status conference to inquire on the progress of the TBI issue. The Court Monitor had submitted his 2007-2008 annual report to the Court, noting the issue of a lack of appropriate services for the treatment of TBI. The Circuit Court ordered the parties to again attempt a negotiated settlement. After negotiations between the parties before a Court appointed mediator, the parties presented their settlement of the issue to the Court. An Agreed Consent Order was entered on July 3, 2007. See Petition for Appeal Ex. C. Terms of the settlement were that the system of care for services to TBI victims would be a "reasonable modification of current policies, and *be consistent with [Appellant]'s financial responsibility to render other behavioral health services and programs.*" *Id.* (emphasis added). The Agreed Order further stated that "[i]f State allocations are not sufficient to fund the desired level of support, the TBI Oversight Group will seek additional funding in future legislative sessions." *Id.*

At a status conference held on January 25, 2008, only three issues remained unresolved under the *Hartley* Circuit Court oversight: case management, forensic services, and TBI. At that conference, Appellant was able to demonstrate substantial compliance with the Court Orders on case management and forensic services, and advised the Circuit Court of its continuing efforts to complete its work in establishing a viable system of care and funding source for the TBI needs. A system of care for TBI is now in place that Appellant believes meets its obligations under this case.

In August of 2008, the Circuit Court held a hearing on, among other things, Appellants' alleged non-compliance with the July 3, 2007 Consent Order. The Circuit

Court found there had been insufficient progress toward resolution of the TBI issue. On March 17, 2009, the Circuit Court entered a Hearing Scheduling Order directing the parties to present evidence at a hearing to be held on May 22, 2009 regarding Appellant's provision of TBI services. Appellant believes the Circuit Court, without notice, expanded the scope of the May 22, 2009 hearing to include testimony regarding compliance with the 2001 Order. Appellant was deprived of adequate notice to prepare any defense regarding the 2001 Order. Furthermore, Appellant believed the 2001 TBI issue to be resolved, and had been implementing the provisions of the 2007 Order. Appellant filed a Writ of Prohibition with this Court to halt the hearing; however, this Court found that the Circuit Court acted within its authority to hold an evidentiary hearing. *State of ex rel. Matin v. Bloom et al.*, 223 W.Va. 379, 386, 674 S.E. 2d 240, 247 (2009) (*Matin III*) (per curiam). After the May 2009 hearing, the Circuit Court entered its Order on August 7, 2009. In that Order, the Circuit Court ruled that Appellant was out of compliance with its previously entered August 6, 2001 and July 3, 2007 Orders regarding the provision of TBI services. Appellant asserts that the 2007 Order supersedes the previously entered 2001 Order, and furthermore, that it has been in compliance with both. See Petition for Appeal Exs. B and C.

The August 7, 2009 Order requires Appellant to prepare an application for renewal of its Medicaid State Plan to include a Medicaid-funded TBI waiver. This provision of the Circuit Court's Order contains the conduct which constitutes the basis for this Appeal. Said

application was to be filed by January 2010. See Appx. pp. 3-4.⁴ Appellant filed Motions for Stay with the Circuit Court, as well as this Court. All motions were denied.

Appellant has provided, and continues to provide funding for TBI behavioral health services under its Medicaid and/or behavioral health services programs within its budgetary and economic constraints. Appellant asserts that throughout the last decade, the Circuit Court, through its monitoring of the *Hartley Plan* by its Court Monitor has expanded the scope of the original *Hartley Plan*, as well as exceeded its judicial authority by ordering Appellant to file an application for a Medicaid TBI waiver. Appellant filed its Petition for Appeal on December 7, 2009, and the Court granted the Petition on March 12, 2010.

III.

STANDARD OF REVIEW

Whether the Circuit Court violated the separation of powers doctrine or the Supremacy Clause presents constitutional questions. "Because interpretations of the West Virginia [and federal] Constitution . . . are primarily questions of law, we apply a *de novo* review[.]" *Phillip Leon M. v. Greenbrier County Bd. of Educ.*, 199 W.Va. 400, 404, 484 S.E.2d 909, 913 (1996), *modified on other grounds, Cathe A. v. Doddridge County Bd. of Educ.*, 200 W.Va. 521, 490 S.E.2d 340 (1997). "Where the issue on an appeal from the circuit court is clearly a question of law . . . , we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 139, 459 S.E.2d 415, 416 (1995).

⁴ The Circuit Court permitted an extension of time for Appellant to submit the TBI Waiver application by its order entered March 16, 2010.

IV.

ASSIGNMENTS OF ERROR

- A. THE CIRCUIT COURT'S ENTRY OF THE 2009 TBI ORDER IS A VIOLATION OF ARTICLE V, § 1 OF THE WEST VIRGINIA CONSTITUTION.
- B. THE CIRCUIT COURT HAS EXCEEDED THE SCOPE OF THIS COURT'S *MATIN* OPINIONS.
- C. THE CIRCUIT COURT HAS VIOLATED THE PRE-EMPTION DOCTRINE.

V.

ARGUMENT

- A. THE CIRCUIT COURT'S ENTRY OF THE 2009 TBI ORDER IS A VIOLATION OF ARTICLE V, § 1 OF THE WEST VIRGINIA CONSTITUTION.

