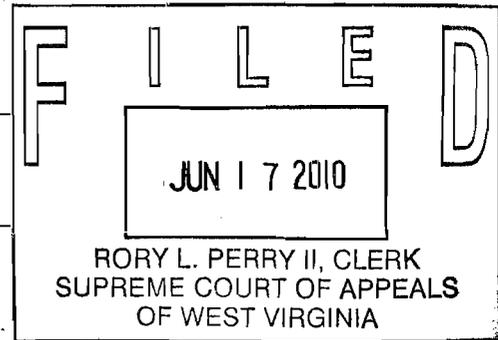


IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA

No. 35558



MEN AND WOMEN AGAINST DISCRIMINATION,

Appellee and Plaintiff Below,

VS.

THE FAMILY PROTECTION SERVICES BOARD,
JUDI BALL, BARBARA HAWKINS, KATHIE KING,
JUDY KING SMITH, AND LORA MAYNARD,

Appellants and Defendants Below.

BRIEF FOR THE APPELLANTS

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KIND OF PROCEEDING

Appellee Men and Women Against Discrimination filed this action in the Kanawha Circuit Court seeking injunctive relief against the continued application of certain rules and policies allegedly maintained by the appellant, the Family Protection Services Board. Appellee's challenges relate to the licensing of domestic violence shelters, certification of domestic violence advocates, and regulation of perpetrator intervention programs. Following submission of the case on cross-motions for summary judgment, the lower court granted the requested injunction. This Court subsequently granted appellants' petition for appeal and their request for a stay of the circuit court's injunction.

STATEMENT OF FACTS

The appellants are the Family Protection Services Board ("the Board") and its members. The Legislature created the Board in the Domestic Violence Act ("the Act"), West Virginia Code 48-26-101, *et seq.* According to § 301 of the Act, the Board is to consist of five members. Three are appointed by the Governor, one of whom must be a "commissioner" of a "family protection shelter" (as defined in § 204¹), one must be a "member of a major trade association that represents shelters across the State," and another from the general public. The other two members are the Secretary of Health and Human Resources ("DHHR") and the Chairperson of the Governor's Committee on Crime, Delinquency and Correction or their designees.

The Board's duties are primarily set forth in §§ 48-26-401 through 406. Those sections give the Board the usual administrative duties but, more substantively, charge the Board with oversight and licensing of domestic violence shelters (§§ 402 & 406) and regulation and licensing of perpetrator intervention programs ("PIPs") (§§ 404-05). The Act also directs the Board to propose

¹Such facilities are referred to in this petition as "shelters" or "domestic violence shelters."

rules for legislative approval to implement the Act's provisions. W. Va. Code 48-26-401(4), -403, & -404(a). As defined in § 204 of the Act, a shelter is "a licensed domestic violence shelter created for the purpose of receiving, on a temporary basis, persons who are victims of domestic violence, abuse or rape as well as the children of such victims." The shelters also provide victims with services to support them and to help them deal with their domestic situations and with the pattern of coercion and control that accompanies domestic violence. PIPs are designed to educate and counsel abusers to end the pattern of coercion or violence that has marked their relationships with their spouses, partners, boy or girl friends, ex-mates, or children, as the case may be. Pursuant to the authority granted to it by the Act, the Board has proposed, and the Legislature has adopted, implementing rules, West Virginia Code of State Regulations, Title 191, Series 1-5.

Men and Women Against Discrimination ("MAWAD") has described itself as "a nonprofit charitable corporation organized to protect the rights of children . . . to access and relationship with both parents regardless of gender and to promote fairness and gender equality in the implementation of the purposes of the West Virginia Domestic Violence Act and the manner in which services are provided pursuant to that Act to the citizens of the State of West Virginia." Complaint, ¶ 1. It contends that the Board has maintained several policies that discriminate against men or that inhibit the free speech rights of its members.

As part of its requirements for licensing shelters,² the Board directs that "at least one-third of [a shelter's] direct service providers [must be] certified by the West Virginia Coalition Against Domestic Violence as Domestic Violence Advocates." WVCSR § 191-2-3.2.k.12. The regulations

²The Board has established a substantial set of standards and requirements that a program must satisfy in order to be licensed as a shelter. They appear in WVCSR §§ 191-2-3 & -4.

define a “Certified Domestic Violence Advocate” as “an advocate employed by a licensed family protection program who has been approved by the Board of Directors of West Virginia Coalition Against Domestic Violence as meeting the eligibility standards outlined in the Coalition’s Domestic Violence Advocate Certification Project.” WVCSR § 191-2-2.2. Domestic violence advocates “assist[] victims of domestic violence and family violence in obtaining support and assistance in securing rights, remedies, and services from criminal justice and other public agencies. [Advocates’] services include but are not limited to: filing temporary restraining orders, providing court accompaniment, assisting with financial, medical, and housing needs.” WVCSR § 191-2-2.1.

