

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
PRESSLEY RIDGE, ELKINS MOUNTAIN
SCHOOL; ACADEMY MANAGEMENT,
LLC; STEPPING STONES, INC.; STEPPING
STONE INC.; FAMILY CONNECTIONS,
INC.; and BOARD OF CHILD CARE OF
THE UNITED METHODIST CHURCH,
INC.;

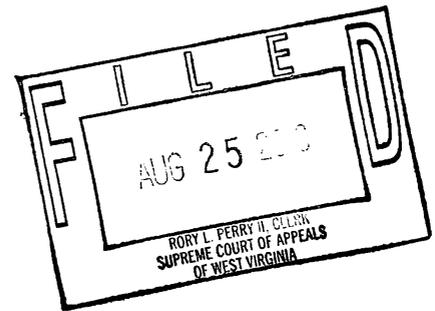
Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES;
KAREN L. BOWLING, Cabinet Secretary of
the West Virginia Department of Health and
Human Resources; WEST VIRGINIA
BUREAU FOR MEDICAL SERVICES;
CYNTHIA BEANE, Acting Commissioner for
the West Virginia Bureau for Medical
Services; WEST VIRGINIA BUREAU FOR
CHILDREN AND FAMILIES; and NANCY
EXLINE, Commissioner for the West Virginia
Bureau for Children and Families,

Respondents.

Docket No. 16-0738



**AMICUS CURIAE BRIEF OF THE ASSOCIATION OF CHILDREN'S
RESIDENTIAL CENTERS IN SUPPORT OF PETITIONERS' VERIFIED
PETITION FOR A WRIT OF MANDAMUS TO REQUIRE RESPONDENTS TO
IMPLEMENT NEW LEGISLATIVE RULES AND REQUEST TO STAY
IMPLEMENTATION OF CHANGES TO EXISTING RESIDENTIAL CHILD
CARE SERVICES PROGRAMS AND REIMBURSEMENT PENDING
PROMULGATION OF SUCH RULES**

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STATEMENT OF INTEREST

The Association of Children's Residential Centers ("ACRC") is the longest-standing national association focused exclusively on the needs of children who access residential treatment, and their families. ACRC's concentration for the past 60 years has been on advancing best practices and clinical excellence for providers. Increasing over the past two decades, ACRC has engaged on a deeper level with national and state policy makers, family members, youth, and our membership in an effort to redefine the shape and scope of residential treatment as an intervention for youth with serious emotional and behavioral disorders, and their families. A critical part of ACRC's mission has been to include all stakeholders in a dialogue that will necessarily lead to a better and more comprehensive system of care of which residential treatment is one vital component. ACRC believes that the same thoughtful and inclusive process must occur here in West Virginia and that is why ACRC supports the pending petition.¹

A. Understanding Systems of Care.

A System of Care ("SOC") is a coordinated network of community-based services and supports organized to meet the challenges of children and youth with serious mental health needs and their families. SOC is not a program — it is a philosophy of how care should be delivered. SOC is an approach to services that recognizes the importance of family, school and community, and seeks to promote the full potential of every child and youth by addressing their physical, emotional, intellectual, cultural, linguistic and social needs. Families and youth work in partnership with public and private organizations to design mental health services and supports that are effective, that build on the strengths of individuals, and that address each

¹ Pursuant to Rule 28(e)(5), ACRC states that this brief was not authored, in whole or in part, by counsel for a party and no monetary contribution was made by a party or their counsel to the preparation of this submission.

person's cultural and linguistic needs. Those services include access to residential interventions when they are clinically appropriate.

B. Coordination Between Community Based Services and Residential.

In 2006, a meeting unlike any other was held by invitation from SAMHSA,² gathering residential and community based providers, family members, youth, policy makers, tribal representatives, and national associations. ACRC was at the table as an honest and enlightening discussion ensued, ultimately resulting in the *Building Bridges Joint Resolution*. (See Exhibit A.) This document, now widely accepted and approved nationally, calls for a comprehensive, family-driven, youth-guided system of care with all participants playing a role in the well-being of every child in every community. This new view of systems assured that residential interventions are a necessary provision within a healthy SOC. The right place for a child at the right time. Gone are the days of residential treatment being the placement of last resort, but new on the scene was the goal of moving young people expeditiously into the community and back home. Such successful transitions depend exclusively on a flexible array of services working in concert with not only residential and community based providers, but youth and families themselves who we understand are integral partners in their own care and successful outcomes.³

² The Substance Abuse and Mental Health Services Administration ("SAMHSA") is the agency within the U.S. Department of Health and Human Services that leads public health efforts to advance the behavioral health of the nation. SAMHSA's mission is to reduce the impact of substance abuse and mental illness on America's communities.

³ ACRC is committed to living its family-driven, youth-guided values within its leadership. There are several board positions, both as directors and advisors, dedicated to youth with lived experience and parents/caregivers of youth who have accessed residential treatment. Their voice is critical to all conversations, in line with the 'nothing about us without us' mantra found in organizational cultures who have embraced Building Bridges.

C. ACRC's Reason for Involvement in West Virginia.

ACRC has long been aware of West Virginia's disproportionate reliance on residential treatment. As ACRC began to understand the complexities of the proposed system change in West Virginia, ACRC engaged in thoughtful dialogue on how best to provide support to the providers, policy makers, administrators, and ultimately the children and families who are affected by current and future system structures. ACRC's board of directors, who work within 17 different states and their unique systems, took pause, understanding that the questions and concerns being raised in West Virginia are those being raised throughout this country and around the world, and they are offering support from a position of allegiance, not judgment. ACRC can provide a view of how other systems have successfully managed a redesign, but can also provide insight into the consequences of decisions made void of careful consideration.⁴

ACRC is deeply concerned that while the logical trend nationally and internationally is toward more transparency and input from stakeholders, the West Virginia Department of Health and Human Resources ("DHHR") appears to be taking a contrary approach in seeking to implement sweeping changes to the delivery of residential services in the state. There is also strong evidence that West Virginia is simply not ready to so dramatically overhaul that system until it first takes the time to establish an adequate infrastructure of community based services. That is why ACRC appeared before the West Virginia Juvenile Justice Commission ("JJC") at a hearing on July 26, 2016 to discuss the potential impact of DHHR's proposed changes, and it is why ACRC is adding its voice to those of the petitioners here in urging that the

⁴ Among other things, ACRC has recently worked with federal legislators on the Families First Prevention Services Act (H.R. 5456), educating staffers on the dangers of arbitrary time limits versus individualized, clinically indicated services to meet the needs of children and families, resulting in a comprehensive, informed bill supporting the provision of quality residential interventions.

Court require DHHR to follow the state's established legislative rule making process prior to implementing those changes.

ARGUMENT

I. THERE IS NO EVIDENCE THAT THE STATE OF WEST VIRGINIA HAS A SUFFICIENTLY ESTABLISHED SYSTEM OF CARE OF COMMUNITY BASED RESOURCES TO ADEQUATELY MANAGE THE PRESSURES THAT WILL BE PLACED ON IT BY THE PROPOSED DHSS CHANGES.

It is undisputed that DHHR's proposed changes will have a dramatic impact on the delivery of residential services. The Petitioners have already described comprehensively the impact of those changes, including (1) effectively attempting to mandate maximum residential stays of 180 days, regardless of the clinical needs of the child, (2) dismantling the existing tiered system of placement based on the acuity needs of the child, and (3) unbundling the formula for compensating providers. We understand that the petitioners who have refused to sign the contract proposed by the Bureau of Children and Families ("BCF") represent approximately 52% (370 of 710) of the residential beds in use in West Virginia. (*See* Exh. B.)⁵ When adding in the other agencies who we understand will be filing *amicus* briefs (those who signed the BCF contract under duress and now face serious operational constraints), the number increases to represent 74% (528 of 710) of the now available beds in the State. (*Id.*)⁶ Moreover, this does not take into account the uncertain status of out of state organizations who provide residential services to West Virginia children in need. This indeed amounts to what has been described as "blowing up" the existing system. We understand that DHHR's position that the changes will not place children at risk, nor cause a massive increase in juvenile incarceration, is based on the

⁵ The data on Exhibit B was furnished from the providers and we understand it was obtained from the WVCPN website

⁶ The petitioners and these three additional "objecting" parties represent *all* of the beds available for to serve children with the most acute needs (those classified currently as Level III) in all of West Virginia. (*Id.*)

erroneous premise that established community based services will be available to handle the increased need.

Just last year, the United States Department of Justice, Civil Rights Division, investigated West Virginia's juvenile mental health system and found it to be in violation of Title II of the Americans With Disabilities Act of 1964, 42 U.S.C. §12131-2134 (2006), requiring that individuals with disabilities, including children with mental illness, receive support and service in the most integrated setting appropriate to their needs. (*See* Exh.C; 6/1/15 Letter from DOJ to West Virginia Governor Tomblin ("DOJ Report").)⁷

The DOJ Report found that over several decades West Virginia had built its entire SOC for children with mental health needs around residential treatment, to the to the exclusion of sufficient community based services that would allow more of those children to obtain effective treatment while remaining at home.⁸ Reducing lengths of stay, keeping children at home with their families, addressing their needs in the community, and using residential as one vital resource within the entire SOC are primary goals of ACRC and its member providers. ACRC is confident they are also goals shared by every other stakeholder in this controversy.

However, the clear message of the DOJ Report was that West Virginia's network of community based services was woefully inadequate -- so inadequate that it constituted a violation of the civil rights of the state's affected children. Significantly, the report concluded that "[c]hildren who depend on the Department of Health and Human Resources ("DHHR") for mental health services experience high rates of placement in segregated residential treatment

⁷ The United States Supreme Court outlined in *Olmstead v. L.C. ex. rel. Zimring*, 527 U.S. 581 (1999) obligations of governments to ensure that, whenever feasible, individuals with mental health needs be allowed to live in communities rather than institutions. States are required to promulgate "Olmstead Plans" to demonstrate their achievement of that goal.

⁸ The DOJ Report noted that "West Virginia reports that its child welfare system has a higher percentage on youth in segregated residential treatment facilities than 46 other states." (*Id.* at 6.)

facilities, including out of state placement, *because* DHHR has not developed a sufficient array of in-home and community based services." (*Id.* at 2.) (emphasis added).

In describing the deficiencies of West Virginia's community based services, the DOJ explained:

- West Virginia has not fully implemented its *Olmstead* plan. It has not developed comprehensive, community based services for children with mental illness, including wraparound supports that are the standard of care for children with significant mental health needs. West Virginia has not developed statewide community based crisis services, nor has it effectively diverted children from unnecessary placement in segregated residential treatment facilities. (*Id.* at 2-3.)
- Child serving agencies in West Virginia fail to collaborate to address the needs of children with mental health conditions involved in multiple systems. As a result, agencies duplicate efforts, waste limited state resources, and provide fractured care delivery, causing confusion and harm to children and families. (*Id.* at 3)
- West Virginia fails to engage families effectively to develop strategies to support children in their homes and communities. (*Id.* at 2)
- States that have successfully developed integrated mental health services have done so by fostering engagement of families and community members as full partners in strategies to support children in their homes and communities. (*Id.* at 11.)
- For children placed out of home, the lack of in home and community based services results in longer stays in segregated residential treatment facilities. An out of state provider said that West Virginia children stay in the provider's facility two months longer than youth from the provider's own state. Because of the lack of in home and community based services in West Virginia, many of those children are discharged to yet another segregated residential treatment facility. In contrast, children from the state where the facility is located leave the program sooner and return home with in home and community based services. (*Id.* at 13.)
- States that have developed integrated mental health services have done so by fostering engagement of families and community members as full partners in developing strategies to support children in their homes and communities. DHHR has long recognized the significant need for, and lack of, child and family outreach and engagement. (*Id.* at 23.)

We are aware of no evidence suggesting that DHHR has significantly improved its community based services since the DOJ Report. In fact, the evidence from reliable sources indicates the opposite. As discussed in more detail below, the JJC recently issued a report on DHHR's proposed changes which concluded, among other things:

The lack of comprehensive and accessible infrastructure to support keeping children in their community, in addition to the proposed contract changes and resulting limitations, may produce community safety concerns and an increase in juvenile incarceration which is counterproductive to juvenile justice reform.

(See Exh. D; "The Juvenile Justice Commission's Findings of Fact and Recommendations Relating to DHHR's Proposed Contract Changes for the Placement of West Virginia Youth," Juvenile Justice Commission, State of West Virginia, 8/22/16. ("JJC Report") at 6.)

Accordingly, the JJC explained that "[w]hile the Commission supports moving children into community based services, such a sweeping change without the proper infrastructure could jeopardize the well-being of children and future rehabilitation efforts." (*Id.* at 9.)⁹

There is no reason to conclude that the community based services portion of West Virginia's SOC, in its nascent state, is equipped to manage the additional pressures resulting from effectively "blowing up" the residential network in the state. Moreover, doing so could damage the proper development of those community programs. Unless and until DHHR can demonstrate that it has first satisfied the deficiencies identified in the DOJ Report, any suggestion that has an effective plan to fill the potential gap left by the reduction of residential resources should be rejected.

⁹ In particular, the JJC Report noted that DHHR's new wraparound service ("Safe at Home") for children ages 12-17 with a particular diagnosis who can be treated with community services "is in its early stages and neither the project nor the comprehensive and accessible infrastructure of treatment services is available in many parts of West Virginia." (*Id.*)

II. ALL RELEVANT PARTIES MUST BE INCLUDED IN A DIALOGUE REGARDING A REDESIGN OF MENTAL HEALTH SERVICES FOR YOUTH IN ORDER TO DEVELOP AN EFFECTIVE SOC AND PROTECT CHILDREN.

Since the adoption of the *Building Bridges Joint Resolution* in 2006, the national trend and recognized best practice for developing comprehensive strategies to transform children's mental health care has been partnership, collaboration and dialogue among providers, community programs, relevant committees, the judiciary and legislators, as well as youth themselves and their families.¹⁰ The Court will find no evidence to the contrary. For reasons unknown, that has not taken root here. By all indications, DHHR's proposed overhaul of residential is substantively flawed *precisely because* it has declined to accept input from other stakeholders before seeking to implement its plan.

The most comprehensive analysis of the problems with DHHR's proposed changes is contained in the recent JJC Report, issued just days ago, which this Court should consider authoritative.¹¹ In response to concerns raised by the petitioners and other stakeholders regarding the sweeping changes proposed by DHHR, JJC held a public forum to address the issues on July 27, 2016. ACRC and many others participated. JJC noted that DHHR "was formally invited to the public forum but publicly opted, through the press, not to appear or send a representative on its behalf." (*See* Exh. D at 3.) JJC's principal findings were as follows:

¹⁰ The critical nature of family and youth involvement in the treatment process is universally acknowledged. ACRC has published several position papers describing the clinical benefits of such involvement. Attached is one such paper. (*See* Exh. E.)

¹¹ In the summer of 2011, *this Court* created the Juvenile Justice Commission ("JJC") to oversee programs operated or contracted by the Division of Juvenile Services and DHHR, including residential treatment facilities. JJC's charge was as follows:

Any children ordered into facilities, removed from their families/homes and who are outside of their home communities, are wards of the courts. Therefore, those youth remain a proper concern of the court system. The Juvenile Justice Commission is the mechanism whereby the Court can monitor and ensure that the system provides safe, nurturing living conditions as well as rehabilitative services.

See www.courts.wv.gov/court-administration/juvenile-justice-commission/History.html.

1. That the proposed changes are a unilateral attempt, under the guise of contract negotiations, to make systemic changes to the care and treatment of West Virginia children.
2. That the proposed changes potentially violate West Virginia law.
3. That the proposed changes could cause a youth and placement crisis and lead to an increase in juvenile incarceration.
4. That the proposed changes were cloaked in secrecy.
5. That the proposed changes could be detrimental to the state's network of shelter and residential placements.
6. That the proposed changes increase safety concerns and may rapidly dismantle the state's youth placement network.
7. That the proposed changes potentially usurp judicial authority.

(*Id.* at 3-8.)

JJC's "Conclusions and Recommendations" essentially mirror the request of the petitioners, including that DHHR withdraw the proposed State Plan Amendment, immediately suspend implementation of the new contracts, and disclose its details regarding its yet undisclosed computer matrix for placing children in residential. JJC ultimately explained that DHHR "has offered no credible explanation for the need to rapidly dismantle, without thorough examination and input, the youth residential treatment system in West Virginia." (*Id.* at 7.) This Court has authority to take judicial notice of the determination of its own commission and ACRC urges it to do so.

Of particular concern to JJC, however, was the unwillingness of DHHR to engage others who might offer valuable insight in the search for appropriate solutions regarding mental health needs for the State's youth, stating:

The Juvenile Justice Commission is deeply troubled with the testimony provided at the public forum. Furthermore, the Commission has taken note that the Department of Health and Human Resources has been provided many opportunities and invitations to explain the aforementioned changes and has

refused to do so, seemingly taking the position that no explanation is warranted to the judiciary, providers, educators and families among others. The Commission finds this position to be presumptuous and short sighted, especially considering that judges, court officers, treatment providers, teachers and families are a critical and necessary part of determining the best treatment options for the individual child.

(Id. at 9.) JJC added:

Any further changes to the process used to place at risk children should be transparent and include input from providers, the judiciary, the West Virginia Intergovernmental Task Force on Juvenile Justice, legislators, the Governor's Oversight Committee on Juvenile Justice Reform, the Commission to Study Residential Placement of Children, the Juvenile Justice Commission and the Department of Education, all of whom are critical stakeholders in the juvenile justice system.

(Id. at 9-10.)

This Court should take particular notice of DIIIIR's unwillingness to address its proposed changes with one of these groups referenced by the JJC -- the West Virginia Commission to Study Residential Placement of Children ("CSRPC"). The CSRPC was expressly created by the legislature to analyze the very issues at issue here.¹² Not only does DHHR Secretary Karen L. Bowling chair the CSRPC, but the other two individual respondents in this case -- BMS Acting Commissioner Cynthia Beane and BCF Commissioner Nancy Exline -- are members as well. (*See* Exh. F; Roster of Commission Members.) The CSRPC also includes, among others, a representative of one of the petitioners (a provider), family / parent representatives, as well as representatives of foster care, probation services, and the judiciary. (*Id.*)

¹² According to its website:

[CSRPC] was created by an act of the 2005 Legislature (HB 2334) to achieve systematic reform for youth at risk of out-of-home residential placement and to establish an integrated system of care for these youth and their families. This focus was broadened with several recommendations made by the Commission in its May 2006 report *Advancing New Outcomes* that include all children and their families in out-of-home placement and those at risk of out-of-home placement. In 2010, the Legislature passed SB 636 to reconstitute the Commission. This Legislative Bill, in addition to the original study areas, includes addressing any ancillary issues relative to foster care placement and requires a reduction in out of state placements.

In reviewing CSRPC's membership roster, this Court will undoubtedly conclude it is a group uniquely situated to facilitate a meaningful discussion between all of the relevant stakeholders. This is particularly so given that the CSRPC is listed on the Building Bridges Initiative website as a "Partner and Supporter" and an agency that has committed to adhere to the inclusive and collaborative model of the *Building Bridges Joint Resolution* discussed above. (See <http://www.buildingbridges4youth.org/partners>.) Inexplicably, however, we understand that after BCF delivered its proposed contract changes to providers in February 2016, Secretary Bowling canceled CSRPC meetings scheduled for March 2016 and September 2016. As for the one meeting that occurred in the interim (June 2016), DHHR's proposed changes to residential treatment were not included as an agenda item. (See Exh. D; JJC Report at 4.) This is disappointing and, again, helps explain the reasons for the myriad problems identified by the JJC Report which may have been avoided by a more inclusive approach.

ACRC is unaware of any other state agency in the country that has proposed such a sudden and dramatic change in the delivery of residential service, let alone excluded input from any other stakeholders in the process. ACRC believes it is simply not possible to develop an effective SOC under such circumstances and urges the Court to halt implementation of the proposed changes until the necessary dialogue occurs.

III. THE COURT SHOULD PROHIBIT DHHR FROM UNILATERALLY IMPLEMENTING PROPOSED CHANGES WITHOUT ALLOWING MEANINGFUL INPUT FROM STAKEHOLDERS THROUGH THE STATUTORY RULEMAKING PROCESS.

As Petitioners have pointed out, the Court's criteria for ordering a writ of mandamus is well established under West Virginia law: "(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which petitioner seeks to compel; and (3) the absence of another adequate remedy." *Syl. Pt. 2, State ex. rel. Kucera v. City*

of Wheeling, 153 W. Va. 538, 170 S.E.2d 367 (internal citations omitted) (1969). Likewise well-established is the fact that the changes proposed by DHHR constitute new legislative rules that must comply with the requirements of West Virginia Code §29A-3-1 et. seq. ACRC will not restate the ample authority for that position which Petitioners have already thoroughly briefed.

As discussed above, ACRC believes there are many reasons why DHHR should have already solicited and considered the perspective of the many parties that have a stake in protecting the safety, permanence, and well-being of West Virginia's children with mental health needs. Fortunately, the law requires DHHR to engage in a statutory rulemaking process which provides at least *minimal* safeguards for the input of all of those affected by proposed changes to the State's residential treatment system. Among other things, DHHR must:

- File with the Secretary of State a full copy of the text of whatever new rules it seeks to implement. This includes all of the proposed changes which DHHR has not yet fully described, including: (1) details of the matrix based placement system, and (2) a clear explanation of the criteria for "standard" and "enhanced" services.
- Explain the reasons for the proposed changes.
- Fix a date, time and place for receipt of public comment from anyone who may have an interest in commenting. This includes providers, community based services, legislators, judges, family members, and the youth themselves.
- Create a fiscal note itemizing the cost of implementing the rule - i.e, the true budget impact of the proposal.

West Virginia Code §29A-3-5.

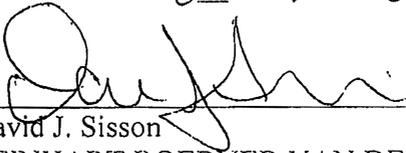
However, ACRC urges the Court to instruct DHHR to not merely "go through the motions" of rulemaking process. Rather, DHHR should be guided to take advantage of this opportunity to fully engage in the kind of deliberative and interactive process with all relevant stakeholders which should have already taken place. As is clear from the JJC Report, the

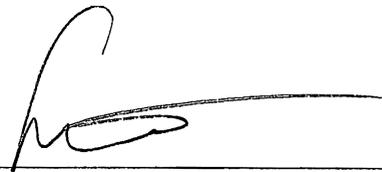
Petitioners' submission and other sources, West Virginia's children have much to gain if DHHR will meaningfully listen to perspectives that will inevitably enhance whatever rules are developed going forward for the delivery of mental health services to youth. That approach would be consistent with the guidance offered by the *Building Bridges Joint Resolution* and countless other sources. ACRC stands ready to engage in future dialogue and support positive system change as the process unfolds.

CONCLUSION

For the reasons stated above, ACRC respectfully requests that the Court grant the Petitioner for Writ of Mandamus to Require Respondents to Implement Legislative Rules an Request to Stay Implementation of Changes to Existing Residential Child Care Services Programs and Reimbursement Pending the Promulgation of Such Rules.

Dated this 24th day of August, 2016.


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VERIFICATION

I, Kari M. Sisson, being first duly sworn, on oath depose and say that I am authorized to verify this *Amicus Curiae Brief of the Association of Children's Residential Centers in Support of the Petitioners' Verified Petition for Writ of Mandamus to Require Respondents to Implement New Legislative Rules and Request to Stay Implementation of Changes to Existing Residential Child Care Services Program and Reimbursement Pending the Promulgation of such Rules ("Amicus Curiae Brief of Association of Children's Residential Centers")*; that I have reviewed the foregoing *Amicus Curiae Brief of Association of Children's Residential Centers* and know the contents; that said *Amicus Curiae Brief of Association of Children's Residential Centers* was prepared with the advice of counsel and from information and material made available from numerous sources; and that said *Amicus Curiae Brief of Association of Children's Residential Centers* is based upon my personal knowledge as well as upon information supplied by others. Based upon the foregoing, the *Amicus Curiae Brief of Association of Children's Residential Centers* is true to the best of my knowledge, information and belief.

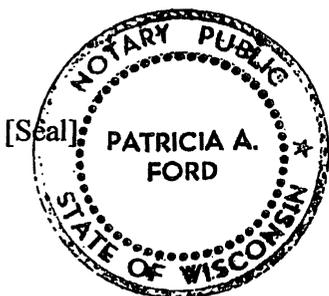
State of Wisconsin)
 : SS
Milwaukee County)

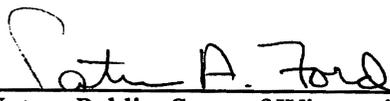
Subscribed and sworn to (or affirmed before) me on the 24th day of August, 2016, by

Kari M. Sisson



Kari M. Sisson
Executive Director
Association of Children's Residential Centers





Notary Public, State of Wisconsin
My commission expires on 2-24-2018

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EXLINE, Commissioner for the West Virginia
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that service of the foregoing **“Amicus Brief of the Association of Children’s Residential Centers in Support of Petitioners’ Verified Petition for a Writ of Mandamus to Require Respondents to Implement New Legislative Rules and**

Request to Stay Implementation of Changes to Existing Residential Child Care Services Programs and Reimbursement Pending Promulgation of Such Rules” was made of the 25th

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By counsel,

A handwritten signature in black ink, appearing to read "Scott H. Kaminski", written over a horizontal line.

Scott H. Kaminski, WVSB No. 6338

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