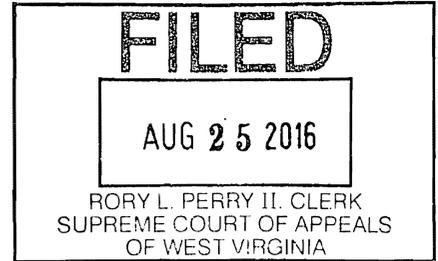


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

Docket No. 16-0738

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.

***Amicus Curiae Brief of Davis-Stuart, Inc., Burlington United Methodist
Family Services and Cammack Children's Center In Support of Petitioners'
Verified Petition For 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 the Promulgation of Such Rules and Supporting Memorandum of
Law***

Jennifer N. Taylor, WWSB 4612
Attorney at Law
1118 Kanawha Boulevard, East
Charleston, WV 25301
304.342.1887
jennifer@jtaylor-law.com
Counsel for Amicus Curiae Movants

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INTRODUCTION

The Movants, Davis-Stuart, Inc., Burlington United Methodist Family Services and Cammack Children's Center respectfully submit their *amicus curiae* brief in support of the "*Verified Petition For 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 the Promulgation of Such Rules*" submitted by the Petitioners Pressley Ridge, Elkins Mountain School, Academy Management, LLC, Stepping Stones, Inc., Stepping Stones, Inc., Family Connections, Inc. and Board of Child Care of the United Methodist Church, Inc.¹

Pursuant to the provisions of Rule 30 of the *W.Va. Rules of Appellate Procedure*, notice of the Movants' intent to file an *amicus curiae* brief was provided by letter e-mailed and mailed by United States Mail, postage pre-paid, upon counsel for the Respondents and counsel then of record on Thursday, August 18, 2016. A copy of said letter is attached hereto as Exhibit No. 1 in the Appendix. As of this filing, the Movants herein have not had a response from the Respondents or their counsel.

¹ Pursuant to the provisions of Rule 30(e)(5) of the *W.Va. Rules of Appellate Procedures*, the Movants, Davis-Stuart, Inc., Burlington United Methodist Family Services and Cammack Children's Center state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and all funding for this brief was provided solely by the *amicus curiae* Movants herein.

INTEREST, IDENTITY AND AUTHORITY

Pursuant to the provisions of Rule 30(e)(4) of the *W.Va. Rules of Appellate Procedures*, your *amicus curiae* Movants state the each of them is a facility identical to that of the Petitioners - a licensed, not-for-profit, group residential child care facility that serves the needs of children throughout the state of West Virginia.

Davis-Stuart, Inc. (“Davis-Stuart”) is a group residential child care facility that has operated for almost 100 years in Lewisburg, West Virginia, in partnership with the Presbyterian Church, U.S.A. Davis-Stuart has a total of **68 beds** available for the treatment of youth. The main campus in Lewisburg provides beds for 44 residents, while each of four group homes in Bluefield, Princeton, Beckley and Maxwelton provide for six (6) residents respectively. The Lewisburg Campus is considered Level II. The community based group homes are designated Level I. Davis-Stuart serves approximately 150 youth and their families each year. The Movant employs 120 people and hosts a West Virginia Department of Education School on the main campus in Lewisburg that provides a full service educational component. Davis-Stuart offers several unique programs on its main campus, such as an equine assisted therapy program, an employment preparation program, a culinary arts program shared with the West Virginia Department of Education, and a Spiritual Life program. The Mercer County Group Homes work very closely in conjunction with 9th Judicial Circuit in serving many youths involved in the Drug Court and enabling those who must be

removed from their respective homes to stay in the community, participate in drug court and attend their school of origin.

Burlington United Methodist Family Services (“Burlington”) is a group residential child care facility headquartered in Charleston, West Virginia. Burlington has also provided residential child care services for over 100 years. Between its main facility and its Beckley operations, Burlington has a total of **91 beds**. The Beckley facility generally serves ten (10) Level II children 12 to 18 years of age, and twenty (20) Level III children in that age group. The facility in Charleston hosts children eight to 18 years old and is segregated by age, which requires more staff. Currently the Charleston facility hosts 14 Level II children and 20 Level III children. Both the Beckley and Charleston facilities have on-ground schools staffed by teachers provided by the West Virginia Department of Juvenile Services. Teacher’s aides are direct Burlington employees. The Daniels facility currently hosts eight (8) children who have been diagnosed with a Level III co-existing disorder. These children require more intense supervision. The Old Fields facility also serves children with a Level III co-existing disorder, ages five (5) to 10 years of age, who also require more intense supervision. These children attend on-ground school and are bussed 12 miles each way by Burlington staff. The Keyser Transitional Living facility has five (5) Phase I children and four (4) Phase II children. Phase I children require more supervision. All programs have a Spiritual Life component that is funded by the Methodist Church and donations.