The West Virginia Coalition Against Domestic Violence (“the Coalition”) is a private nonprofit corporation whose mission “is to work toward the elimination of personal and institutional violence against women, children, and men.” Coalition Website, www.wvcadv.org.³ The Coalition coordinates “statewide efforts to increase safety and options for victims of domestic violence[,] ... focuses on strengthening public policy and securing community-based services[,] . . . [and is] dedicated . . . to the transformation of social systems that support non-violence, accountability, and economic self-sufficiency in diverse family structures and intimate relationships.” *Id.*; *see also* Deposition of Sue Julian at 11-12. Its members consist of the State’s fourteen domestic violence shelters licensed by the Board, it is managed by two team coordinators, *id.* at 9-10, and it is the State’s only “major trade association that represents shelters across the State,” as that phrase is used in § 301 of the Act. Deposition of Judi Ball at 46-47. The Board selected the Coalition to train and certify domestic violence advocates because the Coalition’s staff members “are the experts. They

³The page quoted in the text is at:
<http://www.wvcadv.org/about-us/who-we-are/about-us/who-we-are/history-of-wvcadv>.

are known all over the country for their expertise.” Ball Deposition at 41.

One of the licensing requirements imposed on the shelters by the Board is that each “shall have a written process for obtaining alternative lodging to house victims of domestic violence and their children when the residential facility is filled to capacity or is unable to accommodate special needs populations, including, but not limited to, victims who are: elderly, have disabilities, or who are adult and adolescent males.” WVCSR § 191-2-4.11. The shelters have responded in different ways to this requirement. The Morgantown shelter, for example, has a policy that provides shelter for an adolescent male who comes to the shelter with his mother if the shelter can, space permitting, accommodate privacy concerns. Deposition of Judy King Smith at 12, 16, 65. If an adult male presents himself, he is provided with the full range of the shelter’s services but he would not be housed at the shelter. Rather, the shelter would find accommodations for him at a local motel or homeless shelter. *Id.* at 13-18. Because the overwhelming number of persons who seek safety at the shelter (and at shelters across the country) are women and because Morgantown does not have the facilities to accommodate adult men and women at the same time, the men are given separate facilities. On the other hand, the shelter in Parkersburg can, when not at capacity, simultaneously accommodate adult men and women, and it has done so. Ball Deposition at 13-15. (No adult men had, however, sought shelter in the six years preceding Ms. Ball’s Deposition. *Id.* at 13-14.)

There was no evidence in the record that any man had ever been denied services by a shelter or that any male domestic violence victim had ever complained about separate or unequal services.

The Legislature has also charged the Board with the responsibility for issuing regulations and overseeing programs of intervention for the perpetrators of domestic violence. Pursuant to that charge, the Board has issued Series 3 of Title 191 of the Code of State Regulations. Section 3 of that

Series sets forth the licensing standards for the PIPs. Among them are requirements that educators/facilitators who conduct the PIPs must have thirty hours of training and that the training must include (among other things) “[t]he understanding that domestic violence is deeply rooted in historical attitudes toward women and is intergenerational.” WVCSR § 191-3-3.3a.3.

ASSIGNMENTS OF ERROR

The circuit court erred in making the following rulings:

1. That WVCSR §§ 191-2-2.2 (defining a certified domestic violence advocate as one approved as such by the Coalition) and 191-2-3.2.k.12 (requiring shelters to assure that at least one-third of their direct service providers are certified by the Coalition) exceeded the authority granted to the Board by the Domestic Violence Act, Findings and Conclusions at 9;

2. That the Board has required separate perpetrator intervention programs for men and women and that such programs conflict with the clear intent of the Legislature, Findings and Conclusions at 9-10;

3. That WVCSR § 191-2-1, describing the scope of the Series 2 Rules, is inconsistent with the intent of the Legislature and violates the First Amendment, Findings and Conclusions at 11;

4. That WVCSR § 191-2-4.11, requiring shelters to have a written process for obtaining alternative lodging if they are unable to accommodate special needs populations such as the elderly, disabled, or adult and adolescent males, is inconsistent with the intent of the Legislature and violates the First Amendment, Findings and Conclusions at 11;

5. That WVCSR § 191-3-3, requiring PIP educators/facilitators to have instruction on “the understanding that domestic violence is deeply rooted in historical attitudes toward women and is intergenerational,” is inconsistent with the intent of the Legislature and violates the First

Amendment, Findings and Conclusions at 11.

POINTS AND AUTHORITIES

I. THE BOARD'S RULES RELYING ON THE COALITION AGAINST DOMESTIC VIOLENCE FOR CERTIFICATION OF DOMESTIC VIOLENCE ADVOCATES ARE VALID LEGISLATIVE RULES.

A. As Legislative Rules That Have Been Approved and Enacted by Both Houses of the Legislature and Signed by the Governor, the Board's Rules Are Conclusively Authorized by the Legislature and Have the Force of Law.

State ex rel. Meadows v. Hechler, 195 W.Va. 11, 462 S.E.2d 586 (1995).

State ex rel. Barker v. Manchin, 167 W.Va. 155, 279 S.E.2d 622 (1981).

Kincaid v. Mangum, 189 W.Va. 404, 432 S.E.2d 74 (1993).

Appalachian Power Company v. Tax Department, 195 W.Va. 573, 466 S.E.2d 424 (1995).

B. The Board's Rules Are Consistent with the Original Legislative Grant of Authority Delegated to the Board by the Domestic Violence Act.

Appalachian Power Company v. Tax Department, 195 W.Va. 573, 466 S.E.2d 424 (1995).

