

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.;

16-0738

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.

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

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QUESTION PRESENTED

1. Must the Respondents be Required to Promulgate New Legislative Rules Before Implementing Sweeping Changes to the Existing Residential Child Care Programs and Reimbursement (which are currently scheduled to take effect on September 1, 2016)?

SUGGESTED ANSWER: YES

STATEMENT OF THE CASE

Respondents seek to force Petitioners to execute new Provider Agreements with no standards regarding how they will be delivered and reimbursed for vital services to at risk children, or else face immediate closure and cessation of services, even though they have not implemented required legislative rules to explain how, whether, and if Petitioners will be reimbursed for providing these services. Respondents have failed to comply with their clear legal duty to properly promulgate the new standards prior to implementing them.

On July 29, 2016, the Juvenile Justice Commission, which is charged with examining systemic issues impacting children placed in out of home care by the courts, announced that “We were surprised, since the court system is responsible for placing the children in residential care, that the entire system would be replaced in secrecy, eliminating judicial discretion and jeopardizing the welfare and the safety of children.” (Exhibit “A” – 7/29/16 Juvenile Justice Commission Press Release). The Juvenile Justice System is considering the following recommendations (as well as others) and has promised that a more complete report is forthcoming:

- DHHR initiated a “State Plan Amendment” and submitted it to the federal government. The Commission believes the proposed amendment should be withdrawn until financial ramifications are more fully studied and understood. This significant change could cause certain facilities to close and other needed services to be eliminated. This will further constrain and limit treatment options for the court system and put children at risk.

- The DHHR should immediately suspend implementation of the new contracts. While the commission supports moving children into community-based services, such a sweeping changes without the proper infrastructure could jeopardize the well-being of children and future rehabilitation efforts.
- The DHHR should disclose the computer matrix process it is planning to use, which will determine where to place children. This will eliminate judicial discretion and put placement decisions in a computer program. Currently, a multi-disciplinary team makes recommendations to a court, and then a judge orders a child to a specific placement for specific services. Judges with the multi-disciplinary teams monitor a child's progress every 90 days. The new residential provider agreements force a provider to accept a child at a facility that has a vacancy even though that facility may not have the appropriate treatment services for that child.
- Any further changes to the process used to place at-risk children should be made in a transparent way which includes the input of providers, the judiciary, and the Department of Education, all of whom are critical stakeholders in the juvenile system.

(Exhibit "A," p. 2).

In addition, the Juvenile Justice Commission made the following finding:

West Virginia's foster care system is at capacity. Courts continue to request community-based interventions and options; however, they are not available or accessible. With no foster care placements available and basically non-existent local services, judges must place children in residential treatment centers or shelters.

(Exhibit "A," p. 2).¹

Consistent with the initial findings of the Juvenile Justice Commission, Petitioners agree that the many sweeping changes being implemented by BCF, including a new BCF Provider Agreement and informal guidelines that have not been promulgated as legislative rules, must be established through a deliberative process that allows input from all stakeholders in a transparent

¹ When making his ruling, the Honorable Tod Kaufman, who previously heard a motion for preliminary injunction brought by a group of providers, including the Petitioners, did not have the benefit of the Juvenile Justice System initial report, nor did he allow petitioners to present any evidence as to this impact.

manner. Petitioners submit that the legal obligation of BCF to first promulgate these many changes in the form of legislative rules will provide such an opportunity for transparency, will settle confusion as to legal standards and procedures affecting the rights of providers and children alike, and enable all stakeholders a fair and open opportunity to provide input prior to these changes being made. Respondents must follow the law. The only responsible manner in which to implement these significant changes in the delivery and reimbursement of these services to a fragile population is to first work in collaboration with all stakeholders in an open and transparent manner to develop new program and reimbursement standards in the form of legislative rules, and then proceed to execute new Provider Agreements. The only urgency here is self-imposed by the Respondents.² Without any new legislative rules in place, without being afforded proper notice and opportunity for comment, and without any oversight as to these sweeping changes, Petitioners are being forced to sign new BCF Provider Agreements on or before August 8, 2016 or face closure of their facilities serving over 326 children in West Virginia by September 1, 2016 despite BCF's failure to properly implement legislative rules.

Because of the sweeping nature of the changes to West Virginia's residential child care programs, and speed with which Respondents are pushing them through, Petitioners are seeking extraordinary relief under Rule 16 of the Rules of Appellate Procedure to obtain a Writ of Mandamus to require Respondent BCF to lawfully develop appropriate program requirements before the many changes to the residential child care delivery system take effect on September 1, 2016, and requesting a stay to maintain the *status quo* until such time as said program requirements are developed in order to assure the continuation of services to children placed in

² Respondents will no doubt assert these changes have been in process for months and that the providers have been engaged in meetings, but without new standards no one has been able to fathom the manner in which these changes will be properly implemented, and substantial confusion exists as to what the new standards are and whether these changes are enforceable.

out of home care in the interim. Petitioners specifically seek a ruling that BCF, as it is legally obligated to do, must lawfully promulgate legislative rules that amend or replace the current rules for group residential facilities under W. Va. C.S.R. §78-3-1, *et seq.*, before changes to the system are implemented. Because the current system is a joint program implemented and overseen by Respondents, Petitioners also seek to maintain the status quo relating to the changes being made by BMS, including the unbundling of the rates under the Rehabilitation Manual and the State Plan Amendment submitted by BMS, because these important elements must work in tandem for the new programs to be effectively implemented.³

Respondents' threats to shut Petitioners' facilities down is no idle one. The notices to providers terminating all existing BCF Provider Agreements have been sent. (See Exhibit "B" – 7/29/2016 Notices to providers terminating all existing BCF Provider Agreements). The entire child care delivery system in West Virginia, carefully evolved over the last several decades, will be placed in jeopardy should these closures occur without lawful implementation and proper planning as there are insufficient community-based alternatives and/or other residential placement facilities to currently take care of hundreds of children that will be affected if these facilities are closed or their services are curtailed in unplanned ways.

Without the promulgation of new standards to implement the new residential child care service program, Petitioners are placed in a legal quandary -- they are faced with executing new BCF Provider Agreements with provisions that conflict with existing lawful standards and which incorporate new standards that have not been duly promulgated. Respondents are strong-arming Petitioners into executing new Provider Agreements before they propose and implement the proper standards and procedures. BCF recognized at the outset its obligation to develop new

³ Importantly, to maintain the status quo the Court should recognize and order that BMS immediately withdraw the State Plan Amendment filed with the Centers for Medicare and Medicaid Services ("CMS") on June 22, 2016, before CMS acts upon and approves such State Plan Amendment.

legislative rules. Petitioners are unable to responsibly move forward with a new Provider Agreement for many reasons, which include, but are not limited to: (1) required changes to the existing Manual have not yet been duly promulgated by BMS to allow Petitioners to lawfully bill for the services they will provide under the proposed Provider Agreement; (2) required standards and procedures have not yet been promulgated by BCF to allow Petitioners to determine whether a child will receive “standard” or “enhanced” services as set forth in the Provider Agreement; (3) required standards and procedures have not yet been promulgated by BCF to address the proposed process of initial and subsequent authorization for residential services; (4) required standards and procedures have not yet been promulgated by BCF to determine how decisions are to be made as to placements, continued stays, and exceptions to its rulings, and the procedures to request reconsideration and/or appeal of these determinations; and (5) other new standards have not yet been fully developed to replace, supplant or amend the existing process.

Petitioners are all duly licensed group residential facilities pursuant to W.Va. Code §49-2-113 and W.Va. C.S.R. §78-3-1, *et seq.* Petitioners currently provide group residential care to approximately 328 at risk children with severe emotional and behavioral issues, and are licensed to provide care for up to 362 children. Respondents, collectively, are responsible for oversight of programs for the delivery and reimbursement of residential child care services in West Virginia. Residential child care services are divided into four components: (1) treatment, (2) room, (3) board, and (4) supervision. Each of these components is required to deliver these services. The West Virginia Department of Health and Human Resources, Bureau for Children and Families (“BCF”) is responsible for developing standards for the licensure of group residential facilities which provide residential child care pursuant to W.Va. C.S.R. §78-3-1, *et seq.* BCF is also responsible for payment of the room, board, and supervision components of residential child

care services. The West Virginia Department of Health and Human Resources, Bureau for Medical Services (“BMS”) is responsible for oversight and implementation of the Medicaid program in West Virginia. BMS and BCF currently reimburse Petitioners for all four components of the residential child care services provided pursuant to a “bundled rate,” which varies 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, known as the “Rehabilitation Manual.” Effective September 1, 2016, BCF and BMS plan to modify and implement reimbursement for the four components will be split between BMS, which will reimburse for the treatment component⁴, and BCF, which will reimburse the other three components of room, board, and supervision. However, the new standards that BCF and BMS plan to use to implement these changes have yet to be finalized.⁵ Both BMS and BCF are divisions of the West Virginia Department of Health and Human Resources (“DHHR”). BCF has failed to comply with its clear legal duty to appropriately promulgate its desired changes to the programs and reimbursement for group residential facilities.

Respondents have arbitrarily and unilaterally scheduled these sweeping changes to take effect on September 1, 2016. The changes include numerous modifications to the program and reimbursement requirements which are the responsibility of BCF, which constitute a sea change in the philosophy and the methods for the delivery of services to children placed by the courts in residential settings. These residential services for children have evolved over decades through

⁴ On July 26, 2016, BMS recently proposed to delete Appendix F of the Rehabilitation Manual which currently provides a bundled daily rate for residential child care services, and to reimburse providers for the treatment component under the fee for service codes effective September 1, 2016, under the remaining portions of the Rehabilitation Manual. The public comment period on the proposed changes is now open and will not end until August 26, 2016, which is five days before the target implementation date of September 1, 2016.

⁵ BCF proposes to reimburse providers for room, board and supervision services based upon new daily rates for either “standard” or “enhanced” services. BCF failed to adequately define whether a youth qualifies for “standard” or “enhanced” services. Almost all providers in the state, regardless as to whether they were formerly a Level I, II or III program, will receive only the standards level of reimbursement from BCF. BCF has not followed the proper procedures to establish standards to implement these changes.

carefully tailored programs designed to meet the particular needs of children. The system has been and should remain on sound footing from a service and a reimbursement standpoint if these changes can be stayed until proper standards are duly promulgated. The current system, which has been in place for over twenty years, provides accountability and assures the safety and well-being of children placed in residential care through multiple layers of oversight, including BMS oversight of compliance with the documentation and billing requirements under the Rehabilitation Manual issued by BMS, utilization management oversight by an outside vendor, and BCF oversight as to compliance with the licensure standards for group residential facilities. For over twenty years, residential child care services have been provided under a combined, or “bundled,” daily rate for treatment, room, board, and supervision, have included minimum or core services for children in all facilities, and have been leveled by severity of issues facing the children they serve (Level I, II, or III).⁶

BCF is responsible for overseeing services provided to children and families in West Virginia, and has previously promulgated detailed regulations pursuant to W.Va. C.S.R. §49-2-113, and which are found in W.Va. C.S.R. §78-3-1, *et seq.* These legislative rules govern all aspects of the delivery of residential child care services in group residential facilities, including but not limited to facilities, staffing, credentialing, oversight, supervision, intake, treatment planning, the manner in which services are provided, and discharge. Reimbursement for the room, board, and supervision components of residential child care services has always been funded through BCF, and this BCF funding will continue. However, on September 1, 2016,

⁶ The current core standards for residential services and the current level of programs and linkage between BMS reimbursement and BCF regulations is in Appendix F to the Rehabilitation Manual, which when deleted will also disappear. Petitioners each have an existing Provider Agreement with BMS that enables them to obtain reimbursement for the treatment services they provide. Petitioners also have a group residential facility license and a separate Provider Agreement with BCF. The Provider Agreement in controversy herein is the BCF Provider Agreement.

upon the unbundling of the current reimbursement scheme, new standards for delivery and reimbursement for room, board and supervision components must be in place to clearly define under duly promulgated standards how these services are to be delivered and reimbursed.

To wit, on February 17, 2016, BCF rolled out a new proposed BCF Provider Agreement in meetings with providers, and outlined the many important changes that were needed to implement changes to the residential child care delivery systems. (Exhibit “C” – 2/17/2016 correspondence from N. Exline with proposed BCF Provider Agreement). Included in the “Next Steps” to be completed by BCF was the important task to “review and revise the licensing standards and policy - April, 2016.” (Exhibit “C,” Bates No. 000027). Months later, without any revision by BCF, on or around July 1, 2016, in a letter dated June 30, 2016, BCF announced that it would be terminating all existing BCF Provider Agreements on August 1, 2016, and that residential child care service providers that did not execute a new BCF Provider Agreement on or before July 25, 2016, would be forced to close their residential facilities throughout the State of West Virginia.⁷ (Exhibit “D” – 6/30/2016 correspondence from BCF to Pressley Ridge). At that same time, BCF circulated draft and incomplete informal guidelines, some of which were developed by an outside vendor as an attempt to define the new services and procedures proposed by BCF, including confusing reimbursement policies describing new “Traditional Group Home”⁸ and “Enhanced Group Home” levels of services to be reimbursed by BCF under new daily rates for room, board and supervision, and a chart for providers to complete to identify the target populations they serve (Exhibit “E” – 6/30/2016 email from L. Watts to providers and

⁷ Soon after it was learned that there was an inquiry into these changes by this Honorable Court’s Juvenile Justice Commission, BCF announced on July 1, 2016 that the new BCF Provider Agreement would have to be executed by Petitioners on or before July 25, 2016 (two days prior to the public hearing regarding these changes by the Juvenile Justice Commission).

⁸ The draft reimbursement policy allegedly defining what will be reimbursed under the “standard” rate was actually labeled as “Traditional Group Home”. The Petitioners assume that this document was meant to be titled as “Standard Group Home”.

attached draft informal guidelines, see specifically, “Traditional Group Home” and “Enhanced Group Home” draft informal guidelines, Bates Nos. 000033-000035 and 000155-000159). None of these new standards and policies were in final form, and BCF admitted they were still working on standards, policies, and procedures in meetings with providers. None of these new policies and procedures are embodied in changes to the existing legislative rules.

On July 8, 2016, Petitioners notified BCF that, until the current reimbursement scheme is unbundled by BMS, it is unlawful for providers to receive separate reimbursement from BCF under the existing bundled rate. (See Exhibit “F” – 7/8/2016 correspondence from counsel for providers to BCF). Petitioners also notified BCF that it must first promulgate these changes in the form of legislative rules prior to the implementation of these changes and prior to execution of the new BCF Provider Agreements. (Exhibit “F”). Petitioners asked BCF to place these changes on hold until the new standards could be properly developed as required by law.⁹ (Exhibit “F”). In July, Providers were advised by BCF that BMS would not be issuing any new manuals. (Exhibit “G” – 7/12/2016 correspondence from BCF to providers). Without new rules and without necessary changes to unbundle the rates then in effect, Petitioners were faced with the dilemma of being forced to execute new BCF Provider Agreements without the standards required to implement the changes, procedures to make the new changes work, and a reimbursement scheme that remains currently bundled, making it illegal for providers to obtain reimbursement for these services separately as directed by BMS and BCF.¹⁰

On July 21, 2016, a group of providers filed a Petition for Injunctive Relief in the Circuit Court of Kanawha County seeking to enjoin the implementation of these changes until the new

⁹ BMS received a similar letter on June 22, 2016.

¹⁰ While the rates for residential service remain bundled under Appendix F to the Rehabilitation Manual, providers are prohibited from billing most of the fee for services codes in the Medicaid Manual and are prohibited from billing BCF separately for the room, board and supervision components, and if they followed the directives of BMSD and BCF they would be committing Medicaid fraud.

standards could be properly be developed by both BMS and BCF before the then impending deadline of July 25, 2016 to sign the BCF Provider Agreements. On July 27, 2016, an agreed order was entered granting an extension of time to execute the BCF Provider Agreements until July 29, 2016, and establishing a time for a hearing to consider legal arguments only on July 28, 2016 before Judge Tod Kaufman. On July 26, 2016, after the Petition for Injunctive Relief was filed, BMS reversed course and decided to file a notice and public comment period to amend the Rehabilitation Manual to unbundle the reimbursement scheme to eliminate concerns as to Medicaid fraud being committed upon the rollout of the new reimbursement scheme on September 1, 2016. (See Exhibit “H” – 7/26/2016 BMS Notice re Public Comment; Exhibit “I” Proposed Revision to 503F). This notice provides a public comment period through August 26, 2016, which is only 5 days prior to the planned implementation date of September 1, 2016. (Exhibit “H”). Any public comments submitted to the proposed modifications cannot be seriously considered by BMS prior to the planned implementation on September 1, 2016.

