
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 22-0027



STATE OF WEST VIRGINIA ex rel.
WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
BILL CROUCH, SECRETARY, and
KANAWHA COUNTY CHILD PROTECTIVE
SERVICES DIVISION,

Petitioners,

v.

THE HONORABLE LOUIS H. BLOOM,
Judge, Circuit Court of Kanawha County, and
JENNIFER R. VICTOR and
JENNIFER N. TAYLOR,
*Guardians ad litem for the Circuit
Court of Kanawha County,*

Respondents.

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PETITION FOR WRIT OF PROHIBITION

From the Circuit Court of Kanawha County,
Case No. 18-P-142

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QUESTIONS PRESENTED

1. Whether the Circuit Court committed clear legal error and exceeded its legitimate powers in permitting this mandamus action to continue against these Petitioners and broadening it to encompass statewide staffing issues within Child Protective Services as well as foster care and adoption units.
2. Whether the Circuit Court committed clear legal error and exceeded its legitimate powers in determining that the issues of children staying overnight at Child Protective Services offices and hotels is within the scope of this mandamus action.
3. Whether the Circuit Court committed clear legal error and exceeded its legitimate powers in ordering that, throughout the State of West Virginia, the Department of Health and Human Resources shall not house any child who is in its care, temporarily or permanently, at any local Department of Health and Human Resources office at any time or at any hotel for more than two consecutive nights.

STATEMENT OF THE CASE

I. Introduction

As will be explained in further detail below, Petitioners, West Virginia Department of Health and Human Resources (“WVDHHR”), Secretary Bill J. Crouch, and Kanawha County Child Protective Services (“CPS”) Division, have filed this Petition for Writ of Prohibition, in part, seeking to prohibit the enforcement of a verbal Order issued during a hearing in this mandamus action by the Circuit Court on January 6, 2022.¹ Specifically, the Circuit Court ordered that, statewide, the WVDHHR shall not house any child who is in its care, temporarily or permanently, at any local WVDHHR office at any time or at any hotel for more than two consecutive nights. Although Petitioners have advised the Circuit Court that it will be impossible to comply with its mandates at the January 6, 2022, hearing due to the limitations of placements available, due to the unique circumstances in which individual children come into the care of the WVDHHR, and due to the unique challenges posed by individual children, Petitioners have been unable to obtain relief

¹ Petitioners have requested a copy of the January 6, 2022, hearing transcript and understand it to be forthcoming in short order. Additionally, a draft written order regarding the Circuit Court’s rulings during the January 6, 2022, has been submitted to the court for entry but as of the date of this filing, has not yet been entered. Petitioners intend to supplement the Appendix record in this matter with the transcript and the entered written order as soon as possible.

from the Order at the Circuit Court level. Therefore, because Petitioners have been placed in the untenable position of having no option but to continue housing children in a manner violative of the Circuit Court's Order, Petitioners feel they have no choice but to seek relief on an emergent basis pursuant to the Writ of Prohibition sought herein and the separate Motion for Expedited and/or Emergency Relief being filed contemporaneously herewith.

This action began in June of 2017 as a motion for civil contempt within two child abuse and neglect actions, Kanawha County Civil Action No. 16-JA-249 and 16-JA-250, styled *In re: B.W. and G.W.*², and has since been converted to a mandamus action. By oral motion on June 14, 2017, and written petition submitted on June 22, 2017, Respondent Jennifer R. Victor, Guardian ad Litem for minors B.W. and G.W., moved for the WVDHHR to be held in contempt for its alleged failure to meet its obligations imposed by statutes, rules, regulations, and Court orders caused by failing to maintain adequate staffing in its Kanawha County CPS office and requested specific relief in conjunction therewith. App.000003 - App.000004. On June 22, 2017, this Court entered a Rule to Show Cause Order, setting a show cause hearing on July 12, 2017, and appointing Jennifer N. Taylor as co-counsel with the Petitioner in relation to the show cause proceedings. App.000006.

On July 20, 2017, WVDHHR filed its Response to Petition for Contempt, acknowledging that staffing issues had resulted in less than efficient handling of juvenile abuse and neglect cases in Kanawha County, West Virginia in some instances and that the opioid crisis had played a substantial role in this problem. App.000010. Further, WVDHHR enumerated multiple ongoing efforts it identified and implemented to attempt to address the problem, many of which had already begun prior to Ms. Victor's oral motion for contempt on June 14, 2017, under the leadership of

² Because these matters involve minors and are sealed, the parties are identified by initials herein.