Article V, § 1, of the West Virginia Constitution states, "The legislative, executive, and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others" "The separation of powers doctrine ensures that the three branches of government are distinct unto themselves and that they, exclusively, exercise the rights and responsibilities reserved unto them." *Simpson v. W. Va. Office of the Ins. Comm'r*, 223 W.Va. 495, 505, 678 S.E.2d 1, 11 (2009). This Court has stated, "Article V, section 1 of the Constitution of West Virginia which prohibits any one department of our state government from exercising the powers of the others, is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed." Syl. Pt. 1, *State ex rel. Barker v. Manchin*, 167 W.Va. 155, 155-56, 279 S.E.2d 622, 624 (1981). "The courts of this state are by this article forbidden to perform administrative duties." *State ex rel.*

County Court of Marion County v. Demus, 148 W.Va. 398, 401, 135 S.E.2d 352, 355 (1964) (citing *Sims v. Fisher*, 125 W.Va. 512, 25 S.E.2d 216 (1943)).

The Circuit Court, contrary to the decisions by this Court and prohibitions of our State Constitution, continues to violate the constitutional protection afforded Appellant under Article V, section 1, by ordering the creation of a specific behavioral health service, the TBI Waiver. Annual status hearings have been held throughout the years, and on August 28, 2008, at a status conference, the Circuit Court ruled that the case be reopened for evidentiary hearing, to which Appellant objected.

In the second *Matin* case, this Court reiterated the limitations on the power of the Circuit Court to interfere in the executive branch's authority to run its behavioral health programs. *E.H. v. Matin*, 189 W.Va. 102, 428 S.E.2d 523 (1993) ("*Matin II*"). The parties who initially had filed this action complaining of conditions in a state hospital, had asked the Circuit Court to prohibit the state from constructing a new state hospital. In its September 1, 1992 Order, the Circuit Court granted the relief sought. This Court held that the legislative determination to close a state facility and construct a new hospital would be upheld if it rests on some rational basis. *Id.* This Court further addressed the limits it was willing to allow the Circuit Court in overseeing Appellant's operations:

It appears that both the appellees and the circuit court may have misconstrued the nature of our mandate in the remand of [*Matin I*]. It was not our intention to have the circuit court operate as some type of a judicial super-secretary over the actions of the West Virginia Department of Health and Human Resources. . . . Furthermore, we are concerned with continued judicial involvement in the [*Hartley Plan*]. As we have observed, the earlier remand of this case to the circuit court was not designed to

allow **perpetual judicial control** over the decisions of the West Virginia Department of Health and Human Resources relating to the [*Hartley Plan*].

Id. at 105, 107, 428 S.E.2d at 526, 528 (emphasis added).

1. THE 2001 TBI ORDER

The August 6, 2001 Consent Order does not require Appellant to apply for a TBI Medicaid Waiver until it has secured an appropriate funding mechanism. See Petition for Appeal Ex. B. Appellant acknowledges that the Circuit Court has the power to enforce consent orders. Nevertheless, the law is clear; consent orders have many of the same attributes as contracts and should be interpreted as such. *Floyd v. 3rd Street Diner, Inc.*, 2009 WL 1220498 at *1 (E.D. Va. 2009) (citing *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236, 95 S. Ct. 926, 934 (1975)). "Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms." *United States v. Armour*, 402 U.S. 673, 681, 91 S. Ct. 1752, 1757 (1971). Consent Orders are the result of the parties weighing the risks involved in litigating the matter versus the potential gain, and a product of the respective bargaining power of the adverse parties. *Id.* "For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *Id.* at 682, 91 S. Ct. at 1757; *United States v. Asarco Inc.*, 430 F.3d 972, 980 (9th Cir. 2005); *Robinson v. Vollert*, 602 F.2d 87, 92 (5th Cir. 1979). Contracts may have conditions precedent, "the performance of which is essential before [the parties] become bound by the agreement; in other words, there may be a condition precedent to the existence of a contract." *Miners' and Merchants' Bank v. Gidley*, 150 W.Va. 229, 235, 144 S.E.2d 711, 715 (1965) (quoting 17

Am.Jur.2d, Contracts, Section 24). “A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.” *Sally-Mike Prop. v. Yokum*, 175 W.Va. 296, 300, 332 S.E.2d 597, 601 (1985) (quoting Syl. Pt. 3, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W.Va 484, 128 S.E.2d 626 (1962)). See also *Isaacs v. Bonner*, 2010 WL 1838390 (W.Va. 2010) (per curiam).

Reading within the four corners of the 2001 Consent Order, the terms make the securing of funding for a Medicaid TBI Waiver *or other appropriate funding mechanism* the joint responsibility of the parties, Court Monitor, and the TBI Board. Obtaining the necessary funding was made a condition precedent to applying for the Medicaid TBI Waiver. Since the parties, Court Monitor, and TBI Board were unable to secure the necessary funding, Appellant was not required to, and did not, apply for a Medicaid TBI Waiver. There is no ambiguity to this provision of the Consent Order, and the Circuit Court should be prohibited from interpreting the Consent Order in any other fashion. The Circuit Court relies upon its belief that Appellant has not acted in good faith when it attempts to secure the needed funding. However, the portion of the record that the Circuit Court cites as proving that Appellant did not act in good faith in regards to the 2001 Order is actually in reference to the 2007 Order. See May 22, 2009 Hrg. Tr., pp. 37-39, 44, 93-94, 99, 137, and 144-146. Furthermore, Appellee’s own witness, Ginger Dearth, testified that the TBI Board received money from Appellant to provide legislative education, in hopes of securing a dedicated funding source for providing TBI services. *Id.* at p. 93. If the intent of the parties was for Appellant to shoulder the responsibility for the entire process, then that understanding would have been embodied in the 2001

Consent Order. Indeed, at two status hearings in the winter of 2001 regarding the *Finalization Plan*, all parties, as well as the Court Monitor, agreed that the TBI issue was resolved:

THE COURT: Traumatic brain injury is resolved; does everybody agree with that?