As described above, independent of these matters, on July 27, 2016, the Juvenile Justice Commission convened a public hearing to address their many concerns as to these new changes, which was well attended by providers from all over the State, but during which there was no appearance by Respondents (Exhibit “J” – Juvenile Justice Commission Official Press Release regarding 7/27/2016 Public Forum).

On July 28, 2016, Judge Kaufman conducted a hearing noticed solely for legal arguments of Petitioners and the Respondents. In addition, BCF was permitted to present a witness as to these changes while the petitioners therein were not afforded this right (despite the prior July 27, 2016 order which stated that the hearing was to be on legal arguments only). After considering the legal arguments and the testimony of BCF’s witness, Judge Kaufman announced from the

bench that the injunction was granted for thirty (30) days, and then, in response to a question from counsel for BCF, reversed course and withdrew the injunction previously granted from the bench. Later that same day, he entered a written order denying the request for injunctive relief. There is no adequate remedy for Petitioners, all of whom were petitioners in the circuit court, since these providers were denied the opportunity to present evidence and witnesses while this opportunity was afforded to Respondents. Petitioners had no opportunity to develop a record as to the impact of these changes upon the programs and children served by Petitioners, and since the order from Judge Kaufman did not address the detailed arguments presented in briefs and oral arguments as to why BCF must duly promulgate new legislative rules by BCF (Exhibit “K” – 7/28/2016 Final Order issued by the Honorable Tod J. Kaufman). Without a record, a fair opportunity to present evidence and without any analysis of the requirements for BCF to develop legislative rules in the order, Petitioners do not have an adequate legal remedy outside of the extraordinary relief requested herein. On July 28, 2016, prior to the ruling, BCF extended the deadline to execute the BCF Provider Agreements until August 1, 2016. The next day, BCF terminated all existing BCF Provider Agreements effective September 1, 2016 and notified providers that the new BCF Provider Agreement must be signed on or before August 8, 2016. (Exhibit “L” – 7/29/2016 correspondence from C. Dodrill to counsel for Petitioners).

Petitioners do not oppose the intent of Respondents’ changes to the residential child care program; instead, they have publicly stated that they support the need to provide more community based services. If properly implemented, the proposed changes will likely reduce, over time as new community-based programs are implemented, the State’s need to rely upon residential child care programs. Furthermore, Petitioners will continue to serve as a partner in a collaborative effort with BMS and BCF to redesign the system so long as these changes can be

made in a lawful, transparent manner that comports with due process and allows input by all stakeholders. Petitioners have simply asked both BMS and BCF to place these changes on hold until appropriate standards, regulations and procedures are properly promulgated. These concerns as to the premature implementation of many sweeping changes prior to the due promulgation of new rules, standards and policies in a transparent manner is shared by the Juvenile Justice Commission, which has independently come to this same conclusion.

The current regulations, promulgated by BCF in W.Va. C.S.R. §78-3-1¹¹, govern all aspects of the delivery of residential child care services in group residential facilities, including but not limited to facilities, staffing, credentialing, oversight, supervision, intake, treatment planning and discharge as it relates to children placed in group residential facilities. Since the reimbursement of these combined components will no longer be bundled, it is clear that new standards must be developed by BCF through the legislative rule-making process pursuant to W.Va. Code 29A-3-1, *et seq.* . To date, BCF has not developed any new legislative rules to properly implement these many changes, and, instead, has attempted to implement new informal standards and procedures unlawfully by both: 1) inserting the new standards into the proposed BCF Provider Agreement (Exhibit “M” – Proposed BCF Provider Agreement, revised as of 7/1/2016); and 2) putting forth new informal standards in the form of drafts of informal guidelines that were circulated to providers on June 30, 2016, including utilization guidelines developed by an outside vendor. These informal guidelines are currently drafts, and nevertheless will be used by BCF to amend or supplant existing legislative rules regarding placement, continued stay and discharge of children on September 1, 2016 (Exhibit “E”).

Only after the original deadline for the execution of the new BCF Provider Agreements passed did BMS change course to comply with its legal obligation to change the Rehabilitation

¹¹ The most recent changes to these rules by BCF were on February 16, 2015.

Manual, and BMS gave notice (on July 26, 2016) that the Medicaid manuals would be changed to enable Petitioners to lawfully bill fee-for-service codes. These changes are proposed, under a public comment period, and not yet implemented. The Notice and Comments period for the changes to the Rehabilitation Manual runs from July 26, 2016 through August 26, 2016. It is apparent that BCF is required to comply with the legislative rule making process, that the new standards must be duly promulgated as legislative rules pursuant to W.Va. Code Section 29A-3-1, *et seq.*, and that Respondents cannot simply rely upon BMS deleting Appendix F to the Medicaid Manual, upon the exemption granted to BMS under W.Va. Code Section 29A-1-3(c), or informal ways to get around legislative rule making, such as inserting new standards into contracts and/or referencing informal guidelines and policies. These efforts are clearly aimed at circumventing the clear legal duty of BCF to promulgate appropriate standards needed to implement these changes as legislative rules. The absolute failure to develop any new legislative rules by BCF underscores that the rollout of these changes is premature, unstudied, and unlawful. The Respondents must first duly promulgate these new standards before the revisions to the program are implemented and Petitioners and other providers are required to enter into new BCF provider Agreements.

Accordingly, Petitioners seek: (1) a Writ of Mandamus to require BCF to first develop appropriate legislative rules to implement the many changes which constitute either amendments to existing legislative rules or which effectively are new legislative rules, all of which must first be duly promulgated in the manner required by W.Va. Code Section 29A-3-1, *et seq.*; (2) a Writ of Mandamus to require that DHHR immediately withdraw the State Plan Amendment¹² filed on

¹² On June 22, 2016 BMS submitted a new State Plan Amendment to the State Medicaid plan which deleted the ability of BMS to bundle residential rates for approval of the Centers for Medicare and Medicaid Services (CMS"). BMS can withdraw this SPA or change the implementation date to avoid losing this right altogether since there might be a delay in the implementation of these changes if new rules must first be developed. Likewise, the notice

June 22, 2016 with the Centers for Medicare and Medicaid Services (“CMS”); (3) a Writ of Mandamus to require DHHR to immediately suspend implementation of the proposed new Residential Treatment Provider Agreements that are required to be signed by all residential treatment providers; (4) a stay of the changes to the Medicaid Manual and the implementation of these significant changes to the residential child care service delivery system, including changes to program requirements and reimbursement requirements, until such time as new regulations can be duly promulgated; and (5) such other relief as may serve the interests of justice.

Parties

1. Petitioner, Pressley Ridge, is duly licensed as a group residential child care facility in West Virginia, and currently operates group residential facilities serving children between the ages of 10 and 18 at White Oak, near Walker, West Virginia, at Laurel Park near Clarksburg, West Virginia, at Grant Gardens, near Milton, West Virginia and at Odyssey House and Richwood House in Morgantown, West Virginia.

2. Petitioner, Elkins Mountain School, is duly licensed as a group residential facility, and currently operates group residential facilities serving children between the ages of 12 and 18 at its existing group residential facilities at 100 Bell Street, Elkins, West Virginia and on Leading Creek Road near Elkins, West Virginia.

3. Petitioner, Academy Management, LLC, manages and operates three duly licensed group residential facilities, including Youth Academy, LLC, Yore Academy, Inc., and Yale Academy, LLC, and currently operates group residential facilities serving children between

of the proposed SPA that was issued by BMS to allow providers to reply by May 12, 2016, was fatally defective since providers did not know what the new reimbursement codes would be available and what the new standards for the delivery and reimbursement of these services would look like prior to the notice period expiring and the SPA was submitted. They still don't know.

the ages of 12 and 18, and up to age 21 for transitioning adults, at 3, 7, and 9 Crosswind Drive, Fairmont, West Virginia.

4. Petitioner, Family Connections, Inc., is a duly licensed group residential facility, which currently operates group residential facilities serving children between the ages of 12 and 18, and up to age 21 for transitioning adults, at 3305 Tent Church Road, Colliers, West Virginia.

5. Petitioner, Stepping Stones, Inc., is a duly licensed group residential facility, which currently operates group residential facilities serving children between the ages of 11 and 18, and up to age 21 for transitioning adults, at 1235 Buffalo Creek Road, Huntington, West Virginia.

6. Petitioner, Stepping Stone, Inc., is a duly licensed as a group residential facility, which currently operates group residential facilities serving children between the ages of 12 and 18, and up to age 21 for transitioning adults, at E. Grafton Road, Fairmont, West Virginia.

7. Petitioner, Board of Child Care of the United Methodist Church, Inc., is a duly licensed group residential child care facility in West Virginia, which currently operates group residential facilities serving children between the ages of 12 and 18 at 715 Brown Road, Falling Waters and 40 Campolina Way in or near Martinsburg, West Virginia.

8. Petitioners provide residential services to children with severe emotional and behavioral problems who have been placed in an out of home setting.

9. DHHR is a cabinet-level department of the executive branch of the State of West Virginia, and is responsible for oversight of all divisions of DHHR, including BMS and BCF.

10. Respondent, Karen L. Bowling, is the Cabinet Secretary of DHHR.

11. BMS is an agency within DHHR, and is the single state agency in West Virginia responsible for the administration of the State's Medicaid program.

12. Respondent, Cynthia Beane, is the Acting Commissioner of BMS.

13. BCF is an agency within the department of DHHR and is responsible for oversight and administration of services to children and families, including oversight and administration of group residential facilities and services provided to children placed in out of home settings in West Virginia.

14. Respondent, Nancy Exline, is the Commissioner of BCF.

Jurisdiction

15. The West Virginia Supreme Court of Appeals has original jurisdiction over this matter pursuant to Rule 16 of the Rules of Appellate Procedure.

16. Petitioners are entitled to initiate this Petition against the Respondents without first serving a Notice of Intent to Sue, pursuant to W.Va. Code § 55-17-3, because of the nature of the extraordinary relief requested, which requires immediate relief in the form of a Writ of Mandamus, which is similar in nature to injunctive relief under W.Va. Code § 55-17-3, and based upon the original jurisdiction of this Court.

Factual Background

17. Petitioners are all duly licensed as group residential facilities pursuant to W.Va. Code §49-2-113 and W.Va. C.S.R. §78-3-1 *et seq.*

18. Petitioners each have a current provider agreement with BMS in order to enable these group residential facilities to obtain reimbursement under the West Virginia Medicaid Program pursuant to Chapter 503 of the West Virginia Medicaid Manual for Rehabilitation Services (“Rehabilitation Manual”) and specifically Appendix F to said Chapter 503 (“Appendix F”), which contains the particular codes that Petitioners currently bill for group residential services. (Exhibit “N” – existing Appendix F to Chapter 503 of the Rehabilitation Manual).

19. Petitioners serve approximately 328 children receiving residential services at this time and are duly licensed to provide services to 362 children, which children are placed in group residential facilities operated by the Petitioners due to their particular needs for treatment.

20. The children currently served by Petitioners have been placed in out of home settings due to their serious emotional and behavioral issues. These children are at risk of placement in more restrictive settings if Petitioners are unable to continue to effectively provide group residential facility services, including placements in more restrictive facilities, placements in institutions, and other placements which would create serious concerns for the effective treatment and the safety and wellbeing of these children.

21. Current reimbursement for group residential services under Appendix F is defined by BMS as a comprehensive service, and Petitioners are currently reimbursed the daily rate for treatment, room, board and supervision, based upon the particular level of care (either Level I, II or III).

22. Under Appendix F to the existing Rehabilitation Manual, Petitioners are prohibited from separately billing the majority of the fee for service codes and from separately billing BCF for room, board, and supervision until such time as Respondents properly amend the existing Rehabilitation Manual to enable the Petitioners to lawfully bill for the residential child care services they provide. BMS recently proposed new changes on July 26, 2016 to the Rehabilitation Manual to address the concern that the current billing scheme would be unlawful as of September 1, 2016.

23. BCF has (1) failed to develop any new legislative rules to amend the existing licensure requirements for group residential facilities, (2) failed to establish appropriate rules for

the Petitioners to bill for room, board and supervision, and (3) to develop many changes to these standards and to develop new standards.

24. As of September 1, 2016, there will be no existing definition of the core treatment services that petitioners will be required to provide for children needing residential child care services.

25. As of September 1, 2016, the current Level I, II and III residential facilities, which are “leveled” according to the severity of the needs of children placed there, will be eliminated.

26. As of September 1, 2016, providers of treatment under the Medicaid Program are directed to bill the treatment component under the fee-for-services codes under the existing provisions of the Rehabilitation Manual, and separately bill BCF for the room, board and supervision components under a daily rate for either “standard” and “enhanced” services.

27. BCF has proposed many significant changes to the residential child care program requirements, including but not limited to: (1) BCF proposes to establish a new “standard” level of group residential services for room, board, and supervision as the routine level of such services for all children; (2) BCF proposes to establish a new “enhanced” level of service for room, board and supervision which will be available only if no provider accepts a particular child or perhaps under certain other unspecified circumstances; (3) BCF has proposed to implement new daily rates for room, board and supervision components (previously reimbursed under the “bundled rate”) with a new program that establishes a new “standard” level of reimbursement for such services for all children regardless of their need; (4) BCF has proposed to place children into group residential facilities under the new program based upon new standards that have not yet been completely developed; (5) BCF has proposed to place limits on continued stays of

children placed in group residential facilities under the new program that establishes a uniform limit on these services for all children regardless of their particular need and which will require reauthorization for continued stays based upon new standards that have not yet been completely developed; (6) BCF has proposed new standards referred to as the “no ejection rule” that will eliminate the discretion of Petitioners to discharge children who cannot be adequately treated at that facility to an alternative facility; (7) BCF has proposed new standards that will limit or prohibit Petitioners from rejecting new placements who meet the new “matrix’ definition of target population situations, which eliminates the current practice of addressing the particular needs of children based upon the severity of their needs, particular programs addressing particular needs, and carefully managing the populations of children placed in facilities to assure a compatible and manageable mix of children; and (8) BCF has proposed new standards that will force Petitioners to accept children of different levels of severity into facilities previously dedicated and staffed for particular levels of severity.

28. BCF has promised to provide new standards and procedures to Petitioners implementing the many changes outlined above to Plaintiffs, but has failed to do so prior to requiring Petitioners to execute the new BCF Provider Agreement on or before August 8, 2016.

29. BCF has failed to develop any of these new standards and procedures in a timely manner and as required by law.

30. Most, if not all, of these new standards and procedures must be duly promulgated in the form of legislative rules as required by W.Va. Code Section 29A-3-1, *et seq.*, and pursuant to W.Va. Code §49-2-113 and W.Va. C.S.R. §78-3-1 *et seq.*

31. BCF has developed no new definitions of what the new services described as “standard” and “enhanced” services mean in the form of new legislative rules as required by W.Va. Code Section 29A-3-1, *et seq.*

32. BCF has developed no legislative rules or procedures to determine how the implementation of the proposed new changes to placement, continued stay and reauthorization of stays will be implemented as required by as required by W.Va. Code Section 29A-3-1, *et seq.*, and as pursuant to W.Va. Code §49-2-113 and W.Va. C.S.R. §78-3-1 *et seq.*

33. Many of the new proposed standards, if not properly promulgated as required by law, will conflict with existing legislative rules under W.Va. C.S.R. §78-3-1, *et seq.*

34. BCF may not properly implement the new proposed changes to establish new definitions of services and to implement many new standards and procedures affecting the rights and obligations of providers and changing the rights of and services provided to children without first promulgating these new standards in the form of legislative rules.

35. BCF must develop procedures and due processes to address many changes proposed by BCF so that Petitioners and the children they serve will have an appropriate avenue for redress of their grievances.

36. The failure of BCF to promulgate new rules will have a significant and potentially devastating impact on providers and children as set forth in the Juvenile Justice Commission’s report.

37. BCF must not only develop new standards as required by law, but must provide appropriate notice and due process to Petitioners.

38. BCF has proposed new standards and procedures that unlawfully attempt to modify the existing legislative rules, and cannot be seen as interpreting existing regulations as

there is no definition or treatment of these new services or procedures under W.Va. C.S. R. 78-3-1, *et seq.*

39. Under W.Va. C.S.R. §78-3-14.9(b), termination or discharge is required by providers when the child achieves the goals of his or her treatment, when the child has received maximum benefit, when the guardian terminates treatment, when the child no longer meets eligibility criteria, when the child refuses to meet program standards or requirements, when the child has needs that exceed organizational resources (i.e. that continued treatment of a child at a particular facility poses safety risks or concerns to the continued wellbeing of a child), or when the child completes court ordered treatment. The new BCF Provider Agreement develops or incorporates new standards that prohibit or modify the ability of providers to discharge a child from their facility in important ways, stating that, “Youth will not be discharged from the facility.” (Exhibit “M” – Proposed BCF Provider Agreement, revised as of 7/1/2016).

40. The new BCF Provider Agreement develops or incorporates new standards for “enhanced” or “standard” services.

41. Petitioners are required under the current rules to engage in a multi-disciplinary treatment team (“MDT”) process to continually assess treatment progress for the children in their care. An MDT is a joint effort by providers, Respondents, guardians for the children, the courts and other stakeholders to determine the best place for each individual child. The MDT process is required pursuant to W.Va. C.S. R. 78-3-13.4.

42. Under W.Va. C.S.R. §78-3-14.9, decision making regarding the termination or discharge of a child from a particular residential program is based upon detailed input from the MDT team to the courts.

43. BCF proposes new standards and procedures that conflict with or modify the existing obligations and requirements imposed upon Petitioners under the MDT process under the existing legislative rules, including an automated placement referral system (“APR”) based upon a matrix that no one has seen and which may alter the manner in which children are placed and eliminate the ability of Petitioners to not accept such automated referrals. These new standards and procedures must be duly promulgated as legislative rules.

44. The proposed BCF Provider Agreement removes language that states that the courts may grant an extension of time for a child in a residential placement if the court finds by clear and convincing evidence that the extension is in the best interest of the youth.

45. BCF has proposed to implement new standards and procedures in the new BCF Provider Agreement that either constitute an unlawful attempt to develop new legislative rules that are unlawfully promulgated or which conflict in material ways with the existing legislative rules under W.Va. C.S.R. §78-3-1, *et seq.*

46. Since there are still no new standards promulgated by BCF describing how these new services will be implemented, substantial confusion remains as to how these services are to be delivered and reimbursed as of September 1, 2016.

47. Without new and detailed standards that are properly promulgated by BCF, Petitioners cannot fathom how they will responsibly staff, supervise and deliver the new services, whether they can implement these services in a responsible and safe manner, and whether they will be able to sustain these services under the new reimbursement scheme.

48. Petitioners cannot evaluate whether they can survive these important changes to their programs, which will require staffing changes, changes in program design, and significant investments of time and resources, and make responsible decisions whether to sign the new

Provider Agreement without first evaluating the new program and reimbursement changes as a whole. As stated, they are being asked to sign a BCF Provider Agreement or close their programs without being provided the minimal information to enable them to make an informed decision.

49. The new standards affect the ability of Petitioners to provide services and receive reimbursement lawfully by BCF, and are properly considered to be new rules or amendments to the existing rules developed by BCF under W.Va. C.S.R. §78-3-1, *et seq.*

50. The failure by Respondents to implement these new standards and procedures as required by law has placed the entire child care delivery system in jeopardy.

51. In an effort to work with BCF, the Petitioners have continued to negotiate changes to the new Provider Agreements, and up until Judge Kaufman entered an order denying Petitioners' request for an injunction, Petitioners believed BCF to be negotiating in good faith with respect to changes in the provider agreements.

52. However, on July 29, 2016, the day after Judge Kaufman entered the Order denying Petitioners' request for an injunction, counsel for the Respondents, Christopher Dodrill, informed the undersigned counsel, that Respondents "will not be making any revisions to the contract circulated to providers on June 30[.]" (See Exhibit "K").

53. Also, on July 29, 2016, one day after Judge Kaufman's Order denying Petitioner's request for an injunction, the Juvenile Justice Commission issued its preliminary report, referenced *supra*, wherein the Commission found, among other things, that the Respondents were attempting to keep the aforementioned changes secret from the West Virginia judiciary and that Respondents intended to "blow up" the state's residential model. (See Exhibit "A").

SUMMARY OF THE ARGUMENT

BCF is a state agency that is subject to legislative rule-making. BCF has adopted a comprehensive regulatory scheme to govern all aspects of licensure of group residential facilities in West Virginia pursuant to West Virginia CSR §78-3-1, *et seq.* The rule-making process is required, at least in part, to provide transparency throughout government processes and changes which may affect the public. As the Juvenile Justice Commission found, the process by the Respondents has been anything but transparent. BCF has proposed a multitude of changes to the manner in which residential facilities provide residential childcare services to children in West Virginia, including the development of a new reimbursement scheme that is governed exclusively by BCF and its proposed new standards governing the manner in which these services are delivered by licensed group residential facilities. Many of these changes clearly adopt new standards that are subject to legislative rule-making and many of these changes alter or amend existing legislative rules. As a result, BCF is clearly required to develop legislative rules to implement these changes. In addition, the law is clear that BCF must first duly promulgate these rules as legislative rules prior to implementation of the same. BCF is not authorized to promulgate legislative rules subsequent to implementation of its desired changes that are applied in a retroactive manner.

The Supreme Court should stay the implementation of these changes to allow the lawful and due promulgation of legislative rules which impact the manner in which group residential facilities provide and children receive these services from Petitioners. Should the West Virginia Supreme Court of Appeals fail to stay the implementation of these changes, substantial confusion will exist as to the proper legal responsibilities of group residential providers and the rights of children receiving these services to obtain appropriate services resulting in substantial confusion

that will harm the delivery system until such time as legislative rules are properly promulgated. The failure of BCF to properly promulgate these legislative rules could place group residential facilities in jeopardy of closing, eliminating much-needed services, not being able to provide a full complement of services needed to safely address the particular needs of children, and drastically amending the manner in which children in need of residential services are placed, the services they receive and the standards and procedures for discharge of these children. Given the changes needed to completely revise the program and reimbursement requirements for the delivery of residential childcare services by BCF, the Supreme Court of West Virginia should stay the implementation of all of these changes until such time as legislative rules can be developed in an open and transparent manner.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary pursuant to Rule 18 of the Rules of Appellate Procedure. Petitioners request Rule 20 oral argument on an expedited basis as this case involves issues of fundamental public importance requiring immediate attention by this Court. See Rule 20(a)(2). BCF set a self-imposed deadline of August 8, 2016 for Petitioners to execute new Provider Agreements or face termination of their residential child care service programs. Petitioners are unable to execute the proposed BCF Provider Agreement as its terms require Petitioners to accept new methods of reimbursement that are clearly unlawful, and to accept new standards of treatment that have not been duly promulgated and that are inconsistent with the existing laws. Petitioners are faced with closure of their entire residential programs in West Virginia if they do not submit to this unfair and unlawful process.

ARGUMENT

I. STANDARD OF RELIEF

Petitioners seek a Writ of Mandamus pursuant to the West Virginia Constitution, Article VIII, §3 and W.Va. Code §§ 53-1-2, *et seq.* This Court has original jurisdiction to issue a writ of mandamus. *State ex rel. McLaughlin v. W. Virginia Court of Claims*, 209 W. Va. 412, 415, 549 S.E.2d 286, 289 (2001). “Mandamus is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies.” *State ex rel. McLaughlin v. W. Virginia Court of Claims*, 209 W. Va. 412, 549 S.E.2d 286, Syllabus Point 2 (internal citations omitted).

The standard for the grant of a writ of mandamus in this State is well-settled: “A writ of mandamus will not issue unless three elements co-exist-(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); *Syl. Pt. 1, State ex rel. Brown v. Corporation of Bolivar*, 217 W.Va. 72, 614 S.E.2d 719 (2005); *see also Syl. Pt. 1, State ex rel. Dickerson v. City of Logan*, 221 W.Va. 1, 650 S.E.2d 100 (2006); *Syl. Pt. 1, Graf v. Frame*, 177 W.Va. 282, 352 S.E.2d 31 (1986).

The basic principle is that a writ of mandamus will issue to require the discharge by a public official of a nondiscretionary duty. *State v. Huntington*, 147 W. Va. 728, 131 S.E.2d 160 (1963); *State v. Battle*, 147 W. Va. 841, 131 S.E.2d 730 (1963); *State ex rel. Cassinelli v. Bassett*, 148 W. Va. 697, 137 S.E.2d 232 (1964); *Reed v. Hansbarger*, 173 W. Va. 258, 314 S.E.2d 616 (1984). A fuller statement of this rule is that mandamus will lie where there is a clear legal right to the performance of a particular act or duty at the hands of the respondent and such

act or duty is of a ministerial nature, rather than one involving the exercise of discretion. *State v. Huntington*, 147 W. Va. 728, 131 S.E.2d 160 (1963); *State v. Battle*, 147 W. Va. 841, 131 S.E.2d 730 (1963); *State ex rel. Cassinelli v. Bassett*, 148 W. Va. 697, 137 S.E.2d 232 (1964); *Reed v. Hansbarger*, 173 W. Va. 258, 314 S.E.2d 616 (1984). Moreover, mandamus will lie to compel performance of a nondiscretionary duty of an administrative officer though another remedy exists, where it appears that the official, under misapprehension of law, refuses to recognize the nature and scope of his duty and proceeds on the belief that he has discretion to do or not to do the thing demanded of him. *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. BCF HAS A CLEAR LEGAL DUTY TO IMPLEMENT NEW LEGISLATIVE RULES BEFORE MOVING FORWARD WITH ITS PROPOSED PROGRAM CHANGES.

A. BCF is an agency subject to rule-making requirements.

West Virginia Code §29A-1-2(a) defines “agency” as any state board, commission department, office or officer authorized by law to make rules or adjudicate contested cases except those in the legislative or judicial branches. BCF is authorized pursuant to W. Va. Code §49-2-113 to promulgate legislative rules and pursuant to W. Va. CSR 78-3-1, *et seq.*, has adopted a comprehensive scheme governing the licensure of group residential facilities in West Virginia which governs all aspects of the manner in which these residential childcare services are delivered. The Bureau for Children and Family clearly admitted and accepted its obligation to develop legislative rules to implement these changes as set forth in correspondence from Nancy Exline, Commissioner for BCF, to providers on February 17, 2016 in which it is noted that one of the principal steps in implementing these changes is to review and revise licensing standards

and policies. BCF may not rely upon an exception from the legislative rule-making process granted to the Bureau for Medical Services pursuant to West Virginia Code § 29-1-3(c), which states that the provisions of the State Administrative Procedures Act governing rule-making do not apply to rules relating to contested cases involving the receipt of public assistance. See, e.g. *State, ex rel. Ginsberg v. Watt*, 168 W.Va. 503, 285 S.E.2d 367 (1981). In the instant case, the untimely proposal by BMS to revise the Medicaid manuals by eliminating the current unlawful bundling of services on July 26, 2016 reveals that there has been no proper notice and no proper planning to implement these changes. BMS has proposed to delete the Appendix F to the Rehabilitation Manual, which governs reimbursement for the treatment component of residential childcare services.

The changes proposed by BCF govern the other aspects of the room, board and supervision components and constitute a comprehensive scheme for the delivery of group residential services in West Virginia that is clearly within the purview of BCF pursuant to West Virginia W.Va. CSR § 78-3-1.

B. The proposed changes by BCF constitute new legislative rules or amendments to the existing legislative rules adopted by BCF pursuant to W. Va. CSR §78-3-1, et seq.

The West Virginia Administrative Procedure Act defines a “rule” as every regulation, standard or statement of policy or interpretation of general application and future effect, including the amendment or appeal thereof, affecting private 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 the agency. BCF has proposed the implementation of new standards governing a new definition of “standard services” to be reimbursed by BCF for reimbursement of the room, board and supervision components and a

separate definition of “enhanced services.” These definitions do not appear under current law and clearly constitute new legislative rules pursuant to West Virginia Code §29A-1-2(f). Pursuant to West Virginia Code §29A-3-1, legislative rules must be duly promulgated in accordance with the requirements of §29A-3-1, *et seq.*, and shall be and remain effective only to the extent that such legislative rules have been duly promulgated in accordance with these provisions. No executive or administrative agency has the power and authority to implement legislative rules outside this process unless they are specifically exempted pursuant to West Virginia Code §29A-3-1, *et seq.* BCF has no statutory authority to enact retroactive rules in this case. By failing to duly promulgate legislative rules as required by law and as recognized by BCF, the implementation of these changes will create unnecessary confusion governing the rights and responsibilities of providers of children that require these services and the courts that oversee placement of children in group residential facilities throughout the state of West Virginia. In addition, by failing to properly promulgate these changes as legislative rules, BCF has usurped the legislative oversight function established by W.Va. Code §29A-3-1, *et seq.*, by failing to provide for proper notice and due process, legislative oversight of the rule-making authority of the particular state agency and proper evaluation of the fiscal and programmatic impact of these changes. W.Va. Code §29A-3-1, *et seq.*, sets forth the rule making procedures that an agency must follow before promulgating a new rule. To promulgate a new rule, notice of the rule, the text of the rule, and the reasons for the proposed rule must be filed in the state Register in the Secretary of State’s office. W.Va. Code §29A-3-1, *et seq.* After adequate notice, a public hearing must be held before the rule is adopted. W.Va. Code §29A-3-1, *et seq.*

C. BCF cannot develop legislative rules outside the process required by statute and has a clear legal duty to properly promulgate the new standards prior to implementing them..

Any rule that does not comply with these statutory mechanisms is null and void. W.Va. Code §29A-3-1. See also, *Coordinating Council for Independent Living, Inc. v. Palmer*, 209 W.Va. 274, 546 S.E.2d 454 (2001). The West Virginia Supreme Court of Appeals has also recognized the importance of compliance with the Administrative Procedures Act's rule-making procedures. *Wheeling Barber College v. Roush*, 174 W.Va. 43, 321 S.E.2d 694 (1984); *Palmer*, 546 S.E.2d 454, 209 W.Va. 274 (the State Tax Commissioner's "rule" was deemed void and ineffective because it did not comply with the detailed rule-making procedure set forth in §29A-3-1, *et seq.*). In *Wheeling Barber College v. Roush*, the Court held that, "until the statutory mechanisms set forth in the Administrative Procedures Act for the promulgation of an agency rule are complied with, any resolution of a regulatory agency governed by the Act remains a nullity." *Wheeling Barber College*, 174 W.Va. 43, 321 S.E.2d 694, Syl. 1.

In *Coordinating Counsel for Independent Living*, the Tax Commissioner issued a letter to certain tax payers notifying them that the State Tax Commissioner's new interpretation that homemaker and case management services would be subject to the Healthcare Provider Tax similar to home health agencies that were already taxed, constituted a new agency rule that was required to be promulgated pursuant to 29A-3-1 as a legislative rule. *Coordinating Council for Independent Living, Inc.*, 209 W.Va. 274, 546 S.E.2d 454. In this case, the West Virginia Supreme Court of Appeals determined that the change in policy in the form of a letter from the Tax Commissioner announcing a new standard not previously adopted by rule constituted the unlawful promulgation of a new rule since the enforcement of the letter from the State Tax Commissioner affected the private rights, privileges or interests of the tax payers in question and

thus constituted a new legislative rule. *Coordinating Council for Independent Living, Inc. v. Palmer*, 209 W.Va. 274, 284, 546 S.E.2d 454, 464. In the present case, BCF cannot announce new standards in informal guidelines such as in charts, forms matrices, or proposed polices developed by outside vendors or in proposed BCF Provider Agreements without complying with the procedures to promulgate the new standards as legislative rules.

III. PETITIONERS HAVE A CLEAR LEGAL RIGHT TO NOTICE, DUE PROCESS, AND TO THE PROPER PROMULGATION OF LEGISLATIVE RULES PRIOR TO IMPLEMENTATION OF THESE CHANGES BY BCF.

As noted above, BCF must provide notice of new legislative rules, including the text of the rule, and the reasons for the proposed rule must be filed in the State Register in the Secretary of State's office. W.Va. Code §29A-3-6. After adequate notice, a public hearing must be held before the rule is adopted. W.Va. Code §§29A-3-5 and 7. These processes are clearly intended to serve as notice and due process to Petitioners in this case, and are designed to afford clear standards for legislative rules affecting the rights, privileges and interests of Petitioners, the children they serve, and the public. W. Va. Code §29A-1-2(f). Legislative rules that do not comport with all of the procedures set forth in W. Va. Code §29A-3-1, *et seq.*, are invalid. *See, e.g. Chico Dairy v. West Virginia Human Rights Comm'n*, 181 W. Va. 238, 382 S.E.2d 75 (1989), in which it was held that a proposed legislative rule that was not approved by the legislative committee was invalid.

In *Coordinating Council for Independent Living, Inc. v. Palmer*, 209 W.Va. 274, 546 S.E.2d 454, taxpayers were entitled to rely upon the existing lawfully promulgated regulations defining what services were the subject to the health care provider tax until new legislative rules (and not a new letter interpreting these rules in a new manner) were promulgated. Fairness requires administrative bodies to abide by their rules until they are lawfully changed. This is

especially true when an individual or a company relies upon these regulations promulgated for their guidance or benefit and will suffer because of their violation by the agency. *C&P Telephone Company v. Public Service Commission*, 171 W.Va. 708, 301 S.E.2d 798 (1983). Petitioners are required to comply with the existing regulations duly promulgated by BCF under West Virginia CSR §78-3-1, *et seq.* until BCF lawfully changes these standards. The new changes are either amendments to these rules or are otherwise inconsistent with current legislative rules. Under established precedent, Petitioners are entitled to rely upon current standards, and to not have their programs and facilities placed in jeopardy, until BCF lawfully changes them.

IV. PETITIONERS HAVE NO OTHER ADEQUATE REMEDY.

Mandamus is proper since Petitioners have no adequate remedy at law to address the premature and unlawful rollout of these changes which could have a devastating impact upon their programs and the children they serve. Things are simply moving too quickly, all at the desire of Respondents. A petition seeking injunctive relief was filed in the Circuit Court of Kanawha County on July 21, 2016 to enjoin the implementation of these changes until the new standards could be properly be developed by both BMS and BCF in advance of the then impending deadline of July 25, 2016 to sign the BCF Provider Agreements. On July 27, 2016, an agreed order was entered granting an extension of time to execute the BCF Provider Agreements until July 29, 2016, and establishing a time for a hearing to consider legal arguments only on July 28, 2016 before Judge Tod Kaufman. On July 28, 2016, Judge Kaufman conducted a hearing during which legal arguments were presented on behalf of Petitioners and the Respondents. In addition, BCF was permitted to present a witness as to these changes while providers were denied this same opportunity. The prior July 27, 2016 order stated that the

hearing was on legal arguments only, and once testimony was permitted by Judge Kaufman during the hearing, providers should have been afforded the same opportunity. After considering the legal arguments and the testimony of BCF's witness, Judge Kaufman initially announced from the bench that he was granting the injunction for thirty (30) days until October 1, 2016, and then, in response to a question from counsel for BCF, reversed course and withdrew the injunction previously granted at the bench. Without going back on the record, providers could not protect the record or present their proposed witness. That same day, Judge Kaufman entered a written order, as proposed by Respondents, denying the request for injunctive relief. The order does not address the arguments presented by providers, and dismisses them without required findings. There is currently no adequate remedy for Petitioners herein, which are comprised of some of a subset of the petitioners in the circuit court, since these providers were denied a fair opportunity to present evidence and witnesses while this opportunity was afforded to Respondents, since there was no record made as to the impact of these changes upon the programs and children served by Petitioners (even though Judge Kaufman stated on the record that he would like to hear such evidence), and since the order from Judge Kaufman did not address the detailed legal arguments presented by providers in briefs and oral arguments as to why BCF must duly promulgate new legislative rules. (See Exhibit "K" – 7/28/2016 Final Order). Without a record, a fair opportunity to present evidence and without proper analysis of the requirements for BCF to develop legislative rules in the order, Petitioners do not have an adequate legal remedy to seek an appeal from this decision without first supplementing the record in a proceeding or pleading before Judge Kaufman outside of the extraordinary relief requested herein, and there is insufficient time for them to do so. On July 28, 2016, prior to the ruling, BCF extended the deadline to execute the BCF Provider Agreements until August 1,

2016. The next day, BCF terminated all existing BCF Provider Agreements effective September 1, 2016 and notified providers that the new BCF Provider Agreement must be signed on or before August 8, 2016. (Exhibit “L” – 7/29/2016 correspondence from C. Dodrill to counsel for Petitioners).

CONCLUSION

As more fully set forth above, the Petitioners have demonstrated all of the elements required for the issue of a writ of mandamus from this Court. In a writ of mandamus action, the Petitioners must prove (1) a clear legal right 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).

With respect to the first element of a writ of mandamus, the Petitioners have a clear legal right to request this Court to require the Respondents to properly promulgate rules which completely overhaul the program in which they operate. Without such properly promulgated rules and regulations, the Petitioner are left with the option to execute an unlawful contract or cease operating in the state of West Virginia, thereby leaving the children currently being treated by Petitioners without a place to seek the treatment they so desperately need. Petitioners have a clear right to rely upon existing rules until new ones are lawfully promulgated.

Based upon the foregoing arguments, Petitioners have demonstrated, clearly, that Respondents are required by law to promulgate rules and regulations to achieve the sweeping changes they desire. Respondents’ own letter from February 17, 2016 acknowledges the need to implement new legislative rules. (Exhibit “C,” Bates No. 000027). However, for reasons

unknown to the Petitioners, Respondents have failed to follow through. Accordingly, the second element of a writ of mandamus has been satisfied.

Finally, Petitioners have no adequate remedy at law. The choice for Petitioners is to execute an unlawful contract or cease operations. The deadline to make such a decision is August 8, 2016. Petitioners sought relief from this arbitrary deadline in the form of an injunction action. However, Judge Kaufman summarily denied this request, albeit after briefly granting the same. Without relief from this Court, Petitioners will have no other remedy.

Petitioners respectfully submit that the West Virginia Supreme Court of Appeals should grant (1) a Writ of Mandamus to require BCF to first develop appropriate legislative rules to implement the many changes which constitute either amendments to existing legislative rules or which effectively are new legislative rules, all of which must first be duly promulgated in the manner required by W.Va. Code Section 29A-3-1, *et seq.*; (2) a Writ of Mandamus to require that DHHR and BMS immediately withdraw the State Plan Amendment filed with CMS on June 22, 2016, pending the proper development of these programs; and (3) an Order staying the implementation of the significant changes to the residential child care service delivery system, including changes to program requirements and reimbursement requirements, until such time as new legislative rules can be properly developed and duly promulgated; (4) an Order staying the requirement that Petitioners execute the proposed Provider Agreement since the terms either incorporate, conflict with or attempt to unlawfully amend the existing legislative rules; and (5) such other relief as may serve the interests of justice.

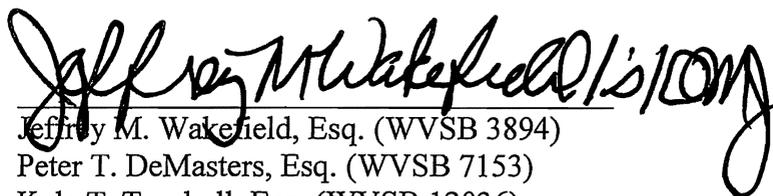
Respectfully submitted,

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.



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Jared M. Tully (WVSB 9444)
Andrew G. Jenkins (WVSB 11279)
Kara S. Eaton (WVSB 12470)
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Counsel for Academy Management, LLC, Stepping Stones, Inc., Stepping Stone, Inc., and Family Connections, Inc.

VERIFICATIONS

VERIFICATION

STATE OF WEST VIRGINIA
COUNTY OF Raleigh, to-wit:

I, Angie Gee-Hamilton/Pressley Ridge, the Petitioner herein, being first duly sworn, deposes and says that he is duly empowered to verify pleadings in this action; that he has read the "Verified Petition for Writ of Mandamus to Require Respondents to Implement New Legislative and Administrative Rules and a Writ of Prohibition 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" and that he/she has personal knowledge of the facts set forth therein or, to the extent he does not have personal knowledge, he/she believes, based upon information made known to him/her, the same to be true.

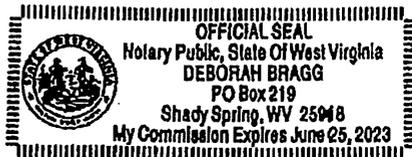
By: Angie Gee-Hamilton
Title: Pressley Ridge Executive Director

Taken, subscribed and sworn to before the undersigned Notary Public this 30th day of August, 2016.

My commission expires June 25, 2023.

(seal)

Deborah Bragg
Notary Public



VERIFICATION

STATE OF WEST VIRGINIA
COUNTY OF Randolph, to-wit:

I, Rebecca Sanders, the Petitioner herein, being first duly sworn, deposes and says that he is duly empowered to verify pleadings in this action; that he has read the "Verified Petition for Writ of Mandamus to Require Respondents to Implement New Legislative and Administrative Rules and a Writ of Prohibition 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" and that he/she has personal knowledge of the facts set forth therein or, to the extent he does not have personal knowledge, he/she believes, based upon information made known to him/her, the same to be true.

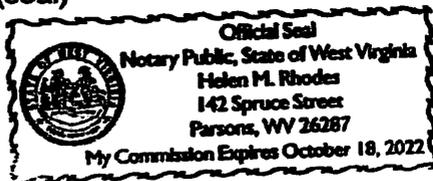
By: Rebecca Sanders
Title: LFO

· Taken, subscribed and sworn to before the undersigned Notary Public this ____ day of August, 2016.

My commission expires 10/18/2022.

Nelson M. Rhodes
Notary Public

(seal)



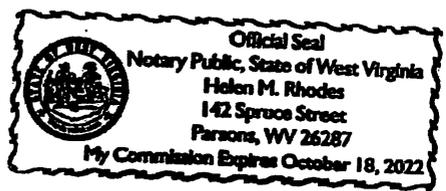
By: Rebecca Sanders
Title: CEO

Taken, subscribed and sworn to before the undersigned Notary Public this _____ day of August, 2016.

My commission expires 10/18/2022.

Helen M. Rhodes
Notary Public

(seal)



VERIFICATION

STATE OF WEST VIRGINIA
COUNTY OF MARION, to-wit:

I, F. DAVID BONASSO, the Petitioner herein, being first duly sworn, deposes and says that he is duly empowered to verify pleadings in this action; that he has read the "Verified Petition for Writ of Mandamus to Require Respondents to Implement New Legislative and Administrative Rules and a Writ of Prohibition 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" and that he/she has personal knowledge of the facts set forth therein or, to the extent he does not have personal knowledge, he/she believes, based upon information made known to him/her, the same to be true.

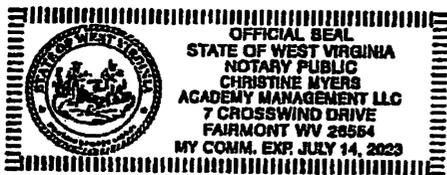
By: F. David Bonasso
Title: PRESIDENT

Taken, subscribed and sworn to before the undersigned Notary Public this 3rd day of August, 2016.

My commission expires JULY 14, 2023.

(seal)

Christine Myers
Notary Public



VERIFICATION

STATE OF WEST VIRGINIA
COUNTY OF

, to-wit:

I, Susan R. Fry, the Petitioner herein, being first duly sworn, deposes and says that he is duly empowered to verify pleadings in this action; that he has read the "Verified Petition for Writ of Mandamus to Require Respondents to Implement New Legislative and Administrative Rules and a Writ of Prohibition 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" and that he/she has personal knowledge of the facts set forth therein or, to the extent he does not have personal knowledge, he/she believes, based upon information made known to him/her, the same to be true.

By: Susan R. Fry

Title: Executive Director
Steppin' Stones, Inc.

Taken, subscribed and sworn to before the undersigned Notary Public this 3rd day of August, 2016.

My commission expires 11-1-2020.

K. Fankhanel

Notary Public



VERIFICATION

STATE OF WEST VIRGINIA
COUNTY OF Marion, to-wit:

I, Heather Collins, the Petitioner herein, being first duly sworn, deposes and says that he is duly empowered to verify pleadings in this action; that he has read the "Verified Petition for Writ of Mandamus to Require Respondents to Implement New Legislative and Administrative Rules and a Writ of Prohibition 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" and that he/she has personal knowledge of the facts set forth therein or, to the extent he does not have personal knowledge, he/she believes, based upon information made known to him/her, the same to be true.

By: Heather Collins
Title: Executive Director

Taken, subscribed and sworn to before the undersigned Notary Public this 3rd day of August, 2016.

My commission expires January 5, 2024.

Terri A. Hiser
Notary Public

(seal)



VERIFICATION

STATE OF WEST VIRGINIA

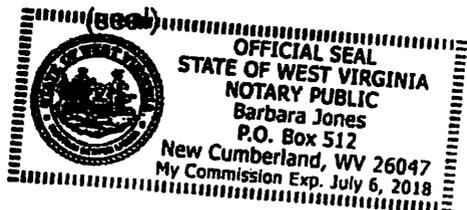
COUNTY OF Putnam, to-wit:

I, family connections inc, the Petitioner herein, being first duly sworn, deposes and says that he is duly empowered to verify pleadings in this action; that he has read the "Verified Petition for Writ of Mandamus to Require Respondents to Implement New Legislative and Administrative Rules and a Writ of Prohibition 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" and that he/she has personal knowledge of the facts set forth therein or, to the extent he does not have personal knowledge, he/she believes, based upon information made known to him/her, the same to be true.

By: Stamm Brumback
Title: Executive Director

Taken, subscribed and sworn to before the undersigned Notary Public this 3rd day of August, 2016.

My commission expires July 6, 2018
Barbara Jones
Notary Public



VERIFICATION

STATE OF WEST VIRGINIA
COUNTY OF Berkley, to-wit:

I, Laurie Anne Spagnola, the Petitioner herein, being first duly sworn, deposes and says that he is duly empowered to verify pleadings in this action; that he has read the "Verified Petition for Writ of Mandamus to Require Respondents to Implement New Legislative and Administrative Rules and a Writ of Prohibition 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" and that he/she has personal knowledge of the facts set forth therein or, to the extent he does not have personal knowledge, he/she believes, based upon information made known to him/her, the same to be true.

By: *Laurie Anne Spagnola*
Title: President + CEO

Taken, subscribed and sworn to before the undersigned Notary Public this 3 day of August, 2016.

My commission expires 9/25/2018.

(seal)

Myra J Ford
Notary Public



CERTIFICATE OF SERVICE

I, Charles M. Johnson, do hereby certify that service of the foregoing *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, Supporting Memorandum of Law, and Appendix* has been made this 4th day of August, 2016, by hand delivery, upon the following:

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WV Department of Health and Human Resources
Office of the General Counsel
One Davis Square, Suite 100 East
Charleston, WV 25301
Karen.C.Villanueva-Matkovich@wv.gov
(via hand delivery and electronic mail)

West Virginia Department of Health and Human Resources
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Ryan M. Sims, J.D.
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West Virginia Bureau for Medical Services
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Karen L. Bowling, Cabinet Secretary
West Virginia Department of Health and Human Resources
One Davis Square, Suite 100 East
Charleston, WV 25301

A. M. Fenway Pollack
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A.M.Fenway.Pollack@wv.gov
(via hand delivery and electronic mail)

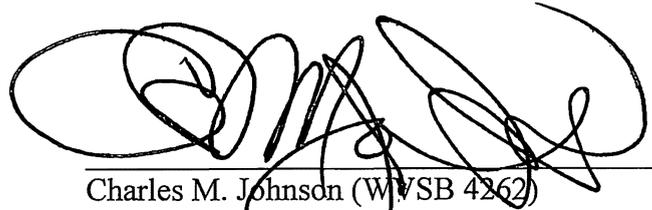
West Virginia Bureau for Medical Services
350 Capitol Street
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Charleston, WV 25301

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