II. THE BOARD'S REGULATIONS REGARDING PERPETRATOR INTERVENTION PROGRAMS ARE VALID.

West Virginia Code of State Regulations, Title 191, Series 3.

III. SECTION 191-2-1 IS VALID AND CONSTITUTIONAL.

IV. SECTION 191-2-4.11'S REQUIREMENT THAT DOMESTIC VIOLENCE SHELTERS WHO ARE UNABLE TO ACCOMMODATE SPECIAL NEEDS POPULATIONS, INCLUDING ADOLESCENT AND ADULT MEN, MUST HAVE A WRITTEN PROCESS FOR OBTAINING ALTERNATIVE LODGING FOR THEM IS VALID.

Woods v. Horton, 167 Cal. App. 4th 658, 84 Cal. Rptr. 3d 332 (2008).

V. WVCSR § 191-3-3, WHICH REQUIRES THAT SERVICE PROVIDERS IN PERPETRATOR INTERVENTION PROGRAMS RECEIVE INSTRUCTION "ON THE UNDERSTANDING THAT DOMESTIC VIOLENCE IS DEEPLY ROOTED IN HISTORICAL ATTITUDES TOWARD WOMEN AND IS INTERGENERATIONAL," IS NOT INCONSISTENT WITH THE DOMESTIC VIOLENCE ACT OR THE FIRST AMENDMENT.

National Endowment for the Arts v. Finley, 524 U.S. 569 (1998).
Rust v. Sullivan, 500 U.S. 173 (1990).
Johannes Livestock Marketing Association, 544 U.S. 550 (2005).
United States v. American Library Association, 539 U.S. 194 (2003)
Pleasant Grove City, Utah v. Summum, ___ U.S. ___, 129 S.Ct. 1125 (2009)

ARGUMENT

I. THE BOARD'S RULES RELYING ON THE COALITION AGAINST DOMESTIC VIOLENCE FOR CERTIFICATION OF DOMESTIC VIOLENCE ADVOCATES ARE VALID LEGISLATIVE RULES.

A. As Legislative Rules That Have Been Approved and Enacted by Both Houses of the Legislature and Signed by the Governor, the Board's Rules Are Conclusively Authorized by the Legislature and Have the Force of Law.

The circuit court held that WVCSR §§ 191-2-2.2 and 191-2-3.2.k.12 “exceed the authority granted to the Board.” Findings and Conclusions at 9. Section 191-2-2.2 defines a “Certified Domestic Violence Advocate’ [as] an advocate employed by a licensed family protection program who has been approved by the Board of Directors of West Virginia Coalition Against Domestic Violence as meeting the eligibility standards outlined in the Coalition’s Domestic Violence Advocate Certification Project.” The relevant portion of § 191-2-3.2.k provides that “A family protection program's board of directors shall adopt and monitor implementation of written personnel policies that shall, at a minimum: . . . 12. Assure that at least one-third of its direct service providers are certified by the West Virginia Coalition Against Domestic Violence as Domestic Violence Advocates.” These rules cannot possibly be outside the Board’s authority because the Legislature has determined otherwise.⁴

All of the Board’s regulations challenged or addressed in this case are “Legislative Rules,”

⁴This argument applies as well to the other Board regulations found by the circuit court to be outside legislative authorizations. See Parts II - V, *infra*.

which means that they were adopted pursuant to the procedures set forth in the Rule Making Article of the State's Administrative Procedure Act, W. Va. Code §§ 29A-3-1, *et seq.* Under those provisions, proposed agency rules (with some exceptions not relevant here) must be submitted to the Legislature's Rule-Making Review Committee, which reviews proposed rules to see if they are consistent with the Legislature's intent and directions in the authorizing legislation. W. Va. Code § 29A-3-11. Any draft bill that the Committee prepares recommending that rules be authorized must "contain a legislative finding that the rule is within the legislative intent of the statute which the rule is intended to implement, extend, apply or interpret[.]" W. Va. Code § 29A-3-11(d). If the Committee concludes that is so, it then submits the proposed rules to the legislative clerks and the rules are packaged into various "bills." W. Va. Code § 29A-3-12. These bills may be referred to other appropriate committees or they may proceed directly to the respective legislative chambers.

Id.

Ultimately, each House votes on each bill proposing rules, and if the bill receives majority approval in both chambers, it is then presented to the Governor for his signature or veto. If he signs the bill, or fails to veto it, then the regulations contained therein become final.

This legislative procedure is that which is set forth in Articles VI and VII of the West Virginia Constitution for the enactment of statutes. The Legislature cannot exercise any power (except as specifically authorized by the Constitution) unless it follows the Articles VI and VII procedures. That is, to assert any sovereign authority, the Legislature must act as a body, must act bicamerally with majority approval⁵ in each House, and its action must be presented to the Governor

⁵Article VI, § 32 of the Constitution defines "majority" for purposes of legislative votes as meaning "a majority of the whole number of members to which each house is, at the time, entitled, under the apportionment of representation, established by the provisions of this Constitution."

for his approval or veto. Those requirements apply to legislative review of proposed agency rules. *State ex rel. Meadows v. Hechler*, 195 W.Va. 11, 462 S.E.2d 586 (1995); *State ex rel. Barker v. Manchin*, 167 W.Va. 155, 279 S.E.2d 622 (1981). Any attempt by the Legislature to use the constitutional procedures for approval of legislative rules must also adhere to all of the substantive as well as procedural requirements in Article VI (or any other provision in the Constitution). *Kincaid v. Mangum*, 189 W.Va. 404, 432 S.E.2d 74 (1993).

