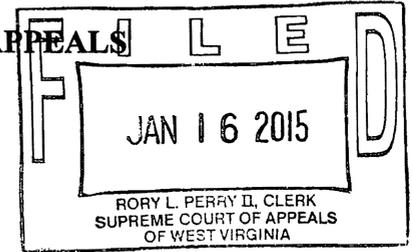


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
NO. 14-0664



**West Virginia Department of Health and Human Resources,
Bureau for Behavioral Health and Health Facilities,
Defendants Below,**

Petitioners

v.

**E.H., et al.,
Plaintiffs Below,**

Respondents.

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Plaintiffs ignore the fundamental problem in the lower court's order: that the court ordered the Department of Health and Human Resources to give \$2.9 million in annual pay raises to state psychiatric hospital employees. Plaintiffs' brief nowhere locates this staggering financial obligation in the text of a statute or a prior order in this case. Instead, Plaintiffs assert that because an earlier agreed order specified the *need* to reduce overtime and increase staff, the lower court has "inherent" power to decide *how* the Department must do so—and that no constitutional limitations restrict the court's choice. Building their entire brief on this mischaracterization of the lower court's authority, they ignore this Court's clear instruction that because policymaking functions belong to the executive branch, "[w]here there is a good faith difference of opinion" about the remedial plan necessary for hospitals to meet their legal obligations, the "differences should be resolved *by the director of the West Virginia Department of Health and not by the courts.*" *E.H. v. Matin (Matin I)*, 168 W. Va. 248, 259–60, 284 S.E.2d 232, 238 (1981) (emphasis added).

Plaintiffs then attempt to evade this Court's review, claiming that the Department's notice of appeal somehow prevents an appeal. But an order that violates the separation of powers and is "final in nature and effect" is always appealable. This Court should review and reverse the lower court's order.

ARGUMENT

- I. **Because section 10(b) only sets forth a general duty to reduce overtime and increase permanent staff, the Department retains policymaking discretion about how it should do so.**
 - A. **Plaintiffs concede that under the separation of powers picking remedial plans is a policymaking decision generally vested in the executive branch.**

Under well-established precedent, if the Department is found not to have satisfactorily fulfilled section 10(b) of the agreed order's provision to reduce overtime and non-permanent

workers, the Department retains the policymaking discretion to select and propose a new means of compliance—and the lower court does *not* have any authority to “remedy” the Department’s shortfall by increasing hospital pay \$2.9 million per year. *See* W. Va. Const. art. V, § 1; Pet Br. at 15–26; App. 244–45, Order of June 2, 2014, at 10–11; App. 1417–1542, 1596 (estimating raises to cost \$2.9 million annually).

Plaintiffs¹ assert in response that the lower court’s order did not transgress section 10(b) or the separation of powers because the lower court was merely “enforcing” an obligation contained in a prior final order. Resp. Br. at 1, 17–31 (“[T]he circuit court’s order simply enforces the parties’ agreements memorialized in section 10(b).”); *id.* at 24 (“[B]ecause the 2014 Enforcement Order solely requires that DHHR comply with its prior agreements, it was proper.”). But Plaintiffs do not contend that section 10(b) *on its face* requires an additional \$2.9 million in annual “market” pay raises on top of section 10(a)’s pay raises. Nor do they identify any other statute or prior order requiring such staggering pay raises.

Plaintiffs instead claim that when an executive agency falls short of an agreed order, the lower court has “inherent” discretion to decide both what the agreed order requires and how the executive branch must comply—without any constitutional restraints limiting the lower court’s choices. Resp. Br. at 17–18, 21, 27, 34–35 (“[B]ecause the circuit court has inherent authority to enforce its own orders, this Court should affirm.”); *id.* at 31 (arguing that “the circuit court’s order [does not] illegally conflict[] with the West Virginia Constitution or this Court’s prior decisions [because] it is well within the circuit court’s authority to ‘enter such orders and decrees as may be necessary to enforce the decrees entered before dismissal’”). Plaintiffs contend that

¹ In this reply brief, the Department refers to the respondents in this appeal as Plaintiffs to avoid confusion because the Department was referred to in the lower court on remand from this Court as respondents or defendants and the parties challenging the Department were referred to as petitioners or plaintiffs. Nevertheless, despite referring here to the response brief as a brief for the plaintiffs, this brief appears to be written by counsel of record without any actual party client, given that all named plaintiffs are deceased and this matter was never certified as a class action.

under this inherent authority, because the Department was not reducing overtime or increasing permanent staff quickly enough, the court has inherent discretion to order \$2.9 million in annual pay raises as the remedy.

That is not the law. As the Department’s exhaustive survey of this Court’s cases show, the executive branch is to select remedial plans, not the courts. Pet. Br. at 15–26. A lower court has no power to “operate as some type of a judicial super-secretary over the actions of the West Virginia Department of Health and Human Resources.” *E.H. v. Matin (Matin II)*, 189 W. Va. 102, 105, 428 S.E.2d 523, 526 (1993). To the contrary, a court may only order the Department to do what a statute or prior court order requires. And “[w]here there is a good faith difference of opinion” about the remedial plan necessary to meet a legal obligation, the “differences should be resolved *by the director of the West Virginia Department of Health and not by the courts.*” *E.H. v. Matin (Matin I)*, 168 W. Va. 248, 259–60, 284 S.E.2d 232, 238 (1981) (emphasis added).²

This basic aspect of the separation of powers is respected by this Court as well as federal and state courts across the country. Pet. Br. at 15–26.³ As a New York appellate court

² These principles are not discretionary, and so the lower court’s compliance with them is a question of law reviewed de novo. Pet. Br. at 27.

