

No. 35505

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

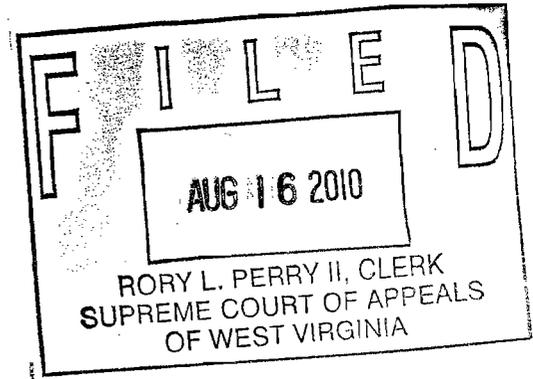
E.H. et al.,

Petitioners Below,
Appellees,

v.

KHAN MATIN, et al.,

Respondents Below,
Appellants.



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

COME NOW the Appellants, the West Virginia Department of Health and Human Resources, (*Matin, et. al*), by their counsel of record, Charlene A. Vaughan, Deputy Attorney General, and submit this Reply to the Appellee's Response Brief in the above action. In their Response, Appellee's repeatedly misstate evidence from the record below, disregard the clearly assigned constitutional errors Appellant alleges to have been committed by the Circuit Court below and the established standard of review to be used by this Court in reviewing such constitutional violations. The resolution of the issue of the constitutionality of the lower Court's actions resulting in its August 2009 TBI Order is the primary ground for Appellant's petition filed December 7, 2009.

The Appellant has been ordered by the lower Court to apply for a Federal Waiver of its Medicaid State Plan to provide mental health services to a specific disability group, those who suffer from Traumatic Brain Injury, (TBI). See, August 7, 2009 Order, Petition Brief, Appx. 1. The lower Court, as well as Appellees misinterprets the mediation agreements in which Appellant has consistently stated that it must first assess the TBI population needs and have appropriated state funds to match any federal funds which would come upon approval of an application for a TBI Waiver.

In spite of all parties, as well as the Court Monitor, agreeing in the winter of 2001 that the TBI issue had been resolved relative to the *Hartley Finalization Plan*, the issue was reopened in 2007 after no Legislative appropriation to fund a TBI Waiver was forthcoming. After Court Ordered mediation, the parties agreed that they, along with the Court Monitor and the Legislatively created Traumatic Brain Injury and Spinal Cord Advisory Board, (TBI Board), a non-party to this action, would "make good faith efforts" to assure that funding for a Medicaid TBI Waiver or other appropriate funding mechanism would be appropriated in the 2002 Legislative Session. The Appellant made such good faith effort to assure funding for the provision of TBI services. The Appellants worked with the 2007 Court Ordered TBI Oversight Committee which was ordered to be composed of representatives from the Appellant, the Appellees, the Appellant's Behavioral Health Ombudsman, WVU Center for Excellence and Disabilities, the Division of Rehabilitation Services, and other individuals with TBI and family members. Appellant worked with the TBI Board in seeking Legislative support for the dedicated funding source. This effort also resulted into a grass roots movement that

became known as the Better Brain Injury Care Coalition. The Appellants further agreed that upon receipt of the required Legislative appropriation needed, it would file for a federal Medicaid TBI Waiver. See, Petition for Appeal, Ex. B. Appellant has never agreed to fund or provide TBI services via a Medicaid Waiver without the necessary assessment of population needs and a Legislative appropriation for its share of the federal/state match to provide a Medicaid funded service.

In 2004, the Appellant agreed in a Memorandum of Understanding authored by its Behavioral Health Ombudsman/ex-Court Monitor in this case, to collaborate with other responsible agencies to ensure systemic accountability for the provision of behavioral health and support services to individuals with a TBI. Appellant never agreed to provide TBI services via a Medicaid Waiver without the necessary Legislative appropriations for a state match to federal funding.

In 2005, there was a change in the administration of the Executive Branch. There was a new Governor. There was a new Cabinet Secretary for the Department of Health and Human Resources. The federally created Deficit Reduction Act, (DRA), was implemented in 2005 which impacted Appellants delivery of Medicaid funded services. These events contributed to the delay in getting funded targeted services for TBI victims.