The upshot of all that is that the Board's Legislative Rules, which coursed the legislative gauntlet, necessarily bear the stamp of legislative approval that has the force of law. Having survived the lawmaking procedures of Articles VI and VII, Legislative Rules must be conclusively presumed to be consistent with legislative intent and direction because the Legislature has by majority vote approved them, and they have received gubernatorial affirmation (or a legislative override). Hence, even *if* the proposed rules were not expressly authorized by the original enabling legislation, the Legislature's subsequent approval of the rules makes those rules the law. Were it any other way, the procedures would violate the separation of powers principles set forth in the *Meadows* and *Barker* decisions, *supra*.

The leading and most comprehensive case in West Virginia on judicial review of administrative regulations, *Appalachian Power Company v. Tax Department*, 195 W.Va. 573, 466 S.E.2d 424 (1995), requires the conclusion that the Board's legislative rules are valid. Writing for the Court in that case, Justice Cleckley observed "that legislative rules in West Virginia are authorized by acts of the Legislature and we have treated them, as they should be, as statutory enactments." 195 W.Va. at 584, 466 S.E.2d at 435. The Court in that case, however, went on to subject the challenged regulations to the analysis from *Chevron U.S.A., Inc. v. Natural Resources*

Defense Council, Inc., 467 U.S. 837 (1984), because the rules had been approved by the Legislature in an omnibus bill in a manner that the Court had previously declared to be unconstitutional as violating the Single Object Clause in Article VI, § 30 in *Kincaid v. Mangum, supra*. 195 W.Va. at 584, 466 S.E.2d at 435. The Court noted in its footnote 10:

After reviewing the omnibus bill passing 110 W. Va. C.S.R. 13, § 1a.2.11 [the rule at issue in that case], it is clear this is the form of omnibus bill that we were concerned about in *Kincaid v. Mangum, supra*. The bill in question groups together many different rules without any rational basis for the grouping. Additionally, the bill does not include the full text of any of the rules it covers. In fact, 110 W. Va. C.S.R. 13, § 1a.2.11 is never specifically mentioned in the bill. The omnibus bill contained a general provision authorizing the promulgation of all the relevant rules subject only to the changes mentioned in the bill. Thus, if the Legislature made no changes to 110 W. Va. C.S.R. 13, § 1a.2.11, it is reasonable to believe that the Legislature did not specifically register its approval of this particular rule and instead relied on the general provisions permitting rule promulgation.

By contrast, in approving WVCSR Title 191, Series 2 and 3 in Senate Bill No. 2014, enacted June 13, 2003, and attached to this Brief as Appendix 1,⁶ the Legislature authorized rules dealing with various professional licensing standards, thus satisfying the Single Object Rule. Section 64-9-5 of that Act enacted rules proposed by the Family Protection Services Board with modifications made to meet the objections made by the Legislative Rule-Making Review Committee and with further changes made during the committee and legislative review process. The inescapable inference from that enactment is that the Legislature has expressly approved the Board's rules as they existed in Series 2 and 3.

Any judicial rejection of these Board rules would defy and usurp legislative authority.

⁶The statute can be retrieved at:
http://www.legis.state.wv.us/Bill_Text_HTML/2003_SESSIONS/2x/Bills/sb2014%20enr.htm.

B. The Board's Rules Are Consistent with the Original Legislative Grant of Authority Delegated to the Board by the Domestic Violence Act.

Even if the Court subjects the Board's regulations to the *Chevron* analysis, which this Court has characterized as the "watershed decision in the area of judicial deference to regulatory agencies," *Appalachian Power, supra*, 195 W.Va. at 582 n.6, 466 S.E.2d at 433 n.6, the rules would pass muster.

The Domestic Violence Act imposes on the Board the duty to "[p]romulgate rules to implement the provisions of [the Act] and any applicable federal guidelines." W. Va. Code § 48-26-401(4). Section 403 of the Act also provides that the "board shall propose rules for legislative approval . . . to effectuate the provisions" of the Act. In addition, the Board is required to "establish and enforce [a] system of standards for annual licensure for all shelters and programs in the state[.]" § 48-26-401(13), and to license the State's domestic violence shelters. W. Va. Code § 48-26-402. These grants of authority are broad and generous in assigning to the Board the discretion to create the standards for the operation of shelters.