MR. SUDBECK: Right.

MR. HEDGES: Yes, your Honor.

MS. VAUGHAN: Yes.

November 1, 2001 Status Conf. Tr., p. 15, l. 23-24, and p. 16, l. 1-4; and,

THE COURT: Very well. Number nine. Has that been resolved?

MR. SUDBECK: Number nine has been resolved.

December 6, 2001 Status Conf. Tr., p. 23, l. 1-3.

But still, no provision of the 2001 Consent Order can fairly be read as putting the amount of responsibility on Appellant as the Circuit Court has done in its August 7, 2009 Order, and the Circuit Court has exceeded its authority.

2. THE 2007 TBI ORDER

At a May 10, 2007 status conference before the Circuit Court, the parties were ordered into mediation to reach an agreed solution on the TBI issue. During this conference, the Circuit Court immediately appointed a local attorney as mediator. See May 10, 2007 Status Conf. Tr., p. 6, l. 15-19. After mediation concluded, an Order was entered. The July 3, 2007 TBI Consent Order clearly states:

The TBI Oversight Group and TBI Coordinator will develop an executive and legislative strategy to secure adequate state funding for the final phase of the TBI System of Service The overall goal is to secure a

dedicated source of State funding for a TBI Trust Fund supported on an annual basis by statute.

See Petition for Appeal Ex. C.

The 2007 Consent Order entered into by the parties supersedes the 2001 Consent Order. As discussed above, "Consent Orders have many of the same attributes as contracts and should be interpreted as such." *Floyd*, 2009 WL 1220498 at * 1; *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236, 95 S. Ct. 926, 934 (1975). "Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms." *Armour*, 402 U.S. at 681, 91 S. Ct. at 1757. They are the result of the parties weighing the risks involved in litigating the matter versus the potential gain, and a product of the respective bargaining power of the adverse parties. *Id.* "For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *Id.* at 682, 91 S. Ct. at 1757; *Asarco Inc.*, 430 F.3d at 980; *Vollert*, 602 F.2d at 92. Also, as discussed above, "[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." *Yokum*, 175 W.Va. at 300, 332 S.E.2d at 601. It is well established in contract law that "[a] valid, unambiguous written contract may be modified, supplemented or superseded by a subsequent written or parol contract based on a valuable consideration." *Lewis v. Dils Motor Co.*, 148 W.Va. 515, 520, 135 S.E.2d 597, 600 (1964) (citations omitted).

In this case, it is clear that the parties had a previous agreement that they, along with the Court Monitor and the TBI Board would attempt to secure funding for a

Medicaid TBI Waiver. Despite this agreement, the Circuit Court, on its own initiative, ordered the parties to enter into mediation to reach a new agreement. See May 10, 2007 Status Conf. Tr., p 6. Subsequently, the parties entered into another agreement in which the responsibility to secure funding for the Medicaid TBI Waiver was to be split between the TBI Oversight Group, TBI Coordinator, and TBI Board. Appellant provided funding to the TBI Board to perform legislative education on TBI services. See May 22, 2009 Hrg. Tr., pp. 37-38 and 93-94. Unfortunately, while a bill indeed was introduced in the House of Delegates, and supported by the Appellant, the efforts of these three groups did not produce a favorable result. This does not change the fact that the parties entered into a new agreement in 2007 which superseded the agreement of 2001 dealing with the provision of TBI services. The Circuit Court could have set a hearing in May 2007 regarding the 2001 Consent Order, but instead ordered the parties to enter into a new agreement. Therefore, any remaining obligations that Appellant may have had to secure funding under the terms of the 2001 agreement were superseded by the 2007 Order. Appellant never waived its discretion to apply for a TBI waiver, and continues to provide TBI services within fiscal constraints under its existing programs to those requesting the same.

The Circuit Court misreads the 2007 Consent Order as requiring Appellant to be solely responsible for securing funds for the TBI Trust Fund. As discussed above, “[c]onsent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms.” *Armour*, 402 U.S. at 681, 91 S. Ct. at 1757. Contracts when written in clear and unambiguous language are not subject to judicial interpretation. *Yokum*, 175 W.Va. at 300, 332 S.E.2d at 601.

The Circuit Court has gone outside the four corners of the 2007 Consent Order and tried to interpret its clear and unambiguous terms in an attempt to justify placing a burden upon Appellant that the 2007 Consent Order clearly does not bestow upon it. No provision of the 2007 Consent Order can be fairly read to require Appellant to secure Medicaid funding for a TBI program. Given the 2007 Consent Order's clear and unambiguous language, it is evident that the Circuit Court committed error, as well as violated the separation of powers doctrine, when it interpreted the Consent Order to mean Appellant has the responsibility to develop a dedicated source for state funding for the provision of TBI services.

In *Matin III*, this Court never mentions the 2001 Consent Order. The Ombudsman's 2007-2008 Annual Report never mentions the 2001 Consent Order. In the Ombudsman's Report, the unresolved TBI issue was anticipated to be resolved by the then-pending 2007 Consent Order. *Matin III* states that "[t]he traumatic brain injury issue was *initially* resolved on July 3, 2007, when the parties entered into a 'Consent Order on Services to Individuals with Traumatic Brain Injuries.'" *Matin III* at 383, 674 S.E.2d at 244 (emphasis added). From this language, one can infer that if it was aware of the 2001 Consent Order, the Court considered the 2007 Consent Order to supersede it.