In 2007, the lower Court again ordered the parties into mediation to address the TBI services program funding issue. In July of that year, the lower Court accepted the parties' mediation agreement that the TBI system of care services would be consistent with Appellants' financial responsibility to render other behavioral health services and programs. Appellant has always argued that it had various disability programs to fund

and that it could not initiate a TBI Waiver Program without the necessary state Legislative appropriation for its share of the federal state match of funds. See, July 3, 2007 TBI Consent Order, attached hereto as Ex. A. This position was stated at the Status Conference Hearing held on January 29, 2007, p. 8, lines 3-16, attached hereto as Exhibit B. Appellees state in their brief that Appellant did not comply with the 2007 Order or the Agreed Timelines established to meet the goals of the 2007 Order. See, Appellees Brief at p 5. As for the Agreed Timelines, factors beyond Appellant's control contributed to the Agreed Timelines not being met. For example, the hiring of the State TBI Coordinator and the Regional Coordinators. See, Sassi testimony, May 22, 2009 Hrg. Tr., pp 24-26.

In the lower Court's August 7, 2009 Order, it misstates the language of the 2007 Consent Order as requiring Appellant to be *solely* responsible for securing funds for the TBI Trust Fund. Appellant never agreed to this term. "Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms." *U.S. v. Armour & Co.*, 402 U.S. 673, 91 S.Ct. 1752 (1971). They are the result of the parties weighing the risks involved in litigating the matter versus the potential gain, and a product of the respective bargaining power of the adverse parties. *Id.* "For that reason the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *Id.* at 682. Contracts, when written in clear and unambiguous language, are not subject to judicial interpretation. *Sally-Mike Properties v. Yokum*, 175 W.Va. 296, 332 S.E.2d 597 (1985). "A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or

interpretation but will be applied and enforced according to such intent. Sally-Mike Properties v. Yokum, 175 W.Va. 296, 332 S.E.2d 597 (1985). Appellant has never agreed to fund a TBI Waiver without having in place a state appropriation of its state share of the match of state federal funds. Appellees Brief at p. 2 admits this by stating, "The resulting agreement required the parties to seek funding from the Legislature and thereafter apply for a TBI Medicaid Waiver. Order E.H. v. Matin, No. 81-MISC-585 (Aug.6, 2001){hereinafter 2001 Consent Order}.

In this case, reading the 2001 order according to the terms within its four corners makes the securing of funding for a Medicaid TBI Waiver or other appropriate funding mechanism the joint responsibility of the parties, Court Monitor, and the TBI Fund Board. Obtaining the necessary funding was made a condition precedent to applying for the Medicaid TBI Waiver. Since the parties, Court Monitor, and TBI Fund Board were unable to secure the necessary funding, contrary to the allegations in Appellees' Brief, Appellant was not required to apply for a Medicaid TBI Waiver. There is no ambiguity to this provision of the Consent Order. The lower Court should be prohibited from reading the Consent Order in any other fashion. The lower Court has gone outside the four corners of the Consent Order and tried to interpret the clear and unambiguous terms of the Consent Order in its attempt to justify placing a burden upon Appellant that the Consent Order clearly does not bestow upon it.

Further, the 2007 TBI Consent Order, pp 4-5 clearly states:

The TBI Oversight Group and TBI Coordinator will develop an executive and Legislative strategy to secure adequate state funding for the final phase of the TBI System of Service... the overall goal is to secure a dedicated source of State funding for a TBI Trust Fund supported on an annual basis by statute.

Appellant did provide the one million dollars it was required to provide. According to the testimony of Lori Risk, The Traumatic Brain and Spinal Cord Injury Board was designated by the Legislature to pursue dedicated funding for the provision of services to this population. May 22, 2009 Hrg. Tr., p. 35, lines 5-17. The Brain Injury Association has pursued long term funding for the provision of TBI services. Appellant was required to use seed money to establish a grass roots Organization to seek funding, which it did.