The circuit court concluded that the Board's delegation to the Coalition for certification of domestic violence advocates exceeded the Board's authority because "[n]owhere in the enabling statute is the Board authorized to delegate the setting of standards for licensed facilities to a private trade organization such as the Coalition." Findings and Conclusions at 9. That analysis is backwards.⁷ Rather, under the *Chevron* analysis as interpreted by this Court in *Appalachian Power*, if the "legislative rule is valid, clear as to its intent and *not contrary to the legislative enactment* that

⁷It has to be backwards because "[n]owhere in the enabling statute is the Board authorized" to do anything other than to create the standards for licensure. If the Board lacked the authority to do anything except that which the Act specifically directs the Board to do, then the Board could do nothing.

triggered its promulgation, the need for further review does not arise. It becomes the court's duty to apply the rule as written." 195 W.Va. at 586, 466 S.E.2d at 437. Making the correct inquiry under *Appalachian Power*, one finds that there is nothing in the Domestic Violence Act that precludes reliance on a private entity to certify domestic violence advocates, and that the Board's rules providing for such are therefore valid.⁸

Drawing on private entities for their expertise in making decisions about licensing is not the least bit inappropriate or unusual. This Court's own Rules for Admission to the Practice of Law, for example, include Rule 3.0, which states:

[A]ny person who wishes to take the bar examination in the State of West Virginia shall satisfy the Board that he or she has completed a full course of study in a law school accredited by the American Bar Association, or its equivalent, and has been granted and holds a degree of L.L.B. or J.D., or their equivalents, and a degree of A.B. or B.S., or higher degree, from an accredited college or university, or its equivalent.

The American Bar Association, of course, is a private trade organization, like the Coalition. Unlike the Coalition, the A.B.A. operates nationwide rather than solely within West Virginia. The accreditation of colleges and universities is also done by private associations, including public institutions.⁹ Reliance on private entities for regulation, accreditation or certification is not uncommon. *See, e.g., National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179 (1988); Brief of *Amici Curiae* National Network to End Domestic Violence, *et al.*

Moreover, the Board's use of the Coalition for certification of advocates was eminently

⁸This argument applies as well to the other Board regulations found by the circuit court to be outside legislative authorizations. *See* Parts II - V, *infra*.

⁹West Virginia University, for example, receives its accreditation from the Higher Learning Commission of the North Central Association of Colleges and Schools, which is an independent corporation. www.ncahlc.org.

reasonable: its staff persons “are the experts. They are known all over the country for their expertise.” Ball Deposition at 41. The Legislature also implicitly recognized that fact when it required that one of the Board’s members “must be a member of a major trade association that represents shelters across the State.” W. Va. Code § 48-26-301(a). The only such association in West Virginia is the Coalition. Ball Deposition at 46-46.¹⁰

II. THE BOARD’S REGULATIONS REGARDING PERPETRATOR INTERVENTION PROGRAMS ARE VALID.

The circuit court held at pages 9-10 of its Findings and Conclusions:

The legislature has expressed a clear intention to provide for licensure and funding of perpetrator intervention programs that are gender-neutral. The Board, acting on its own, has morphed this intent into a gender specific program that includes only men and excludes all women. As a result, women are deprived of the benefits of participation in perpetrator intervention programs. Male victims of domestic violence perpetrated upon them by women are deprived of the benefits they may receive from their spouse, sibling or significant other’s participation in an approved program. The rule conflicts with the clear intent of the legislature and is void.

This holding is truly baffling and wholly unsupported.

First, there is no “rule” that creates gender-specific PIPs. One will search in vain throughout the entirety of Title 191, Series 3 – that which deals with “standards and procedures for the licensure” of PIPs – looking for a gender classification. Nowhere do the regulations call for differential treatment of men and women in PIPs. The most relevant provision, § 191-3-3.5, sets forth the “criteria concerning a perpetrator’s appropriateness for the program.” It calls for a perpetrator to be admitted to a program if the perpetrator is “assessed by the program to be eligible for participation in the program.” *Id.* According to the stated criteria, that assessment is essentially

¹⁰The federal government’s Department of Health and Human Services has also recognized the value of domestic violence coalitions. *See*:

<http://www.acf.hhs.gov/programs/fysb/content/familyviolence/coalitions.htm>.

concerned with any mental health or substance abuse issues that the perpetrator may have and how they would affect the individual's appropriateness for the program. At no point is there any reference to the person's gender. There is simply no "rule" that says what the circuit court has found to be "void" or that the Board could change.

Second, the Board has nothing to do with the actual decisions about who is "appropriate" for PIPs. Referrals to PIPs are made by judges and others in the system, Ball Deposition at 65;¹¹ Appendices 2 and 3,¹² and as noted above, the decision about whether to admit the referral is made by the individual PIP. WVCSR § 191-3-3.5. If PIPs are gender-specific in West Virginia, then MAWAD needs to sue the judges making the referrals and the programs making the admissions decisions. The Board is simply not a player in those determinations.

Given that there are no Board regulations providing for (or even mentioning) gender-specific PIPs and that the Board is not involved in screening PIPs participants, it is not surprising that the circuit court's above-quoted conclusion fails to cite any rule promulgated, or action taken, by the Board to support the conclusion that the Board discriminates. It does not.

Third, it also would not be surprising if the PIPs' admittees are disproportionately male: the overwhelming percentage of domestic violence perpetrators are men. Ball Deposition at 13-14; Julian Deposition at 80; King Smith Deposition at 16-20; American Bar Association Commission on Domestic Violence, "A Survey of Recent Statistics," available at: <http://www.abanet.org/domviol/statistics.html> (84% of spouse abuse victims are women and 86%

¹¹The Board's rules also provide for voluntary admissions, § 191-3-3.5, but those are extremely rare. Ball Deposition at 60.