On August 28, 2008, the Circuit Court held a hearing to discuss the issues identified in the 2007-2008 Ombudsman's Report "and on the continuing question of the DHHR's compliance with the [TBI] Consent Order agreed to by the parties in July 2007." *Id.* at 384, 674 S.E.2d at 245. At that hearing, Appellees never mentioned the 2001 Consent Order, only twice referring to the 2007 Consent Order. August 28, 2008 Hrg.

Tr., pp. 7, l. 5-6; 8, l. 9-11. After the hearing, the Circuit Court ordered “that the proceedings . . . be reopened . . . for the purpose of evidentiary hearings and relief upon these two issues [:]” compliance with the 2007 Consent Order and facility overcrowding.

Further, in its Memorandum of Law in opposition to Appellant’s Petition for Writ of Prohibition filed with this Court on October 17, 2008, Appellees mentioned only the 2001 Consent Order in their Facts section. Throughout their Discussion section, Appellees refer to a Consent Order in the singular, not plural, form. Significantly, on p. 19 of their Memorandum, Appellees state:

The Department, not the court, constructed a plan to deliver the necessary TBI services, and then agreed that this plan be adopted through a consent order. The Department then failed to comply with the timeline that it established and that it agreed would be enforced through the court. The court’s decision to hold an evidentiary hearing on the Department’s compliance with *the* consent order, entered voluntarily, is well within the bounds of its authority.

(citation omitted; italics added).

As to *Matin III*’s treatment of the TBI issue, this Court’s opinion stated that the parties entered into the 2007 Consent Order and Appellant had failed to comply with its own timeline. It further stated that the Circuit Court could exercise its power to enforce consent orders. Finally, it said, “[W]e believe that the circuit court is well within its authority to hold an evidentiary hearing on the DHHR’s failure to comply with this [2007] Consent Order.” *Matin III*, 223 W.Va. at 386, 674 S.E.2d at 247.

Appellant already has implemented a TBI system of care within the economic and budgetary constraints open to it. Appellant funds services to eligible individuals within existing TBI service programs in the community. Persons who suffer from TBI who meet the medical standards are eligible to apply for existing waiver services

through Appellant's Aged/Disabled ("A/D") Waiver and Mental Retardation/ Developmental Delay ("MR/DD") Waiver programs. These waiver programs are not solely dedicated to the TBI population, because Appellant is responsible for providing services to individuals with various disabilities. Appellant's programs also provide gap measures through an unmet needs fund called "Fund For You" which TBI survivors can access to get services funded that are not covered by other sources, such as private insurance, Appellants' Medicaid or Behavioral Health programs.

3. THE AUGUST 7, 2009 TBI ORDER

The August 7, 2009 TBI Order, though carefully worded, shows that it is the Circuit Court's intent to continue to be the super secretary over Appellant's behavioral health programs and direct Appellant how it is to implement the provision of TBI services to those in state hospitals and in the community. The Circuit Court has "reserve[d] the right to find DHHR in contempt" for failure to abide by the terms of previous TBI Orders, and to make the provision of TBI services a priority. Appx. p. 5, Conclusion of Law # 4.

The Circuit Court encroaches upon the executive branch's constitutional authority by ordering Appellant to develop an application for a Medicaid TBI waiver. The action of the Circuit Court encroaches upon the executive branch's authority by imposing its own will and judgment over a system of care which has been determined by the Congress of the United States and the West Virginia Legislature to belong to this state's executive branch.

By requiring Appellant to develop a Medicaid waiver application within 30 days of the August 7, 2009 Order, the Order has removed the administrative decision-making

process from Appellant's Bureau for Medical Services ("BMS"). According to state and federal statutes, the sole discretion for determining what services should be provided under the Medicaid State Plan rests with the BMS, (the federally-designated single state agency) and the Secretary of DHHR. W.Va. Code § 9-2-6(10); 42 U.S.C. § 1396a(5). As this Court noted in *Matin II*, absent a failure to fulfill a statutory duty, a violation of the constitution, or an arbitrary or capricious act by Appellant, neither the Court nor Appellees have any authority to challenge the system of care provided by Appellant. *Matin II*, 189 W.Va. at 105, 428 S.E.2d at 526.

The Circuit Court's 2009 Order further impermissibly encroaches upon the Legislature's authority in violation of the separation of powers doctrine. This Court in *Boyd v. Merritt*, 177 W.Va. 472, 354 S.E.2d 106 (1986), clearly stated the limits of judicial authority to create legislation, stating that the court does not "sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation. It is the duty of the legislature to consider facts, establish policy, and embody that policy in legislation." *Id.* at 474, 354 S.E.2d at 108. See also *State ex rel. Blankenship v. Richardson*, 196 W.Va. 726, 474 S.E.2d 906 (1996). Even though the statutory protections established by the legislature may be insufficient, it is up to the legislature to rectify the problem. *In re Dandy*, 224 W.Va. 105, ___, 680 S.E.2d 120, 126 (2009). The United States Supreme Court has made similar pronouncements regarding the proper limits of judicial entry into policy making. See *Local 1976, United Bhd. of Carpenters of Am v. NLRB*, 357 U.S. 93, 78 S. Ct. 1011 (1958).

In this case, the Circuit Court has ordered (1) that the parties decide what the TBI services program as a whole should look like and how it shall be funded, and (2) that if the parties cannot agree, that **the Circuit Court will make the final decision**. The Circuit Court has determined that a dedicated TBI services program is needed and that the program shall be funded by way of a Medicaid TBI Waiver. The creation of State programs is the sole responsibility of the Legislature. Once created, the Legislature can then delegate the administration of the program to a government agency. Here, however, the Legislature has decided not to create such a program, and has in fact decided not to appropriate money to the TBI Board, the entity that the Legislature created in W.Va. Code § 18-10K-1 *et seq.* to access the provision of TBI services. While the Legislature's attempt at helping those with TBI may be inadequate, as this Court stated in *Dandy*, it is up to the Legislature to correct the problem, not the courts. *Dandy*, 224 W.Va. at ____, 680 S.E.2d at 126.

A program for TBI services is funded as all human service programs are funded, through appropriations by the Legislature. If the Legislature does not appropriate money for the program, Appellant is powerless to force it to do so, and powerless to fund the State match to a federal appropriation for the provision of services in the program. As the Circuit Court noted, the legislature has not acted upon TBI in the last three legislative sessions, and has not done so in spite of attempts to educate legislators on TBI. See May 22, 2009 Hrg. Tr., pp 37-38, and 93-94. A bill was introduced this past legislative session to provide funding for TBI services, but did not pass. See S.B. 657, H.B. 4610, 2010 Regular Legislative Session. The Circuit Court is making Appellant's compliance with its Order and the *Hartley Plan* contingent upon

receiving funding from a separate branch of government over which Appellant has no control. The 2010 Legislature did not fund TBI. Instead, it added fifteen million dollars to Appellants two existing A/D and MR/DD Waiver programs. Appellant asserts the action of the Circuit Court ordering Appellant to apply for a Medicaid TBI Waiver is an exercise of power by the Judicial branch of government that properly belongs to the Executive and Legislative branches of government.

The 2001 Order required Appellant, the Court Monitor, in conjunction with the TBI Board to make "good faith efforts" to assure funding for a Medicaid TBI Waiver in the 2002 Legislative Session. Despite this plain and unambiguous language the Circuit Court found, as fact, that the "DHHR has not engaged in 'good faith efforts' to secure funding for a Medicaid TBI Waiver, nor has DHHR applied for a Medicaid TBI Waiver." See Appx. p. 2, Finding of Fact #2. This finding of fact by the Circuit Court is astonishing in light of the fact that there was not one scintilla of evidence presented at the hearing as to what occurred in the 2002 Legislative Session.

Specifically, the testimony on which the Circuit Court relied in reaching its finding is from the Petitioners' below, Lori Risk, WVU CED TBI Programs Coordinator:

Q: Is Plaintiff's Exhibit 3 still in front of you?

A. No.

Q: Do you disagree with the earlier testimony about the status of these items on the consent order?

A. I agree with everything; the only thing that may be just a matter of interpretation, the development, of a self advocacy group to seek legislative support. It didn't happen by August 2007, but it happened in Fall of 2007, with the development of a better brain injury care coalition by the Rehab Fund Board. And then, they worked with the Legislature in that next session.

Q. Was their funding dedicated toward that initially?

A. Initially, for the Board – do you mean to assist them?

Q. Yes.

A. Yes.

Q. Was that funding continued the following year?

A. No.

Q. Since – Mr. Sassi was unable to testify until last summer, since that time has there been any progress on these items?

A. There was legislation introduced once again this year, but it didn't make it.

THE COURT: Did the Bureau support is so far as you know?

THE WITNESS: I don't know.

BY MS. WAGNER: Q. There has been testimony.

THE COURT: Did the executive claim to support it?

THE WITNESS: As far as the Governor's office?

THE COURT: Yes.

THE WITNESS: Not that we are aware of. We didn't – there wasn't any formal –

THE COURT: Who introduced the bill? Was it introduced by the Speaker and the President?

THE WITNESS: No, it was by Veterans Affairs and Health and Human Resources. And that was who the Board was asked to present to during the Legislative Session, to provide them with information.

THE COURT: So, the Executive Branch never presented the bill to the Legislature?

THE WITNESS: Not that I – no.

THE COURT: Okay.

See May 22, 2009 Hrg. Tr., pp. 37-39.

In addition, the Circuit Court relied on the following testimony from Ginger Dearth, then Chairperson of the TBI Board, for its finding that Appellant failed to engage in "good faith efforts" to secure funding:

Q: And what is the role of the TBI Board in regards to the 2007 TBI Consent Order?

A. That would be to provide grass roots advocacy and Legislative education to hopefully provide a dedicated funding stream for TBI services in West Virginia.

Q: And did the Board receive funding from DHHR for this purpose?

A. One year we did, to assist with providing some consulting for the Legislative education piece. I know a large portion of that money went to WVU CED to provide and implement surveys and state program, and things like that, that I believe Ms. Risk previously testified to.

Q: Did you – did the Board request renewed funding for the Legislative advocacy?

A. Yes, we did.

Q: Did you receive that?

A. No, we did not.

Q: How was the initial funding used by the Board?

A. We contracted with TSG Consulting and they actually helped us establish the Better Brain Injury Coalition. They actually provided a lot of public information, allowed us to provide a lot of education to the Legislature, and in turn this past year we did get a bill introduced into the Legislature, but without that support of the consulting, we didn't have the ability to get into the Legislative education piece and provide too much of that to them this past year.

Q: Did DHHR support your efforts in the Legislature?

A. No, they did not.

Q. Did the TBI oversight group ever present a plan for the system of services and support?

A. No, they did not.

See May 22, 2009, Hrg. Tr., pp. 93-94.

There is simply no evidence that Appellant failed to engage in “good faith efforts” to secure funding in the 2002 Legislative Session as was agreed to in the 2001 Order. Rather, all of the testimony and evidence involved the 2007 Consent Order and there was no requirement that Appellant, nor any other party, engage in “good faith efforts” to secure funding for a Medicaid TBI Waiver in that Consent Order. The Circuit Court’s finding of fact that Appellant failed to engage in “good faith efforts” to secure funding for a Medicaid TBI Waiver consistent with the 2001 Order is clearly erroneous and should be reversed. See *Isaacs v. Bonner*, 2010 WL 1838390 (W.Va. 2010) (per curiam).

Moreover, this Court in *Matin III* held that the Circuit Court was within its authority to hold an evidentiary hearing on the July 3, 2007 Consent Order. There is no mention in this Court’s Opinion that the Circuit Court also hold a hearing on the 2001 Order.

Finally, this case, which involves institutional mental health reform litigation, is similar to other institutional reform litigation cases, e.g., corrections and education, in which courts have been admonished for depriving state officials of their designated legislative and executive powers. The United States Supreme Court has addressed such deprivations by federal courts in *Horne v. Flores*, ___ U.S. ___, 129 S. Ct. 2579 (2009). Although it is an education reform case, that case addresses the issue of judicial abuse of discretion, which is an issue appealed from in this case. In *Flores*, the

litigation arose in 1992 when Arizona students and parents brought a class action lawsuit alleging that the State of Arizona was violating the Equal Educational Opportunities Act of 1974 by failing to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs. The District Court entered declaratory judgment in favor of the students and parents in 2000. After 8 years of repeated attempts to seek relief from the declaratory judgment, the State filed a Rule 60(b)(5) motion for relief on the grounds that enforcement of the judgment was no longer equitable. The Supreme Court granted *certiorari* after the Court of Appeals for the Ninth Circuit affirmed the denial of petitioner's motion for relief, and reversed the judgment of the court of Appeals and remanded for further proceedings. What is instructive in this case is that the Supreme Court noted:

[I]nstitutional reform injunctions often raise sensitive federalism concerns. Such litigation commonly involves areas of core state responsibility, such as public education. See *Missouri v. Jenkins*, 515 U.S. 70, 99 (1995) (“[O]ur cases recognize that local autonomy of school districts is a vital national tradition, and that a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution” (citations omitted)); *United States v. Lopez*, 514 U.S. 549, 580 (1995) (KENNEDY, J., concurring).

Federalism concerns are heightened when, as in these cases, a federal court decree has the effect of dictating state or local budget priorities. States and local governments have limited funds. When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs. See *Jenkins, supra*, at 131 (THOMAS, J., concurring) (“A structural reform decree eviscerates a State’s discretionary authority over its own program

and budgets and forces state officials to reallocate state resources and funds”).

Id. at ___, 129 S. Ct. at 2594.

This case too involves a core state responsibility, the provision of behavioral health services and administration of the State Medicaid program within the fiscal constraints of funds appropriated by the Legislature. The Circuit Court should not be permitted to dictate to Appellant that it make the provision of TBI services a priority within its behavioral health programs budget.

B. THE CIRCUIT COURT HAS EXCEEDED THE SCOPE OF THIS COURT'S PRIOR *MATIN* OPINIONS

The Circuit Court committed error when it expanded the scope of the May 22, 2009 evidentiary hearing to include testimony regarding the 2001 Consent Order. The Circuit Court denied Appellant adequate notice to prepare its defense that it was not in compliance with the 2001 Order. In its February 6, 2009 decision, this Court held that the Circuit Court could hold evidentiary hearings regarding Appellant's compliance with the 2007 TBI Consent Order. *Matin III*, 223 W.Va. at 386, 674 S.E.2d at 247. Normally, Rule 8(a)(1) of the W.Va. Rules of Civil Procedure requires that a complaint contain, “a short and plain statement of the claim showing that the pleader is entitled to relief[.]” “The primary purpose of the[] provision[] is rooted in fair notice.” *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 776, 461 S.E.2d 516, 522 (1995). “Notice is an issue of crucial importance throughout the adjudication of a contested case. Failure to provide adequate and timely notice in a contested case is significant if the parties are to have the opportunity to prepare a defense and cross-examine

witnesses.” *McJunkin Corp. v. W. Va. Human Rights Comm’n*, 179 W.Va. 417, 420, 369 S.E.2d 720, 723 (1988) (citing A. Neely, *Administrative Law in West Virginia* § 5.11, at 274 (1982)). The right to be heard at trial means little without notice. *Id.* “[N]otice contemplates meaningful notice which affords an opportunity to prepare a defense and to be heard upon the merits.” *Id.* (quoting *State ex rel. Hawks v. Lazaro*, 157 W.Va. 417, 440, 202 S.E.2d 109, 124 (1974)).

This Court’s 2009 Opinion specifically referred to the July 3, 2007 Consent Order. *Matin III*, 223 W.Va. at 383, 387, 674 S.E.2d at 244, 248. However, the Circuit Court’s Order states that Appellant did not comply with the terms of the 2001 Consent Order. By extending the scope of the proceeding beyond the 2007 Consent Order the Circuit Court went beyond the scope of this Court’s decision, and in the process, denied Appellant adequate notice of the subject matter into which the Circuit Court intended to inquire. Appellant was not aware of the Circuit Court’s intention to rule on compliance with the superseded 2001 Consent Order, and therefore, was not able to properly prepare to defend against such allegations. The Administration of the Executive Branch had changed between 2001 and 2007.

Also, the Circuit Court’s Order exceeded the grant of authority given to it by this Court in the original *Matin* decision. In *Matin I*, this Court clearly stated that, “it is important for courts to recognize that we are not experts in medicine, mental health, or institutional management.” *Matin I*, 168 W.Va. at 258, 284 S.E.2d at 237. “Where there is a good faith difference of opinion among equally competent professional experts concerning appropriate methods of treatment and custody, such differences should be

resolved by the director of the West Virginia Department of Health and not by the courts." *Id.* at 259-260, 284 S.E.2d at 238.

The Circuit Court attempts to act as an expert in the fields of Medicaid and behavioral health program design and program budgeting. It has ordered Appellant to apply for a Medicaid TBI Waiver, and create and fund a TBI trust fund. See Appx. pp. 3-5. Essentially what the Circuit Court is saying is that it does not care that Appellant has not yet decided whether a TBI Waiver is needed, that necessary State match funding for a waiver – which must be appropriated by the WV Legislature – is not available, or that a trust fund may or may not work. At the May 2009 hearing, Appellant's witness, Patricia Winston, DHHR Behavioral Health Developmental Disabilities Program Manager, testified that there was not enough data for Appellant to make a recommendation of whether or not a Medicaid TBI Waiver was appropriate. See May 22, 2009 Hrg. Tr., pp 118, 122, 128-130. Appellant is the federally designated single State Agency which has partnered with the U.S. Department of Health and Human Services Center for Medicare and Medicaid Services, ("CMS"). Appellant has agreed in its Medicaid State Plan approved by CMS to administer and supervise the administration of the WV Medicaid State Plan which uses federal and state dollars. The Circuit Court has not been so designated.

Any individual with a TBI injury who would be eligible for a Medicaid TBI Waiver is currently eligible for one of the two existing Medicaid Waivers. Appellant is providing TBI services through its existing Medicaid waiver programs and other available Behavioral Health programs. Appellees presented witnesses at the hearing who believed a TBI Medicaid waiver program was needed. Appellees, as well as the Circuit

Court, refuse to acknowledge that Appellant can only provide behavioral health services to individuals with TBI within resources available to it and balancing the needs of others receiving state supported disability services. This is the exact situation presented in *Matin I* that this Court said the courts should defer to the judgment of Appellant. For the Circuit Court to now unilaterally decide that a Medicaid waiver program shall be had to provide services to that population, regardless of Appellant's responsibility to the needs of individuals with other behavioral or physical disabilities exceeds the Circuit Court's grant of authority and expertise.

C. THE CIRCUIT COURT HAS VIOLATED THE PRE-EMPTION DOCTRINE

Article VI, Clause 2 of the U.S. Constitution states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Apart from violating the separation of power doctrine, and exceeding this Supreme Court's opinions, the Circuit Court committed error when it ordered Appellant to create a Medicaid TBI Waiver in violation of federal and state statutes which delegate to Appellant's BMS, the single state Medicaid agency, the responsibility for administering the Medicaid program in West Virginia. See W.Va. Code § 9-2-6 (2010).

The federal regulation found at 42 C.F.R. 431.10(b) requires:

(b) Designation and certification. A State Plan Must

- (1) Specify a single State Agency established or designated to administer or supervise the administration of the plan; and

(2) Include a certification by the State Attorney General, citing the legal authority for the single State agency to

- (i) Administer or supervise the administration of the plan; and
- (ii) Make rules and regulation that it follows in administering the plan or that are binding upon local agencies that administer the plan.

42 C.F.R. § 431.10(b) (2010). Further, 42 C.F.R. § 430.10 requires that the state assure the CMS in its State Plan that the Medicaid Program will be “administered in conformity with the specific requirements of Title XIX, the regulations in this Chapter IV, and other applicable official issuances of the Department [of Health and Human Services].” 42 C.F.R. § 430.10 (2010). Subsection (e) of 42 C.F.R. § 431.10 further provides that

In order for an agency to qualify as the Medicaid agency

- (1) The agency must not delegate, to other than its own officials, authority to
 - (i) Exercise administrative discretion in the administration or supervision of the plan, or
 - (ii) Issue policies, rules and regulation on program matters.
- (2) The authority of the agency must not be impaired if any of its rules, regulation or decisions are subject to review, or similar action by other offices or agencies of the State.
- (3) If other State or local agencies or offices perform services for the Medicaid agency, they must not have the authority to change or disapprove any administrative decision of that agency, or otherwise substitute their judgment for that of the Medicaid agency with respect to the application of policies, rules and regulations issued by the Medicaid agency.

42 C.F.R. § 431.10(e) (2010).

The Office of the Governor and the West Virginia Legislature have designated Appellant's BMS to administer and supervise the W.Va. Medicaid Program and empowered the Secretary of DHHR to carry out this mandate. W. Va. Code §§ 9-2-3 and -6 (2010). BMS, within the DHHR, is the single state agency that is authorized by statute to "promulgate, amend, revise and rescind Department rules and regulations respecting qualifications for receiving the different classes of welfare assistance consistent with or permitted by federal laws, rules and policies, but not inconsistent with state law" W. Va. Code § 9-2-6(2) (2010).