No provision of the 2001 or 2007 orders can be fairly read to require Appellant to secure a Medicaid TBI Waiver without having the state appropriation in place first. Given the Consent Order's clear and unambiguous language, it is evident that the lower Court violated the Separation of Powers Doctrine when it read into the Consent Order that Appellant has the responsibility to develop a dedicated source for state funding for the provision of TBI services or that Appellant would apply for a TBI Waiver regardless of whether it had secured the state match funding.

STANDARD OF REVIEW

The primary argument of this appeal is that the lower Court has violated Appellant's constitutional rights. Appellees do seem to understand that the constitutional arguments that the lower Court has violated both the Separation of Powers Doctrine and the Pre-Emption Doctrine are reviewed *de novo* by this Court. Whether the Circuit Court violated the Separation of Powers Doctrine or the Supremacy Clause presents constitutional questions. "Because interpretations of the West Virginia [and federal] Constitution . . . are primarily questions of law, we apply a *de novo* review

[.]” *Phillip Leon M. v. Greenbrier County Bd. of Educ.*, 199 W.Va. 400, 404, 484 S.E.2d 909, 913 (1996), *modified on other grounds, Cathe A. v. Doddridge County Bd. of Educ.*, 200 W.Va. 521, 490 S.E.2d 340 (1997). “Where the issue on an appeal from the Circuit Court is clearly a question of law . . . , we apply a *de novo* standard of review.” Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 139, 459 S.E.2d 415, 416 (1995).

SEPARATION OF POWERS DOCTRINE

From reading the Appellees Brief, they do not understand the principles of the Separation of Powers Doctrine. Appellant is berated for its failure to comply with terms of its mediation that it did not agree to. Appellee’s state, “Rather than finally complying with its agreement to provide services, the Department thereafter appealed the Enforcement Order and three times requested a stay, which the Circuit Court and this Court denied”. *See, Response Brief at page 6.* Appellant believes its argument that the lower Court has exceeded its jurisdiction does have merit. Appellant acknowledges that its prior Writ of Prohibition filed with this Court on September 19, 2008 to prohibit the lower Court from holding an evidentiary hearing on the TBI issue was premature. The present appeal of the lower Court’s 2009 ruling after its evidentiary hearing is now ripe for review.

In the second *Matin* case, this Court reiterated the limitations on the power of the Circuit Court to interfere in the Executive Branch’s authority to run its behavioral health programs. *E.H. v. Matin*, 189 W.Va. 102, 428 S.E.2d 523 (1993). This Court addressed the limits it was willing to allow the Circuit Court in overseeing the Petitioner’s operations:

It appears that both the appellees and the Circuit Court may have misconstrued the nature of our mandate in the remand of *E. H. v. Matin*, supra. It was not our intention to have the Circuit Court operate as some type of a judicial super-secretary over the actions of the West Virginia Department of Health and Human Resources....Furthermore, we are concerned with continued judicial involvement in the BHSP. As we have observed, the earlier remand of this case to the Circuit Court was not designed to allow **perpetual judicial control** over the decisions of the West Virginia Department of Health and Human Resources relating to the BHSP (emphasis added).

Id. at 105 and 107, 526 and 528.

Article 5, § 1, of the West Virginia Constitution clearly states, "The Legislative, Executive, and Judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others..." "The Separation of Powers Doctrine ensures that the three branches of government are distinct unto themselves and that they, exclusively, exercise the rights and responsibilities reserved unto them." *Simpson v. West Virginia Office of the Ins. Com'r.*, 678 S.E.2d 1, 11 (2009). This Court has stated "Article 5 § 1 of the state constitution, which prohibits any one department of our state government from exercising the powers of the others, is not merely a suggestion; it is part of the fundamental law of our State and, as such it must be strictly construed and closely followed." Syl. Pt. 1 *State ex rel Barker v. Manchin*, 167 W.Va. 155, 279 S.E.2d 622 (1981). "The Courts of this state are by this Article forbidden to perform administrative duties." *State ex rel. Court of Marion County v. Demus*, 148 W.Va. 398, 135 S.E.2d 352 (1964).

