

THE JUVENILE JUSTICE COMMISSION'S
FINDINGS OF FACT AND RECOMMENDATIONS
RELATING TO DHHR'S PROPOSED CONTRACT
CHANGES FOR THE PLACEMENT OF
WEST VIRGINIA YOUTH

JUVENILE JUSTICE COMMISSION,
STATE OF WEST VIRGINIA

Issued August 22, 2016

FINDINGS OF FACT AND CONCLUSIONS AND RECOMMENDATIONS **OF THE JUVENILE JUSTICE COMMISSION**

Whereas, the Juvenile Justice Commission (previously known as the “Adjudicated Juvenile Rehabilitation Review Commission”) was established by the Supreme Court of Appeals of West Virginia to provide a complete and thorough review of West Virginia’s juvenile justice facilities, as well as the rules, regulations, and procedures being utilized in these facilities, in order to ensure that children in custody are being educated and rehabilitated in a safe and protected manner;¹ and

Whereas, the Juvenile Justice Commission subsequently expanded its review of West Virginia’s juvenile justice facilities to include all facilities inside and outside the State of West Virginia where a juvenile may be placed outside of the home as a result of cases involving abuse and neglect, delinquency, and status offender matters, which includes, but is not limited to all Division of Juvenile Services facilities, all Department of Health and Human Services facilities inside and outside the State of West Virginia, and all psychiatric hospitals in West Virginia that house juveniles;² and

Whereas, the Juvenile Justice Commission membership is diverse and includes circuit judges, as well as representatives of the West Virginia Department of Education, social workers, religious leaders, attorneys, legislators, and other community leaders;³ and

Whereas, the Juvenile Justice Commission was recently informed of proposed contract changes between the Department of Health and Human Resources and the shelter network and residential treatment providers, and that these changes were substantial and related to the care of children in the judicial system of West Virginia; and

Whereas, the Juvenile Justice Commission was informed that the shelter network and residential providers had unanswered concerns that the Department had not addressed; and

¹ Administrative Order creating the Adjudicated Juvenile Rehabilitation Review Commission, (2011), http://www.courtswv.gov/court-administration/juvenile-justice-commission/pdf/Admin%20Order_4.pdf (last visited Aug 17, 2016).

² Administrative Order expanding the Juvenile Justice Commission’s review, (2015), http://www.courtswv.gov/court-administration/juvenile-justice-commission/pdf/Admin%20Order_3.pdf (last visited Aug 17, 2016).

³ Juvenile Justice Commission membership, (2016), <http://www.courtswv.gov/court-administration/juvenile-justice-commission/Members.html> (last visited on Aug 17, 2016).

Whereas, the Juvenile Justice Commission, on March 8, 2016, voted unanimously to host a public forum and invite the Department of Health and Human Resources, providers, and the public to allow the stakeholders to express the effects of these proposals and to give the Department an opportunity to discuss its position on fundamental changes to the child welfare system;⁴ and

Whereas, the Juvenile Justice Commission exercised its discretion in deferring the public forum until July to obtain information on these changes and to give the Department time to finalize the contract changes; and

Whereas, the Juvenile Justice Commission hosted an all-day public forum on July 27, 2016, in the Senate Judiciary Committee room of the West Virginia State Capitol.⁵ More than seventy-five (75) people attended, and the following individuals appeared and provided testimony:

- Kari Sisson, Executive Director, Association of Children's Residential Centers;
- Mark Drennan, Executive Director, West Virginia Behavioral Health Care Providers Association;
- Steve Fairley, Executive Director of Academy Programs;
- Pat Varah, Public Relations Director of Academy Programs;
- Father Brian Crenwelge, Chairman of the Board for St. John's Home;
- Mike Price, Executive Director of Burlington United Methodist Family Services;
- Senior Status Circuit Judge Donald Cookman, Davis Stuart Board Member;
- Temporary Family Court Judge Susan Perry, Davis Stuart Board Member;
- Bob Coffield, Attorney with Flaherty Sensabaugh Bonasso PLLC;
- Nathan Schoetz, Advisory Board Vice Chairman of Academy Programs;
- Patrick McGeehan, House of Delegates, District 01;
- Bill Hartman, Elkins Mountain School Board of Directors;
- Laurah Currey, Chief Operating Officer, Pressley Ridge;
- Delegate Don Perdue, West Virginia House of Delegates, District 01;

⁴ Juvenile Justice Commission press release to host public forum, (2016), http://www.courtswv.gov/public-resources/press/releases/2016-releases/july13c_16.pdf (last visited on Aug 17, 2016).