Cammack Children's Center ("Cammack") is a group residential child care facility located in Huntington, West Virginia that has served families in West Virginia since 1914. Cammack is a Level II therapeutic group home with an intensive professional multi-disciplinary focus for adolescents who are in need of a residential setting. The Movant provides a structured and alternative living situation for both male and female youth between the ages of 12 through 17 who are in the custody of the West Virginia Department of Health and Human Resources. Cammack provides individual and group therapy for children, family therapy, supportive counseling on an individual or group basis, and behavior management. The facility currently has **32 co-ed beds**. Cammack has an on-grounds school that provides credit recovery with transition to public schools. It also offers summer school, a recreational facility and a 24-hour on-call on-site nursing staff.

Like the original Petitioners, each Movant herein is duly licensed as a group residential facility pursuant to the provisions of *W.Va. Code* § 49-2-113 and *W.Va. Code of State Rules* §78-3-1. They each provide services to children with varying ranges of emotional and behavioral issues. For decades, each Movant has been a signatory to provider agreements with the West Virginia Department of Health and Human Resources ("DHHR") Bureau for Children and Families ("BCF") and the Bureau for Medical Services ("BMS"). The Movants also receive significant private funding from other sources, including the Presbyterian Church U.S.A and the United Methodist Church.

The BMS is responsible for oversight and implementation of the Medicaid program in West Virginia. Under prior agreements, the BMS and BCF reimbursed residential child care providers for four components of services under a “bundled rate” system. That payment system varied based upon the level of services provided (Level I, II, or III) under Appendix F to Chapter 503 of the West Virginia Medicaid Provider Manual. For room, board, and supervision the providers were paid from state dollars through BCF. For services that fell into the “treatment” category, providers were paid through BMS and were subject to the 3-to-1 Medicaid match from the federal government.

In July 2016, the Respondents presented the providers of residential child care services in this state with new contracts. Under the new agreements, reimbursement for the four components would be transitioned into what amounts to a fee-for-service system. The providers would be reimbursed for traditional services, such as room and board, counseling and medical services, as recognized by the Medicaid manual. However, some specialized services, such as the equine assisted therapy program, employment preparation program, culinary arts program and the extensive nursing services offered by Davis-Stuart, did not fall into the traditional categories recognized by the Medicaid program. Consequently, the specialized services offered by the Movants would not be subject to reimbursement; the children would be deprived of these highly successful programs; and the providers would suffer significant financial harm.

The new provider agreements were also drafted without any basis in rule or law. The previous agreements were subject to the provisions of legislative rules,

which included standards, guidelines and enforcement authority approved by the West Virginia Legislature. However, BCF and BMS failed and refused to develop or promulgate any new rules that reflect the procedures and reimbursement schedules contained in the new provider agreements. The Respondents circumvented their clear legal duty to appropriately promulgate the anticipated changes to the programs and reimbursement methodologies for group residential facilities. As a result, both the Movants and the Respondents themselves were without clear direction on how to proceed.

The entire contractual arrangement proposed by the Respondents was based on arbitrary, internal policies that could be changed at any time and were not subject to legislative review or approval. The intentional protections offered by a legislatively-approved rule were brushed aside in favor of an ever-changing, arbitrary system that lacked the governmental oversight inherent in the state rulemaking procedures.

The Movants, the Petitioners and other parties protested the terms of the new agreements and asked the Respondents if the parties could discuss the issues. The Respondents agreed, and appeared to be engaged in negotiations with all of the stakeholders. However, the Respondents ultimately backed off from the negotiations and insisted that all providers sign the new agreements or face immediate termination of all contracts. Quite simply, the Respondents required the Movants to sign unconscionable contracts of adhesion.

As noted by the Juvenile Justice Commission, the new provider agreements and the proposed operational changes were “a unilateral attempt,

under the guise of contract negotiations, to make systemic changes to the care and treatment of West Virginia children.” *The Juvenile Justice Commission’s Findings of Fact and Recommendations Relating to DHHR’s Proposed Contract Changes for the Placement of West Virginia Youth*, August 22, 2016, p. 3, (“Juvenile Justice Commission Findings”), Appendix, Exhibit No. 2.