The August 7, 2009 TBI Order, though carefully worded, shows that it is the lower Court's intent to continue to be the super secretary over the Appellant and direct Appellant how it is to implement the provision of behavioral health services to those in State hospitals

and in the community. Appellant asserts that it has and continues to comply with the lower Courts Orders. Because both the lower Court and this Court refused to grant Appellant's Motions for Stay of the lower Court's August 2009 Order, Appellant has complied with the Order pending its appeal. Appellees state within their Response brief that Appellant has applied for the TBI Waiver, and question why Appellants takes this appeal. That Appellant is complying with the August 9, 2009 Order does not moot the point that the lower Court has and will continue to violate the Separation of Powers Doctrine and the Pre-Emption Doctrine in this case.

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

TBI service programs are funded in whole or in part as are all of Appellants' other programs, through appropriations by the Legislature. The lower Court noted at

hearing, the Legislature has not acted upon TBI in the last three Legislative Sessions, and has not done so in spite of attempts to educate legislators on TBI. See, May 22, 2009 Hrg. Tr. at pp 37-38, and 93-94. Contrary to the representations within Appellees Response Brief regarding "the Department's failure to even once request funding from the Legislature for TBI at any point after 2001", the Appellant have supported the effort to seek funding. See, Appellees Brief, p. 9. Appellees appear to ignore the testimony of their own witness, Lori Risk, Program Manager for the WVU Center for Excellence in Developmental Disabilities, that Appellant, along with Veterans Affairs had caused the introduction of a Legislative Bill in 2008 which sought funding for TBI program services. See May 22, 2009 Hearing Tr. pp 37-39.¹ It is an undisputable fact that the Division of Veterans Affairs and the referenced Bureau (DHHR) are part of the Executive Branch of Government. Appellant, DHHR had also joined with other impacted state agencies in a Memorandum of Understanding to jointly collaborate to ensure systemic accountability for the provision of TBI services. See, Petition Appx. 6. Appellant has complied with the Courts' Order to seek funding prior to applying for a TBI wavier. The provision of TBI services is a responsibility of agencies across State Government, not just the Appellant. The Legislature created the TBI Board to do a statement assessment of the issue and seek dedicated funding. Appellant joined in that effort. Not all traumatic brain injuries result in the need for mental health services. Some traumatic brain injuries may result in physical limitations only as was stated in the Court Monitors' 1999 Formal

¹ The 2008 bill, H.B. 4576 was introduced February 15, 2008 to create a TBI Services Commission with the purpose of assisting military veterans and other West Virginians with TBI to receive services. The Appellant had also supported introduction of S.B. No. 236 in January 2002 which would have added a new article to the W.Va. Code § 33-46, which would have required health benefit plan coverages to provide certain benefits related to brain injury.

Recommendation to the lower Court. And, according to the testimony of Appellant's then, MR/DD Waiver Program Manager, John Sassi, services for individuals with TBI have always been available under Appellants' Medicaid plan. See, May 29, 2009 Hrg. Tr., p. 20, lines 16-22.

The lower Court is making Appellant's compliance with its Order and the Hartley Plan contingent upon receiving funding from a separate branch of government which Appellant has no control over. Further, The West Virginia Constitution defines the method by which a budget is to be created in Article 6, § 51. That section clearly provides that the preparation of the budget for submission to the Legislature is entirely a function of the Executive Branch, and our state Constitution at Article 5 §1, which prohibits the exercise of the power by any branch of government by any other branch. Although this Court has held that provision in the executive budget for adequate funds for clearly defined and Legislatively mandated programs is subject to mandamus, it has acted only to require the executive to perform its duty. It has not condoned direct intervention into the budget preparation process by the judiciary or other third party. *Dadisman v. Moore*, 384 S.E. 2d 816, 181 W.Va. 779 (1988); *Allen v. State Human Rights Commission*, 324 S.E.2d 99, 174 W.Va. 139 (1984).