¹²The appendices' captions refer to "BIPPs," which is the acronym for Batterers Intervention and Prevention Programs, which is another term for PIPs.

of dating partner abuse victims are women).¹³

Finally, as administered by the individual PIPs, women perpetrators are, in fact, put into programs and do receive needed counseling or education. The curricula for men and women, however, are different, and the genders are separately schooled or facilitated. Ball Deposition at 54-55; King Smith Deposition at 22. The separate curricula and the dynamics dictate the gender-separate instruction. *Id.* The most prominent programs used for men are the Duluth and Emerge curricula, and these are designed specifically for men. Ball Deposition at 71-72. Evidence-based studies have repeatedly found them to be effective. Ball Deposition at 72. The PIPs have used different content to deal with women abusers, and they vary in what they use. King Smith Deposition at 22-27; *see* Appendices 2 & 3.

The Board's rules and practices regarding PIPs do not conflict with any provision of the Domestic Violence Act or the legislative intent that led to its enactment.

III. SECTION 191-2-1 IS VALID AND CONSTITUTIONAL.

The circuit court held at page 11 of its Findings and Conclusions that WVCSR § 191-2-1 “conflict[s] with the express intention of the legislation that authorized the promulgation of [the Board's] rules” and that it violated the First Amendment rights of MAWAD members. The section states, in its entirety:

¹³The commission cited a study done by the U.S. Department of Justice for its data. That study was Matthew R. Durose et al., U.S. Dep't of Just., NCJ 207846, *Bureau of Justice Statistics, Family Violence Statistics: Including Statistics on Strangers and Acquaintances*, at 31-32 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf>. Other sources concur in those findings. *E.g.*, National Coalition Against Domestic Violence, “Domestic Violence Facts” (85% of DV victims are women), available at: [http://www.ncadv.org/files/DomesticViolenceFactSheet\(National\).pdf](http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf).

§ 191-2-1. General.

1.1. Scope -- This rule establishes general standards and procedures for the licensure of family protection programs as specified in W. Va. Code §48-26-401. The West Virginia Code is available in public libraries and on the Legislature's web page at <http://www.legis.state.wv.us/>.

1.2. Authority -- W. Va. Code §§48-26-401(4) and 48-26-402.

1.3. Filing Date -- June 23, 2003.

1.4. Effective Date -- August 11, 2003.

The section could not possibly be inconsistent with legislative intent; all that it does is to provide the basic information about the scope of and background on Series 2. It includes no substantive content, and it does the same thing that is set forth in every other § 1 of every other series in the Code of State Regulations. *See also* Part I, *supra*. Just as obviously, it has nothing at all to do with anyone's speech.

If one infers that the circuit court intended to insert "*et seq.*" after the citation -- and thereby void all of Series 2 -- but accidentally omitted the phrase, the result would be just as silly. The circuit court's order nowhere explains why the entirety of Series 2 would be invalid and nowhere gives any guidance as to what the Board would have to do to satisfy the court.

The circuit court's ruling as to § 191-2-1 must be reversed.

IV. SECTION 191-2-4.11'S REQUIREMENT THAT DOMESTIC VIOLENCE SHELTERS WHO ARE UNABLE TO ACCOMMODATE SPECIAL NEEDS POPULATIONS, INCLUDING ADOLESCENT AND ADULT MEN, MUST HAVE A WRITTEN PROCESS FOR OBTAINING ALTERNATIVE LODGING FOR THEM IS VALID.

Page 11 of the Findings and Conclusions also holds that § 191-2-4.11¹⁴ is inconsistent with the legislative intent behind the Domestic Violence Act and with the First Amendment. That section states, in its entirety:

¹⁴The Findings and Conclusions at 11 actually state that "§ 191-to-4.11" is void. It is clear from the context, however, that the court was referring to § 191-2-4.11.

A shelter shall have a written process for obtaining alternative lodging to house victims of domestic violence and their children when the residential facility is filled to capacity or is unable to accommodate special needs populations, including, but not limited to, victims who are: elderly, have disabilities, or who are adult and adolescent males.

In terms of whether the section is consistent with whatever legislative intent the circuit court is referring to, the arguments in Part I establish that it is consistent with legislative intent and that the regulation is valid. S.B. 2014 (2003) – Appendix 1 – specifically and conclusively approved the rule (*see* Part I-A, *supra*) and there is nothing in the Domestic Violence Act that is inconsistent with the section (*see* Part I-B, *supra*).

As for the First Amendment, § 191-2-4.11 does nothing to regulate or inhibit anyone's speech, other than to require some regulated shelters to engage in some expression of their own choosing. The section in no way affects the speech of MAWAD's members. How a requirement for the provision of protective services for special needs populations could *ever* be an inhibition on anyone's right of free speech simply defies imagination.

The circuit court in its conclusion may have had in mind, as a basis for § 191-2-4.11's invalidity, the court's Finding number 28, which stated:

Rule 191-2-4.11 not merely allows, but requires as a condition to licensure that any domestic violence shelter must adopt and adhere to the principles of "separate but equal treatment" based on gender; the practical effect of this rule is to exclude adult and adolescent males from their statutory right to safety and security free from domestic violence for no reason other than their gender; by the application of this rule male victims of domestic violence are rejected from licensed domestic violence shelters in West Virginia even when those shelters are otherwise unoccupied.

Findings and Conclusions at 7. The finding is simply unsupportable.

First, § 191-2-4.11 does not require, as the lower court claimed, separate but equal treatment.