During this period, the Respondents also submitted an amendment to the State Health Plan to the Centers for Medicare and Medicaid Services, again without promulgating new legislative rules that would offer operational standards and instruction. This amendment would substantially change the state’s Medicaid plan and directly affect the reimbursement provisions for child care providers. These changes were not made in collaboration with any of the affected stakeholders; were not enacted through legislation or standard rulemaking procedures, and are contrary to the progress West Virginia has made in terms of appropriate child placement.

The Respondents proposed instead, to use internal policies that would serve as “guidelines” - policies that are vague, contradictory, and void of any actual direction or legislative oversight. The policies do not state how to bill for the unbundled services or even what to bill. They do not recognize the varying treatment levels for children, or the unique programs offered by many providers that are not necessarily included in standard reimbursement formulas. Some of the contract terms and the guidelines are at odds with each other, and with current law.

The shift from legislatively-approved rules to vague, internal guidelines significantly affects the reimbursement rates to the providers of group residential child care services, place children at risk of placement in more restrictive settings, and would increase the number of out of state placements or children who receive no services at all. The agency charged with the health and human services of this state has failed in its duty to safeguard either one.

Davis-Stuart, Burlington and Cammack signed the new agreements, under protest and under duress. Davis-Stuart and Burlington recognized that as faith-based providers, their moral commitment to the children of West Virginia far outweighed the possible and probable financial distress that would result from the new provider agreements. Each of the Movants chose to continue serving the children of this state - notwithstanding the possible illegality of the new agreements, the probable financial losses and the general mass confusion surrounding the process – instead of risking immediate closure and the certainty of a loss of services to their vulnerable clients.

The Movants are directly and detrimentally affected by the significant and arbitrary changes proposed by the Respondents through the provider agreements. They stand to lose significant portions of their budgets, and have no means of recouping their losses. Three well-established residential child care providers that have operated in the State of West Virginia for over a century now face closure if the Respondents are permitted to continue acting in a reckless, irresponsible and illegal manner.

The children of this state also face irreparable harm if the Respondents are permitted to continue on this road to chaos and confusion. Without the specialized residential services provided by the Movants the number of out-of-state placements would increase, and children would be placed in more restrictive environments. West Virginia has fought against both of these issues for over three decades, and in one single move the Respondents would cause the state to regress backwards instead of progressing forward when it comes to the care of its youngest and most vulnerable citizens.

The West Virginia Juvenile Justice Commission issued findings of fact and recommendations on August 22, 2016, and specifically found that not only were the Respondent's proposed changes "cloaked in secrecy," they could indeed be detrimental to the state's network of shelter and residential placements. "*West Virginia Juvenile Justice Commission's Findings of Fact and Recommendations Relating to DHHR's Proposed Contract Changes for the Placement of West Virginia Youth*," August 22, 2016, p. 6, *Appendix Exhibit No. 2*.

These findings cannot be ignored. The submission of a new amendment to the State Health Plan without the underlying, required state rules, the insistence on contracts of adhesion that likewise have no basis in rule or law reflect a department in disarray, with no sense of responsibility towards either the providers in this state or the children.

As such, the Movants join with the Petitioners in their Writ of Mandamus and pray that this Court require the Respondents to act according to the law and not by their own arbitrary standards that circumvent the same.

ARGUMENT

I. Standard of Relief.

Three elements must be present in order for this Court to issue a writ of mandamus: The parties must establish “(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of the respondent to do the thing which the 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 (1969); Syl. Pt. 1, *State ex rel. Brown v. Corporation of Bolivar*, 217 W.Va. 72, 614 S.E.2d 719 (2005); Syl. Pt. 1, *State ex rel. Dickerson v. City of Logan*, 221 W.Va. 1, 650 S.E.2d 100 (2006.)

A writ of mandamus is entirely appropriate in order to require the performance of a non-discretionary duty by a governmental agency or body. Syl. Pt. 2, *State ex rel McLaughlin v. W.Va. Court of Claims*, 209 W.Va. 412, 549 S.E. 2d 286 (2001.) By granting a writ of mandamus, the Court may compel an administrative officer to perform a nondiscretionary duty where it appears that the official refuses to recognize the nature and scope of his or her duty and proceeds on the belief of entitlement in the discretion to do or not to do the thing demanded by law. See, e.g., *Walter v. Ritchie*, 156 W. Va. 98, 191 S.E.2d 275 (1972); *Potomac Edison Co. v. Jefferson County Planning & Zoning Comm’n*, 204 W. Va. 319, 512 S.E.2d 576 (1998).

II. The Respondents Have a Legal Duty to Promulgate Legislative Rules.

The Movants support the writ of mandamus filed by the Petitioners asking this Court to require the Respondents to promulgate new legislative rules before

seeking approval of the amendment to the State Health Plan, implementing operational changes or requiring all providers to sign the new agreements. As noted by the Petitioners and other *amicus curiae*, the West Virginia Administrative Procedures Act, *W.Va. Code § 29A-1-1, et seq.* requires the Respondents to submit legislative rules; to give all stakeholders interested or affected by the rules the opportunity to comment and participate in the promulgation of the same; and to obtain specific legislative approval of those rules.

As noted by this Court's own Juvenile Justice Commission, the Respondents completely circumvented the rulemaking process and resorted to dictatorial tactics that ignore the basic purpose behind the Administrative Procedures Act. Rather than repeat the arguments of the Petitioners and other *amicus curiae* on this issue, the Movants simply state that they agree with the position of these parties, incorporate their arguments herein, and pray that this Court find that the failure of the Respondents to promulgate proper legislative rules prior to requiring the proposed changes is a dereliction of their clear legal duty to the providers and children of this state.

The Respondents should be required to recall the new State Health Plan amendment submitted for federal approval; to promulgate legislative rules using the rule-making process that protects the interests of state agencies and all stakeholders involved; to perform the studies and analyses as recommended by the Juvenile Justice Commission, and to perform such other acts as the Court deems reasonable and necessary under the circumstances.

III. The Respondents Have a Duty to Promulgate Rules that Take Into Consideration the Specialized Needs of Children and the Specialized Services Offered by the Movants.

The rules that the Respondents should have promulgated – and hopefully will be required to promulgate – must reflect the varying needs of children who are placed in group residential care homes, as well as the different and unique specialized services that the Movants provide. Neither children nor residential child care providers fit into the pre-determined molds proposed by the Respondents. The failure to recognize the distinctive needs of the children, as well as the unconventional but successful services of the providers, results in serious and detrimental harm to everyone involved.

West Virginia has spent many years developing legislation and participating in extensive and decades-long litigation focused on the placement of children in residential care facilities. The ultimate goals are to place a child in the least restrictive environment, in a West Virginia facility that appropriately ensures the safety of that child and others around him or her, and to develop collaboration among all interested and affected parties as to the most appropriate placement and treatment for the child. Those parties consist of judges, multidisciplinary teams, providers, professionals and para-professionals from multiple areas and, of course, the parents and children themselves.

The new policies proposed by the Respondents are contrary to the long-term goals that the Legislature, the courts and advocates of children have work so hard to obtain. The Respondents' proposed policies and procedures fail to recognize the individual needs of children in need of residential care programs

and completely disregard the concepts of judicial discretion and recommendations from multidisciplinary teams. The mysterious computerized matrix - which no one has ever seen – supposedly selects placement of the child according to arbitrary standards that do not consider court findings, the recommendations from multidisciplinary teams or even the ability of the provider to appropriately treat the child.² Such a system is a disaster waiting to happen.

Just as children differ, so do child care providers differ. The obvious distinction among the providers embroiled in this proceeding is emergency child care shelters, which do not provide the same services as residential treatment facilities. The residential child care providers have significantly more beds, and provide a full range of varying, often specialized services to children with multiple levels of needs. Yet, the policy propounded by the Respondents intends to treat all providers alike, regardless of the level of services or care.

Under the previous system, all parties were bound by specific rules that recognized the ever-changing needs of the children and the different levels of services provided by the facilities. *W.Va. C.S.R. §78-3-1, et seq.*, provided guidance and direction for both the agencies and the facilities regarding the delivery of residential child care services. The rules established requirements for operating facilities; hiring and training of staff; credentialing professionals and employees; oversight, supervision, and reporting; procedures for intake, treatment planning and discharge. They recognized the varying levels of need

² Juvenile Justice Commission Findings, p. 4.

and treatment as reflected in the classification of a child as either Level I, Level II or Level III.³

Traditionally, the DHHR paid providers for the cost of all room, board and supervision expenses out of state funds. These costs were paid through the BCF and subject to a ceiling or cap established by DHHR. Any expenses in excess of the cap were deemed residual costs, and paid out of Medicaid funds through BMS, which, in turn were subject to the federal 3-to-1 match. These two funding sources were combined to establish a “bundled” per diem rate for the provider.⁴

Under the new system, providers will receive one standard level of reimbursement, regardless of the level of services provided. BCF proposes to reimburse residential child care providers for room, board and supervision services based upon new daily rates for either “standard” or “enhanced” services. However, the new internal policies that purportedly supersede W.Va. C.S.R. §78-3-1, *et seq.*, fail to define the terms “standard” or “enhanced” services, and disregard the fact that there are varying levels of needs on the part of the children and varying levels of services as provided by the facilities.

³ Level III reflects a child in need of the highest level of specialized care. A facility that normally serves a Level I or Level II group of children often does not have the skilled professionals needed to serve an acute Level III child. A facility that does have the specially-trained staff to treat a high-acuity Level III child will, naturally, have more specialized treatment programs and higher costs.

⁴ Davis-Stuart has residual costs in the form of its equestrian, culinary arts and employment preparation programs. These specialized services are different; they do not neatly fall into a pre-determined category and are not easily checked off as standard residential treatment. Davis-Stuart has a \$5.4 million annual budget, and under the DHHR's proposed plan the agency will experience a \$950,000 deficit. These specialized programs will not be sustainable.

Not only do the new policies fail to recognize the varying needs of the children, they also fail to recognize – and pay for - the specialized services offered by many child care providers, including the Movants herein. The original Medicaid Manual, on which the Respondents intend to rely, was written for outpatient treatment, not group residential programs that offer specialized services. Moreover, the codes for billing in a residential facility environment are woefully insufficient, especially in light of the additional service requirements that the Respondents have imposed upon the providers.⁵

The amendment to the State Health Plan and the Medicaid Manual should be re-written to recognize that children have varying needs and that fee-for-service reimbursement rates cannot possibly cover all treatment services provided, whether standard or specialized. The basic room, board and supervisions rates should also be adjusted in order to cover the additional supervision requirements now imposed by the Respondents. All of these changes require a meeting of the minds, coordination and cooperation of both agencies and stakeholders and, most importantly, legislative review and approval.

The Respondents should be required to develop legislative rules and an appropriate amendment to the State Health Plan that clearly recognize the needs

⁵ Davis-Stuart estimates that the most it can expect to capture from Medicaid is \$350,000 per year. Combined with the other rate reductions proposed by the Respondents, Davis-Stuart is looking at a total net loss of \$600,000 deficit. That leaves the Movant with only one choice – reduce and eliminate the specialized treatment programs that have been the trademarks of that highly successful facility for nearly a century.

and rights of the children affected, as well as the distinctive differences in the services provided by the Movants and other similar facilities.

IV. The Movants Have a Clear Legal Right to Negotiate Provider Agreements Without Threats or Duress.

The provider agreements signed by the Movants should be deemed unenforceable and contrary to principles of equity and fairness. The Respondents required the Movants to sign the new agreements under duress, with the threat of immediate termination of contracts and services, and the Movants should not be made to adhere to such unconscionable contracts of adhesion.

The allegations in the original writ, as well as the findings of the Juvenile Justice Commission, clearly establish that the Respondents did not negotiate the new agreements in good faith and mislead the Movants all along. “[T]he 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.” *Juvenile Justice Commission Findings*, p. 3. “[T]he proposed changes were cloaked in secrecy. The Department of Health and Human Resources intended to unilaterally overhaul the child residential placement system without consulting key figures in the West Virginia juvenile justice system. . . . The Department told the shelter network and residential providers, during contract discussions, to not worry about judges and not worry about money; and . . . not to discuss the contracts with others.” *Juvenile Justice Commission Findings*, p. 6.

The evidence easily establishes that the contracts tendered by the Respondents and signed by the Movements were contracts of adhesion, unconscionable and unenforceable. The contracts were one-sided contracts of adhesion, and the duplicity of the Respondents in the arbitrarily terminated negotiations violates basic principles of conscionability and fairness.

“A contract of adhesion is one drafted and imposed by a party of superior strength that leaves the subscribing party little or no opportunity to alter the substantive terms, and only the opportunity to adhere to the contract or reject it. A contract of adhesion should receive greater scrutiny than a contract with bargained-for terms to determine if it imposes terms that are oppressive, unconscionable or beyond the reasonable expectations of an ordinary person.” Syl. Pt. 18, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011), [overruled in part on other grounds by *Marmet Health Care Center, Inc. v. Brown*, — U.S. —, 132 S. Ct. 1201, 182 L.Ed.2d 42 (2012)].” Syl. Pt. 11, *Brown v. Genesis Healthcare Corp.*, 229 W.Va. 382, 729 S.E.2d 217 (2012).

This Court has long recognized that most contracts signed in this nation are contracts of adhesion, submitted by one party on the basis of “this or nothing,” and that the ultimate goal is to determine whether an adhesion contract should be enforced. *State ex rel. Clites v. Clawges*, 685 S.E.2d 693, 224 W.Va. 299, 306 (2009); *State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 557, 567 S.E.2d 265, 273 (2002); *State v. Sanders*, 228 W.Va. 125, 137, 717 S.E.2d 909, 921 (2011).

A key factor is whether the agreement in question is unconscionable. *Clites*, 224 W.Va. at 306, 685 S.E.2d at 700; Syl. Pt. 3, *Bd. of Ed. of the County of Berkeley v. W. Harley Miller, Inc.*, 160 W.Va. 473, 236 S.E.2d 439 (1977). “Unconscionability is an equitable principle, and the determination of whether a contract or a provision therein is unconscionable should be made by the court.” Syl. Pt. 7, *Brown v. Genesis Healthcare Corp.*, 229 W.Va. 382, 729 S.E.2d 217 (2012); Syl. Pt. 1, *Troy Mining Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 346 S.E.2d 749 (1986).

The doctrine of unconscionability means that, because of an overall and gross imbalance, one-sidedness or lop-sidedness in a contract, a court may be justified in refusing to enforce the contract as written. The concept of unconscionability must be applied in a flexible manner, taking into consideration all of the facts and circumstances of a particular case.

Syl. Pt. 4, *Brown*, 229 W.Va. at 385, 729 S.E.2d at 220; Syl. Pt. 7, *Dan Ryan Builders, Inc. v. Nelson*, 230 W.Va. 281, 737 S.E.2d 550 (2012).

In determining whether a contract is unconscionable, the Court must consider the circumstances surrounding the execution of the contract; the fairness of the contract as a whole; the relative positions of the parties; the adequacy of the bargaining position; and the meaningful alternatives available to the other party. See, e.g., *Troy Mining Corp.*, 176 W.Va. at 601, 346 S.E.2d at 750 (1986); *Brown*, 229 W.Va. 382, 729 S.E.2d 217 (2012); *Art's Flower Shop, Inc. v. Chesapeake and Potomac Tel. Co. of W.Va., Inc.*, 186 W.Va. 613, 413 S.E.2d 670 (1991). “A determination of unconscionability requires a two-part analysis: whether the contract is procedurally unconscionable, and whether it is substantively unconscionable.” *Pingley v. Perfection Plus Turbo-Dry, LLC*, 746

S.E.2d 544, 231 W. Va. 553 (W.Va., 2013); *Brown*, 228 W.Va. at 681, 724 S.E.2d at 285.

Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract, including a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties and considers all the circumstances surrounding the transaction. These inadequacies include, but are not limited to, the age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract. *Pingley*, 746 S.E.2d at 551.

Substantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party. The factors to be weighed include the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns. *Id.*

In the present matter, the evidence supports the Movants' contentions that the provider agreement with the DHHR was not only a contract of adhesion, it was also one that was both procedurally and substantively unconscionable. First, there is a great disparity in the relative positions of the parties: the Movants provide residential child care services, and the DHHR is the only game in town when it comes to getting referrals, placement and payment. The provider agreement was a lengthy and complex document with multi-page attachments

that referred to a matrix and policies that were undefined and nothing short of confusing. Although the parties had attempted to negotiate various terms over a several month period, the DHHR ultimately rescinded any changes or compromises and declared that each provider would sign the new agreement as originally presented, or face immediate termination and closure. These actions were not only unfair and unreasonable, they resulted in an agreement that was one-sided, harsh and against public policy. Thus, the provider agreements were both procedurally and substantively unconscionable.

Davis-Stuart, Burlington and Cammack all signed the adhesive and unconscionable agreements, under protest and under great duress. Davis-Stuart submitted a protest letter with its agreement, noting its specialized services and describing how the new agreement would not cover all of these programs. The Movant further suggested that the DHHR follow the recommendations of the Juvenile Justice Commission and “slow down.” Appendix, Exhibit No. 3.

Likewise, Burlington submitted a protest letter with its executed agreement, noting that the signing of the contract “should not be viewed as approval of the actions taken by DHHR and the Bureau to substantially alter the way that the residential treatment programs in West Virginia are offered.” Burlington further noted that there were many questions about the new fee model, and expressed concerns about the “severe consequences” on whether they would be able to continue operations. Appendix, Exhibit No. 4.

Cammack, also afraid of the terms of the agreement, waited until the very last moment to sign and submit the contract, hoping that at the very end some

cool, logical head would prevail and recognize the egregiousness of the Respondents' actions. When that did not happen, Cammack, under pressure to either stay in business and continue serving the children of this state, albeit at a loss, or to immediately close its doors, signed the agreement.

The Movants signed the new provider agreements under duress, and those actions should not be held against them. Equity and fairness demand that the Movants should be given the benefit of any decision made by this Court, regardless of whether or when they signed the proposed contracts and regardless of whether they submitted a formal protest. Holding the Movants to the terms of the new contract while other providers operate under the old contracts would result in even more chaos and confusion.

The Movants agree with the Juvenile Justice Commission that the DHHR acted in an underhanded, sneaky fashion and did not negotiate the new contracts in good faith. As such, they pray that this Court find that the new contracts are unconscionable and unenforceable, and that the Respondents must continue the reimbursement practices established under the former system.

IV. The Movants Have a Clear Legal Right to Maintain the Status Quo While the Respondent Properly Promulgates Legislative Rules.

It is imperative that this Court void the new provider agreements signed by the Movants and maintain the *status quo* until such time as the Respondents promulgate new legislative rules as required by law. The *status quo* includes directing the Respondents to reimburse the residential child care providers for all services under the terms and conditions of the old contracts. It also includes requiring the Respondents to recall or rescind the amendment to the State Health

Plan tendered to the CMS for approval. There are too many parties who will be detrimentally affected if the actions of the Respondents are not curtailed.

As noted previously, the Respondents forced Davis-Stuart, Burlington, Cammack and many other providers into signing unconscionable contracts of adhesion. The Respondents completely disregarded the issues raised by the stakeholders, ignored the fact that the proposed contract was contrary to state law and was based on vague, ever-changing internal guidelines, and disregarded the possibility of many child care facilities closing because of the conflicting and onerous provisions in the new agreement.

Most importantly, the Respondents failed to recognize that the closure, whether immediate or impending, of a single residential child care facility would result in children being placed in out of state facilities, being placed in more restrictive settings, or, tragically, being denied services at all.

The Respondent has attempted to downplay the significance of its new agreement and the lack of rules by noting that a “majority” of the child care providers have executed the adhesive contract. However, the number of providers who signed the proposed new contract does not reflect the total number of beds involved, and does not accurately reflect the number of children who will be detrimentally affected.

As can be seen by the breakdown of residential beds, included as Appendix Exhibit No. 5, there are a total of 19 residential care providers,

excluding emergency shelter beds.⁶ These 19 facilities offer a total of 714 beds. Of those facilities, seven agencies did NOT sign the new provider agreement. Those facilities represent 370 of the total beds available, or 51.82%. Four agencies signed the provider agreements under protest, including the three Movants herein, representing 194 beds, for an additional 27.17% of the total available beds. Altogether, these 11 agencies offer 564 beds – 78.99% of the total beds available. They also represent 57.89% of the 19 residential providers in this state.

Clearly, the majority of the facilities with a majority of the beds are in agreement with the Juvenile Justice Commission, the Petitioners and the Movants herein that this Court should order the Respondents to maintain the *status quo* until such time as the ship known as the DHHR is turned around and sailing on the proper course.

VI. The Respondents Have a Legal Duty to Prevent the Loss of Federal Matching Funds That Would Be Lost Under the New Provider Agreements.

Under the old provider agreements, the DHHR realized the benefit of the three-to-one match from CMS, who reimbursed the state for specialized residential child care services that did not fall under the general room and board categories. By amending the State Health Plan, forcing providers into contracts of adhesion and totally circumventing the legislative rulemaking purpose and processes, the Respondents not only show complete disregard for the safety and

⁶ As noted previously, emergency shelter beds should not be considered in the same category as residential child care facilities since they only offer limited services and do not provide the care, education or specialized programs that residential care facilities offer.

well-being of the children in need of residential care facility services, they also reflect complete fiscal irresponsibility. By changing the reimbursement procedures and schedules for the residential care providers, the Respondents bypass a significant amount of federal matching funds that cannot be found elsewhere, all at a time when the State of West Virginia is in the midst of a full-fledged financial crisis. The Movants estimate that approximately \$30 million in federal matching funds that the State now receives for residential child care treatment will be lost. Given the current condition of the State budget, that is not an insignificant amount of monies.

This is an issue that has been largely ignored by both parties, but one that the Movants maintain is very significant and very relevant on the effect of the actions by the Respondents.

VII. Conclusion

The Movants pray that this Honorable Court stay the implementation of the changes proposed by the Respondents, and direct them to promulgate appropriate legislative rules that adhere to statutory requirements and which take into consideration the needs and rights of the affected children, the impact upon the group residential child care facilities, and all other affected parties in this state.

Any deviation from the *status quo* will most likely result in substantial confusion as to the placement, control and discharge of vulnerable children; confusion as to the methods of reimbursement to providers; the potential that the Movants and other similarly situated providers will cease offering highly successful specialized services or cease operations altogether; and result in children being

deprived of services in West Virginia, thereby detrimentally affecting their safety, health and well-being.

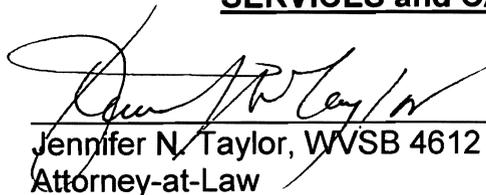
As recognized by the Juvenile Justice Commission, if the substantial changes desired by the Respondents are to be implemented, the all parties involved should take the time to study the proposals, digest the potential effects and work together to develop the proper rules so as to protect all stakeholders, but especially the children.

For these reasons, the Movants pray for the entry of an order granting the writ of mandamus and staying the implementation of the proposed changes until such time as legislative rules can be developed in an open and transparent manner.

Respectfully submitted,

**DAVIS-STUART, INC., BURLINGTON UNITED METHODIST FAMILY
SERVICES and CAMMMACK CHILDRENS' CENTER**

By Counsel

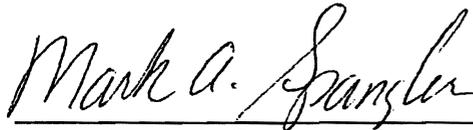


Jennifer N. Taylor, WVSB 4612
Attorney-at-Law
1118 Kanawha Boulevard, East
Charleston, WV 25301
304.342.1887
Jennifer@jtaylor-law.com
Counsel for *Amicus Curiae Movants*

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF GREENBRIER, TO-WIT:

The undersigned, Mark Spangler, being first duly sworn, on my oath, depose and say that I am authorized to verify this *Amicus Curiae Brief of Davis-Stuart, Inc., Burlington United Methodist Family Services and Cammack Children's Center in Support of Petitioners' Verified Petition For 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 the Promulgation of Such Rules and Supporting Memorandum of Law*; that I have reviewed the foregoing brief and know the contents; that said brief was prepared with the advice of counsel and from information and materials made available from numerous sources; and that said brief is based upon my personal knowledge, as well as upon information supplied by others. Based upon the foregoing, the brief is true to the best of my knowledge, information and belief.



Mark A. Spangler
Executive Director
Davis-Stuart, Inc.

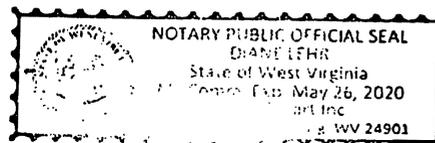
Taken, subscribed and sworn to before the undersigned authority this 24 day of August, 2016, by Mark A. Spangler, for and on behalf of Davis-Stuart, Inc.


Notary Public

My Commission Expires:

May 26, 2020

[Notary Seal]



CERTIFICATE OF SERVICE

The undersigned does hereby certify that service of the foregoing *Motion for Leave to File Amicus Curiae Brief by Davis-Stuart, Inc., Burlington United Methodist Family Services and Cammack Children's Center* was made on the 24th & 25th day of August, 2016, by hand-delivery and electronic filing upon the

following:

Charles M. Johnson, Esq.
Frost Brown Todd LLC
500 Lee Street East, Suite 401
Charleston, WV 25301
Counsel for Pressley Ridge, Elkins Mountain School and the Board of Child Care of the United Methodist Church, Inc., Petitioners

Jeffrey M. Wakefield, Esq.
Robert Coffield, Esq.
Flaherty Sensabaugh Bonasso PLLC
200 Capitol Street
Charleston, WV 25301
Counsel for Academy Management, LLC, Stepping Stones, Inc., Stepping Stone, Inc. and Family Connections, Inc., Petitioners
Christopher S. Doddrell, Esq.
Office of the Attorney General
Health and Human Resources Division
812 Quarrier Street, 2nd Floor
Charleston, WV 25301
Counsel for Respondents

G. Nicholas Casey, Esq.
Lewis Glasser Casey & Rollins, PLLC
300 Summers Street
BB&T Square, Suite 700
Charleston, WV 25326
Counsel for St. John's Home for Children Amicus Curiae

Scott Kaminski, Esq.
Kaminski Law, PLLC
P.O. Box 3548
Charleston, WV 25335-3548
Counsel for Association of Children's Residential Centers

Christopher S. Dodrill, Esq.
Office of the Attorney General
Health and Human Resources Division
812 Quarrier Street, 2nd Floor
Charleston, WV 25301
Counsel for Respondents



Jennifer N. Taylor, WVSB 4612
Counsel for Amicus Curiae Movants