The issue of designing and funding a specific TBI program is different from prior issues previously before this Court in the *Matin* line of cases in that no set of rights or standard of care has been created by the Legislature specifically for TBI victims. The state Legislature has not clearly defined and Legislatively mandated a Medicaid funded TBI program. Appellant has provided TBI services within its current behavioral health service plan and within its budgetary constraints, which is what the 2007 mediation

agreement/Order required: that the TBI system of services be consistent with Appellants financial responsibility to render other behavioral health services and programs. The lower Court has exceeded its authority by ordering a program of services and the funding of that program of services that the Legislature has not seen fit to create. Will this lower Court be permitted to Order the method of development of and funding for any and every new mental health need that presents itself to Appellant forever? Appellant asks this Court to answer No.

The lower Court has stated that the parties may decide what the TBI program services as a whole should look like and how it shall be funded, but if the parties cannot agree that the lower Court will make the final decision. Its decision is that a dedicated program of services is needed specifically for TBI victims regardless of the many other disability programs Appellant must provide services for, and more importantly and at issue to this appeal, that the program shall be funded by way of a Medicaid Waiver. The creation of programs is the sole responsibility of the Legislature. Once created, the Legislature can then delegate the administration of the program to a government agency. Here, however, the Legislature has decided not to create such a program, and has in fact decided not to appropriate money to the TBI Fund Board, the entity that the Legislature created in W.Va. Code § 18-10K-1 et seq. to watch over the TBI issue. While the Legislature's attempt at helping those with TBI may be inadequate, as this Court stated in *Dandy*, it is up to the Legislature to correct the problem, not the Courts.

PRE-EMPTION DOCTRINE

The lower Court encroaches upon the Executive Branches' constitutional authority by ordering the Appellant to develop an application for a Medicaid TBI Waiver

and submit it to the Court Monitor and counsel for the Appellee's prior to submission to the federal authorities. This action encroaches upon the Executive Branch's authority by imposing its own will and judgment over a system of care which has been determined by the United States Congress and the West Virginia Legislature to belong to this state's Executive Branch, specifically Appellant's Bureau for Medical Services, (BMS).

At the May 10, 2007 hearing, the lower Court stated:

Good morning, David. David, I'm going to ask you, since you've been working on this traumatic brain injury, **at my request**, at least I assume you have been, to bring me up to date on where we are (emphasis added). See, May 10, 2007 Hrg. Tr., p 4 lines 12 – 16.

By requiring Appellant to develop a Waiver application within 30 days of the August 7, 2009 Order and having the application subject to review by counsel for the Appellee's, the Court Monitor, and eventually the lower Court; the Order has removed the decision making process from the Appellant. According to State and Federal Statutes, the sole discretion for determining what services should be provided under the Medicaid State Plan, **and the sole responsibility for ensuring the solvency of the funds from which those services are paid rests with the BMS**, (the Federally designated single State Agency) and the Secretary of DHHR (emphasis added). W.Va. Code § 9-2-6(10). As this Court noted in the second *Matin* case, absent either a failure to fulfill a statutory duty, a violation of the constitution, or an arbitrary or capricious act by Respondents, neither the Court nor the Petitioners have any authority to challenge the system of care provided by Respondents. *E.H. v. Matin et al.*, 189 W.Va. 102, 428 S.E.2d 523 (1993). There is no statutory duty for Appellant to fund TBI services above all other disability groups. Appellant has not violated the constitution by not applying for

a Medicaid TBI Waiver without first having its share of the required state match of funds. Appellant has not acted arbitrary or capriciously by not applying for a Medicaid TBI Waiver without first having its share of Legislatively appropriated funds for the State/Federal match.

The lower Court violates the Pre-Emption Doctrine when it ordered Appellant DHHR to create a Medicaid TBI Waiver in violation of Federal and State Statutes which delegate to the BMS as **the single State Agency** the responsibility for administering the Medicaid program in West Virginia within its financial ability. See, W.Va. Code § 9-2-6 (2005); 42 C.F.R. 431.10(b)(1)(emphasis added). 42 C.F.R. § 430.10 (1979) requires that the state assure the CMS in its State Plan that the Medicaid Program will be “administered in conformity with the specific requirements of Title XIX Chapter IV, and other applicable official issuances of the Department of Health and Human Services.” Federal law requires the State to designate a single State Agency to administer and supervise the Medicaid Program. *Id.* 42 C.F.R. § 431.10(e) (2) further provides that, “... In order for an agency to qualify as the Medicaid agency—

The authority of the agency must not be impaired if any of its rules, regulation or decisions are subject to review, or similar action by other offices or agencies of the State.