Rather, it merely says that, if a program does not have the facilities to house both women and men,

then it must have a written process for providing alternative shelter for men.

Second, it does not exclude men from “their statutory right to safety and security free from domestic violence for no reason other than their gender.” Rather, it requires that shelters *will* provide male victims of domestic violence with lodging that will be safe and secure.

Third, the evidence in the case was that some shelters do take in men and that some do not. Judi Ball, director of a shelter in Wood County that serves an eight county area, said that its’ policy is to house men who appear as domestic violence victims and that it has done so in the past. Ball Deposition at 13-15. She also stated that none had appeared in the six years prior to her deposition, and that her shelter routinely operated at full capacity. *Id.* On the other hand, Judy King Smith, director of a shelter in Morgantown, stated that she did not have the facilities to accommodate men and that her program’s practice was to provide lodging for male victims in a local motel or homeless shelter. King Smith Deposition at 12-16. She also stated that her shelter did accommodate adolescent males who came in with their mothers, but that privacy concerns sometimes prompted the shelter to place them in alternative accommodations, such as a motel or with a relative. *Id.* at 12, 16, 65. Other than the separate accommodations, male victims received the same range of services as did female victims. *Id.* at 13-16; Ball Deposition at 13-18, 22-27.

Fourth, there was no evidence in the record – *none* – of any male victim ever being denied shelter by any Board-licensed program in the entire State. If discrimination against men in the provision of domestic violence shelters were a problem, then one would think that at least one example would have been adduced to illustrate the problem.

Because of the foregoing realities, the only differential treatment of men of which MAWAD can complain is the fact that some, but not all, shelters house men separately from the women. The

reasons for the separate facilities are patent. One reason is the same reason why the bathrooms in the East Wing of the Capitol and in nearly every other public facility in the State are sex segregated: privacy. Some of the shelters do not have living arrangements to provide privacy for both men and women. Because women are by far the largest percentage of the population to seek asylum from domestic violence, and because there is a constant flow of them, those shelters that cannot accommodate both sexes must necessarily find alternative accommodations for the men that occasionally – but rarely – present themselves for help. King Smith Deposition at 16-17, 26, 65. Moreover, shelters could have legitimate concerns for the psychological well-being of recently battered women if a male enters their midst.¹⁵

Finally, shelters can make the judgment that they should be sex-segregated for the same reasons that we maintain sex-segregated prisons and youth detention centers: the safety of women and their privacy. Under our notions of equal protection, we would not tolerate racial segregation of or in our prisons without proof that it was necessary to achieve a compelling governmental interest, *e.g.*, *Johnson v. California*, 543 U.S. 499 (2005), but those notions most assuredly do not preclude sex-segregated prisons and jails, which exist everywhere in this country and have from its inception.

Until recently, California had maintained a system of domestic violence shelters and services that were statutorily limited to women and children. Men who had been victims of domestic violence from their wives or girl friends challenged the State's failure to extend its protections to men. A California Court of Appeals rightly concluded that the system violated equal protection.

¹⁵The Court can take notice that many male victims of domestic violence might actually prefer a motel room to the embarrassment and discomfort of placement with a houseful of women and children.

Woods v. Horton, 167 Cal. App. 4th 658, 84 Cal. Rptr. 3d 332 (2008), *review denied sub nom.*

Woods v. Shewry, 2008 Cal. Lexis 15055 (Cal. 2008). In reaching that conclusion and requiring the provision of shelter and services for male victims of domestic violence, the Court added this qualification:

In reforming the statutes that provide funding for domestic violence programs to be gender neutral, we do not require that such programs offer identical services to men and women. Given the noted disparity in the number of women needing services and the greater severity of their injuries, it may be appropriate to provide more and different services to battered women and their children. For example, a program might offer shelter for women, but only hotel vouchers for a smaller number of men.

Id. 167 Cal. App. 4th at 679, 84 Cal. Rptr. 3d at 350.

That is common sense. The circuit court erred in finding that § 191-2-4.11 is void.

V. WVCSR § 191-3-3, WHICH REQUIRES THAT SERVICE PROVIDERS IN PERPETRATOR INTERVENTION PROGRAMS RECEIVE INSTRUCTION “ON THE UNDERSTANDING THAT DOMESTIC VIOLENCE IS DEEPLY ROOTED IN HISTORICAL ATTITUDES TOWARD WOMEN AND IS INTERGENERATIONAL,” IS NOT INCONSISTENT WITH THE DOMESTIC VIOLENCE ACT OR THE FIRST AMENDMENT.

In the last of its triple play on page 11 of its Findings and Conclusions, the circuit court holds that § 191-3-3 conflicts with legislative intent and the First Amendment. Again, for the reasons stated in Part I, the rule is a valid legislative rule that has been conclusively approved by the Legislature and that conflicts with no provision in the Domestic Relations Act. The argument that the rule violates the First Amendment not only has no authority anywhere but it has also been emphatically, repeatedly, and recently rejected by the United States Supreme Court.

Unlike the other two provisions invalidated by the lower court’s triple play, § 191-3-3 does at least deal in some small part with expression. Subsection 191-3-3.3.a.3 requires, among other things, that training of educators/facilitators shall include instruction on “[t]he understanding that

domestic violence is deeply rooted in historical attitudes toward women and is intergenerational.” That provision sets forth part of the programmatic message that the Board wants to be delivered. It does not, however, “abridge,”¹⁶ limit, or even “chill” speech of the plaintiff or its members. They are free – regardless of § 191-3-3.3.a.3 – to promulgate anywhere and to whomever whatever counter message that they want to express.

Any state agency has to have the capacity to express itself, to take positions on issues, if it is to do the business of governing. When an agency does so, it does not trammel on the First Amendment rights of those who might disagree with the agency’s position. This is basic to democracy; it is why we elect our representatives. As Justice Scalia forcefully put it in his concurrence in *National Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998):

It is the very business of government to favor and disfavor points of view on . . . innumerable subjects – which is the main reason we have decided to elect those who run the government, rather than save money by making their posts hereditary. And it makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether these officials further their (and in a democracy, our) favored point of view by achieving it directly (having government-employed artists paint pictures, for example, or government-employed doctors perform abortions); or by advocating officially (establishing an Office of Art Appreciation, for example, or an Office of Voluntary Population Control); or by giving money to others who achieve or advocate it (funding private art classes, for example, or Planned Parenthood.) None of this has anything to do with abridging anyone’s speech.

Hence, for example, government can decide to instruct its public school students on the value of equality and racial and sexual diversity without violating the “rights” of the Ku Klux Klan and its members. “When Congress established a National Endowment for Democracy to encourage

¹⁶The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech, or of the press[.]” The Amendment has been construed to prohibit, through the Fourteenth Amendment, all levels and manner of government from “abridging” the freedom of speech. “Abridge” means to “diminish, curtail, . . . deprive, cut off.” RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 6 (unabridged 2nd ed. 1987). When government speaks, or engages others to deliver its message, it does not “abridge” the speech of anyone.

other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.” *Rust v. Sullivan*, 500 U.S. 173, 194 (1990). And the State can educate the public that smoking tobacco and drinking alcohol are dangerous to citizens’ health without violating the First Amendment rights of tobacco companies and distillers. It can even run an ad campaign promoting beef – “it’s what’s for dinner” – without stepping on the First Amendment toes of pork and chicken producers or of those advocating diets with lower fat content. *See Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005).

The point is that the government in implementing its policies necessarily makes judgments about the substantive content of its expression. The State does so all the time in formatting the curricula of its public schools, its prison reform and substance abuse programs, welfare parents’ home instruction, and on and on. In doing so, the government is completely entitled to define its programmatic messages. *E.g.*, *United States v. American Library Association*, 539 U.S. 194 (2003); *National Endowment for the Arts v. Finley*, *supra*. Thus, in *Rust v. Sullivan*, 500 U.S. 173 (1990), the Court held that the federal government could prohibit its family planning grantees from counseling clients on the option of abortion as a means of family planning. Government may “selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.” 500 U.S. at 193; *accord*, *NEA v. Finley*, *supra*, 524 U.S. at 588. The government can contract for whatever services with whatever programmatic message that it wants.

All of this was reinforced by last year's unanimous decision in *Pleasant Grove City, Utah v. Summum*, ___ U.S. ___, 129 S.Ct. 1125 (2009), which rejected the argument by a religious organization that its free speech rights were violated when a city had accepted and installed in a municipal park a monument displaying the Ten Commandments but had refused to accept the organization's monument touting "the Seven Aphorisms of Summum."¹⁷ The Court concluded that the City's monument was government speech and did not intrude on any rights of any private citizen or entity who might have disagreed with the monument's message. Nor did its display by the city create for anyone a right to install in the park something with a countervailing message. According to the Court:

The Free Speech clause restricts government regulation of private speech; it does not regulate government speech. . . . Indeed, it is not easy to imagine how government could function if it lacked this freedom. "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed." *Keller v. State Bar of California*, 496 U.S. 1, 12-13 (1990).

129 S.Ct. at 1131.

The point emerges that the government – including the Family Protection Services Board – is completely free to take a position on any issue and to implement any content-based policy that it deems appropriate without abridging the rights of those who might disagree with those judgments.

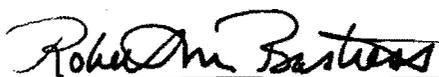
We live in a democracy.

¹⁷The Seven Aphorisms were, the Summums claim, included on the original tablets that were handed down by God to Moses on Mount Sinai but then destroyed by Moses because he did not believe the Israelites were ready to receive them. 129 S.Ct. at 1129-30 n.1. According to the Summums, Moses shared the tablets with a select few before destroying them, but the Aphorisms did not make the second edition of the tablets, which included only the Ten Commandments. *Id.* Compare EXODUS, Chapters 20, 31-34.

RELIEF PRAYED FOR

The Court should reverse the circuit court's decision and remand with directions to dismiss the case.

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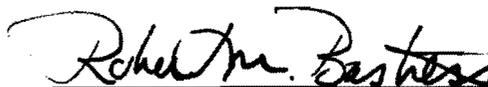


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CERTIFICATE OF SERVICE

I have mailed a copy of the foregoing Brief for Appellants and its Appendices on appellees' counsel, Harvey D. Peyton, The Peyton Law Firm, 2801 First Avenue, Nitro, W. Va. 25143, on this the 16th day of June, 2010.



EXHIBITS

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