⁵ Phil Kabler, *Concerns raised over DHHR juvenile reimbursement changes*, CHARLESTON GAZETTE-MAIL, (July 27, 2016), <http://www.wvgazettemail.com/article/20160727/GZ0101/160729578>.

- Mark Spangler, Executive Director of Davis Stuart;
- Chuck Johnson, Attorney with Frost Brown Todd LLC;
- Steve Tuck, Children’s Home Society;
- Sarah Fox, former residential youth;
- Sara McDowell, Executive Director of Big Brothers Big Sisters; and
- Amy Whitehair, Highland Hospital, Clarksburg.

Whereas, the Department of Health and Human Resources was formally invited to the public forum but publicly opted, through the press, not to appear or send a representative on its behalf.⁶

FINDINGS OF FACT

Based upon the testimony of witnesses at the public forum and other documents reviewed, and noting the absence of the Department of Health and Human Resources to provide any testimony or provide a written statement in lieu of testimony, the Commissioners made the following findings:⁷

1. **That the proposed changes are a unilateral attempt, under the guise of contract negotiations, to make systemic changes to the care and treatment of West Virginia children.** After preparing the proposed contract changes, the Department of Health and Human Resources additionally sought, through a “State Plan Amendment,” to amend the state’s Medicaid plan. Despite unprecedented collaboration between the executive, judicial, and legislative branches of government to reform the juvenile justice system in 2015, the Department independently proposed changes that will impact, and may violate, the product of that collaboration: Senate Bill 393.⁸ The testimony and documents revealed that

⁶ Jeff Jenkins, *DHHR secretary on child welfare reform: “We’re going to prove to them it’s the right approach,”* METRONews, (July 26, 2016, 5:39 PM), <http://wvmetronews.com/2016/07/26/dhhr-secretary-on-child-welfare-reform-were-going-to-prove-to-them-its-the-right-approach/>, (Department of Health and Human Services Secretary Karen Bowling: “I just think change is hard right now. Having a public forum about our contracts—we won’t be there”).

⁷ These findings of fact and recommendations were adopted unanimously by the Juvenile Justice Commission.

⁸ S.B. 393, 2015 Leg., 81st Sess. (W. Va. 2015), http://www.legis.state.wv.us/Bill_Text_HTML/2015_SESSIONS/RS/Bills/SB393%20SUB1%20enr.htm.

- a. The proposed changes were not developed through the West Virginia Intergovernmental Task Force on Juvenile Justice; and
 - b. The proposed changes were not enacted through legislation; and
 - c. The Department neither consulted with nor advised the Governor's Oversight Committee on Juvenile Justice Reform prior to or during the proposed changes. The Department had at least two opportunities during meetings on May 12, 2016, and again on August 12, 2016, to mention the proposed changes to this Committee and failed to do so; and
 - d. The Department neither consulted with nor advised the Commission to Study the Residential Placement of Children prior to or during the proposed changes. During this time frame, the Department cancelled one meeting of the Commission to Study the Residential Placement of Children and failed to include the topic for the June 16, 2016, meeting; and
 - e. The Department neither consulted with nor advised the Juvenile Justice Commission prior to or during the proposed changes; and
 - f. The Department of Education was neither advised nor consulted prior to the proposed changes. When approached by the Department of Education, the Department of Health and Human Resources advised the Department of Education that it did not need to be at the table at this time, although the proposed changes may violate state education regulations.
2. **That the proposed changes potentially violate West Virginia law.** The introduction of a computerized matrix and other contract provisions may interfere with the codified multidisciplinary process.⁹ The testimony and documents revealed that
- a. The Department's unknown computerized matrix largely, if not completely, controls the child placement determination and appears to impact the role of the Multidisciplinary Treatment team and the ability of the provider to accept and discharge children whose placement may be inappropriate for their treatment needs; and
 - b. Placing these restrictions on providers may risk the safety of the child and others, as well as impact rehabilitation and undermine the current placement process that

