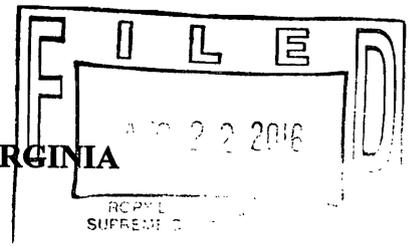


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 16-0738



**STATE OF WEST VIRGINIA ex rel.
PRESSLEY RIDGE, ELKINS MOUNTAIN
SCHOOL; ACADEMY MANAGEMENT, LLC;
STEPPING STONES, INC.; STEPPING
STONE, INC.; and FAMILY
CONNECTIONS, 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.

***AMICUS CURIAE* BRIEF OF ST. JOHN'S HOME FOR CHILDREN
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 THE PROMULGATION OF SUCH RULES AND SUPPORTING
MEMORANDUM OF LAW**

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INTRODUCTION

St. John's Home for Children respectfully submits this brief in support of the *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 Programs and Reimbursement Pending the Promulgation of such Rules and Supporting Memorandum of Law* ("Writ of Mandamus") filed by 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. ("Petitioners"). Notice of St. John's Home for Children's intent to file this brief was provided by letter emailed to counsel for Petitioners and counsel for Respondents on Monday, August 15, 2016, and that letter was faxed to counsel for Respondent on Tuesday, August 16, 2016. Petitioners have consented to the filing of this brief and Respondents have not consented to the filing of this brief. St. John's Home for Children has accordingly concurrently filed a *Motion for Leave to File Amicus Curiae Brief*.

STATEMENT OF INTEREST, IDENTITY, AND AUTHORITY

Pursuant to West Virginia Rule of Appellate Procedure 30(e)(4), *amicus curiae* St. John's Home for Children ("St. John's") states that it is a children's group residential treatment facility licensed by the State of West Virginia Department of Health and Human Resources ("DHHR") and by the Office of Health Facility Licensure and Certification, in addition to being nationally accredited by the Council on Accreditation. St. John's receives significant funding from the Roman-Catholic Diocese of Wheeling-Charleston ("Diocese").¹ It is also funded in part under a

¹ As required by West Virginia Rule of Appellate Procedure 30(e)(5), St. John's Home for Children states 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. Funding for this brief was provided by the Bishop Michael J. Bransfield of the Roman-Catholic Diocese of Wheeling-Charleston.

provider agreement with the West Virginia Bureau for Children and Families (“BCF”), DHHR, and a provider agreement through the West Virginia Bureau of for Medical Services (“BMS”) which provides reimbursement for treatment services through the Medicaid program.

St. John’s is a private, non-profit 501(c)(3) organization that was established over 160 years ago in an effort to serve children and families. St. John’s is the oldest residential facility in the state and, in fact, it is older than the state of West Virginia. Over these past 160 years, St. John’s has ministered to tens of thousands of youth.

Currently, St. John’s is a twelve (12) bed residential treatment facility for boys ages eight (8) to fourteen (14) years old. These young boys primarily present with behavioral or emotional difficulties, and/or who are victims of abuse and neglect. Under current regulations and provider agreements, St. John’s is categorized as a Residential Level II facility for preadolescent boys. St. John’s accepts youth from the entire state and is located in Wheeling, West Virginia.

Respondents DHHR, BMS, BCF, and their Commissioners, along with the Secretary of the West Virginia Department of Health and Human Resources, Karen Bowles, (“Respondents”), are attempting to change the existing standards, programs and provider agreements for the delivery and reimbursement of child group residential care.² This involves treatment, room, board and supervision, all vital aspects of care for the children at issue. Under prior standards, regulations and provider agreements, reimbursements for this care, treatment, room, board and supervision, was on a bundled basis and courts placed the children at issue in appropriate residential group homes based on their level and the judge’s consideration of the relevant facts. *See e.g.* Appendix of Petitioners filed August 4, 2016 (“Appendix”), Exhibit A, 7/29/2016

² The Provider Agreement referenced herein is the provider agreement with the Bureau for Children and Families, which includes reimbursement for room, board and supervision of the children placed within the residential group facilities at issue.

Juvenile Justice Commission Press Release, p. 000003 (describing existing procedures and proposed changes affecting judicial discretion in placement decisions); Appendix, Exhibit J, Juvenile Justice Commission Official Press Release regarding 727/2016 Public Forum, pp. 000247-48 (same).

As a part of this proposed change, Respondents moved to terminate existing provider agreements with the BCF (“Provider Agreements”) under a thirty (30) day notice provision. Respondents then advised providers that they must sign new Provider Agreements. Facing this ultimatum, St. John’s, under extreme duress, and with great hesitation and concern, ultimately signed the new Provider Agreement.³

St. John’s signed the new Provider Agreement based on its moral, social and professional responsibility to the young boys in its care. St. John’s is unique in that it serves younger boys, beginning at age eight (8). To allow these young boys to suddenly be transitioned away from St. John’s without careful planning and forethought based on the ultimatums of Respondents was simply untenable. However, even having signed the new Provider Agreement with Respondents, St. John’s had no clear guidance on how the state will place children in its care, what to bill for services provided, the treatment level for children that are placed in its care, and a variety of other significant and substantial details that Respondent has not sufficiently clarified through properly promulgated new standards and regulations. Further, some contracts terms appear to conflict with current standards and regulations. As such, St. John’s faces immense risk both practically and financially given this undefined new system and for this reasons joins in Petitioners’ Writ of Mandamus.

³On August 10, 2016, Respondent West Virginia Bureau for Children and Families advised St. John’s and others that the termination letters for Provider Agreements issued July 29, 2016 should be considered rescinded and current contractual relations will remain in effect during this proceeding by email.

ARGUMENT

I. Standard of Relief

In order to issue a writ of mandamus, three elements must be present: “(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 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)(internal citations omitted). Further, mandamus is appropriate to “require the performance of a nondiscretionary duty by various governmental agencies or bodies.” Syl. Pt. 2, *State ex rel. McLaughlin v. W. Va. Court of Claims*, 209 W. Va. 412, 549 S.E.2d 286 (2001)(internal citations omitted). Each required element is present in this case and the mandamus should issue as requested by Petitioners.

II. St. John’s and Petitioners Have a Clear Legal Right to Public Rule Making

The general relief sought in the Writ of Mandamus is to require Respondents to promulgate new legislative rules before implementing sweeping changes to the existing residential child care programs and reimbursement. *See* Petitioners’ Brief at pp. 1; 35. West Virginia’s State Administrative Procedure Act, W. Va. Code §§ 29A-1-1 *et seq.*, (“WVAPA”) was enacted to avoid the type of declaratory rule making and to enact procedures to avoid the exact situation that is presented in this Writ of Mandamus. *See* W. Va. Code § 29A-1-1 (stating legislative purpose of the State Administrative Procedures Act). As discussed below, Respondent BCF is a state agency subject to the State Administrative Procedures Act and it has a clear legal duty to properly promulgate standards and rules through public rulemaking procedures. *See* discussion *infra*. St. John’s is a stakeholder in this process as a residential treatment facility governed by the proposed new rules, and as a signatory to both the current

contract and the proposed new contract that has now been stayed by BCF until a ruling issues from this Court.

As set forth above, St. John's is a twelve (12) bed children's residential treatment facility, caring for young boys, ages eight (8) to fourteen (14). As explained in the Writ of Mandamus, Respondents are attempting to implement significant changes to the structure of and reimbursement for these residential child care services. Those changes were set to become effective September 1, 2016, however, this Court has stayed the implementation of the new provider agreements and the changes to the residential care services delivery system pending consideration of the petition for the Writ of Mandamus by Order dated August 8, 2016. Prior to the stay in this case, providers were notified that they must sign new provider agreements on or before July 25, 2016 or the contracts would be terminated and that provider would have to cease providing care to its residents. Termination letters were issued for the prior provider agreements, but rescinded after the Court's August 8, 2016 Order.

In a very general explanation, Respondents have moved to "unbundle" the treatment aspect of group residential care facilities from the room, board and supervision reimbursement provisions, which seem to conflict with current standards and rules. Further, the proposed rules, standards and new proposed contracts are patently ambiguous on significant aspects of categorization of services provided and do away with the "level" designations previously used by both courts and group residential homes. Instead of utilizing "level" designations, it appears there will be a "standard" level of service as the basic service level for most children and an "enhanced" level of service for a minority of children. There is also a new procedure for placements and continuing stay decisions and limitations on St. John's Home for Children's ability to discharge children that cannot be properly served at its facility. In short, St. John's and

other providers are being asked to simply trust that everything will work out and buy into this new system with eyes closed and fingers crossed.

In the case of St. John's, its residents are 8 to 14 year old boys who, for a variety of reasons, are not able to be placed in the foster care system and require some additional services, and those under the age of 12 are currently criteria ineligible for the State's new wraparound service, commonly known as Safe at Home. After participating in a complaint for injunction in the Kanawha County Circuit Court of West Virginia that was denied, St. John's ultimately, and under duress, signed the new Provider Agreement so that it could continue to provide care to its vulnerable resident population without disruption. St. John's has been, and remains, concerned and disturbed by the new Provider Agreement, the unclear guidelines for providing services, placement decisions and the potential for reimbursement guideline "standards" that conflict with legislatively approved regulations. There simply is not sufficient information and detail available to determine if it is even feasible for St. John's to continue to provide services to the children in its care. Based on what is known to date, St. John's has significant concerns that its program will not survive these changes and, again based on the scant information available at this time, anticipates an estimated deficit under the new proposal in excess of nearly \$100,000 on an annual basis. This takes into account both the new reimbursement structure and changes in the infrastructure of St. John's to deal with anticipated new standards, procedures and regulations. The financial implications of these changes could ultimately result in St. John's closure after it is able to responsibly transition its boys to different placements.

Significantly, as a party to this new Provider Agreement, St. John's has an even greater right to unambiguous and carefully considered rules that will not conflict with contract terms and

a contract that does not conflict with legislative rules and department standards.⁴ St. John's has signed the new proposed contract, under duress, and now faces uncertainty with regard to placement of children and conditions of children that would be placed in its care, reimbursement for its services, and a variety of other material terms that simply remain undefined, ambiguous and potentially invalid given a total lack of clarity by Respondents. Respondents have put the cart before the horse in a race to change a system that has been in place for years by first terminating contracts and submitting a new "state plan" through BMS for Medicaid reimbursement, and claiming that the relevant rules and standards will be forthcoming and consistent. This is especially irresponsible and significant in this instance, involving children placed in these group residential facilities. Respondents should be required to meticulously follow the appropriate public rule-making process so that all stakeholders have notice of the changes and have the opportunity to comment and participate in the evaluation of these changes. *See e.g.* Appendix, Exhibit A, 7/29/2016 Juvenile Justice Commission Press Release, p. 000003 (explaining need for transparency and involvement of critical stakeholders in the juvenile system in changes to the process used to place at-risk children).

As a residential treatment facility, St. John's prides itself on working with families and creating an appropriate environment for the boys in its care. This includes elements of interaction and activities with its youth that create a full continuum of care and infrastructure of services that may not necessarily fit an as yet undefined "service" or "standard" level by Respondents, yet can be the key to returning youth to a "normal" environment and critical in teaching them to deal with everyday life. This uncertainty and failure to consider these

⁴ By letter dated August 11, 2016, the Respondents confirmed that the termination letters previously sent were rescinded as stated in the August 10, 2016 email and further stated that BCF would not countersign any contracts received on August 4, 2016 or later. St. John's contract was signed and submitted on August 5, 2016 and so presumably has not been countersigned by BCF.

potentially significant negative effects on treatment and care for this vulnerable population should not be permitted.

Moving from the current bundled rates system to a fee for service system could also result in increased service limits or caps for each service that may be provided, requirements for prior approval for services or additional services that will limit the ability of these group residential treatment facilities to deal with their unique challenges. These are children, the most vulnerable members of our society and this lack of information, process and ability to provide them some stability and enough flexibility to address their individual needs cannot be accomplished without careful consideration and a thoughtful, thoroughly defined set of regulations. There is simply no reason for this race to unbundle rates of reimbursement and rewrite the entire residential child care system. The financial and pragmatic ramifications of this change are significant and need to be fully studied and understood. *See e.g.* Appendix, Exhibit A, 7/29/2016 Juvenile Justice Commission Press Release, p. 000002 (explaining financial impact of proposed “State Plan Amendment” changes). This is specifically relevant to the BCF reimbursement for room, board and supervision and what should be included or not included in that rate and the related contracts.

The complexities of these children’s individual situations, and the fact that every child responds differently to treatment, make it clear that it takes varying amounts of intervention for each child to overcome not only his or her trauma, but to begin helping them to develop healthier ways to deal with their individual clinical issues. Respondents have not only a social, clinical and professional responsibility to care and support these youth in the most appropriate setting, but also a moral responsibility to ensure youth and families have access to the full range of a continuum of services, including these residential treatment services, to ensure they are clinically

receiving the best possible services. The discretion of the judicial branch and the role of the multidisciplinary team in assessing these needs and matching children to appropriate facilities is also an unresolved issue in this new process. *See e.g.* Appendix, Exhibit A, 7/29/2016 Juvenile Justice Commission Press Release, pp. 000002-3. The Respondents' current lack of infrastructure within the proposed new reimbursement model, and its fast paced plan of implementation of its proposed changes without having such a full infrastructure, could substantially decrease, if not eliminate, the residential component of a socially just continuum.

To that end, St. John's contends that the implementation of Respondents' current plan must be delayed until such time that the Respondents develop a systemic infrastructure through properly promulgated legislative rules that place the emphasis on meeting the behavioral health needs of the children. Without such an unambiguous systemic infrastructure, the very basis of St. John's program is at risk. For example, existing Appendix 503F to the BMS rehabilitation manual provides for levels of care (either Level I, II or III) based on the needs of the child at issue and defines those levels. *See* Petitioners' Brief, p. 17, ¶ 21; p. 18, ¶25. *See also*, Appendix, Exhibit N, Appendix "F" to the Chapter 503 of the West Virginia Medicaid Manual for Rehabilitation Services, pp. 000283-89. St. John's is set up only to handle Level II care. The new Provider Agreements, such as the one signed by St. John's which contains identical terms to those set forth in the Proposed BCF Provider Agreement at Exhibit M of the Appendix, 000266-81, references new standards for "enhanced" or "standard" services, without clear definition, and do not address the Level I, II or III categorization of care. This could result in children at any level of required service being placed at St. John's, despite its staffing and service capacity as a Level II facility, which is not beneficial for the child at issue or the children already placed at that facility.

For these reasons, and as set forth below and in the Writ of Mandamus, St. John's, Petitioners, and have a clear legal right to notice and due process under the WVAPA. Further, as a signatory to the proposed new contract, St. John's has an additional interest in ensuring that the proposed changes are properly promulgated and do not run the risk of being null and void because they did not comply with detailed rule-making procedures set forth in the WVAPA. *See e.g. Coordinated Council for Independent Living, Inc. v. Palmer*, 209 W. Va. 274, 546 S.E.2d 454 (2001)(voiding a State Tax Commissioner's "rule" provided in a letter setting forth a new interpretation of terms and holding it ineffective because it did not comply with the WVAPA).

III. Respondent BCF has a Legal Duty to Comply with the WVAPA and Implement New Rules Prior to Terminating Provider Agreements and Issuing New Provider Agreements Based on New Rules

WVAPA was enacted to avoid the type of declaratory rule making and to enact procedures to avoid the exact situation that is presented in this Writ of Mandamus. *See* W. Va. Code § 29A-1-1 (stating legislative purpose of the WVAPA). BCF proposes changes to room, board and supervision for these group residential services and constitute a comprehensive scheme of the provision of services under W. Va. C.S.R. §§ 78-3-1, *et seq.* The standards and procedures under the new Provider Agreements and standards proposed by Respondents have not been promulgated in the form of legislative rules under W. Va. Code §§ 29A-3-1, *et seq.*; 49-2-113, *et seq.* and W. Va. C.S.R. §§78-3-1 *et seq.* Respondent BCF is a state agency subject to the WVAPA and its rules in this instance should be promulgated under the procedures specified by the WVAPA. *See* W. Va. Code § 29A-1-2(a)(defining "agency" including state agencies with rulemaking or adjudicate contested cases that are not in the legislative or judicial branches of

government); W. Va. Code § 49-2-121 (granting BCF authority to promulgate legislative rules); W. Va. Code § 49-2-113 (authority for licensure standards).⁵

At issue here is a wholesale change to the current regulations governing room, board and supervision by BCF. The WVAPA defines a “rule” as “every rule, standard or statement of policy or interpretation of general application and future effect, including the amendment or repeal of the rule, affecting constitutional, statutory or common law rights, privileges or interests, or the procedures available to the public, adopted by an agency to implement, extend, apply, interpret or make specific the law enforced or administered by it or to govern its organization or procedure ...” W. Va. Code § 29A-1-2(j). BCF has proposed two new standards – “standard services” and “enhanced services” - with no clear definitions of those terms. This alters the comprehensive scheme for the delivery of group residential services in West Virginia under W. Va. C.S.R. §§ 78-3-1.

As these are “rules” under the WVAPA, and specifically legislative rules⁶, BCF is required under the WVAPA to duly promulgate these changes in an open manner. This means that there must be notice of a new rule, publication of the text of the new rule, and an explanation of the reasons for the new rule, and a public hearing on the rule prior to adoption. W. Va. Code §§ 29A-3-1 *et seq.* This is a clear legal duty and BCF must comply with that legal duty.

⁵ Respondent BMS claims an exception from the legislative rule-making process under W. Va. Code § 29A-1-3(c) as involving the receipt of public assistance. BCF’s changes are not exempt as they are related to licensing standards and agreements for these residential treatment facilities.

⁶ Legislative rules are defined as “every rule, as defined in subdivision (j) of this section, proposed or promulgated by an agency pursuant to this chapter. Legislative rule includes every rule which, when promulgated after or pursuant to authorization of the Legislature, has: (1) The force of law; or (2) supplies a basis for the imposition of civil or criminal liability; or (3) grants or denies a specific benefit. Every rule which, when effective, is determinative on any issue affecting constitutional, statutory or common law rights, privileges or interests is a legislative rule. ...” W. Va. Code § 29A-3-2(e).

IV. No Other Adequate Remedy Exists

Finally, mandamus is the only adequate remedy in the instant case. As Respondent BCF has not undertaken this process in a formal manner prior to requiring the execution of new agreements and the termination of prior agreements, St. John's and Petitioners were faced with a Hobson's choice. An attempt was made to seek injunctive relief, however, as set forth by Petitioners in their brief, which was unsuccessful and failed to consider or allow testimony from witnesses for Petitioners. *See* Petitioners' Brief at pp. 32-33. As set forth above and in Petitioners' Brief, this matter has proceeded on an accelerated timeline without adequate consideration, notice and discussion. If BCF chooses to execute the contracts submitted to it, St. John's can be bound to a potentially illegal contract with vague, ambiguous terms or terms that conflict with existing, properly promulgated rules and standards.

CONCLUSION

St. John's and Petitioners have established that a writ of mandamus is required in this situation. St. John's and Petitioners have a clear legal right to properly promulgated rules in this situation. They also have a right to rely on existing rules until new ones are promulgated. Respondent BCF has a clear legal duty to properly promulgate legislative rules. Finally, there is no other adequate remedy. The ramifications from a practical treatment perspective, a placement perspective and a financial perspective are potentially severe and the uncertainty is crippling. Based on the little information known to date, St. John's may even be forced to close its doors. St. John's and other residential group facilities have no clear guidance on how the state will place children in its care, what to bill for services provided, and the treatment level for children that are placed in its care, and a variety of other significant and substantial details that Respondent has not sufficiently clarified through properly promulgated new standards and

regulations. Further, some contracts terms appear to conflict with current standards and regulations. As such, St. John's faces immense risk both practically and financially given this undefined new system and for this reasons joins in Petitioners' Writ of Mandamus.

**St. John's Home for Children,
By Counsel,**

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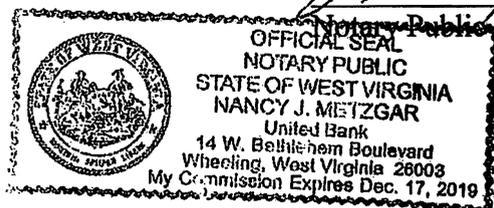
VERIFICATION

I, Terence A. McCormick, being first duly sworn, on oath depose and say that I am authorized to verify this *Amicus Curiae Brief of St. John's Home for Children 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 Programs and Reimbursement Pending the Promulgation of such Rules and Supporting Memorandum of Law ("Amicus Curiae Brief of St. John's Home for Children")*; that I have reviewed the foregoing *Amicus Curiae Brief of St. John's Home for Children* and know the contents; that said *Amicus Curiae Brief of St. John's Home for Children* was prepared with the advice of counsel and from information and materials made available from numerous sources; and that said *Amicus Curiae Brief of St. John's Home for Children* is based upon my personal knowledge as well as upon information supplied by others. Based upon the foregoing, the *Amicus Curiae Brief of St. John's Home for Children* is true to the best of my knowledge, information and belief.

By: *Terence A. McCormick*
Terence A. McCormick
Executive Director
St. John's Home for Children

Taken, subscribed and sworn to before the undersigned authority this ___ day of August, 2016.

My commission expires: *Dec 17, 2019*



CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of August, 2016, she served the foregoing AMICUS CURIAE BRIEF OF ST. JOHN'S HOME FOR CHILDREN 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 THE PROMULGATION OF SUCH RULES AND SUPPORTING MEMORANDUM OF LAW upon the following by enclosing a true and accurate copy thereof in an envelope addressed to each of them at their last known addresses, shown below each of their names, and depositing the same, postage prepaid, in the regular United States Mail and via electronic mail, unless otherwise provided below:

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