³ Like this Court and federal courts, state courts across the country hold that under the separation of powers the executive branch is to select any remedial plans necessary to bring state institutions into legal compliance. See, e.g., *Pena v. Doar*, 37 Misc. 3d 1201(A) at * 7, 960 N.Y.S.2d 51 (Sup. Ct. 2012) (“As for plaintiffs’ request in their supplemental submission that defendants be compelled, by Court order, to allocate their staffing and funding resources in a specific way, the Court agrees with the City defendants that, at least in this respect, such an order would *overstep the bounds of the judiciary*, involving it too intimately in *the State and City defendants’ affairs.*”) (emphasis added); *McCleary v. State*, 173 Wash. 2d 477, 541-42, 269 P.3d 227, 259 (2012) (refusing to “cross[] the line from ensuring compliance with article IX, section 1 into dictating the precise means by which the State must discharge its duty” because to do otherwise “fails to respect the division of constitutional responsibilities” (internal quotations omitted); *Hancock v. Comm’r of Educ.*, 443 Mass. 428, 455, 460, 822 N.E.2d 1134, 1153, 1156 (2005) (holding that because this area is “rife with policy choices that are properly the Legislature’s domain,” “courts should order remedies and “step[] in, only reluctantly, *after* many years of *legislative* failure or inability to enact education reforms and to commit resources to

implement those reforms”) (emphasis added); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 799 (Tex. 2005) (“The Constitution does not require a particular solution. We leave such matters to the discretion of the Legislature.”) (emphasis added); *Ex parte James*, 836 So. 2d 813, 819 (Ala. 2002) (“[A]ny specific remedy that the judiciary could impose would, in order to be effective, necessarily involve a usurpation of that power entrusted exclusively to the Legislature.”) (emphasis added); *Lee v. Macomb Cnty. Bd. of Comm’rs*, 464 Mich. 726, 735-36, 629 N.W.2d 900, 905 (2001) overruled on other grounds by *Lansing Sch. Educ. Ass’n v. Lansing Bd. of Educ.*, 487 Mich. 349, 792 N.W.2d 686 (2010) (“[I]t is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution”) (emphasis added); *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1280 (Wyo. 1995), as clarified on denial of reh’g (Dec. 6, 1995) (providing “a reasonable period of time for the legislature to achieve constitutional compliance.”); *DeRolph v. State*, 1997-Ohio-84, 78 Ohio St. 3d 193, 212-13, 677 N.E.2d 733, 747 (“Although we have found the school financing system to be unconstitutional, we do not instruct the General Assembly as to the specifics of the legislation it should enact” because “[w]e refuse to encroach upon the clearly legislative function of deciding what the new legislation will be.”) (emphasis added); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 214 (Ky. 1989) (“It is now up to the General Assembly to re-create, and re-establish a system of common schools within this state which will be in compliance with the Constitution. We have no doubt they will proceed with their duty.”) (emphasis added); *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 90 Wash. 2d 476, 520, 585 P.2d 71, 96 (1978) (“While the Legislature must Act pursuant to the constitutional mandate to discharge its duty, the general authority to select the Means of discharging that duty should be left to the Legislature.”) (emphasis added); *Serrano v. Priest*, 18 Cal. 3d 728, 775 n. 54, 557 P.2d 929, 957 (1976) (in bank) supplemented, 20 Cal. 3d 25, 569 P.2d 1303 (1977) (“We are confident that the Legislature . . . will be able to devise a public school financing system which achieves constitutional conformity because the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.”) (internal quotations omitted) (emphasis added); *McDuffy v. Sec’y of Executive Office of Educ.*, 415 Mass. 545, 619 n. 92, 615 N.E.2d 516, 554 (Super. Ct. 1993) (“We shall presume at this time that the Commonwealth will fulfil its responsibility with respect to defining the specifics and the appropriate means to provide the constitutionally-required education.”) (emphasis added); *Pascack Ass’n, Ltd. v. Mayor & Council of Washington Twp., Bergen Cnty.*, 131 N.J. Super. 195, 204, 329 A.2d 89, 94 (Ch. Div. 1974) modified, 74 N.J. 470, 379 A.2d 6 (1977) (“Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults. . . . [T]he judiciary should not itself devise a plan except as a last resort.”) (emphasis added). These practices reflect the broader principle that courts should be reluctant to interfere at all with the management and funding of state institutions. See, e.g., *Nebraska Coal. for Educ. Equity & Adequacy (Coal.) v. Heineman*, 273 Neb. 531, 557, 731 N.W.2d 164, 183 (2007) (“The landscape is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their states’ school funding systems. Unlike those courts, we refuse to wade into that Stygian swamp.”); *Abrams v. New York City Transit Auth.*, 39 N.Y.2d 990, 992, 355 N.E.2d 289, 290 (1976) (“Here questions of judgment, discretion, allocation of resources and priorities inappropriate for resolution in the judicial arena are lodged in a network of executive officials, administrative agencies and local legislative bodies. To allow such actions would in effect attempt displacement, or at least overview by the courts and

