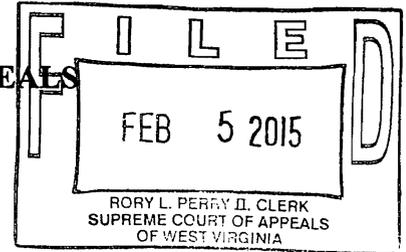


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
NO. 14-0845



**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: 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, a legislative appropriation, 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 "[w]here there is a good faith difference of opinion" about the remedial plans and policies 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 precludes jurisdiction. But the orders identified in the Department's notice of appeal are final and appealable, including the court's decision to order pay raises. This Court should review and reverse the lower court.

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 the separation of powers vest in the executive branch discretion to pick a remedial plan.

Under well-established precedent, if the Department does not satisfactorily reduce overtime and non-permanent workers under Section 10(b) of the agreed order, the Department retains policymaking discretion to select and propose a new means to do so—and the lower court

does *not* have any authority to “remedy” the Department’s underperformance by increasing hospital pay \$2.9 million per year. W. Va. Const. art. V, § 1; Pet Br. at 15–26; App. 1417–1542, 1596 (estimating raises to cost \$2.9 million annually).

Plaintiffs¹ assert that the lower court’s order does not transgress Section 10(b) or the separation of powers because the lower court is merely “enforcing” an obligation contained in a prior final order. Resp. Br. at 1, 18, 22–30 (“[T]he circuit court’s orders simply enforce DHHR’s own earlier agreement to avoid the use of temporary workers and mandatory overtime in staffing its hospitals.”). But Plaintiffs do not contend that Section 10(b) *on its face* requires \$2.9 million in raises on top of Section 10(a)’s 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 how the executive branch must remedy its non-compliance—without any constitutional restraints limiting the lower court’s remedial choices. Resp. Br. at 18–19, 21–22, 32–34 (Because “[t]he circuit court has inherent authority to enforce its own orders,” “this Court should affirm.”); *id.* at 29–30 (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, because the Department was not reducing overtime or non-permanent staff quickly enough, the court has inherent discretion to order \$2.9 million in pay raises as the remedy.

That is not the law. As the Department’s exhaustive survey of precedent shows, the executive branch devises any necessary remedial plan, not the court. Pet. Br. at 14–24. A lower

¹ In this reply brief, the Department refers to Respondents in this appeal as Plaintiffs to avoid confusion. On remand from this Court, the lower court calls the Department respondents or defendants, and calls the parties challenging the Department petitioners or plaintiffs. Nevertheless, despite referring here to the response brief as a brief for Plaintiffs, the response 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.

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 principle stems from the separation of powers, as both state³ and federal⁴ courts across the country agree. Pet. Br. at 14–26. As one New York court explained, where “[t]he

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 25–26.

³ Like this Court, state courts nationwide hold that under the separation of powers the executive branch is to select any remedial plans necessary to bring state institutions into legal compliance. *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 [law] 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)); *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

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, 325–26, 928 N.Y.S.2d 236, 247 (App. Div. 2011).⁵

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.") (emphasis added); *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 90 Wash. 2d 476, 520, 585 P.2d 71, 96 (1978) ("[T]he general authority to select *the Means* of discharging [a constitutional] 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) (trusting that the "*Legislature*" will "*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.") (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) (The "*Commonwealth* will fulfil its responsibility with respect to defining the specifics and the appropriate means.") (emphasis added).

⁴ Federal courts concur. Pet. Br. at 24–25; *see also Graves v. Arpaio*, 623 F.3d 1043, 1046–47 (9th Cir. 2010) ("[I]deally, a district court would first determine whether there are ongoing violations, then assign the state 'the task of devising a Constitutionally sound program' to correct those constitutional violations, and then finally approve the state's plan subject to any amendments necessary." (citations omitted)); *Ass'n for Retarded Citizens of N. Dakota v. Olson*, 713 F.2d 1384, 1392 (8th Cir. 1983) ("[T]he district court order only requires *State officials* to develop a program. This can hardly be classified as an unreasonable intrusion into professional judgment.") (emphasis added); *Disability Advocates, Inc. v. Paterson*, No. 03-CV-3209, 2010 WL 933750, at *1 (E.D.N.Y. Mar. 11, 2010) ("Before imposing a remedy, the court provided Defendants an opportunity to come forward with their own proposal for remedying the civil rights violations."); *Rosie D. ex rel. John D. v. Romney*, 474 F. Supp. 2d 238, 239 (D. Mass. 2007) ("[R]espect for the sovereignty of the Commonwealth and the competence of its officials requires the court to allow the state to demonstrate that its chosen remedial plan will address, promptly and effectively, the Medicaid violations identified by the court. The Supreme Court has emphatically underlined the obligation of the court to defer to the judgment of state authorities in fashioning remedial orders and to avoid excessive intrusiveness.").

⁵ These decisions reflect the broader principle that courts should not *interfere at all* with state institutions' management and funding. *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,

Indeed, Plaintiffs do not contest these constitutional principles. They concede that the Department's brief sets forth "undisputed principles of constitutional law"; they admit that "DHHR's citations to prior orders in this case are accurate"; and they agree that "[t]here is no dispute over the general principal [*sic*] that reform should be spearheaded by the executive branch." Resp. Br. at 25, 27–28. As they say, under these precedents, when "this Court has invalidated a statute and/or regulation," this Court "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 29.

B. Plaintiff's attempts to evade these constitutional constraints are unpersuasive.

1. These constitutional principles require the lower court to allow the Department to identify the new remedial plan to reduce overtime and increase permanent staff. Pet. Br. at 14–16. Far from having unlimited discretion to restructure the Department as it pleases, the lower court must abide by the original order, which did not specify the means of compliance, and the separation of powers, which do not vest the court with policymaking authority to decide how the Department will meet its legal obligations. *Id.* The lower court however disregarded both limits on its powers and grafted new duties onto Section 10(b) under the guise of "enforcing" it. App. 244–45. 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 22–25 ("Despite DHHR's attempts to distract with constitutional arguments, this is an issue of straightforward contract law."); *id.* at 29 ("[T]hese cases dealing with the validity of statutes has [*sic*] no bearing on the

administrative agencies and local legislative bodies. To allow such actions would in effect attempt displacement, or at least overview by the courts and the plaintiffs in litigations, of the lawful acts of appointive and elective officials charged with the management of the public enterprises.").

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: it applies to state contracts and remedial plans alike. W. Va. Const. art. I, § 3. This Court has never held otherwise. After all, 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. 14–27; *cf. Matin II*, 189 W. Va. at 104, 106, 428 S.E.2d at 525, 527 (examining whether subsequent remedial orders abided by agreed orders and the separation of powers).

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

First, Plaintiffs refer to this Court’s holding in *Matin IV* that the separation of powers does not prevent a court from receiving evidence on the Department’s compliance with prior 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 3–4, 23, 25, 30. Plaintiffs claim that this decision suggests that enforcement orders can never “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.’” Resp. Br. at 29–30. But this misses the point. Whether a court has the power to inquire into violations of past orders differs from whether a court may order the Department to implement a new remedial plan of the court’s choice. Pet. Br. at 18.

Second, Plaintiffs cite this Court’s decision 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, 23–24, 28. But

this holding, 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 18. Here the situation is far different: under the guise of enforcing an agreed order, the lower court required much more than ministerial compliance. Its remedial plan created new obligations and took over policymaking decisions vested in the Department.

3. Plaintiffs next claim that even if the separation of powers normally bars courts from imposing their own remedial plans, the court nevertheless may devise a remedial plan if the Department's first remedial plan falls short. Resp. Br. at 1, 22, 24, 26, 29–30 (“[T]he *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.).

Plaintiffs' proposed forfeiture rule cannot be squared with the separation of powers, which precludes a court from devising a remedial plan unless the executive branch *defaults* on its duty to propose a plan. Pet. Br. at 14–25. “Remedial judicial authority does not put judges automatically in the shoes of [executive] authorities whose powers are plenary. Judicial authority enters only when local authority *defaults*.” *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) (emphasis added). That is why the “judiciary should not itself devise a plan except *as a last resort*,” *id.*, “step[ping] in, only reluctantly, after many years of legislative failure or inability to enact [necessary] reforms and to commit resources to implement those reforms.” *Hancock v. Comm'r of Educ.*, 443 Mass. 428, 455, 460, 822 N.E.2d 1134, 1153, 1156 (2005). Plaintiffs also do not take into account the extraordinary lengths to which this Court and other courts defer to

the executive branch. Pet. Br. at 19–25; *e.g.*, *Goff v. Harper*, 59 F. Supp. 2d 910, 914 (S.D. Iowa 1999) (Because state officials “should be given the first opportunity to correct the violations,” the court “has given defendants not only the first opportunity but numerous opportunities.”).

No default exists here, nor do any extraordinary circumstances merit departure from this Court’s usual deference to the coordinate branches. Pet. Br. at 10, 15–16. The court found the Department in full compliance in April 2012. App. 16–17. Only in mid-2014 did the court find the Department deficient, and even then the Department was ready to adopt another remedial plan. Pet. Br. at 9–10. Even under the plaintiff’s supposed exception for extraordinary executive 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 the agreed order’s Section 10(b): whether any state statute requires the Department to reduce overtime and increase permanent staff. Resp. Br. at 21–30. But no one is arguing about whether the hospitals’ staffing levels in 2009 or the present fall short under *some statute*: this appeal assumes that Section 10(b) 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 mandate to reduce overtime and increase permanent staff: by not appealing the lower court’s holding of non-compliance, this appeal assumes a deficiency. The Department instead appeals the narrow question, first decided in the June order, whether—assuming a legal deficiency exists—the Department has discretion to pick a remedial plan to reduce overtime and non-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 pay raises. Pet. Br. at 1.

5. Unable to defend the lower court 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 on its own a 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.

Resp. Br. at 25–26. 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, let alone provides for this kind of massive “remedy” in the event of insufficient results.

Plaintiffs next assert that the court’s plan was freely proposed by the Department in 2014 when the lower court held the Department was falling short of Section 10(b). Resp. Br. at 27 (“[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 29 (“[T]he circuit court permitted DHHR to create its own plan” and “order[ed] DHHR to draft its own plan.”); *id.* at 26 (“[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 decided what plan *it* wanted the Department to “submit” to reduce overtime and increase permanent staff. Pet. Br. at 8–12, 15–16, 24. After the court held an evidentiary hearing on compliance with the agreed order, it announced that not only was the Department deficient under the agreed order, but also the Department must implement the court’s chosen remedy. Because the Department had volunteered before the evidentiary hearing that it wanted any remedy to involve the legislature, Pet. Br. at 7, it objected to the court order and submitted three remedial plans of its own—each of which involved the legislature and had a reasonable prospect of reducing overtime and increasing permanent staff—but none of which involved unilateral multi-million dollar pay raises. Pet. Br. at 8–12; Resp. Br. at 15. The court

however ignored the Department's proposals and stuck to its own plan to raise pay. Pet. Br. at 8–12, 15–16, 24. And then the court held the Department *in contempt* until the Department “submitted” and implemented the court-designed plan. Pet. Br. at 10–11; Resp. Br. at 15–17, 19.

Plaintiffs are thus mistaken to suggest that in this situation the Department had any choice about what kind of plan to submit or implement. Resp. Br. at 28, 31. The court required the remedy to be immediate 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; Pet. Br. at 8–12; Resp. Br. at 12, 14–18, 26, 27, 31. Far from being allowed to choose how to reduce overtime and increase permanent staff, the Department was reduced to the court's scrivener. Pet. Br. at 8–9, 37–40.

Plaintiffs also mistakenly assert that the lower court's remedy respected the legislature's role. Resp. Br. at 30–31. They claim that “[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 [to] implement[] immediately.” *Id.* at 30. But Plaintiffs miss the point. The Department's argument is not that the lower court 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, 13–16. 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 11–13, 21; Resp.

Br. at 18 (claiming that permanent pay raises will save money).⁶ This idea also misses the mark. The question is not whether evidence supports the court's preferred remedy, but whether law empowers the court to require the Department to implement this remedy. Pet. Br. at 1, 13. Whether the court's plan is better 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).

Under the separation of powers, a court may not "simply substitute its judgment of a more equitable remedy for that of the legislative body; it may only consider whether the proffered remedial plan is legally [acceptable] . . . that is, whether it fails to meet the same standards applicable to an original challenge of a legislative plan in place." *McGhee v. Granville Cnty., N.C.*, 860 F.2d 110, 115 (4th Cir. 1988). A "court is not to inquire whether the defendants have proposed the very best available remedy, or even whether the defendants have proposed an appealing one." *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 750 (N.D. Ohio 2009). Instead, a "court may reject the defendant's proposal under only one condition: if that proposal is legally unacceptable." *Id.*

Even if this appeal rested on whether the court or the Department's plan is better policy, serious questions exist about whether the lower court's plan will reduce overtime and increase

⁶ Plaintiffs also are wrong to claim that the Department *agreed* that the court's \$2.9 million annual pay raises would be budget-neutral. Resp. Br. at 18 ("DHHR further represented that it expects to be able to pay for the increased salaries through savings in expenditures currently paid to short-term contract employees.") (citing App. 1599–1602, 1617–18.). Plaintiffs claim this admission was made in testimony, but Plaintiffs cite only hypothetical questions asked to the Department under the court's "hope and rationale . . . that saving will be realized in contract labor." App. 1601. And even then the Department stressed that "we don't know" if any savings will materialize, and "hospital operations" could "be shortchanged" under the court's plan if "the savings doesn't [*sic*] materialize." App. 1601–02; App. 1617–18 (noting that any "potential savings" will not occur at a minimum for "some amount of time"; "[w]e won't know those numbers until we sort of live through it and see what happens"; and in the meantime the Department will be "absorbing both costs" of existing pay *and* the court's pay raises).

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 5–8. Nor are patients helped when hospital funds meant for other important purposes are diverted to unearned staff pay raises. Budget shortfalls exist as it is. And contrary to Plaintiffs’ assertion, the lower court’s order will not increase the actual number of hospital workers in the hospitals at any given time. Resp. Br. at 12 n.5. The lower court did not order the hospitals to create new positions or add extra people to wards: it just ordered the Department to pay existing staff more. Pet. Br. at 8–10. Because vacant permanent positions are always filled in practice with contract or temporary workers, the hospitals are never short of staff at any time, so the same number of people will work with patients 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—increases 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 1–4, 7–9, 25–27. Plaintiffs abandoned any contrary argument. Resp. Br. at 9, 13, 14–15, 18–19, 32–34.

Plaintiffs instead argue that a *later* 2012 order required a new starting salary for future employees. Resp. Br. at 9, 13, 14–15, 18–19, 32–34 (“[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 2012 order, denying reconsideration of prior orders, states:

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 by making employees working “on or after January 1, 2013” eligible for raises at the month’s end, the court increased starting salaries for future hires.

The more natural reading of this 2012 reconsideration order, however, is that the court ordered raises by the end of the month for existing employees who were working at the hospitals on or after January 1, 2013—just as the court had earlier 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)). After all, the terms “[s]alaries and raises” do not mean the same thing; instead employees “receive pay increases based on the amount of time they’ve spent in the system” as employees. Rebecca Catalanello, *Schools revamping vague personnel rules*, Mobile Register, 2001 WLNR 11154498 (Aug. 20, 2001). Someone not working for the Department cannot receive a “raise,” just a higher starting salary.

Providing raises for existing employees moreover satisfied Section 10(a)’s purpose of retaining and recruiting workers. If existing employees receive raises, causing morale and retention to improve, the hospital can be a more desirable for job applicants. And, given that the Court ordered all raises to be reflected in employee paychecks by January 31, 2013, the “raises described” could not encompass “raises” for employees not yet hired by January 31, 2013.

Plaintiffs also do not explain where the court would have received authority to expand the agreed order in this unanticipated and offhand way, especially given that the court said it was

only ordering raises “as provided” in prior orders. Plaintiffs cite no authority, apart from Section 10(a), that could have permitted such an order, and Plaintiffs concede that Section 10(a) does not require new starting salaries. Nor do they explain how the court could have altered or expanded Section 10(a) without notice or a hearing to the Department. Moreover as the Department argued—but as Plaintiffs 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.” Pet. Br. at 27.

Last, Plaintiffs are wrong to argue that the Department ignored the agreed order in its entirety and willfully did 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.⁷ The Department and the legislature provided raises for many workers beyond what the order required and satisfied what *both* believed the order required. Pet. Br. at 3–4. In the end, the Department’s remedial actions did not satisfy the lower court, but that does not mean the Department was idle. Pet. Br. at 4, 6.

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. Their contentions that this Court lacks jurisdiction are unpersuasive.

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

1. An order is appealable when it approximates a final order in nature and effect. Pet. Br. at 27–35. Plaintiffs concede this standard. Resp. Br. at 35 (“[Plaintiffs] do not disagree that orders in this case can approximate final orders in their nature and effect, and have in the past.”).

⁷ Plaintiffs cite nothing to support their allegation that the Department “admitted” that its conduct violated the 2009 and 2012 orders. Resp. Br. at 19.

Under this standard, the orders here are final in nature and effect—and immediately appealable like this case’s past orders. *E.H. v. Matin (Matin V)*, No. 35505 (W. Va. Apr. 1, 2011) (memorandum decision) (not questioning appellate jurisdiction). Each order resolves disputed issues, disposes of liability, and orders a remedy. Pet. Br. at 27–37. The June 2, 2014 order decides whether the Department was in compliance with the agreed order and ordered immediate implementation of a remedy. The August 1 and 13, 2014 orders rest on the June 2 order and further require the Department to implement a plan documenting the court’s June 2, 2014 remedy. The August 13, 2014 finality order likewise decisively denies a Rule 54(b) certification.

2. Plaintiffs show no reason why the lower court’s orders (either from June or August) are *not* final in nature and effect. Indeed, if there were an argument against the final nature and effect of any of these orders, Plaintiffs certainly would have identified a prior occasion in this case (or any similar case) when this Court held it lacked jurisdiction to review orders like these. And yet Plaintiffs did not.

Rather than engaging this Court’s standard for finality, Plaintiffs repeat the lower court’s assertion that all of its orders from 2014 are not final because they “continue to address the same problems” as prior orders. Resp. Br. at 1, 18, 35. That is not a reason for non-finality. If the court enters a final order on the same problem as a past order, but resolves new legal questions and requires a new permanent remedy to be implemented, the court enters a new final order.

Plaintiffs claim that an order cannot be a final judgment unless it “ends” the entire case, so that no other issues are pending. Resp. Br. at 20–21, 37. 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 other issues or on enforcement of the order, which it does whenever an order is unstayed. Pet. Br. at 27–35.

In fact, Plaintiffs concede that “enforcement” orders like the orders here were appealable and appealed before in this case, despite litigation continuing to this day. Resp. Br. at 2–4, 6, 23, 23–25, 28, 30 (“DHHR appealed” the order giving rise to *Matin II, IV and V*); *id.* at 9 (“DHHR did not appeal the circuit court’s orders” from 2012”); *id.* at 32 (“[T]his issue was settled by the unambiguous December 18, 2012, Order that DHHR did not appeal.”); *id.* at 32 (“DHHR did not appeal the 2012 orders and those orders are valid and enforceable”); *id.* at 35 (Plaintiffs “do not disagree that orders in this case can approximate final orders in their nature and effect, and have in the past.”). 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 35–37.

Plaintiffs cite to *Adkins v. Capehart*, 202 W. Va. 460, 465 & n.1, 504 S.E.2d 923, 928 & n.1 (1998) (per curiam decision) for the proposition that an order is non-final if “the circuit court clearly has continued jurisdiction and is undertaking additional review, a variety of issues continue to be litigated, and ongoing monitoring is being performed by the court.” Resp. Br. at 36. But *Adkins* only holds that the trial court has not issued a final decision if the court has yet to rule on the defendants’ compliance with a consent decree. Pet. Br. at 29. Here, the lower court *did* rule on compliance, making its decision final.

Without any precedent to support their position, Plaintiffs try to distinguish this Court’s jurisdictional cases on their facts, asserting that an order can only be final in nature and effect if it dismisses a party or claim. Resp. Br. at 36. This misstates this Court’s understanding of the nature of finality. Final orders take many forms. Under this Court’s precedents what makes a decision final is its nature and effect: a ruling on liability and remedy. And here the court *did* rule on the Department’s obligations and *did* decide a remedy.

3. Rather than show why the order at issue here is not final in nature and effect, Plaintiffs suggest that this Court’s jurisdiction is affected by the pendency of an earlier-filed appeal. Resp. Br. at 1, 18, 38 (“[T]wo of the three assignments of error raised by DHHR in the instant appeal are identical to the errors it raised in another pending appeal, Supreme Court Appeal Number 14-0664”). But far from asking this Court to decide the same issues twice, the Department has said all along that if this Court has jurisdiction to resolve the first appeal, this appeal is unnecessary, and if the Court lacks jurisdiction over the first appeal, this appeal is proper. Plaintiffs also do not explain how a premature appeal strips jurisdiction over a later ripe appeal.

Here, the Department filed two appeals concerning the lower court’s restructuring of hospital pay. Pet. Br. at 10, 34–35. *First*, in early July 2014, the Department appealed the lower court’s June 2, 2014 order interpreting the agreed order and setting forth the court’s remedial plan. *See* No. 14-0664 (assigning as error that the court transgressed the separation of powers and the agreed order). *Second*, in late August 2014, the Department appealed from orders entered on August 1 and 13, 2014, which required the Department to implement the plan ordered on June 2, 2014, and which also denied an express entry of finality under Rule 54(b). *See* No. 14-0845. The second appeal includes the same merits issues as the first, plus 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.

If the Court fully reviews and reverses the lower court’s June order in the first appeal, there is no need to reach this appeal. Pet. Br. at 34–35. But, should this Court find the June order not final and that it lacks jurisdiction over the Department’s first appeal, this second appeal provides a clean vehicle to review that order because it concerns three later orders that incorporate the June order, each of which are unquestionably final. The lower court’s August

remedial orders are the product of the prior order and mandate a permanent, specific plan. Pet. Br. at 27–37. The August denial of Rule 54(b) certification is also appealable, and, if overturned, provides an additional basis for jurisdiction over the June 2 order. Pet. Br. at 32–35.

4. Plaintiffs next assert that jurisdiction is missing because the Department’s notice of appeal did not list and identify the orders at issue here. Resp. Br. at 2, 15, 18–19, 22, 31, 35 (“The 2014 Enforcement Order . . . was not addressed in the August 1, 2014, or August 13, 2014, orders which DHHR purports to challenge in the instant appeal. Similarly, in its third assignment of error, DHHR argues that the June 2, 2014, Enforcement Order is a ‘final judgment’ and, thus, can be reviewed on appeal . . . despite not designating that order as one of the ‘judgments’ being appealed.”). Plaintiffs are mistaken.

First, a defect in a notice of appeal does not strip the court of jurisdiction. In a notice of appeal, petitioner need only identify “[t]he order that sets forth the lower court’s decision from which [it is] appealing, *including any prior orders that are fairly comprised therein*”; beyond that, the notice of appeal is non-binding. Guide To Preparing An Appeal From A Circuit Court Decision Using The Revised Rules Of Appellate Procedure 6 (2010); W. Va. Code § 58–5–4; W. Va. R. App. P. 5 & App. A. The petitioner then may perfect its appeal by briefing any issues it wishes, including “issues intended to be presented to the Court that were *not* contained in the notice of appeal.” W. Va. R. App. P. 7(e). Plaintiffs cite no contrary authority.

Second, the Department’s notice of appeal *did* list all the orders raised in its brief. The Department appealed final orders entered on August 1 and 13, 2014 and stated that

Fairly contained within the court’s final orders are earlier orders forming the basis for its decisions, including the Order of June 27, 2014 (finding plans inadequate); the Order of June 2, 2014 at 10–11 (“the plan should utilize the currently available options, as set forth in the policies of the Division of Personnel, to implement special hiring rates and incentives in order to recruit fulltime direct care employees”); and the Orders of Apr. 24 & 29, 2014 (calling for administrative plans); *cf.* H’ring of June 11, 2014, at 5 (“I wanted a plan presented to me that was going to comply with the Court order that could be implemented

promptly and would not require legislative action.”); Order of Aug. 20 (denying reconsideration).

Notice of Appeal § 6 & § 9 Supp.⁸ The Department then attached each order from August 1, 13, and 20, 2014; June 2 and 27, 2014; and April 24 and 29, 2014.

Plaintiffs’ argument therefore boils down to the claim that the court’s earlier orders are not appealable because they are not fairly comprised within the August enforcement and finality orders. Plaintiffs are incorrect. The August orders rest on the June 2 order’s resolution of the Department’s legal obligations and remedy. On August 1, 2014, the court orally ordered the Department to implement the plan the Department had submitted to purge contempt—the plan documenting the court’s June 2, 2014 remedy. On August 13, 2014, the court memorialized its oral order—again telling the Department to implement the plan complying with the June 2, 2014 order. And, on August 13, 2014, the court declined to enter a partial final judgment under Rule 54(b) as to the August 1 order *and* as to the Court’s June 2, 2014 order.

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

1. The lower court’s orders meet this Court’s standard for finality, but even if they did not, this Court could still review them under the collateral order doctrine for orders that resolve issues separate from a final judgment.⁹ Pet Br. at 35–37.

⁸ The Department’s notice of appeal also listed these orders in its “outcome below” section: “On April 24, 2014 and April 29, 2014, and by Orders dated June 2 and June 27, 2014, the Circuit Court ordered the Department to restructure hospital pay and specified the contents of the plan. On August 1, 2014, the Circuit Court orally ordered the plan of its own choice implemented. On August 13, 2014, the Circuit Court entered a written order with the same holding and declined to expressly enter a partial final judgment as to these issues. On August 20, 2014, the court denied reconsideration.” Notice of Appeal § 16 Supp.

⁹ Plaintiffs abandoned their earlier assertion that the Department should seek a writ of prohibition instead of appealing. Motion To Dismiss at 12–13 & n.6, 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.”).

Plaintiffs offer no reason why the collateral order doctrine would not apply, nor explain when the Department can appeal these orders, if not now. They instead assert that 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 37. But this order does much more than "enforce" a prior order. *Supra* Pt. 1.A–B. And Plaintiffs do not explain how an order can resolve issues "central to this case" and order a remedy but not be *final* in nature and effect.

2. 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). Here, the exceptional nature of this case warrants review even if a jurisdictional question exists. Pet. Br. at 37. Plaintiffs fail to address this point, apparently conceding this case's extraordinary nature.

C. This Court may review enforcement of agreed orders.

By agreeing to an order, a party does not agree to expanding the order or implementing an unlawful remedy for non-compliance. Pet. Br. at 37. Plaintiffs do not address this point, apparently conceding that nothing precludes review on this basis.

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

The lower court held that compliance with the court's order to submit and implement the court's remedial plan waived the Department's objections to the 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; Pet. Br. at 37–40. Nor in a constitutional case like this *could* the Department waive its objections. Pet. Br. at 39–40. Plaintiffs do not contend otherwise.

CONCLUSION

The lower court should be reversed.

Respectfully submitted,

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Dated February 5, 2015

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
NO. 14-0845

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 February 5, 2015, I served a copy of *DHHR/BHFF'S Petitioner's Reply Brief* upon all parties as indicated below by mail:

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