⁹ W. Va. Code §49-4-403(b)(1).

promotes collaboration between various disciplines in determining needs and monitoring treatment;¹⁰ and

- c. The current placement process utilizes the statutorily required Multidisciplinary Treatment team, which is a group of professionals and paraprofessionals representing a variety of disciplines. These teams may include, but are not limited to, medical, educational, child care and law-enforcement personnel, social workers, parents, psychologists and psychiatrists;¹¹ and
 - d. The goal of the Multidisciplinary Treatment team is “to pool their respective skills in order to formulate accurate diagnoses and to provide comprehensive coordinated treatment with continuity and follow-up for both parents and children;”¹² and
 - e. This approach is an integral part of placement determination, flexing to meet the children’s unique needs based on the many challenges they face today: poverty, the drug epidemic, abusive and neglectful parents, mental health issues, and other problems that lead children into the juvenile justice system;¹³ and
 - f. The Department has not demonstrated that the proposed changes will comply with existing West Virginia law, including the multidisciplinary process, and, specifically, Senate Bill 393 on juvenile justice reform.
3. **That the proposed changes could cause a youth treatment and placement crisis and lead to an increase in juvenile incarceration.** The effort by the Department of Health and Human Resources to drastically change the existing youth placement model is premature and lacking the crucial infrastructure to provide community-based services for these youth and their families. The testimony and documents revealed that
- a. The new proposal eliminates the three classifications of children based on the level of treatment needed and, instead, classifies them as either “standard” or “enhanced,” both terms of which are currently undefined; and
 - b. The proposed changes invite ambiguity in determining the services available for a child at each of the facilities and leave circuit courts to speculate when

¹⁰ W. Va. Code §49-4-404(a).

¹¹ W. Va. Code §49-1-207.

¹² *Id.*

¹³ *Id.*

determining whether a particular facility can appropriately provide for the children in their care; and

- c. The potential loss of youth shelter and residential placement networks will reduce beds and the circuit courts' options for treatment; and
 - d. The Department's new "Safe at Home" project for children ages twelve (12) through seventeen (17) with a particular diagnosis, involving wrap-around services in home communities, is in its early stages and neither the project nor the comprehensive and accessible infrastructure of treatment services is available in many parts of West Virginia; and
 - e. The lack of comprehensive and accessible infrastructure to support keeping children in their community, in addition to the proposed contract changes and resulting limitations, may produce community safety concerns and an increase in juvenile incarceration which is counterproductive to juvenile justice reform.
4. **That the proposed changes were cloaked in secrecy.** The Department of Health and Human Resources intended to unilaterally overhaul the child residential placement system without consulting key figures in the West Virginia juvenile justice system. The testimony revealed that
- a. The Department told the shelter network and residential providers, during contract discussions, to not worry about judges and not worry about money; and
 - b. The Department told the shelter network and residential providers not to discuss the contracts with others.
5. **That the proposed changes could be detrimental to the state's network of shelter and residential placements.** The proposed contracts, in terms of financial reimbursement, shift from a bundled services billing model to a fee-for-service billing model, which could cause the reduction of currently available services in, and closures of, youth residential facilities, including those with educational services on grounds. Furthermore, the Department of Health and Human Resources has offered no evidence, public or otherwise, that it has undertaken a cost-benefit analysis to show savings in taxpayer dollars by this shift in business model. The testimony and documents revealed that

- a. The new proposal, the “State Plan Amendment,” eliminates the bundling of services that currently compensates residential providers at a rate of \$250 per day and replaces it with a standard rate of \$178 per day for room, board, and supervision, while requiring residential care facilities to bill separately for other services provided to each child on a fee-for-service basis; and
 - b. The billing codes for some services are nonexistent or incomplete; and
 - c. The potential complexity of billing will shift manpower from treatment to securing reimbursement, stressing staff-to-student ratios; and
 - d. The still-present uncertainty in billing places providers in an impossible position to budget and estimate capital and human resources costs; and
 - e. The new proposal could cause cuts to educational programs and decimation of specialized and sexual offender treatment programs and diagnostics; and
 - f. The proposed contracts may make it difficult not only to adequately and appropriately serve children but even to remain in business.
6. **That the proposed changes increase safety concerns and may rapidly dismantle the state’s youth placement network.** The Department of Health and Human Resources has offered no credible explanation for the need to rapidly dismantle, without thorough examination and input, the youth residential treatment system in West Virginia. The testimony revealed that
- a. Legislators were told that the current billing model utilized by West Virginia, the bundled-service rate, is a fraudulent billing practice although West Virginia is permitted to bill at a bundled rate through a grandfather provision. Once the bundled rate is dismantled, it will no longer be available; and
 - b. The Department, in discussions with providers, stated its intention to “blow up” the residential treatment system; and
 - c. Providers, individually and collectively, reached out to the Department multiple times for clarification and collaboration on concerns with continually-changing contracts; and
 - d. The Department ignored letters requesting a meeting from residential providers and attempts at communication were met with silence; and

- e. Providers were issued final contracts with unresolved issues and told to sign by an expedited date or risk closure; and
 - f. Unresolved issues included concerns with billing, treatment, safety, expectations, discretion, and more, which impacts the youth and the juvenile justice system as a whole.
7. **That the proposed changes potentially usurp judicial authority.** The contracts employ a computerized matrix to determine placement and possibly impose arbitrary timelines on treatment. The testimony and documents revealed that
- a. The Department intends to use a computerized matrix in placing children that has not been revealed to the public, the providers, or the judiciary and may be contrary to West Virginia law; and
 - b. Utilizing a computer program for placement does not account for the individual needs of the child. This could result in children with very severe issues and safety concerns being placed among children with more moderate problems, and could result in a child under the supervision of the court being injured while in custody; and
 - c. The proposed changes impose time frames for treatment and force the removal of children from residential placement and/or non-payment to providers for children placed over a certain number of days, undermining rehabilitation and individualization based upon specific issues such as family systems and level of trauma; and
 - d. The arbitrary time frames for treatment could be interpreted as an attempt to usurp judicial discretion as it is the judiciary that determines how long a child remains in a particular placement, subject to the laws of the State of West Virginia.¹⁴

CONCLUSIONS AND RECOMMENDATIONS

The Juvenile Justice Commission is deeply troubled with the testimony provided at the public forum. Furthermore, the Commission has taken note that the Department of Health and Human Resources has been provided many opportunities and invitations to explain the aforementioned changes and has refused to do so, seemingly taking the position that no

¹⁴ W. Va. §49-2-1002(d)(4).

explanation is warranted to the judiciary, providers, educators, and families among others. The Commission finds this position to be presumptuous and shortsighted, especially considering that judges, court officers, treatment providers, teachers, and families are a critical and necessary part of determining the best treatment options for the individual child.

The Juvenile Justice Commission is also deeply troubled with the rapid and sweeping changes that the Department of Health and Human Resources intends to implement through contract negotiations with shelter and residential placement networks without thorough examination as to the financial ramifications and without proper infrastructure in place to serve the needs of the children in their communities. To the extent of this Commission's knowledge based upon testimony provided and documents reviewed without explanation or clarification from the Department of Health and Human Resources despite many opportunities and invitations to do so, the Commission recommends the following.

- **The Department of Health and Human Resources should withdraw the “State Plan Amendment” submitted to the federal government until the financial ramifications are fully studied and understood.** This significant change could cause the closure of certain facilities and the elimination of other needed services and cause further constraint and limitations on treatment options available to the court system, thereby placing children at risk; and
- **The Department of Health and Human Resources should immediately suspend implementation of the new contracts.** While the Commission supports moving children into community-based services, such a sweeping change without the proper infrastructure could jeopardize the well-being of children and future rehabilitation efforts; and
- **The Department of Health and Human Resources should disclose the computer matrix process that possibly eliminates judicial discretion and impacts the multidisciplinary process in determining the needed placement and services for the child.** 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; and
- **Any further changes to the process used to place at-risk children should be transparent and include input from providers, the judiciary, the West Virginia**

Intergovernmental Task Force on Juvenile Justice, legislators, the Governor's Oversight Committee on Juvenile Justice Reform, the Commission to Study the Residential Placement of Children, the Juvenile Justice Commission, and the Department of Education, all of whom are critical stakeholders in the juvenile justice system.