explained, where “[t]he Legislature, by statutory provision, saw fit to put these types of decisions squarely within [a hospital system’s] executive function,” “[n]either the petitioners nor the courts should be permitted to substitute their judgment for the discretionary management of public business by public officials, as neither have been lawfully charged with that responsibility.” *Roberts v. Health & Hospitals Corp.*, 87 A.D.3d 311, 325, 928 N.Y.S.2d 236, 247 (App. Div. 2011).

Indeed, Plaintiffs do not dispute these constitutional principles. They concede that “DHHR’s citations to prior orders in this case are accurate.” Resp. Br. at 29. They also agree that “[t]here is no dispute over the general principal [*sic*] that reform should be spearheaded by the executive branch.” *Id.* at 30. And they recognize that under these precedents, when “this Court has invalidated a statute and/or regulation,” it “stay[s] its decision” on the question of a remedy in order to “to give the Legislature the opportunity to remedy the issue.” *Id.* at 30.

B. Plaintiff’s attempts to evade this constitutional constraint are unpersuasive.

1. As a result, under the separation of powers, if the Department is not meeting a legal duty to reduce overtime and increase permanent staff, the lower court’s enforcement authority extends only to requiring the Department to identify and adopt a new remedial plan to reduce overtime and increase permanent staff. Pet. Br. at 15–17. Far from having unlimited discretion to direct the Department as it pleases, the lower court must remain faithful to the original order, which here did not specify the means of compliance, and to the separation of powers, which here do not vest in the court policymaking authority to decide the means by which the Department will meet its legal obligations. *Id.* The lower court however disregarded both limits on its powers and instead grafted new duties onto section 10(b) under the guise of “enforcing” it. App.

the plaintiffs in litigations, of the lawful acts of appointive and elective officials charged with the management of the public enterprises.”).

244–45, Order of June 2, 2014, at 10–11. Under this Court’s precedent, this decision cannot stand.

Plaintiffs maintain that the separation of powers is irrelevant here because the Department’s duty to reduce overtime and increase permanent staff stems from an *agreed* order, which they argue needs only comply with “contract law.” Resp. Br. at 24–26 (“Despite DHHR’s attempts to distract with constitutional arguments, this is an issue of straightforward contract law.”); *id.* at 31 (“[T]hese cases dealing with the validity of statutes has [*sic*] no bearing on the instant matter, which involves the enforcement of an agreement between the parties.”). Plaintiffs are incorrect. The state constitution always limits the executive and judicial branches. *See* W. Va. Const. art. I, § 3. It applies to state contracts and remedial plans alike.

Plaintiffs moreover cite no precedent holding that a court enforcing a prior agreed order need not abide by the separation of powers. Nor can they, because constitutional limits on *the judicial branch’s* remedial powers have nothing to do with the *source* of the Department’s underlying legal obligations. If the constitution and statutes vest policymaking discretion in the executive, nothing can transfer that authority to the court. Pet. Br. 17–26; *cf. Matin II*, 189 W. Va. at 104, 106, 428 S.E.2d at 525, 527 (examining whether the lower court’s subsequent remedial orders abided by both *agreed orders* and the separation of powers).

2. Unable to muster any serious reason why these precedents do not apply here, Plaintiffs instead cite two decisions rejecting separation of powers challenges in other contexts earlier in this case. Resp. Br. at 24–31. Neither decision is relevant.

First, Plaintiffs refer to this Court’s holding that the separation of powers does not prevent the lower court from holding evidentiary hearings on the Department’s compliance with prior court orders. *State of West Virginia ex rel. Matin v. Bloom (Matin IV)*, 223 W.Va. 379, 381–82, 386, 674 S.E. 2d 240,242–43, 247 (2009); Resp. Br. at 4, 24–25, 27, 31. Plaintiffs claim

that *Matin IV* stands for the proposition that “the circuit court’s order [does not] illegally conflict[] with the West Virginia Constitution or this Court’s prior decisions” because “[a]s this Court has already held, it is well within the circuit court’s authority to ‘enter such orders and decrees as may be necessary to enforce the decrees entered before dismissal,’ which is precisely what occurred here.” Resp. Br. at 31. But this misses the point. Whether a court has the power to inquire into violations of its orders is an entirely separate question from whether the court may order the Department to implement a remedial plan of the court’s own choice. Pet. Br. at 19.

Second, Plaintiffs cite this Court’s decision holding that when the Department agreed to seek a federal waiver, the court could direct the Department to seek the waiver. *E.H. v. Matin (Matin V)*, No.35505 (W. Va. Apr. 1, 2011) (memorandum decision); Resp. Br. at 6, 24–25, 29. But this, too, is beside the point. In that instance, having rejected the Department’s arguments about the advisability of a waiver and the policy judgments involved, the Court affirmed the lower court’s decision to order the Department to do exactly what a prior agreed order required: no more, no less. Pet. Br. at 19. Here the situation is far different: under the guise of enforcing a past agreed order, the lower court required much more than ministerial compliance. It created new obligations and took over policymaking decisions vested in the Department under both the order and the separation of powers.