The Office of the Governor and the West Virginia Legislature have designated DHHR to administer and supervise the Medicaid Program and empowered the Secretary of DHHR to carry out this mandate. W.Va. Code §§ 9-2-3 (1970); 9-2-6 (2005). In this case, the lower Court’s August 7, 2009 TBI order requires the Medicaid TBI Waiver application be developed within 30 days by DHHR, then submitted to counsel for the Respondents and the Court Monitor for review and comment, and that disputes should

be resolved by the Court Monitor, and if necessary the lower Court. These provisions in the Order clearly violate 42 C.F.R. § 431.10(e)(1) and (2) because the lower Court is usurping the single State Agency's power and giving it to counsel for the Respondents, the Court Monitor, and itself.

As stated in its Brief, Appellant maintains the *Home v. Flores* case, 516 F. 3d 1140 (2009), is instructional in spite of its dealing with a federal Courts' encroachment upon the authority of state executive and Legislative powers. What is instructive in that case is that the U.S. Supreme Court noted that:

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

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

CONCLUSION

The lower Court has gone beyond simply enforcing one of its Orders. It's Order has restated the terms of the parties mediated settlement. Its Order requires an Executive Branch State Agency to apply for a Federal Program Waiver without the

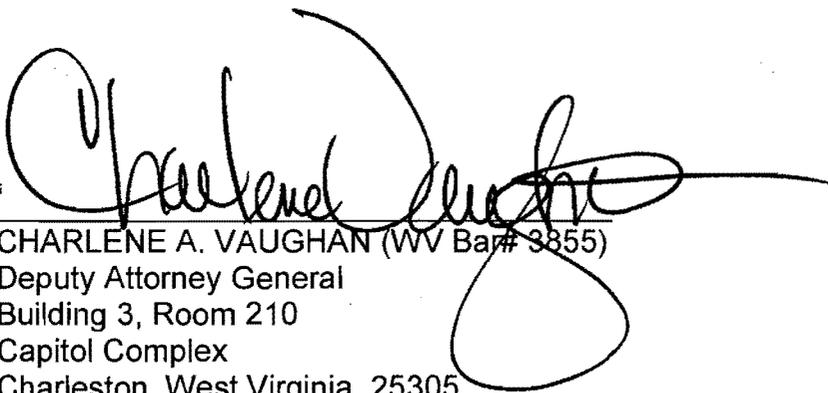
benefit of a Legislative appropriation to support the necessary state share of funds. Its Order requires the creation of a state program of services for a disability group regardless of the countless other disability groups also needing to be funded by the Appellant. All these actions are a violation of constitutional principles. Appellant asks this Court to grant its requested relief by holding that the lower Court has exceeded its judicial authority in this instance, and overturn its 2009 Enforcement Order.

Respectfully submitted,

WV Department of
Health and Human Resources,
Appellant,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

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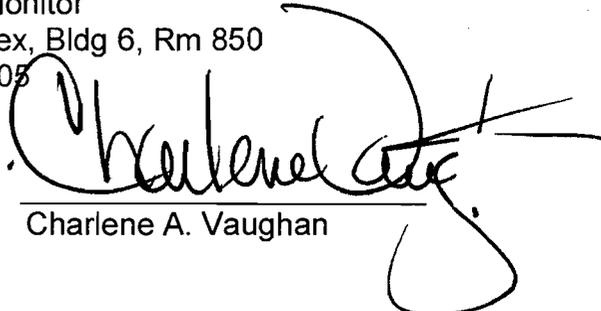
CERTIFICATE OF SERVICE

I, Charlene A. Vaughan, Deputy Attorney General and counsel for the West Virginia Department of Health and Human Resources, do hereby certify that I have this 16th day of August, 2010 served a copy of the foregoing **REPLY BRIEF OF APPELLANT, WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES** by U.S. mail upon the following individual(s):

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

Daniel F. Hedges, Esquire
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Charleston, WV 25305


Charlene A. Vaughan

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE