

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 16-0738

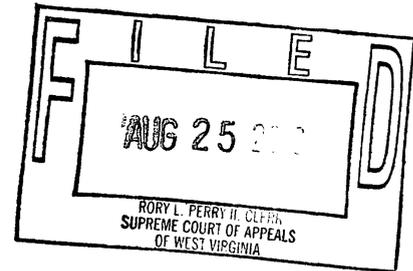
STATE OF WEST VIRGINIA *ex rel.*
PRESSLEY RIDGE, ELKINS MOUNTAIN
SCHOOL; ACADEMY MANAGEMENT, LLC.;
STEPPING STONES, INC.; STEPPING
STONE, INC.; FAMILY CONNECTIONS,
INC.; and BOARD OF CHILD CARE OF THE
UNITED METHODIST CHURCH, INC.;

Petitioners,

v.

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

Respondents.



RESPONSE IN OPPOSITION TO 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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
QUESTIONS PRESENTED.....	3
STATEMENT OF THE CASE.....	4
I. Factual background	4
A. The State contracts with treatment centers to provide residential youth services to children in the State’s custody who require placement out of the home.	4
B. The State is seeking to change the way providers are contractually reimbursed for their services to increase accountability and improve treatment provided to the State’s children.	4
C. The Department notified Petitioners of its planned changes to the Medicaid program in September 2015.	7
II. Procedural history	10
A. In July 2016, Petitioners sued Respondents for injunctive relief in the Circuit Court of Kanawha County.....	10
B. Rather than appealing the circuit court’s order, Petitioners have filed a brand-new action in this Court’s original jurisdiction.	11
SUMMARY OF ARGUMENT	13
STATEMENT REGARDING ORAL ARGUMENT AND DECISION	16
STANDARD OF REVIEW	17
ARGUMENT.....	17
I. This Court lacks jurisdiction to hear this case because Petitioners failed to comply with the pre-suit notice requirement of West Virginia Code § 55-17-3.	17
II. This is duplicative litigation, not an appeal: Res judicata bars Petitioners’ mandamus claim because they could have raised the claim in the prior circuit court action but did not.	20
III. Mandamus relief is inappropriate because a less drastic remedy exists.	22
IV. This Court lacks authority to compel the single state Medicaid agency to withdraw a State Plan Amendment.....	24
A. Granting mandamus relief would violate the separation-of-powers doctrine.....	24
B. Petitioners are seeking to unlawfully interfere with BMS’s authority to administer the West Virginia Medicaid Plan.....	25
V. Contractual terms are not required to be defined by legislative rule.	27
CONCLUSION.....	31

TABLE OF AUTHORITIES

Federal Cases

<i>Armstrong v. Exceptional Child Center</i> , 135 S. Ct. 1378 (2015).....	26
<i>Wilder v. Va. Hosp. Ass'n</i> , 496 U.S. 498 (1990).....	8

State Cases

<i>Appalachian Reg'l Healthcare, Inc. v. W. Va. Dep't of Health & Human Res.</i> , 232 W. Va. 388, 752 S.E.2d 419 (2013).....	25, 26
<i>Blake v. Charleston Area Med. Ctr., Inc.</i> , 201 W. Va. 469, 4498 S.E.2d 41 (1997).....	20
<i>Chesapeake & O. Ry. Co. v. McDonald</i> , 65 W. Va. 201 (1909)	21
<i>Danielley v. City of Princeton</i> , 113 W. Va. 252, 167 S.E. 620 (1933).....	24
<i>Frymier–Halloran v. Paige</i> , 193 W. Va. 687, 458 S.E.2d 780 (1995).....	25
<i>Motto v. CSX Trans., Inc.</i> , 220 W. Va. 412, 647 S.E.2d 848 (2007).....	18
<i>Stapleton v. Board of Educ. of County of Lincoln</i> , 204 W. Va. 368, 512 S.E.2d 881 (1998).....	22
<i>State ex rel. Barker v. Manchin</i> , 167 W. Va. 155, 279 S.E.2d 622 (1981).....	24
<i>State ex rel. Billings v. City of Point Pleasant</i> , 194 W. Va. 301, 460 S.E.2d 436 (1995).....	17
<i>State ex rel. Blankenship v. McHugh</i> , 158 W. Va. 986, 217 S.E.2d 49 (1975).....	20
<i>State ex rel. Public Service Comm'n of West Virginia v. Town of Fayetteville, Municipal Water Works</i> , 212 W. Va. 427, 573 S.E.2d 338 (2002).....	17
<i>State v. Buchanan</i> , 24 W. Va. 362 (1884)	25
<i>State v. Coleman</i> , 167 W. Va. 536, 281 S.E.2d 489 (1981).....	21
<i>State v. Coleman</i> , 167 W. Va. 536, 538, 281 S.E.2d 489, 489 (1981).....	20
<i>W. Va. Dep't of Health & Human Res. v. E.H.</i> , 236 W. Va. 194, 778 S.E.2d 643 (2015) (Davis, J., dissenting).....	25

Federal Statutes

42 U.S.C. § 1316(a)(1)..... 8
42 U.S.C. § 1396a(a)(5)..... 26
42 U.S.C. § 1396a(b) 8

State Statutes

W. Va. Code § 29A-1-2(e)..... 28
W. Va. Code § 29A-1-2(j) 28
W. Va. Code § 55-17-3(a)(1)..... 17
W. Va. Code § 9-1-2(n) 4, 26
W. Va. Code § 9-2-13(a)(3)..... 26
W. Va. Code § 9-2-6(4) 25

Other Authorities

W. Va. Const. art. V, § 1..... 24
W. Va. Const. art. VIII, §§ 3 & 4..... 17
42 C.F.R. § 431.10(e)..... 26
Rev. R.A.P. 16(a)..... 17

INTRODUCTION

This original jurisdiction action is an attempt by a handful of residential youth treatment providers in West Virginia—seven of twenty four in the State—to prevent the Department of Health and Human Resources from changing the way it reimburses them for behavioral health services under the West Virginia Medicaid Plan. Although Petitioners say this case is about compelling a legislative rule to define contractual terms in their residential treatment contracts, the facts undermine that assertion. As the Circuit Court of Kanawha County has already found on these exact issues in previously filed litigation, “[c]learly, 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.” Pet’rs’ App. 259.

Contrary to the picture painted by Petitioners, the Department’s changes to provider reimbursement are neither ill-conceived nor rushed. The reasons for the Department’s changes are simple. The Department seeks these changes to both increase provider accountability in the way in which they bill the State for youth residential treatment services and to improve the behavioral health services provided to youth placed in the Department’s custody. Currently, many providers are receiving substantial sums of Medicaid dollars without adequately substantiating what corresponding behavioral health services they say they are providing. As a result, our children and the taxpayers are being disserved.

To fix the current opaque Medicaid reimbursement scheme, the Department notified providers nearly a year ago of the changes that are at the heart of this lawsuit. But despite being aware of these changes for nearly a year, these providers have just recently filed suit against the Department to halt these needed changes to the Medicaid program. They first filed suit in the Circuit Court of Kanawha County where they lost their quest for an injunction, and they have

now filed suit in this Court's original jurisdiction where they seek mandamus relief based on the same set of allegations presented in the circuit court litigation. Knowing that the law does not allow Petitioners to challenge Medicaid rates directly, Petitioners carefully base their claims in state law pertaining to legislative rulemaking. The remedy they seek, though, belies their mere request for a legislative rule. Petitioners ask this Court to take an even more severe step than order a change in rates: they ask this Court to order that the single state Medicaid agency withdraw an entire State Plan Amendment that has already been submitted to the federal government for approval. Petitioners thus ask this Court to insert itself into matters that are within the sole prerogative of the executive branch: to compel the single state Medicaid agency to withdraw a State Plan Amendment submitted to the federal government for approval nearly two months ago. In seeking this relief, Petitioners are creating chaos in the State's child welfare system, not preventing it. Unable to use a scalpel, Petitioners ask for a machete.

Petitioners' request for mandamus relief must fail on several fronts. *Procedurally*, this Court lacks jurisdiction over this action because Petitioners failed to provide pre-suit notice; *res judicata* bars Petitioners' claim for mandamus relief because Petitioners could have raised the claim in the prior circuit court action but did not; and mandamus is an inappropriate vehicle for relief because Petitioners' recourse is to simply refuse to sign the contract, not to obtain extraordinary mandamus relief. *On the merits*, Petitioners' requested relief would violate the separation-of-powers doctrine and intrude upon the authority of the single state Medicaid agency to administer the Medicaid program; and the terms Petitioners identify are not required to be defined by legislative rule.

Petitioners' request for mandamus is not supported by law, and it must be denied.

QUESTIONS PRESENTED

1. May a plaintiff avoid providing pre-suit notification to the State under West Virginia Code § 55-17-3(a)(1) when the plaintiff (i) had opportunity to provide pre-suit notice and (ii) identifies no irreparable harm that would have occurred if it had complied with the statute?

2. May a plaintiff pursue a mandamus action in this Court's original jurisdiction when that plaintiff has already unsuccessfully sought injunctive relief in a state circuit court against the same defendant based on the same allegations and chose not to seek mandamus relief there?

3. Does a plaintiff have standing to sue the State for extraordinary mandamus relief to challenge the implementation of a state contract that the plaintiff is simply free to reject?

4. Do the separation-of-powers doctrine and Medicaid federal field preemption prevent this Court compelling the Bureau for Medical Services, the statutorily designated single state Medicaid agency, to withdraw a State Plan Amendment already submitted to the Centers for Medicare and Medicaid Services for federal approval under the Medicaid Act?

5. Must the State define every material term in a contract for services by legislative rule, even if the term does not constitute a "rule" or have the force of law, supply a basis for the imposition of civil or criminal liability, or grant or deny a specific benefit?

STATEMENT OF THE CASE

I. Factual background

A. The State contracts with treatment centers to provide residential youth services to children in the State's custody who require placement out of the home.

Petitioners are seven of twenty-four providers in West Virginia that have previously entered into contracts with the State to provide residential youth treatment services to children. Pet'rs' App. 251.¹ These children have been placed in the custody of the Department of Health and Human Resources and suffer from behavioral, functional, diagnostic, or social support conditions that require their placement in residential settings outside of their homes. These children receive two types of services from providers that are paid for by the State. The children receive residential services—room, board, and supervision—which are reimbursed by the Bureau for Children and Families (“BCF”). And the children receive behavioral health treatment, which is reimbursed by the Bureau for Medical Services (“BMS”) and the West Virginia Medicaid program. Resp'ts' App. 2, 21.

B. The State is seeking to change the way providers are contractually reimbursed for their services to increase accountability and improve treatment provided to the State's children.

Issues with provider accountability (or lack thereof) have led the State to change the way it reimburses these providers. For several years, the Department has paid providers for behavioral health services under a “bundled” Medicaid rate.² Under this bundled rate scheme,

¹ Five of the centers are emergency shelters, while the other nineteen are non-emergency residential treatment facilities. A twenty-fifth facility, the West Virginia Children's Home, also provides residential treatment services but it is owned and operated by the State. Resp'ts' App. 2. As such, the State does not contract with it, and it is not part of this case.

² The Department administers the West Virginia Medicaid Plan through the Bureau for Medical Services. State law designates BMS as the single state agency responsible for administering the West Virginia Medicaid program. W. Va. Code § 9-1-2(n).

providers charge BCF a single daily rate for each child's daily room, board, and supervision, and then charge BMS a single, bundled rate for behavioral health services provided to each child. *Id.* Remarkably, this bundled rate for behavioral health services is paid regardless of the quantity of services provided to any particular child. For example, a provider could give just 15 minutes of behavioral health services to a child in a certain day, but be paid as though the provider had given the child 24 hours of services.

This method of reimbursement lacks transparency and leaves the Department unsure if children are receiving the services that taxpayers were funding. For one, the daily rate that BCF pays providers for room, board, and supervision was inconsistent across providers and the various rates paid to providers lacked any underlying rationale. Also, the bundled rate that BMS pays for behavioral health treatment prevents the Department from determining whether children are receiving services for individualized evidence-based treatment for their behavioral health issues. For instance, a retrospective analysis conducted between February 2012 and July 2013 of providers showed that Petitioner Pressley Ridge substantiated its utilization of services only 23 % of the time in the areas of clinical consistency and residential services, while Petitioners Stepping Stone and Stepping Stones had sub-standard compliance rates of 61 % and 39 % in these areas. Resp'ts' App. 21, 24-34. So not only does the bundled rate obscure what behavioral health services are being provided, but analysis of provider reimbursements given to providers suggests that the children may be receiving necessary behavioral health services only a fraction of the time.

The Department set out to clarify this opaque reimbursement scheme to increase provider accountability. Under a new reimbursement plan announced nearly a year ago, the Department made public its intent to change both the way providers are reimbursed for room, board, and

supervision by BCF, and the way that providers are reimbursed for behavioral health services by BMS. Under this new method of reimbursement, while providers will continue to receive a separate daily rate from BCF for room, board, and supervision, the rate will be one that is consistent across providers. Rather than receiving payment based on a complex matrix independently negotiated by each provider, providers will now be paid a daily rate at either a standard rate or an enhanced rate, depending on the services required for each child. And residential providers will seek reimbursement from BMS through a fee-for-service model and be reimbursed separately for the specific behavioral health services they provide the children under their care. Under the unbundled model, providers will be held accountable and paid only for the services that they actually perform. Resp'ts' App. 21.

The Department hopes these changes will also improve the behavioral health services that the Department's children receive by incentivizing providers to provide more services. Perversely, the current bundled reimbursement scheme rewards providers for providing a minimal amount of services. Providers are paid so long as a minimal amount of behavioral health services are provided. But that changes when payments are unbundled. For providers to receive the same amount of money that they received under the bundled rate, they will actually have to provide the behavioral health services to the children. Children should receive more services because providers will be incentivized to actually provide more services. The transition to an unbundled reimbursement method also expands the number of reimbursable services that providers can offer children. Specifically, the Department looks to expand Targeted Case Management ("TCM"), which is the coordination of services to ensure that eligible Medicaid members have access to a full array of needed services, including appropriate medical,

educational, or other services. This TCM expansion will increase the billing opportunities for providers and further enhance the care they provide. Resp'ts' App. 21-22.

C. The Department notified Petitioners of its planned changes to the Medicaid program in September 2015.

These planned changes to residential treatment reimbursement are no surprise to Petitioners. BCF first suggested this change to providers nearly a year ago, in September 2015. Resp'ts' App. 3. Recognizing that its contractual partners would need time to prepare for these changes, however, BCF involved providers in this process from the beginning and gave them the information necessary to make this transition, through frequent meetings in 2015 and 2016. *Id.* As a further concession to providers, on April 1, 2016, the Department also extended the July 1, 2016 effective date to September 1, 2016. Resp'ts' App. 3, 6-7.

Changes to the Medicaid Plan were also discussed with providers. BMS notified providers on February 17, 2016, that there would be 25 Medicaid codes providers could use to bill Medicaid after September 1, 2016. And BMS officials went out of their way to offer technical assistance to providers regarding those changes, offering training between April 19 and 25, 2016, in four regions of the State. *Id.* BMS also provided online training to providers and offered individualized training to any provider that requested it. Resp'ts' App. 22.

These discussions between the Department and providers continued into May 2016. On May 26, 2016, BCF held a two-hour meeting with providers, many of whom had counsel attend (lawyers from both law firms representing Petitioners here were present), and addressed provider concerns. Resp'ts' App. 3-4, 8-11. Minutes from this meeting reflect that BCF leadership gave providers an overview of the new reimbursement method, including the utilization management guidelines that defined "Standard and Enhanced Criteria." *Id.* The issue concerning the definition of these terms or where they would be defined never came up. Resp'ts' App. 8-11.

After this meeting, providers did not contact BCF regarding these changes for over a month. Resp'ts' App. 3-4.

BMS, the single state Medicaid agency, has publicly submitted this change to the State Medicaid Plan for federal approval.³ On April 4, 2016, the Department gave public notice that it would be submitting a State Plan Amendment (“SPA”) to the federal Centers for Medicare and Medicaid Services (“CMS”), unbundling the behavioral health reimbursement rates for residential treatment centers effective September 1, 2016. Resp'ts' App. 38-40.⁴ This notice invited public comment and clarified that “no services are being eliminated under this state plan amendment; only the manner in which these services can be billed.”⁵ *Id.* The notice further explained that “[t]he reason for this change is to ensure financial accountability and to ensure that the appropriate amount, scope and duration of needed behavioral health services are provided to children residing in residential care.” *Id.* The SPA was submitted to CMS for federal approval on June 22, 2016. Resp'ts' App. 21-22; 41-43.

³ “Medicaid is a cooperative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals.” *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990). “To qualify for federal assistance, a State must submit to the Secretary [of the Department of Health and Human Services] and have approved a ‘plan for medical assistance,’ § 1396a(a)” that complies with statutory requirements. *Id.*

⁴ CMS is the division of the federal Department of Health and Human Services responsible for ensuring that state plans comply with the Medicaid Act. Under the Medicaid Act, states must submit their proposed plans to CMS, and CMS must review each plan, “make a determination as to whether it conforms to the requirements for approval,” 42 U.S.C. § 1316(a)(1), and “approve any plan which fulfills the conditions specified” in the Medicaid Act, 42 U.S.C. § 1396a(b). States are required to amend their plans “whenever necessary to reflect,” among other things, “[m]aterial changes in State law, organization, or policy, or in the State's operation of the Medicaid program.” *Id.*

⁵ The public comments received, and the responses to those comments, are posted at W. Va. Bureau for Med. Servs., “Residential Child Care Services Billing Methodology SPA 16-001 Comments and Responses,” <http://www.dhhr.wv.gov/bms/News/Pages/Residential-Child-Care-Services-Billing-Methodology-SPA-16-001-Comments-and-Responses.aspx>

After months of negotiating with providers, BCF sent providers the final draft of the new provider agreement for residential services on June 30, 2016. Pet'rs' App. 29 (cover letter), 265 (final provider agreement). BCF's letter notified providers that the deadline for them to sign the new provider agreements that incorporated these changes to reimbursement would be July 25, 2016. *Id.* Contrary to Petitioners' assertion, BCF did not choose the July 25 signature deadline to avoid the July public hearing of the Juvenile Justice Commission. Petitioners' suggestion that BCF set the July 25 deadline to undermine the Juvenile Justice Commission is baseless. In fact, the July 25 deadline was sent out before the BCF Commissioner knew that the July public meeting had been scheduled. Resp'ts' App. 4.

Nor was this deadline arbitrary. This deadline was necessary in advance of the September 1 effective date so the Department could make alternative arrangements for children who would be impacted should some providers refuse to sign the new provider agreement. Each child in the Department's care requires specialized attention, so BCF needed time to look at every child and determine the best placement for them if their provider decided to no longer provide them with services. *Id.* In fact, BCF Commissioner Nancy Exline expressed these concerns and the reasons for the Department's timing to the chairman of the Juvenile Justice Commission in a letter dated July 11, 2016. Resp'ts' App. 44-45.

The majority of residential treatment providers in West Virginia have signed contracts with the Department on these new terms: Of the twenty-four providers, all five emergency shelters have signed contracts, as have twelve out of nineteen residential treatment providers. Resp'ts' App. 4.

II. Procedural history

A. In July 2016, Petitioners sued Respondents for injunctive relief in the Circuit Court of Kanawha County.

Nearly a month after being notified of the Monday, July 25, 2016 signature deadline, and at the last minute before that deadline, on Thursday, July 21, Petitioners sued the Department in the Circuit Court of Kanawha County by filing a complaint styled, “Petition for Injunctive Relief and Motion for Temporary Restraining Order and/or Preliminary Injunctive Relief.” Petitioners’ circuit court complaint requested that “the Respondents be enjoined 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.” Resp’ts’ App. 46-68.⁶

Much like this current action for mandamus relief, Petitioners contended that an injunction was required to maintain the status quo because the Department, among other things, had failed to implement legislative rules prior to making changes to the Medicaid Plan and the residential provider reimbursement contracts. Resp’ts’ App. 46-68, 69-95. Notably, Petitioners filed the circuit court action without filing the required pre-suit notice under West Virginia Code § 55-17-3, although Petitioners subsequently provided notice by letter dated July 22, 2016. Resp’ts’ App. 96-99.

Given the last-minute circuit court filing by Petitioners, on July 22, 2016, the Department extended the July 25 signature deadline to Friday, July 29, 2016, and the parties agreed to continue the preliminary injunction hearing to Thursday, July 28, 2016. The circuit court held a

⁶ Seven providers are named Petitioners in this original jurisdiction action. Of these seven, six were petitioners in the circuit court lawsuit. Only one Petitioner here, Board of Child Care of the United Methodist Church, Inc., was not a party to the circuit court suit.

hearing on Petitioners' motion on July 28, and following that hearing, the court denied the request for injunctive relief. Pet'rs' App. 250-60. In its order, the court ruled that Petitioners had failed to provide adequate pre-suit notice; that the requested relief would violate the separation of powers; that Petitioners could not identify any failure by the Department to implement legislative rules; and that the balancing of the harms did not warrant a preliminary injunction. *Id.*

The Department recognized that providers needed time to consider their options after entry of the Court's order, so it again extended the signature deadline, this time to August 8, 2016. Pet'rs' App. 262. Although the effective date of the new provider agreements was not until September 1, BCF needed the time between August 8 and September 1 to assess each child's needs and determine what alternative placements would be appropriate. Resp'ts' App. 4-5. BCF also mailed out letters to all providers, notifying them of its intent to terminate existing provider agreements, effective September 1, 2016. BCF was required to do this so that the new provider agreements could take effect on that date. *Id.*

B. Rather than appealing the circuit court's order, Petitioners have filed a brand-new action in this Court's original jurisdiction.

A week passed after the circuit court's order denying the motion for a preliminary injunction. Then, on August 4, 2016, Petitioners filed this new action in this Court's original jurisdiction. The procedural posture of this case is important: Rather than appealing the circuit court's order and seeking review of the lower court's findings and conclusions, Petitioners have now filed *an entirely new action*, seeking mandamus relief in this Court's original jurisdiction based on the same allegations that were asserted in circuit court. Petitioners have thus chosen to institute a new civil action based on the same allegations and claims that were the foundation of their petition for injunctive relief in circuit court and that have been partially litigated and remain

pending. Petitioners again assert that the Department has failed to implement legislative rules defining two terms regarding payment in the new provider agreement, a claim the circuit court rejected.

Along with their petition for mandamus, Petitioners also filed a motion for expedited consideration and a stay on August 4, 2016. As directed by this Court, the Department responded to that motion on the morning of August 8, 2016. Within minutes of that filing, Petitioners then filed a “supplemental” motion, disclosing confidential settlement negotiations between the parties to the Court to further their arguments for expedited relief and for a stay. The Department subsequently moved to strike that “supplemental” motion. On the afternoon of August 8, this Court granted the motion for expedited consideration and stayed “implementation of the residential services Provider Agreements and the implementation of changes to the residential child care services delivery system pending consideration and resolution of the petition for writ of mandamus by this Court.”

Accordingly, the Department has taken a number of steps to comply with this Court’s August 8 order. The Department has notified all residential treatment providers that the existing provider agreements would continue in effect until this case is resolved. Resp’ts’ App. 5. The Department has further notified those seventeen providers who had signed new provider agreements that those agreements would not go into effect on September 1, 2016. *Id.* Additionally, CMS has issued routine questions to BMS and is not processing the June 22, 2016 State Plan Amendment while this case is pending. Resp’ts’ App. 22.

SUMMARY OF ARGUMENT

The relief sought in this case is unprecedented. A handful of Medicaid providers are suing the single state Medicaid agency in the state supreme court to force the agency to withdraw a State Plan Amendment already submitted to the federal government for approval. This dramatic relief is required, they argue, because contractual terms—which they admit will be defined in an agency manual—must be defined by legislative rule. This request for extraordinary mandamus relief must be rejected for several reasons, any one of which is sufficient to deny a writ.

First, this Court lacks jurisdiction over this mandamus action because Petitioners failed to provide pre-suit notice to the State prior to filing suit, as required by West Virginia Code § 55-17-3(a)(1). Petitioners have known that the Department had planned to implement changes to their reimbursement since September 2015. On April 1, 2016, the Department notified Petitioners that the new effective date of the reimbursement changes would be September 1, 2015. Then, after a public notice-and-comment period, the Department proposed a State Plan Amendment to CMS on June 22, 2016, that would set September 1, 2016, as the effective date of the changes. And again, the Department formally notified Petitioners on June 30, 2016, that they would have until July 25, 2016, to sign new provider agreements that would be effective September 1. Petitioners have thus known of the timing of the Department's changes to Medicaid reimbursement for months, yet they did not provide the State with the notice required by state law, and they have not identified any irreparable harm that would have occurred had they complied with the statute. Accordingly, this Court lacks jurisdiction to hear this case.

Second, *res judicata* bars Petitioners' claim for mandamus relief in this Court's original jurisdiction. Petitioners could have raised that claim in their lawsuit filed in the Circuit Court of Kanawha County just a week before they filed this action, but they did not. Instead, Petitioners

used the circuit court proceedings as a dress rehearsal. Now, after losing their motion for a preliminary injunction, they are attempting to start all over again in this Court rather than simply appealing the circuit court's ruling, which would give this Court the benefit of that lower court record, findings, and conclusions. Because Petitioners could have filed this mandamus claim in their circuit court action but chose not to do so, they are precluded from asserting it in a new lawsuit in this Court's original jurisdiction.

Third, Petitioners are not entitled to extraordinary mandamus relief because another avenue of relief is available to them. Petitioners argue they are entitled to mandamus relief because agreeing to the new provider agreement will bind them to undesirable contractual terms. But Petitioners' claim for relief depends on their erroneous assumption that they are somehow entitled to a contract with the State to provide these services. The State is not required to continually contract with Petitioners. Each party is free to negotiate, and if the terms of the contract are unacceptable to either party, then both parties—the provider and the State—is free to walk away. Petitioners' remedy for their alleged wrong is not mandamus relief. Rather, the proper remedy would be for them to simply not sign the new provider agreement. A party is not entitled to mandamus relief simply because terms of a proposed contract have changed.

Fourth, granting mandamus relief would both violate the separation of powers between the judiciary and the executive branch and intrude upon the federal and state authority granted to BMS, West Virginia's single state Medicaid agency. As an initial matter, this Court should not interfere with the executive branch's general duty to negotiate state contracts. State law vests the Department's Cabinet Secretary with the sole authority to enter into contracts on the Department's behalf. The Department is entitled to negotiate contracts according to its terms, and if Petitioners do not want to sign those contracts, then they are free to reject them.

Petitioners should not be able to force the Department to remain in contractual relationships that the executive branch has determined are not in the State's best interests. Mandamus is thus inappropriate: While this Court may direct the Department to achieve a certain end, such an order to adequately place children in the Department's care, this Court may not direct the Department how to administer the State Medicaid Plan or how to pay for those services.

Underscoring this point, the relief Petitioners seek touches the State Medicaid Plan. As a result, the executive branch's discretion in this area is entitled to even more deference because both state and federal law grant the Department's Bureau for Medical Services the sole authority to administer the West Virginia Medicaid program. Both precedent from this Court's precedent and case law from the Supreme Court of the United States prohibit Medicaid providers from challenging Medicaid rate-setting. While Petitioners have crafted their arguments to avoid challenging rates, in doing so, they go far beyond that: they challenge the entire State Medicaid Plan. This sort of interference with the administration of the State Medicaid Plan is not permitted by law.

Fifth and finally, Petitioners' core argument is without merit, as they fail to explain why a legislative rule must define the terms "standard" and "enhanced" treatment that appear in the new provider agreements circulated to providers on June 30, 2016. Interestingly, Petitioners make this argument while acknowledging that the Department has defined these terms in its utilization management manual. But without any justification, Petitioners argue that the manual is insufficient to define these terms, even though similar terms under the prior provider agreement were defined in the same manner. Petitioners clearly misunderstand the purpose of legislative rules. Legislative rules are meant to set legislatively approved guidelines that can impose liability or guide the substantial rights of individuals; they are not required for every

contractual term. The terms “standard” and “enhanced” are not rules, and they do not need to be defined in the State Register. Accordingly, the request for mandamus relief must be denied.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Despite the broad and unprecedented relief sought by Petitioners, their claims can be readily rejected on the briefs and without oral argument. Petitioners’ claims are procedurally barred under settled law regarding pre-suit notice and basic civil procedure. And their claims fail on the merits because they call for this Court to upend the separation-of-powers doctrine and to rewrite the statute concerning legislative rules. Oral argument is not required in this case, and Petitioners’ claim should be denied by summary order or memorandum decision.

If, however, this Court entertains Petitioners’ claims and determines that oral argument is required, then argument under Rule 20 would be appropriate. The expedited ruling that Petitioners request would alter the relationship between the three branches of government. New syllabus points would be required, as Petitioners are asking this Court to do several things it has never done before: waive the jurisdictional requirement that the State be provided with pre-suit notification; allow a party to re-litigate issues in this Court’s original jurisdiction that were previously litigated in a separate circuit court case; compel the single state Medicaid agency to withdraw a State Plan Amendment that has already been submitted to CMS; and force a State agency to unnecessarily define contractual terms through legislative rules. Such sweeping changes in this Court’s jurisprudence would be of fundamental public importance and, if granted, should be issued by published decision after oral argument.

STANDARD OF REVIEW

This expedited mandamus action was filed in this Court's original jurisdiction under West Virginia Constitution article VIII, sections 3 and 4 and Revised Rule of Appellate Procedure 16(a). "Mandamus is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies." Syl. Pt. 2, *State ex rel. Public Service Comm'n of West Virginia v. Town of Fayetteville, Municipal Water Works*, 212 W.Va. 427, 573 S.E.2d 338 (2002). It is well-established, however, that "[a] writ of mandamus will not issue unless three elements coexist—(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, *Stapleton v. Board of Educ. of County of Lincoln*, 204 W. Va. 368, 512 S.E.2d 881 (1998). "Since mandamus is an 'extraordinary' remedy, it should be invoked sparingly." *State ex rel. Billings v. City of Point Pleasant*, 194 W. Va. 301, 303, 460 S.E.2d 436, 438 (1995).

ARGUMENT

I. This Court lacks jurisdiction to hear this case because Petitioners failed to comply with the pre-suit notice requirement of West Virginia Code § 55-17-3.

As they did in the circuit court action for preliminary injunctive relief, Petitioners have again failed to provide the State with 30-days' pre-suit notice of their intent to sue under West Virginia Code § 55-17-3(a)(1) prior to filing this action. That Code provision requires the following:

Notwithstanding any provision of law to the contrary, at least thirty days prior to the institution of an action against a government agency, the complaining party or parties must provide the chief officer of the government agency and the Attorney General written notice, by certified mail, return receipt requested, of the alleged claim and the relief desired. . . . The provisions of this subdivision do not apply in actions seeking injunctive relief where the court finds that irreparable harm would have

occurred if the institution of the action was delayed by the provisions of this subsection.

This statutory pre-suit notice requirement is mandatory and jurisdictional. Syl. Pt. 3, *Motto v. CSX Trans., Inc.*, 220 W. Va. 412, 647 S.E.2d 848 (2007).

Petitioners cannot dispute that they have not provided the State with 30 days' pre-suit notification, either for this action or the equitable action they filed in circuit court last month. Nor can they show that "irreparable harm would have occurred if the institution of the action was delayed by" complying with the statutory and jurisdictional requirement. This was one of the grounds for the circuit court to deny Petitioners' motion for a preliminary injunction in their earlier lawsuit filed just two weeks before they filed this case. Pet'rs' App. 253.

As the circuit court found in its ruling, Petitioners had sufficient time to provide pre-suit notification and still protect their rights in court at several different points over the last few months. The effective date of the changes to the State Plan and the provider agreements was September 1, 2016. So, at the very latest, the time that Petitioners learned of this effective date started the clock for their obligation to provide the State with pre-suit notice. Remarkably, Petitioners have known of the State's proposed changes for nearly a year, and they have known of the September 1, 2016 effective date for months:

- On April 1, 2016, the Department notified Petitioners that the effective date of the changes to the Medicaid Plan would be September 1, 2016. Although Petitioners admittedly did not have the final contracts at this point, they would have known that the Department purportedly lacked the legislative rules that Petitioners maintain are required to implement these changes.
- On April 4, 2016, the Department gave public notice of its intent to submit a State Plan Amendment to the federal government, again putting Petitioners on notice of the changes set to take effect on September 1.
- On May 26, 2016, the Department met with a group of providers, including counsel for Petitioners here, and again stated that the effective date for the changes to reimbursement would be September 1, 2016.

- On June 22, 2016, the Department submitted its State Plan Amendment to CMS, announcing September 1, 2016, as the effective date of the changes to the Medicaid program.
- Then, a week later, on June 30, 2016, the Department notified all providers that the Department would still be changing the way by which providers are reimbursed effective September 1, and the Department gave providers until July 25 to signal their intent to sign new provider agreements.

Thus, as early as April 1, 2016, but no later than June 30, 2016, Petitioners had the information they needed to challenge the Department's decision. Yet they sat on their claims and waited until July 21, 2016, to take any action at all.

Underscoring this point, Petitioners managed to find time to file two separate lawsuits to assert their claims. Petitioners' first choice of venue was not this Court but the Circuit Court of Kanawha County, where they filed a no-notice Petition for Injunctive Relief. It was not until the circuit court denied their motion for a preliminary injunction that they re-tooled their arguments and filed this original jurisdiction action in this Court. Undoubtedly, Petitioners had sufficient time from June 30 to provide pre-suit notification to the State and still file this suit in advance of the September 1 effective date of the new reimbursement method, but they chose not to comply with this statutory mandate. Indeed, this successive action filed in this Court's original jurisdiction was not filed until August 4, 2016, over a month after the June 30 notice. Petitioners' failure to provide the State with notice thus deprives this Court of jurisdiction. As a result, their Petition must be denied.

II. This is duplicative litigation, not an appeal: Res judicata bars Petitioners' mandamus claim because they could have raised the claim in the circuit court action but did not.

The procedural posture of this second lawsuit is unique. By filing this action in this Court's original jurisdiction, Petitioners have chosen not to appeal the prior ruling of the Circuit Court of Kanawha County that denied Petitioners' claims that were based on the same arguments they now present here. Instead, after losing their motion for a preliminary injunction, Petitioners have re-tooled their briefing and filed this brand-new lawsuit looking for a second bite at the apple. The law disfavors such a waste of judicial and governmental resources.

American civil procedure generally bars parties from raising claims that have already been adjudicated or that could have been adjudicated by another court in a separate proceeding. Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 4498 S.E.2d 41 (1997). This rule furthers judicial economy and finality by encouraging parties to bring all the claims they have against each other in one proceeding and not in a piecemeal fashion. Here, there was a ruling on the motion for preliminary injunction in the circuit court lawsuit; the circuit court lawsuit involved the same parties that are involved here; and Petitioners had a full and fair opportunity to raise their mandamus claim in the circuit court's original jurisdiction but chose not to do so.

This Court has explained that “[u]nder *W. Va. Const.*, art.VIII, §§ 3, 4 this Court and all circuit courts of the State have concurrent original jurisdiction in mandamus.” *State v. Coleman*, 167 W. Va. 536, 538, 281 S.E.2d 489, 489 (1981). And when the Constitution was adopted, “the permissibility of successive applications for extraordinary relief in mandamus or prohibition was controlled simply by common-law concepts of former adjudication.” *State ex rel. Blankenship v. McHugh*, 158 W. Va. 986, 990, 217 S.E.2d 49, 52 (1975). As such, a circuit court's final judgment on a petition for a writ of prohibition bars a new proceeding in prohibition in this

Court's original jurisdiction. Syl., *Chesapeake & O. Ry. Co. v. McDonald*, 65 W. Va. 201 (1909). Likewise, a denial of mandamus with prejudice in this Court necessarily precludes a circuit court from hearing the same claim in its original jurisdiction. Syl., *State v. Coleman*, 167 W. Va. 536, 281 S.E.2d 489 (1981). That same rationale precludes bringing a suit in mandamus in this Court after a petitioner previously filed a petition for an injunction in circuit court and the mandamus claim could have been raised but was not.

Petitioners chose to file a lawsuit for injunctive relief in Kanawha County—they controlled the venue and the timing of that suit, dropping a last-minute motion for an injunction into the lap of the circuit court and the State. That case remains active and has not been finally dismissed or resolved. To be sure, Petitioners could have brought this claim for mandamus relief in that circuit court action. Or, having lost their motion for a preliminary injunction, they could have simply appealed the circuit court's denial of a preliminary injunction and continued their pursuit for relief for injunctive relief on the merits. Likewise, instead of going to circuit court, they could have brought their suit in this Court in the first place, which would have avoided the expense of resources spent litigating that case and the prolonged uncertainty that this litigation has created. But rather than taking any of these actions, Petitioners filed a petition for an injunction in circuit court, lost a motion for a preliminary injunction in that action, and then filed a brand-new suit in this Court while the circuit court action remained active and presumably ongoing.

The law does not allow Petitioners to test their claim for injunctive relief in circuit court and then after failing to get the preliminary relief they want, raise an identical claim under a different procedural vehicle in a new lawsuit under this Court's original jurisdiction. Allowing this case to proceed would both allow parties to maintain identical actions at the same time in

both this Court and a circuit court and promote a bizarre type of intrastate forum shopping by which a plaintiff could test out his case in circuit court and then try again in this Court's original jurisdiction, reformulating his briefs and creating a new record unbound from the circuit court's findings and conclusions. This type of procedural gamesmanship and attempts at "do overs" wastes the resources of the judiciary and the State, and even worse here, it puts the well-being of this State's most vulnerable children at risk. Petitioners had the ability to raise a claim for mandamus relief in that court and did not. Their failure to do so thus bars this duplicative action.

III. Mandamus relief is inappropriate because a less drastic remedy exists.

Petitioners are also seeking to misuse the writ of mandamus. Any claim for mandamus relief requires a showing of the "absence of another adequate remedy." Syl. Pt. 2, *Stapleton v. Board of Educ. of County of Lincoln*, 204 W. Va. 368, 512 S.E.2d 881 (1998). Petitioners are seeking mandamus relief to avoid having to agree to what they believe are undesirable contractual terms. But they miss a critical consideration: they are not required to sign a contract with the State, nor is the State required to sign a contract with them. Rather than seeking mandamus relief against the State, Petitioners should simply exercise their contractual right to refuse to sign the new provider agreements. That negotiation process has a natural give and take. On the one hand, if enough providers refuse to sign, then the Department will have to bend to their terms because the Department needs a certain number of providers to give services; on the other hand, if a majority of providers sign such that the Department can ensure adequate residential services for its children, then the protesting providers need to decide whether they can accept the new terms. But either way, mandamus is inappropriate.

Say, for example, a person owns a paving company that conducts large-scale road repair. The company's only customer is the State, and its entire business model is built around serving that single client. The company performs multiple functions: it not only supplies asphalt, but it

delivers it to repair sites and performs necessary road work. As with any State vendor of services, the business relationship with the State exists through contract only; without a contract, the company is not obligated to provide services to the State, and the State is not obligated to pay the company for its services. Under the contract, the State has agreed to pay the company for its several services together; the company charges the State a combined rate for labor, material, and costs. At some point during the contractual relationship, though, the State decides that it still wants to pay for the company's services, but instead of paying for everything at one rate, the State decides it would rather pay the company for each service separately. What is the company to do? The answer is easy. If the company does not like these terms, its recourse is not to sue for mandamus relief against the Commissioner of Highways to force the State to continue the old contract under the terms the company preferred. Rather, the company's recourse is to simply decline to sign the contract. The same is true here.

Both sides here, Petitioners and the Department, are free to negotiate terms of the provider agreements and to decide whether or not to obligate themselves to those terms. Both sides have the freedom to accept or reject a contract. Remarkably, the majority of residential treatment providers understand this, and they have chosen to sign new provider agreements with the State. Petitioners, however, apparently believe that they are entitled to contracts in perpetuity with the State on their own terms and that extraordinary mandamus relief should be granted to bend the State to those terms. That is not how contractual relationships work. Petitioners lack standing to sue in this case because they have no injury that is caused by the State, and their claim for mandamus relief must fail.

IV. This Court lacks authority to compel the single state Medicaid agency to withdraw a State Plan Amendment.

A. Granting mandamus relief would violate the separation-of-powers doctrine.

Looking past Petitioners' procedural failings—their failure to provide pre-suit notice and their attempt to litigate a collaterally estopped claim—their claims must also be rejected on the merits. Petitioners are asking this Court to do something drastic. The requested injunction would violate the Department's right to contract as well as the separation of powers between the executive and the judiciary. This Court should not usurp the Department's Bureau for Medical Services as the statutorily designated single state agency responsible for administering the West Virginia Medicaid program.

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]henver a subject is committed to the discretion of the legislative or executive department,” the separation of powers 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). This court has recognized that “administrative agencies . . . are active players in the division of powers, and, while always subject to properly enacted and valid laws and to constitutional constraints, their actions are entitled to respect from ... the courts.” *Frymier–Halloran v. Paige*, 193 W. Va. 687, 694, 458

S.E.2d 780, 787 (1995). This separation of powers is critical to functioning government: “The departments of the government must be kept separate and distinct, and each in its legitimate sphere must be protected. Otherwise the government fails.” *State v. Buchanan*, 24 W. Va. 362, 379 (1884).

Granting mandamus relief here would “move[] into a new realm that dangerously obliterates the bright lines between the constitutional separation of powers.” *W. Va. Dep’t of Health & Human Res. v. E.H.*, 236 W. Va. 194, ___, 778 S.E.2d 643, 666 (2015) (Davis, J., dissenting). Petitioners are asking this Court to breach the separation of powers between the judiciary and the executive by inserting itself into an area that State law reserves solely to the executive branch. 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 tell the Department how to contract for residential treatment services.

B. Petitioners are seeking to unlawfully interfere with BMS’s statutory authority to administer the West Virginia Medicaid Plan.

Making matters worse, Petitioners are also asking this Court to impermissibly interfere with the Department’s authority in administering the West Virginia Medicaid program. Medicaid is a federal-state partnership, and State law recognizes “that the State’s participation in a cooperative assistance program such as Medicaid requires compliance with the applicable federal laws, rules and regulations.” *Appalachian Reg’l Healthcare, Inc. v. W. Va. Dep’t of Health & Human Res.*, 232 W. Va. 388, 397, 752 S.E.2d 419, 428 (2013) (citing W. Va. Code § 9-2-3). Critically, 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). Federal law also prohibits the designated single state agency delegating “the authority to supervise the [State] plan or to develop issue policies, rules, and regulations on program matters.” 42 C.F.R. § 431.10(e).

Underscoring the importance of the single state agency designation, both the Supreme Court of the United States and this Court have held that providers have no cause of action to challenge Medicaid rate setting. *Armstrong v. Exceptional Child Center*, 135 S. Ct. 1378 (2015); *Appalachian Reg’l Healthcare, Inc. supra*, at Syl. Pt. 5. In *Appalachian Reg’l Healthcare*, for example, a Beckley hospital challenged the reimbursement rates set by BMS as unreasonable. This Court recognized that “Medicaid rate-setting is field preempted by federal law” and rejected the hospital’s attempt to circumvent that preemption through various state common law causes of action. 232 W. Va. at 397, 752 S.E.2d at 428. And in *Armstrong*, the Supreme Court of the United States held that providers have no cause of action to enforce the federal Medicaid Act against a state’s single state Medicaid agency. Writing for the majority, Justice Scalia emphasized that a provider’s remedy for inadequate rate-setting is to go through CMS and the Department of Health and Human Services, rather than filing a lawsuit to enjoin the single state agency. 135 S. Ct. at 1387 (“Their relief must be sought initially through the Secretary rather than through the courts.”).

Like the *Appalachian Regional* plaintiffs, Petitioners here are trying to challenge BMS’s authority as the single state Medicaid agency by using a state law claim to circumvent federal field preemption and avoid challenging Medicaid rate-making directly. But there is no mistaking the result of Petitioners’ request. Petitioners are asking this Court to order West Virginia’s single state Medicaid agency to not just delay the effective date of changes to the Medicaid program or

to comply with a State law that it has violated. Instead, they ask this Court to go even further and order BMS to entirely withdraw a State Plan Amendment submitted to the federal government for approval nearly two months ago. Such an order would interfere in BMS's administration of the Medicaid program and place that authority with the providers themselves. Simply put, Petitioners cannot command such interference in the Medicaid program, and their attempt to avoid *Armstrong* and *Appalachian Regional* must be rejected.

V. Contractual terms are not required to be defined by legislative rule.

Notwithstanding the grave implications of granting the requested mandamus relief, Petitioners' request must also fail because their underlying argument lacks merit. Petitioners' claim for mandamus relief boils down to a single false syllogism: Petitioners allege (1) that under the Administrative Procedures Act ("APA") certain things must be defined by legislative rule; (2) that the Bureau will pay different rates under the new provider agreements depending on whether services provided to a child are "standard" or "enhanced"; so (3) under the APA, the terms "standard" and "enhanced" must be defined by legislative rule. While Petitioners premises are accurate—the APA does compel rules for certain things and the new provider agreements call for two different rates of reimbursement—their syllogism fails at the conclusion.

"Standard" and "enhanced" are simply not the types of terms that have to be defined by legislative rule; in fact, it would be inappropriate for the Department to define them in that way.

State law defines what constitutes a "rule." A "rule"

includes every rule, standard or statement of policy or interpretation of general application and future effect, including the amendment or repeal of the rule, affecting constitutional, statutory or common law rights, privileges or interests, or the procedures available to the public, adopted by an agency to implement, extend, apply, interpret or make specific the law enforced or administered by it or to govern its organization or procedure, but does not include rules relating solely to the internal management of the agency, nor rules of which notice is customarily given to the public by markers or signs, nor mere instructions.

W. Va. Code § 29A-1-2(j). More specifically, legislative rule (the type of rule that Petitioners want this Court to compel the Department to implement) is any rule approved by the Legislature that has “(1) The force of law; or (2) supplies a basis for the imposition of civil or criminal liability; or (3) grants or denies a specific benefit.” W. Va. Code § 29A-1-2(e).

The terms “standard” and “enhanced” do not satisfy any of this criteria. The new provider agreements state that the Department agrees to pay providers different rates depending on the services provided to a particular child. Under the contract, the Department agrees to pay the provider \$178.00 per day, per youth for “standard” room, board, and supervision. And if the youth satisfies the criteria for an “enhanced” rate, then the Department will pay \$228.00 per day, per youth. Petitioners complain that the terms “standard” and “enhanced” are not defined by legislative rule, and therefore they cannot determine whether this term of the contract is reasonable.

Several problems undermine Petitioners’ argument:

1. As Petitioners acknowledge, the Department has in fact defined the terms “standard” and “enhanced” as they pertain to the daily rate that the Department will pay providers for room, board, and supervision. These terms will be defined in the Department’s utilization management manual (the “UM Manual”). Resp’ts’ App. 4; Pet’rs’ App. 33-36. The proposed UM Manual, which has already been circulated to providers, lays out detailed definitions of standard and enhanced and guides providers as to when each rate of payment would apply. It defines “Traditional Group Home” (called “standard” in the provider agreement) as follows:

Provision of supervision, room, board and psychosocial or habilitative treatment for children who are in need of out-of-home care and may be considered emotionally, developmentally and or behaviorally challenging. All youth admitted must require immediate and/or intensive interventions consisting of

multiple strategies to address their problem(s)/need(s). Providers are expected to provide core residential support services and meet any clinical needs of the individual youth. The provider may offer clinical services or the youth may be referred to qualified providers in the community. Residential support services are defined as assistance with the acquisition, retention or improvement in skills development; community participation and inclusion; socialization and relationships; health, safety and fitness; decision making, choice and control; and meaningful activities.

Pet'rs' App. 33. The UM Manual then identifies "core residential supports" through a list and two pages of charts guiding providers on the various criteria that further define the term.

Likewise, the UM Manual defines "Enhanced Group Home" as follows:

Additional daily funding for youth who require immediate and or intensive interventions consisting of multiple strategies to address their problem(s)/need(s). Providers are expected to provide increased residential support services and more frequent evidenced based clinical services and interventions. Residential support services are defined as assistance with the acquisition, retention or improvement in skills development; community participation and inclusion; socialization and relationships; health, safety and fitness; decision making, choice and control; and meaningful activities.

Pet'rs' App. 155. Like with the definition of "Traditional Family Home," the UM Manual definition contains additional criteria that further define the term. Pet'rs' App 155-59.

Petitioners have not identified how these definitions are insufficient.

Terms used in the existing provider agreements are illustrative. Under the existing agreements, providers are paid a daily rate for each child depending on the level of services that the provider is giving the child. The current provider agreements call for services at Levels I, II, and III. Interestingly, though, these terms defining service level are not defined by legislative rule. Instead, they are defined in Section 503 of the State Medicaid program's Provider Manual. Pet'r's App. 284-89. Because of the unbundling of rates, however, room, board, and supervision will no longer be administered by the Medicaid program. Therefore, the State has decided to include the definition of "standard" and "enhanced" services in the UM Manual promulgated by

the Bureau for Children and Families. The Department is thus defining “standard” and “enhanced” in the same manner that it currently defines Level I, II, and III. This reveals the insincerity of Petitioners’ claim.

2. Not every term in a contract needs to be defined by legislative rule. The contractual terms “standard” and “enhanced” do not “implement, extend, apply, interpret or make specific the law,” nor do they have the force of law, impose civil or criminal liability, or grant or deny a specific benefit. Simply put, they are contractual terms. Indeed, Petitioners’ argument taken to its logical end would have a ridiculous effect on the State. Under Petitioners’ view, the State would be required to define every contractual term by legislative rule, essentially requiring that every contract be legislatively approved. Such an interpretation would bring the executive branch to a grinding halt, forcing the executive branch to implement a legislative rule for every term in every contract that it makes with vendors for state services.

3. Petitioners’ argument that the Department must define “standard” and “enhanced” in the legislative rules pertaining to the licensure of residential treatment facilities is misplaced. Those rules have nothing to do with the terms of payment that the Department will make to providers. Rather, they pertain to the criteria required for treatment centers to operate in West Virginia. The rules guide issues such as facilities, administration, treatment and care, complaints, and training and supervision of employees. These rules set standards for the centers to follow so they can operate; they do not define the contractual terms of payment for the Department.

Given these considerations, there is no justification for ordering the Department to implement new legislative rules before it can proceed with its planned changes to residential treatment contracts and the State Medicaid Plan.

CONCLUSION

The “Verified Petition for Writ of Mandamus to Require Respondents to Implement New Legislative Rules and Request to Stay Implementation of Changes to Existing Residential Child Care Services Programs and Reimbursement Pending the Promulgation of Such Rules” must be denied.

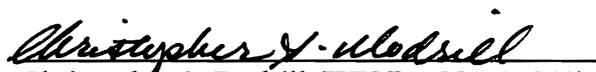
Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Christopher S. Dodrill, counsel for Respondents, certify that I have served the foregoing *Response in Opposition to 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* upon counsel for Petitioners by first-class mail on this day, August 25, 2016, at the addresses below:

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