3. Plaintiffs next claim that even if the separation of powers does presumptively bar courts from imposing their own remedial plans, the court nevertheless may devise a remedial plan itself if the Department’s first remedial plan falls short. Resp. Br. at 26, 31. Plaintiffs assert that “undoubtedly the five years in which DHHR has failed to comply with the 2009 Agreed Order by eliminating mandatory overtime and reliance on temporary workers is sufficient to permit the circuit court to” “intervene.” *Id.*

Plaintiffs' proposed forfeiture rule cannot be squared with the separation of powers however, which under this Court's precedents preclude courts from devising remedial plans unless the executive branch *defaults* on proposing a plan. That did not happen here. Nor does this approach take into account the extraordinary lengths to which courts in the past deferred to the executive branch so that it may come up with a suitable remedy. Pet. Br. at 20–25.

In any event, no extraordinary circumstances exist here meriting departure from this Court's historic deference to the coordinate branches. As of April 2012, the Department was in full compliance with the agreed order. App. 16–17. Only in mid-2014 was the Department found deficient, and even then it was ready to propose and adopt one of three alternate plans it believed could remedy the deficiency. Pet. Br. at 7–8, 11. Surely, even under the plaintiff's supposed exception for extraordinary executive branch dereliction, more judicial patience is called for than the lower court showed here.

4. Plaintiffs also suggest that the Department is attempting to re-litigate the question settled in section 10(b) of the agreed order: whether any state statute requires the Department to reduce overtime and increase permanent staff. Resp. Br. at 23–25, 33. But no one is arguing about whether the hospitals' staffing levels in 2009 or the present fall short under a statute: this appeal assumes that section 10(b) properly identified a legal duty on the Department to reduce overtime and increase permanent staff. Nor is the Department appealing whether its hospitals currently fall short of section 10(b)'s own mandate to reduce overtime and increase permanent staff: by not appealing the lower court's merits finding of deficiency, that deficiency is assumed in this appeal. The Department instead is appealing the narrow question, first decided in the lower court's June order, of whether—assuming a legal deficiency exists—*the Department* has the discretion to pick a remedial plan that will reduce overtime and increase permanent staff or if

instead *the lower court* has the power to decide that the only way to satisfy section 10(b) is through \$2.9 million in new annual pay raises. Pet. Br. at 1.

Because the question of deficiency is not at issue in this appeal, Plaintiffs are also entirely off-target in providing lengthy recitals of the ways in which they believe the Department has been deficient under section 10(b). Resp. Br. at 3–16, 24, 26–28.

5. Left with no defense of the lower court’s actions under precedent, Plaintiffs resort to claiming that the plan ordered by the lower court is in fact *the Department’s* preferred plan, and not a plan the court selected or forced on the Department. Resp. Br. at 16–17, 27–28. Plaintiffs assert that

[T]he circuit court has not concocted its method of addressing deficient care at the hospitals. Instead, the court allowed the parties to reach a mutually agreeable solution through mediation in 2009, in which DHHR agreed to discontinue the use of mandatory overtime and temporary workers and agreed that the best way to address these concerns was through providing competitive salaries through wage increases. DHHR, not the court, constructed this plan, and then agreed that this plan be adopted through a consent order.

Plaintiffs could not be more wrong. Pet. Br. at 7–13, 16, 25. The Department did not agree to this plan in 2009 because section 10(b) says nothing about staff pay.

Plaintiffs next assert that this plan was freely proposed by the Department when the lower court held the Department was falling short of section 10(b) and they claim that the Department had no plan other than raising pay. Resp. Br. at 28 (“[T]he circuit court left the remedy to DHHR’s discretion, solely ordering it to ‘develop a plan’ to ensure compliance with its prior agreements.”); *id.* at 31 (“[T]he circuit court permitted DHHR to create its own plan in the instant matter” and “order[ed] DHHR to draft its own plan.”); *id.* at 28 (“[T]he *only* remedy presented for DHHR’s violation of its agreement was to increase staff salaries.”).

But rather than letting *the Department* propose a plan to reduce overtime and increase permanent staff, the lower court instead decided what plan *it* wanted the Department to “submit” to reduce overtime and increase permanent staff. Pet. Br. at 7–13, 16, 25. Before the evidentiary hearing, the Department told the court it wanted any remedy to involve the legislature. Pet. Br. at 7. The court then held a hearing solely dedicated to the question of merits liability. *Id.* Then, the court unexpectedly announced its chosen remedy alongside its merits ruling, after which the Department immediately submitted detailed evidence about three remedial plans it would support instead, all of which involved the legislature. Pet. Br. at 9–13; Resp. Br. at 15–16. The court ignored these proposals and stuck to its original decision requiring the Department to immediately raise pay and not defer action until after the legislature time could adopt its own remedy. Pet. Br. at 9–13, 16, 25. The court furthermore held the Department *in contempt* until the Department submitted this court-designed plan. Pet. Br. at 12–13.

Plaintiffs are mistaken to suggest that in this situation the Department had a suitable choice about what kind of plan to submit. Resp. Br. at 28, 31. As the court said itself, the remedy must immediately provide pay raises and as the Court knew, there is only one administrative way to immediately raise pay: ask the Division of Personnel to make an exception permitting pay raises. App. 244–45, Order of June 2, 2014, at 10–11; Pet. Br. at 9–13. Far from being allowed to select any way it chose to reduce overtime and increase permanent staff, the Department was reduced to serving as the court’s scrivener.

Plaintiffs also assert that the lower court’s remedy respected the legislature’s freedom to implement its own solution. Resp. Br. at 31–33. After all, they say, “[t]he circuit court permitted DHHR to work with the Legislature to implement a long-range plan of its choosing, in addition to developing a plan which can be implemented immediately.” *Id.* But Plaintiffs miss the point. The Department’s contention is not that the lower court improperly precluded the

Department from going to the Legislature for a statutory override *after* the Department implemented the lower court's plan; the Department's objection is that the lower court required the Department to implement *the court's* plan *immediately*, instead of letting the Department work with the Legislature to implement a plan of *their* choice *instead of* the lower court's plan. Pet. Br. at 1–2, 7–8, 10–17. Simply put, being told to fix things the court's way, after which the Department could approach the legislature, is not the same as being allowed to fix things the Department or the Legislature's way from the start.

6. Finally, Plaintiffs suggest that the court's plan should be upheld because evidence showed that more money could help fix the hospitals' problems. Resp. Br. at 11–12, 20. This idea also misses the mark. The question is not whether evidence supports the court's choice of remedy, but whether law empowers the court to require the Department to implement this remedy. Pet. Br. at 1. Whether or not the court's plan is better than the Department's proposals as a matter of policy is irrelevant because “[w]here there is a good faith difference of opinion” about the remedial plan necessary for hospitals to meet a legal obligation, the “differences should be resolved *by the director of the West Virginia Department of Health and not by the courts.*” *Matin I*, 168 W. Va. at 259–60, 284 S.E.2d at 238 (emphasis added).

Even if this appeal rested on whether the court's or the Department's plan is better policy, serious questions exist about whether the lower court's plan will reduce overtime and increase permanent staff at the hospitals. The lower court seemed to think that money is a magic solution, but paying existing workers more money without reforming leave and hours rules is unlikely to succeed. Pet. Br. at 4, 6–7. And, contrary to Plaintiffs' assertion, the lower court's order also will not increase the actual number of hospital workers in the hospitals at any given time. Resp. Br. at 12 n.6. The lower court did not order the hospitals to create new positions and add extra people to wards: it just ordered the Department to pay existing staff more. Pet. Br. at 6–10.

Because vacant permanent positions are always filled in practice with contract or temporary workers, so that the hospitals are not short of staff on the wards at any time, the same number of people will work with patients at all times no matter how this appeal is decided.

II. Section 10(a) of the agreed order and subsequent orders do not mention, let alone require, higher starting salaries for new hospital employees.

Section 10(a) of the agreed order—the only section of the agreed order dealing with pay raises— only requires increasing pay for existing employees: consistent with the Department’s understanding from mediation, it says nothing about increasing starting salaries for future hires. App. 4, Agreed Order of July 2, 2009 at ¶ 10(a); Pet. Br. at 1–2, 4, 8, 27–28. Plaintiffs have abandoned any argument to the contrary. Resp. Br. at 9, 13, 15, 18, 33–36.

Plaintiffs instead argue that a *later* 2012 order required a new starting salary for all employees. Resp. Br. at 9, 13, 15, 18, 33–36 (“[T]he question of whether DHHR is required to implement new starting salaries for certain classes of health care workers was settled *in 2012*.”) (emphasis added). That order, dedicated to denying reconsideration of prior orders, states that

It is further ORDERED that employees in the LPN and Health Service Trainees, Workers, and Assistants classifications employed on or after January 1, 2013, are entitled to pay raises effective January 1, 2013, as provided in the Order entered December 11, 2012. . . . It is FURTHER ORDERED that the raises described above must be reflected and included in employee paychecks by January 31, 2013.

App. 143. Plaintiffs claim that the phrase “on or after January 1, 2013” expanded the scope of section 10(a)’s raises for existing employees to create higher starting salaries for all future hires.

The more natural reading of this 2012 reconsideration order, however, is that the Court ordered raises for existing employees who worked for the hospitals at any time in January 2013, just as the court had interpreted section 10(a) to require. Pet. Br. at 5. The common meaning of the term *pay raise* is an increase in compensation for an existing employee beyond what the existing employee is currently paid. *E.g., Maclin v. SBC Ameritech*, 520 F.3d 781, 789 (7th Cir.

2008) (distinguishing between “the employee’s salary relative to her pay range” and “the total raise and bonus for which the employee [later] qualifies”); *Jones v. Nat’l Council of Young Men’s Christian Associations of the United States of Am.*, No. 09 C 06437, 2014 WL 2781579, at *48 (N.D. Ill. June 18, 2014) (noting that an employee claimed that other employees “were all paid more *and* received raises and promotions faster than she did” (emphasis added)). The terms “[s]alaries and raises” do not ordinarily mean the same thing; instead employees usually are said to “receive pay increases based on the amount of time they’ve spent in the system” as existing employees, in which case a raise is on top of what the employee has previously earned, or employers are said to give “step raises—set pay increases defined by the salary schedule according to length of time employed” —on top of what an existing employee has already earned. Rebecca Catalanello, *Schools revamping vague personnel rules*, *Mobile Register*, 2001 WLNR 11154498 (Aug. 20, 2001). Providing raises for existing employees moreover satisfied section 10(a)’s purpose of retaining and recruiting workers because if existing employees receive raises, causing morale and retention improve, the hospital can also be a more desirable place for job applicants. And, given that the Court ordered all raises to be paid and reflected in employee paychecks by January 31, 2014, the “raises described” in the order could not encompass “raises” for employees not yet hired by January 31, 2014.

Plaintiffs also do not explain where the court would have received authority to expand the agreed order in this unanticipated and offhand way. They do not cite any statutes or authority, apart from section 10(a), that could have permitted such a change to the mediated settlement. Nor do they explain how the court could have altered the agreed order without notice, briefing, or a hearing to the Department. Moreover as the Department argued—and as Plaintiffs conveniently ignore—“[r]equiring the state to expend money—that neither the executive nor legislature believe that it agreed to spend—raises serious questions about whether the lower

court has the power to order the appropriation of state funds and limit the legislature’s decision-making authority over Department budgets.” Pet. Br. at 28. For these reasons, the more prudent course is to interpret the 2012 order in harmony with section 10(a) and the Department’s understanding from mediation: that this order does not affect future employees’ starting salaries.

Last, Plaintiffs are wrong to argue that the Department has ignored the agreed order in its entirety and willfully done nothing to improve staffing. Resp. Br. at 1, 12–13, 16, 24, 27–28, 32, 36 (alleging that DHHR “failed to take any steps on its own to bring itself into compliance with the court orders or the law over the past five years.”). Here the parties had a good-faith dispute over the obligations of the agreed order. The Department and the legislature provided raises for many workers beyond what the order required and fully satisfied what *they* believed the order required based on the mediated settlement. Pet. Br. at 4. In the end, the Department’s remedial plan fell short of increasing salaries, reducing overtime, and increasing permanent staff to the lower court’s satisfaction, but that does not mean the Department was idle. Pet. Br. at 6, 9.

III. Plaintiffs cite nothing preventing this Court from reviewing the lower court’s order.

Because Plaintiffs have no answer to the Department’s constitutional arguments, they seek to avoid the merits by arguing that this Court lacks jurisdiction. Their contentions are unpersuasive.

A. The lower court’s order is immediately appealable because it is final in nature and effect.

1. This court has jurisdiction to hear this case because the lower court’s June order resolves disputed legal obligations and orders a permanent remedy. This order is final in its nature and effect—and immediately appealable just like this case’s past orders. Pet. Br. at 28–35; *see E.H. v. Matin (Matin V)*, No.35505 (W. Va. Apr. 1, 2011) (memorandum decision) (not questioning appellate jurisdiction).

Plaintiffs have no direct response. Conspicuously missing from Plaintiffs' brief is any discussion of the standard for finality. Resp. Br. at 1–2, 17, 19–21, 33 n.12. As this Court well knows, “[t]he key to determining if an order is final . . . is *whether the order approximates a final order in its nature and effect.*” Syl. Pt. 1, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 773, 461 S.E.2d 516, 519 (1995) (emphasis added). No certification language is required. *Id.* And yet Plaintiffs' brief includes nary a mention of this Court's standard *or* why the order here would not meet it.

Plaintiffs' silence is a telling acknowledgment. It shows that no reason exists why the lower court's order is *not* final in its nature and effect. Indeed, if there were an argument against the final nature and effect of an order like this, Plaintiffs certainly would have identified a prior occasion in this case (or any similar case) when this Court held it lacked jurisdiction to review an order like this. And yet they did not.

Rather than engaging this Court's standard for finality, Plaintiffs claim that an order cannot be a final judgment unless it “ends” the entire case, such that no other issues are “pending.” Resp. Br. at 19–21, 33 n.12; *id.* at 22 (arguing that the order is “not final” because “the circuit court conducted numerous hearings and issued several subsequent orders on the same topic over the several months following the entry of that order”). But that is not the standard. If an order is final in nature and effect, that is the end of the discussion. It is irrelevant that the lower court continues to hold hearings on enforcement of the order, which it would do in all cases where the original order is unstayed, nor is it relevant that the lower court holds hearings on other unrelated merits disputes. Pet. Br. at 28–35.

And despite arguing that an appeal cannot proceed if anything remains pending in the lower court, Plaintiffs conceded elsewhere in their brief that past orders like this one were appealable and appealed, despite litigation continuing to this day. Resp. Br. at 2–4, 25, 29

(“DHHR appeals” the order giving rise to *Matin V* in 2011 and citing the appeal in *Matin II*); *id.* at 9 (“DHHR did not appeal the circuit court’s orders” from 2012”); *id.* at 33 (“[T]he question of whether DHHR is required to implement new starting salaries for certain classes of health care workers was settled in 2012 in orders that DHHR did not appeal.”); *id.* at 34–36 (“DHHR did not appeal the 2012 orders and those orders are valid and enforceable”). Plaintiffs offer no reason to explain why the 2009 agreed order or the 2012 “enforcement” orders were immediately final, appealable, and preclusive—while the similar “enforcement” order at issue here is not. Resp. Br. at 18–19. Nor do they explain why the same June 2014 order would be final in No. 14-0845 but not final here. Resp. Br. at 2, 17, 21, 23 (arguing that this court should “reserve that issue” of the first assignment of error “for Appeal No. 14-0845, in which it will be fully addressed”). Nor do they coherently explain why part of this order’s merits determination may be appealable here but not all of it. *Id.* at 23 (“Respondents herein respectfully request that this Court reserve consideration of the first assignment of error, which raises the circuit court’s holding in subparagraph (a) of the 2014 Enforcement Order for consideration in Appeal No. 14-0845, and limit the focus of this appeal to the second assignment of error, specifically the holding contained in subparagraph (b) of the 2014 Enforcement Order.”).

2. Rather than providing any reason under this Court’s standards for why the order at issue here is not final, Plaintiffs argue that in its *notice of appeal* the Department somehow conceded that this order was non-final, despite the notice of appeal’s statement that “the Order is final.” Resp. Br. at 21–23. Plaintiffs seem to think that because the Department had yet to submit a plan to reduce overtime and increase permanent staff, an issue that remained pending in the lower court in contempt proceedings, the Department conceded that the order was final as to a special starting salary but non-final as to the duty to submit a plan. *Id.* But this strains the Notice of Appeal too far. Under a section labeled “relief sought,” the Department stated that its

merits argument against this order was would be that “the Circuit Court is without authority to order” *any* “additional salary increases beyond what the 2009 Agreed Order required and contemplated.” Notice of Appeal Att. at 6.

In any event, a notice of appeal is non-binding and this Court does not require an appellant to do more in a notice of appeal than identify the order to be appealed. *See* W. Va. Code § 58–5–4; W. Va. R. App. P. 5(f). Unlike in federal court, in which filing of a notice of appeal is the dispositive jurisdictional event, an appeal in this Court is perfected by filing an opening brief, which occurs several months after a notice of appeal. *In re E.P.*, No. 13-0782, 2014 WL 1302458, at *3 (W. Va. Mar. 31, 2014).

That is also why Plaintiffs are wrong to suggest that this court cannot hear assignments of error added since the notice of appeal. Resp. Br. at 1–2, 21–23. Under this Court’s revised rules, “the assignments listed in the Notice of Appeal are not binding on the petitioner when the brief is filed and the appeal is perfected.” Guide To Preparing An Appeal From A Circuit Court Decision Using The Revised Rules Of Appellate Procedure 6 (2010) (“[T]he assignments set forth at the docketing stage must” *only* “reflect that the petitioner has performed a review of the case and has a good faith belief” in the appeal’s merit.). After a notice of appeal is filed, the petitioner may add “any issues intended to be presented to the Court that were *not* contained in the notice of appeal.” W. Va. R. App. P. 7(d). And the “assignments of error” in the brief “need not be identical to those contained in the notice of appeal.” W. Va. R. App. P. 10(c)(3); *Dellinger v. Pediatrx Med. Grp., P.C.*, 232 W. Va. 115, 123, 750 S.E.2d 668, 676 (2013) (considering assignment of error despite arguable omission from a notice of appeal). Plaintiffs cite no authority to the contrary.

3. Plaintiffs also contend that jurisdiction is defeated *not* because of any lack of finality *but* because “the same exact issue is being appealed separately in Appeal No. 14-0845” and “this

Court refused DHHR’s request to consolidate Appeal No. 14-0845 with the instant appeal.” Resp. Br. at 21. The existence of a subsequent appeal, or the denial of a procedural consolidation, cannot strip the Court of appellate jurisdiction. The Department filed a second appeal out of an abundance of caution to ensure that this Court would have jurisdiction over the lower court’s order even if Plaintiffs argued this order was non-final. Pet. Br. at 34–35. The second appeal includes an appealable denial of certification under Rule 54(b)—a certification that in their brief Plaintiffs ultimately do not contend is necessary—but which the Department earlier sought in case Plaintiffs did contend it was necessary to review the lower court’s order. *See id.* As a result, to the extent this Court has doubts about jurisdiction in this case, due to the need for an entry of finality or a more detailed notice of appeal, the appeal in No. 14-0845 provides a clean vehicle for review. But, far from requesting this Court rule on the same issues twice, the second appeal is only necessary if an obstacle prevents hearing the first. Indeed, the Department moved to consolidate these appeals because the second appeal’s extra basis for jurisdiction is the only difference between the appeals. Denial of consolidation, however, does not mean that this Court dismissed either appeal.

B. The collateral order doctrine provides an alternate basis for review.

The lower court’s order meets this Court’s standard for finality, but even if it did not, this Court could still review it under the collateral order doctrine.⁴ Pet Br. at 35–37. The lower court’s order resolved each disputed issue in a permanent and complete way, and almost by

⁴ Plaintiffs would thus be wrong to suggest, as they have in the past, that instead of appealing the Department should have sought a writ of prohibition. Motion To Dismiss at 12-13, No. 14-0845. A writ is only appropriate when no appellate review is available, and, as prior appeals in this case show, appellate jurisdiction exists here. *Cf. State ex rel. McGraw v. King*, 229 W.Va. 365, 371 729 S.E.2d 200, 206 (2012) (“This Court looks with disfavor upon the use of the extraordinary writ process to address problems which should have been handled by an appeal.”). Should this Court depart from precedent and hold that no appellate jurisdiction in fact exists, a writ would become ripe. Perhaps recognizing this point, Plaintiffs fail to press in this appeal that a writ is somehow the proper vehicle.

definition “resolves an important issue completely separate from the merits of the action” if the order is not a final judgment because it concerns *who* is to devise the necessary remedial plan. *Id.* at 35–36. If this Court defers review until no other issues remain pending on any topic in the lower court, it will effectively preclude appellate review of any orders in this case. *Id.* at 36.

Because Plaintiffs have no argument why this order is not final in its nature and effect, Plaintiffs allege that the Department *only* argued that the order falls under the collateral order doctrine. Resp. Br. at 19, 22 (“It is undisputed that the 2014 Enforcement Order is not a final judgment in this case, in the sense that it has not ended the litigation . . . DHHR contends, however, that appellate jurisdiction exists in this case under the collateral order doctrine.”). But Plaintiffs misstate the Department’s brief, which argued that the collateral order doctrine provides an alternate basis for review to the extent the order proves non-final. Pet. Br. at 35–37. Plaintiffs also appear to confuse the collateral order doctrine, which provides for review of decisions that are something less than a final order, and the final-judgment rule, which provides for review of any order final in its nature and effect. Resp. Br. at 19–22.

More importantly, however, Plaintiffs offer no reason why the collateral order doctrine does not apply if the lower court’s June order is non-final. They instead assert that this doctrine is unmet because the lower court’s order “merely enforce[s] prior agreements entered into by DHHR, as well as prior orders of the circuit court, and because the issues resolved by the 2014 Enforcement Order are central to the case.” Resp. Br. at 19–20. But this contention fails to explain how the order can at once resolve and enforce merits issues “central to this case” while at the same time *not* being a definite resolution of disputed merits issues and an order for a remedy, such that the order is *final* in its nature and effect. And even under the collateral order doctrine, Plaintiffs’ contentions fail for the same reasons as Plaintiffs’ merits argument that the lower

court's "enforcement" order is immune from legal challenge or constraint: this order did much more than merely "enforce" a prior order. *See supra* Pt. 1A–B.

Finally, as this Court has held, "in extraordinary circumstances," this Court may address "issues not properly before it." *McGraw v. Am. Tobacco Co.*, 224 W. Va. 211, 223, 681 S.E.2d 96, 108 (2009). Plaintiffs have declined to respond to the argument that the exceptional nature of this case warrants review even if a jurisdictional question exists. Pet. Br. at 36–37.

C. This Court may review enforcement of agreed orders.

An agreed order does not waive a party's future objections to or appeal of a subsequent order that purports to enforce the agreed order but in reality expands the order or that orders an unlawful remedy for non-compliance. Pet. Br. at 37. Plaintiffs' brief does not address this point, and therefore appears to concede that nothing precludes review on this basis.

D. The Department did not waive its objections in the lower court.

The Department preserved its issues for review by noting its objections promptly orally and in writing in the lower court. Pet. Br. at 37–40. The lower court nevertheless held that the Department's later compliance with the court's order to submit a plan along court-ordered lines waived any prior objection to the requirement to submit a plan. App. 1282–83, 1315, 1318–19. But a party does not waive its objections to a court's order when it complies with an order—over its noted objections—merely to purge contempt. W. Va. R. Civ. P. 46. Nor in a constitutional case like this *could* the Department waive its objections. Pet. Br. at 39–40.

Perhaps for these reasons, Plaintiffs have abandoned any contention that the lower court was correct to hold that the Department waived its objections in the lower court.

CONCLUSION

The lower court should be reversed.

Respectfully submitted,

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
BUREAU FOR BEHAVIORAL HEALTH
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Dated January 16, 2015

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
NO. 14-0664

**West Virginia Department of Health and Human Resources,
Bureau for Behavioral Health and Health Facilities, Defendants Below,**

Petitioners

v.

E.H., et al., Plaintiffs Below,

Respondents.

CERTIFICATE OF SERVICE

I, Julie Marie Blake, Assistant Attorney General and counsel for Defendants-Petitioners, verify that on January 16, 2015, I served a copy of *DHHR/BHHF'S Petitioner's Brief* upon all parties as indicated below by hand delivery:

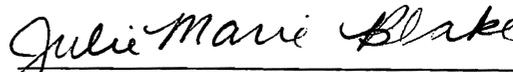
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