The Circuit Court's August 7, 2009 TBI Order requires DHHR to develop a Medicaid TBI Waiver application within 30 days, then submit it to counsel for Appellees and the Court Monitor for review and comment. It further requires that disputes should be resolved by the Court Monitor, and if necessary the Circuit Court. These provisions in the Order clearly violate 42 U.S.C. § 1396a(5) and 42 C.F.R. § 431.10(e)(1) and (2), as the Circuit Court is usurping the single state agency's power and giving it to counsel for Appellees, the Court Monitor, and itself. Under the Circuit Court's Order, counsel for Appellees, or the Circuit Court if the parties cannot come to an agreement, will dictate what should be in the Medicaid TBI Waiver application, rather than the single state agency. 42 C.F.R. § 430.10 requires that the state "assure" CMS in its State Plan that the Medicaid Program will be "administered in conformity with the specific requirements of title XIX, the regulations in this Chapter IV, and other applicable official issuances of the Department [of Health and Human Services]." 42 C.F.R. § 430.10 (2010). This Court has written that this mandamus action could be maintained against responsible state officials to enforce statutory right. Syl. Pt. 1, *Matin I*, 168 W.Va. at 248, 284

S.E.2d at 232. Appellees have no statutory right to TBI services funded solely by Medicaid.

In *Harrison v. Skyline Corp.*, 224 W.Va. 505, 686 S.E.2d 735 (2009) (common law negligence claims based on formaldehyde exposure in manufactured homes sought to establish a standard of performance not covered by the federal Manufactured Home Construction and Safety Standards Act), this Court discussed the analysis applied to preemption questions in *Morgan v. Ford Motor Co.*, 224 W.Va. 62, 680 S.E.2d 77 (2009).

As related in *Morgan*, the preemption doctrine has its roots in the supremacy clause of the United States Constitution and is based on the premise that federal law can supplant inconsistent state law. *Id.* at Syl. Pt. 2. However, preemption is not automatic, especially in areas such as health and safety which have traditionally been regulated by the states. *Id.* at Syl. Pt. 3. Thus for preemption to occur, there has to be convincing evidence that Congress intended a federal law to supersede a state law. Such Congressional intent may be express or implied in the language of the statute under consideration. *Id.* at Syl. Pts. 4 and 5. Preemption may be implied when the pervasive regulatory scheme of a federal Act leaves no room for state regulation (field preemption), or where compliance with both federal and state regulations is physically impossible or state regulation otherwise is an obstacle to accomplishing congressional objectives (conflict preemption). *Id.* at Syl. Pt. 7. In brief, the first step in a preemption analysis is to determine if the federal Act in question expressly bars state action. If state involvement is not expressly barred by the terms of the federal statute, the second step is to determine whether field preemption or conflict preemption may be implied from the construction of the statute or federal standards promulgated thereunder.

Harrison, 224 W.Va. at ___, 686 S.E.2d at 741. The federal Medicaid Act clearly states that the sole responsibility for administering the State Medicaid Plan lies with the single state agency, or Appellant's Medicaid single state agency, the BMS. 42 U.S.C. § 1396a(5) (2010). State law mirrors this federal law at W.Va. Code § 9-2-6(10) (2010). Federal regulations clearly state that

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

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

42 C.F.R. § 431.10(e)(2) and (3) (2010). There is clear congressional intent that Appellant's BMS alone is the single state agency that administers the state Medicaid program and no other office or agency of the State may substitute its judgment for that of the single state agency. There is no conflict between federal statute and regulation and state statute and policy. Appellant's BMS is the single state agency that administers the State Medicaid programs, including Medicaid waiver programs, not the Circuit Court or its Office of the Court Monitor.

V.

PRAYER FOR RELIEF

For the reasons stated above, this Court should overturn the Order of the Circuit Court which require Appellants to apply for a Medicaid TBI waiver or fund TBI program services beyond its appropriated budget.

Respectfully submitted,

WV Department of
Health and Human Resources,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read "Charlene A. Vaughan". The signature is written in a cursive style with a large initial "C" and a long horizontal stroke at the end.

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No. 35505

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

E.H. et al.,

Petitioners Below,
Appellees,

v.

CIVIL ACTION NO. 81-MISC-585

KHAN MATIN, M.D., et al.

Respondents Below,
Appellant.

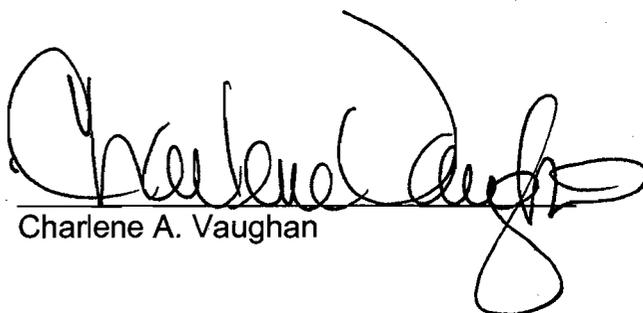
CERTIFICATE OF SERVICE

I, Charlene A. Vaughan, Deputy Attorney General, and counsel for the West Virginia Department of Health and Human Resources, do hereby certify that I have this 28th day of May, 2010 served a copy of the foregoing **APPELLANT, WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES' BRIEF**, by U.S. mail upon the following individual(s):

The Honorable Louis Bloom
Circuit Court Judge
Kanawha County Courthouse
111 Court Street
Charleston, WV 25301

Daniel F. Hedges, Esquire
Jennifer S. Wagner, Esquire
Mountain State Justice
1031 Quarrier Street, Suite 200
Charleston, WV 25301

David G. Sudbeck, Court Monitor
Office of the Court Monitor
State Capitol Complex
Building 6, Room 850
Charleston, WV 25305



Charlene A. Vaughan

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE