

16-0738

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

2016 JUL 28 PM 3:12  
CATHY S. GARDNER, CLERK  
KANAWHA COUNTY CIRCUIT COURT  
UHM

PRESSLEY RIDGE; ELKINS MOUNTAIN )  
SCHOOL; ST. JOHN'S HOME FOR CHILDREN; )  
ACADEMY MANAGEMENT, LLC; )  
STEPPING STONES, INC.; STEPPING )  
STONE, INC.; and )  
FAMILY CONNECTIONS, INC., )

*Petitioners,*

Civ. Action No. 16-C-1117  
(Hon. Tod J. Kaufman)

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.*

**ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION**

On July 28, 2016, the parties, by counsel, appeared and presented arguments with respect to Petitioners' *Verified Petition for Injunctive Relief and Motion for Temporary Restraining Order and/or Preliminary Injunctive Relief*. After considering the arguments of counsel and reviewing the parties' submissions and relevant law, the Court **DENIES** Petitioner's motion for a preliminary injunction. The Court's findings of fact and conclusions of law are as follows:

## FINDINGS OF FACT

1. Petitioners are seven entities that provide residential services to youth in West Virginia. Petitioners provide services to children under the age of 21, who have been professionally evaluated and have been determined to suffer from behavioral, functional, diagnostic, or social support conditions that require their placement in residential settings outside of their homes, and for whom the State of West Virginia is legally responsible. There are a total of twenty-four providers of residential treatment services in West Virginia. Five providers offer emergency shelter services, while nineteen offer non-emergency residential treatment services.

2. Respondents are the West Virginia Department of Health and Human Resources, its Cabinet Secretary, the West Virginia Bureau for Medical Services, its Acting Commissioner, and the Bureau for Children and Families, its Commissioner. The Secretary of the Department of Health and Human Resources is vested with the sole authority by West Virginia law to enter into contracts for the residential treatment for children on behalf of the State of West Virginia. Respondent Bureau for Medical Services is the single state agency designated by law to regulate the West Virginia Medicaid Program.

3. Petitioners are currently under contracts for the provision of services with the Department. Those contracts allow either party to cancel the contracts, with or without cause, so long as written notice is provided within 30 days.

4. For several years, the Department has engaged for these services with providers whereby the State paid for services under a "bundled" rate. The bundled-rate method of reimbursement allowed providers to comingle their rates, including the rates for the daily room, board, and supervision, along with the provision of medical treatment.

5. On September 14, 2015, Respondents notified providers of youth residential treatment services that the method of reimbursement for services would change. Specifically, rather than reimbursing providers based on a "bundled" rate, the reimbursement rates would be "unbundled." While providers had previously been allowed to receive a global daily rate for all services provided, including room, board, supervision, and medical treatment, providers will now have to bill for medical treatment separately for room, board, and supervision.

6. The payment of room, board, and supervision will be reimbursed by the Bureau for Children and Families with state dollars. The payment of qualified medical services will be reimbursed by the Bureau for Medical Services, with approximately 75% of the money coming from the federal government through the Medicaid program.

7. The initial effective date of this new reimbursement method was initially set as July 1, 2016. That date was later moved to September 1, 2016, as an accommodation to the providers.

8. From September 2015 through July 2016, Respondents had a series of meetings with providers, including Petitioners. Respondents also offered multiple training sessions for providers across the State and online to train providers in the new reimbursement method.

9. On June 22, 2016, the Department submitted a State Plan Amendment ("SPA") to the federal Centers for Medicare and Medicaid ("CMS") for approval.

10. On June 30, 2016, Respondents sent providers the final draft of the new provider agreement with a deadline of July 25, 2016, for signature.

11. Fourteen of the twenty-four providers have signed the new contracts and have agreed to be subject to the new "unbundled" method of reimbursement, effective September 1, 2016.

12. On July 21, 2016, Petitioners filed this action, seeking an injunction against Respondents from implementing changes to the reimbursement of youth residential services under the State Medicaid Plan. This Court set a hearing on Petitioners' motion for a preliminary injunction for July 22, 2016, at 1:30 p.m.

13. Prior to the hearing, Respondents agreed to extend the signature deadline from July 25, 2016, to July 29, 2016. Accordingly, this Court continued the hearing on Petitioners' motion until July 28, 2016, at 11 a.m.

14. Petitioners did not provide Respondents or the Attorney General with pre-suit notice under West Virginia Code § 55-17-3 until July 22, 2016.

#### CONCLUSIONS OF LAW

##### I. PETITIONERS FAILED TO PROVIDE PRESUIT NOTICE

1. West Virginia Code § 55-17-3 requires a plaintiff to notify the State of the intent to sue at least 30 days before the complaint is filed. This requirement is mandatory and jurisdictional. Syl. Pt. 3, *Motto v. CSX Trans., Inc.*, 220 W. Va. 412, 647 S.E.2d 848 (2007). By the plain text of the statute, this requirement may be avoided only if the plaintiff proves that complying with the statute would have caused irreparable harm, even if the plaintiff is seeking an injunction and not money damages.

2. Despite being aware of the Department's anticipated changes to the State Medicaid Plan for months, Petitioners failed to provide the State with pre-suit notification. This failure is not excused, as Petitioners have identified no irreparable harm that would have occurred had they complied with this jurisdictional mandate. With Petitioners having failed to provide pre-suit notification to the State of this lawsuit, this Court lacks jurisdiction to hear this case.

**II. ENTERING THE REQUESTED INJUNCTION WOULD VIOLATE THE  
SEPARATION OF POWERS AND DEPRIVE THE STATE OF ITS  
CONTRACTUAL RIGHTS**

3. The West Virginia Constitution divides the powers of government among the three branches: “The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time[.]” W. Va. Const. art. V, § 1. Under the separation of powers, “[g]enerally speaking, the Legislature enacts the law, the Governor and the various agencies of the executive implement the law, and the courts interpret the law, adjudicating individual disputes arising thereunder.” *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 168, 279 S.E.2d 622, 631 (1981). “[W]henever a subject is committed to the discretion of the legislative or executive department,” the separation of powers therefore provides that “the lawful exercise of that discretion cannot be controlled by the judiciary.” *Danielley v. City of Princeton*, 113 W. Va. 252, 167 S.E. 620, 622 (1933).

4. The discretion to contract on behalf of the State lies in the executive branch. West Virginia law vests the Secretary with the sole authority and discretion to contract in the name of the Department on the State’s behalf. Specifically, State law authorizes the Secretary to “[s]ign and execute in the name of the state by the State Department of Health and Human Resources any contract or agreement with the federal government or its agencies, other states, political subdivisions of this state, corporations, associations, partnerships or individuals[.]” W. Va. Code § 9-2-6(4). Yet Petitioners ask this Court to disregard that authority and instead commandeer the Department’s executive authority to contract for residential treatment services without identifying how the Department has purportedly violated the law. Such an injunction would clearly violate the separation of powers between the executive and the judiciary.

5. This interference in executive discretion is amplified because Petitioners are also asking this Court to interfere with the Department's authority in administering the West Virginia Medicaid program. Medicaid is a federal-state partnership, and federal law requires each state to designate a "single state agency" to operate their respective Medicaid programs. 42 U.S.C. § 1396a(a)(5). That entity in West Virginia is the Bureau for Medical Services. W. Va. Code §§ 9-1-2(n) & 9-2-13(a)(3). Critically, federal law prohibits the designated single state agency delegating its authority to "issue policies, rules, and regulations on program matters." 42 C.F.R. § 431.10. Yet Petitioners are asking this Court to interfere in the Department's administration of the Medicaid program and place the decision of how providers are to be reimbursed with the providers themselves. Simply put, Petitioners cannot command such interference in the Medicaid program.

6. Additionally, the requested injunction would violate the Department's contractual rights under the existing provider agreements. Under the provider agreements that the Department has with Petitioners, either party is free to terminate the agreement, with 30 days' written notice. The Department wants to terminate the current contracts and enter into contracts with new terms that implement the unbundled reimbursement plan. But the injunction that Petitioners request would deny the Department its ability to exercise that contractual option and instead force the Department to remain in the current contracts. Neither this Court nor Petitioners have the authority to deprive the Department of these powers and rights.

### **III. PETITIONERS FAILED TO ALLEGE FACTS THAT SHOW ANY WRONGDOING BY THE STATE**

7. It is axiomatic that any claim for relief must be grounded in a cause of action. As the Supreme Court of Appeals has recognized, "[s]implicity and informality of pleading do not permit carelessness and sloth: the plaintiff's attorney must know every essential element of his

cause of action and must state it in the complaint.” *Sticklen v. Kittle*, 168 W. Va. 147, 158, 287 S.E.2d 148, 164 (1981) (internal quotations omitted).

8. Petitioners’ Petition and Motion fail to meet the standards of basic pleading. It seeks an injunction but identifies no cause of action or legal standard that compels that extraordinary relief against the Department. Combing through the Petition, the closest thing to a cause of action are the statutes governing legislative rulemaking. Petitioners contend that the Department has failed to submit the changes in its Medicaid rates through legislative rulemaking. Pet. 8. But Petitioners fail to recognize that Medicaid rate setting is not subject to legislative rulemaking. Rather, the Rehabilitation Manual is Department policy. The Department generally provides 30 days’ notice for any changes to this policy and solicits public comment, but it is not required to submit changes for legislative approval.

9. Contrary to Petitioners’ claims, Petitioners will not be forced to either forgo Medicaid reimbursement or violate the law. Petitioners claim that the Department intends no changes to the Rehabilitation Manual. However, Respondents have issued public notice that the Manual will be updated prior to September 1, 2016, and that the Manual will comply with the proposed changes to reimbursement.

10. Furthermore, the State Medicaid Plan is exempt from legislative rulemaking. Section 29A-1-3(c) states, “The provisions of this chapter do not apply to rules relating to . . . the receipt of public assistance.” The Rehabilitation Manual is BMS policy and not subject to legislative rulemaking, as Petitioners allege. To the contrary, BMS is free to amend or revise the Rehabilitation Manual without legislative approval.

11. Nor do Petitioners identify how the Bureau for Children and Families has failed to implement appropriate rules and regulations regarding the payment of residential treatment

facilities. Petitioners do not explain what standards or procedures BCF has failed to implement or what standards or procedures would assuage their concerns.

12. Petitioners' request for an injunction finds no foundation in the law, and it must be rejected.

#### IV. PETITIONERS FAILED TO PROVE THAT AN INJUNCTION AGAINST THE STATE IS WARRANTED

13. In determining whether to grant a preliminary injunction, courts are guided by a four-factor balancing test. A court should consider (1) the likelihood of harm to the plaintiff if an injunction is denied; (2) the likelihood of harm to the defendant if an injunction is granted; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest. *Camden-Clark Mem'l Hosp. Corp. v. Turner*, 212 W. Va. 752, 756, 575 S.E.2d 362, 366 (2002).

14. These factors compel denying the injunction that Petitioners request. Petitioners cannot satisfy their burden of justifying an injunction. Petitioners claim that they will suffer irreparable harm if the injunction is not granted. But Petitioners ignore a critical fact: the Department is not bound to provide them with contracts. Petitioners are sophisticated business entities that are free to contract with the State. Petitioners' argument that an injunction is required because the lack of a State contract will place them out of business ignores the concept of mutuality of contract. If Petitioners were entitled to an injunction simply because they refused to sign a contract, then the State would be eternally bound to every vendor that has become reliant on its contract with the State. If Petitioners do not wish to agree to the Department's contractual terms, then Petitioners are free to exercise their rights. But the State is not required to bow to Petitioners' unilateral terms.

15. Furthermore, Petitioners identify no evidence that the children served by Petitioners will be displaced or denied services if this injunction is denied. Petitioners represent

just seven of nineteen residential treatment homes in West Virginia. Even if all of Petitioners do not sign new contracts with the Department, the Department has assured this Court that it will find proper placements for the children affected.

16. Conversely, the Department will suffer irreparable harm if this injunction is granted. Not only will the Department will be held hostage, forced to enter into contracts on Petitioners' unilateral terms, but the requested injunction would also place the Department in an untenable situation with regard to its Medicaid plan. The Department has submitted a State Plan Amendment to the federal Centers for Medicare and Medicaid Services ("CMS"), requesting approval to change the State Plan from bundled to unbundled reimbursement for these services. Because some residential treatment providers have signed contracts that will incorporate this new method of payment, an injunction would require the Department to apply separate Medicaid reimbursement standards to Petitioners and under a State Plan that will no longer be federally approved. This means that the Department will be forced to pay for services out of state dollars that would otherwise have been paid with federal dollars; this is something that the Department simply cannot afford to do and that would place an incredible financial burden on the State. Thus, contrary to Petitioners' assertions, an injunction would irreparably harm Respondents.

17. As explained above, Petitioners are unlikely to succeed on the merits of their claims. For starters, Petitioners do not identify any law that justifies an injunction. Additionally, granting the requested injunction would intrude upon the rights of the Department in negotiating these contracts and violate the separation of powers.

18. Denying the injunction would serve the public interest in several ways. If enjoined, the Department will be forced to continue paying Medicaid dollars for medical services that may not be provided by residential providers. Instead, taxpayers will have to keep

reimbursing providers for bundled rates that do not hold providers accountable for amounts that they are billing the Department. Furthermore, denying the injunction will serve the children at issue, as they will be guaranteed to receive the services that the Department is paying for. Unbundling rates will give providers an economic incentive to provide the medical services that best serve the children. Given these considerations, the public interest requires that the injunction be denied.

19. Finally, the injunction that Petitioners seek is unduly broad, ambiguous, and unworkable. They ask this Court to enjoin the Department "from implementing the many significant changes to their residential programs which provide for the unbundling of reimbursement for group residential facility services and other changes until such time as the Respondents properly promulgate new standards to implement these changes in a lawful and appropriate manner." Pet. 19. Yet, Petitioners do not define what they mean by "promulgate new standards to implement these changes in a lawful and appropriate manner." Under this unduly broad and ambiguous standard, the Department is likely to be prevented from ever changing its Medicaid rate reimbursement structure because there are no standards in this injunction for the Department to meet. This only underscores the fact that this injunction cannot be justified by the law.

20. Clearly, what Petitioners really want is to keep the Department in the current contracts and prevent the Department from changing its reimbursement system in an effort to avoid accountability for the services provided. If Petitioners' requested injunction is granted, the Department will be held to accept Petitioners' terms and be bound by them. This attempt to deprive the Department of its discretion and freedom to contract must be rejected.

Petitioners' Motion must therefore be **DENIED**.

This is the Court's FINAL ORDER. The Motion for Preliminary Injunction is hereby DENIED.

The Clerk of this Court shall send certified copies of this ORDER to all parties:

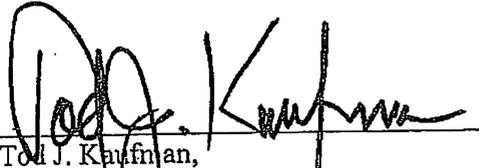
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Enter this ORDER this 28<sup>th</sup> day of July, 2016.

  
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Tom J. Kaufman,  
Chief Judge

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, BATHY'S GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT. 284  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 28<sup>th</sup>  
DAY OF July 2016  
  
BATHY'S GATSON, CLERK  
CIT COURT OF KANAWHA COUNTY, WEST VIRGINIA  
UHM