Secretary Bill Crouch, who took office in January, 2017, App.000012 - App.000014. Thereafter, the Circuit Court held status conferences in this matter on July 24, 2017, and September 8, 2017. On November 8, 2017, the Circuit Court held an evidentiary hearing and granted the Guardians' motion for leave to amend their Petition for Contempt. App.000018. The Guardians filed their Amended Petition for Contempt on December 13, 2017, seeking to expand its scope to encompass staffing of CPS offices statewide and seeking additional sanctions. App.000023. In response, Petitioners filed a Motion to Dismiss on several grounds, including: an insufficient factual basis existed to support the Guardians' attempt to broaden the scope of the contempt proceeding statewide; the Guardians lacked standing to bring a statewide action and were not entitled to the relief sought for a multitude of reasons, including that maintaining 100% staffing is not possible; and the requested Order requiring judicial oversight of the WVDHHR's hiring and retention practices for CPS is violative of the separation of powers doctrine. App.000028.

At the December 18, 2017, continuation of the evidentiary hearing, the Court granted the Guardians leave to convert the matter to a separate mandamus action and ruled that such action would pertain only to Kanawha County. App.000041. At that hearing, the parties also agreed to enter into a Stipulation Agreement, which was reduced to writing and signed by the parties during a status conference on March 29, 2018, whereby the WVDHHR "acknowledge[d] that there is an ongoing systemic problem at the Department with maintaining adequate staffing, retention and training of Child Protective Services ('CPS') employees in its Kanawha County office" and agreed to take certain action to attempt to correct the problem within the Kanawha County CPS office. App.000047.

The Guardians filed their Petition for Writ of Mandamus on April 26, 2018, asserting that Respondents herein "have a clear legal duty to act as required by the applicable state and federal

statutes, rules, regulations, policies and procedures applicable to the children entrusted to the care of the Department through child abuse and neglect proceedings. App.000055. In support of their Petition, the Guardians further alleged that “[f]rom and after January 1, 2016, the Petitioners noted a consistent decrease in the number of persons employed by the Department and at the [Kanawha County (“KC”)] CPS offices; a high turnover of employees; increasing KC CPS workers failing to file required court summaries and permanency plans; failing to appear at hearings and multi-disciplinary team meetings; failing to properly serve required reports and plans; and failing to properly and effectively protect the interests of the children entrusted to their care through abuse and neglect proceedings [. . . and that a]s a result of the Department’s acts and omissions, the children who were the clients of the guardian[s] ad litem . . . suffered continuous delays in achieving permanency through reunification, permanent placement and/or adoption. ” App.000055.

On May 11, 2018, the Circuit Court issued a Rule to Show Cause, finding that the Petition for Writ of Mandamus “contains detailed averments that demonstrate that the Respondents, individually or jointly, failed to fully staff, train and operate the Kanawha County Child Protective Services Division, as required by applicable state and federal laws, rules and regulations, and all internal policies and procedures of the Department; failed to meet timelines and deadlines established by statutes, rules, regulations, policies or procedures; and that the children charged to the care and custody of the Department in abuse and neglect proceedings ultimately suffered from delayed proceedings, multiple placements and lack of permanency.” App.000060. The Court determined that the “Respondents, the West Virginia Department of Health and Human Resources, the Secretary and the Kanawha County Child Protective Services Division have a legal duty to

perform the acts which the Petitioners seek to compel, as established by state and federal statutes, state rules, federal regulations and internal policies and procedures of the Department.” *Id.*

Petitioners herein filed their Response to the Petition for Writ of Mandamus on May 21, 2018, again denying that the Guardians were entitled to the relief sought and enumerating Petitioners’ many, varied ongoing efforts to increase hiring and retention in the Kanawha County CPS office. App.000063. Among those ongoing efforts at that time were: implementing a \$1500 hiring bonus for new employees contingent upon the new worker staying in a crisis county for a year; increasing the number of available CPS worker positions in Kanawha County by 13 since the initiation of the contempt proceedings; using a crisis team to significantly reduce the backlog of cases in Kanawha County; creating new positions/job classification within CPS to allow for potential advancement and pay increases; reducing the amount of time involved in the hiring process; developing a procedure that will trigger immediate measures to be taken when staffing levels drop below a certain level; broadening the advertising of open positions; hosting numerous job fairs all over the state; expediting training for new employees to get them on the job more quickly; streamlining training to include more experienced-based training rather than classroom instruction to better prepare trainees for their day-to-day lives as CPS workers; adding recruitment and retention sections to the DHHR Office of Human Resource Management; getting legislation passed in the 2018 legislative session to establish a 2- and 5-year 5% retention incentive for CPS workers; getting legislation passed in the 2018 legislative session to provide CPS trainees, workers and supervisors a 2% salary increase over and above the 5% (\$2160) salary increase afforded all state employees, and instituting a new standard operating procedure to improve the efficiency of case handling in the Kanawha County CPS office, including development of a chart to track upcoming deadlines and overall compliance. App.000068 - App.000069.

The Court held review hearings in this matter on June 21, 2018, and September 5, 2018. “On the basis of the evidence and arguments presented at the September 5, 2018, review hearing, the Court noted that a lot of progress had been made in hiring individuals to fill the vacancies in the Kanawha County CPS Division.” App.000073.

On December 13, 2018, Petitioners filed a Motion to Dismiss Petition for Writ of Mandamus, noting that the WVDHHR was in the process of addressing the staffing deficiencies that are the subject of this action prior to Guardian Victor’s oral motion for contempt, advising that Court that it appeared the Kanawha County CPS office would be 95% staffed by the end of December 2018³, assuring the Court that Petitioners will continue its ongoing efforts to maintain staffing levels in the Kanawha County CPS office, and seeking to dismiss the mandamus action as unnecessary because mandamus “will not issue if the duty sought to be enforced has already been done or is being performed.” *State ex rel. Nelson v. Ritchie*, 154 W. Va. 644, 651, 177 S.E.2d 791, 795 (1970). App.000078.

The Court held a review hearing in this matter on December 19, 2018, at which it found that Kanawha County CPS continued its efforts to increase staffing levels, improved timeliness of their report submissions, and improved their level of attendance at hearings. App.000090. In the Order regarding that hearing, the Court specifically commended Cabinet Secretary of the WVDHHR, Bill J. Crouch, and Commissioner for the Bureau for Children and Families⁴, Linda Watts⁵, for the progress made by the WVDHHR in this matter and stated as follows:

One thing that is absolutely not in doubt, at least in my mind, and I believe Ms. Taylor shares my position, that I have no doubt in the good faith of the Department,

³ The Petitioners noted that they had increased CPS worker positions from 48 to 61 during the pendency of this action and explained that based on the 48 position baseline, the Kanawha Office would be overstaffed, but based on the 61 positions, the office would be staffed to 95% with 58 of 61 positions filled.

⁴ As referenced below, in 2021, the former Bureau for Children and Families was split into two separate bureaus: the Bureau for Social Services and the Bureau for Family Assistance.

⁵ Former Commissioner of the Bureau for Children and Families Linda Watts retired in 2021.

and I have been impressed with their vigor in addressing this very difficult situation. The opioid epidemic has hit the Department hard, and I applaud their efforts in attempting to meet these unlimited needs with limited resources.

App.000123.

At a review hearing on April 12, 2019, Petitioners advised they had obtained approval for special hiring rates within CPS and that with all the salary initiatives, CPS personnel then saw an average 20% salary increase over the past two years. Petitioners also reported on developing new initiatives to improve job classifications for CPS workers to promote their retention, including better mentoring, a career ladder for upward mobility, and training programs to assist CPS personnel in preparing for Court proceedings. App.000129. The Court held that the ruling on Petitioners' Motion to Dismiss would be held in abeyance. *Id.*

At the January 29, 2020, review hearing, Petitioners advised that they were conducting exit interviews to help determine reasons employees choose to leave CPS employment and that the WVDHHR was seeking legislation to add eighty-seven (87) positions statewide, including forty-three (43) CPS senior positions, thirty-four (34) CPS case coordinators, five CPS supervisors, one social service coordinator, and four adoption workers. App.000134. The Guardians sought to amend their Petition to address CPS staffing statewide and to consider staffing and performance of adoption units, foster care, and similar issues affecting children in state custody pursuant to a child abuse and neglect proceeding, and Petitioners objected to these requests. *Id.* The Court unsealed this mandamus action and ordered that the parties brief the issues raised by the Guardians' motions to amend their Petition. *Id.*

The Guardians filed their Initial Brief on February 28, 2020. While arguing that the matter should encompass hiring and retention statewide and should address the adoption and foster care units as well as CPS, even they were forced to recognize the WVDHHR's many efforts thus far:

The DHHR, through Bill Crouch, Cabinet Secretary, and Linda Watts, Commissioner for the Bureau for Children and Families (“BCF”), and the rest of the DHHRs management team, have worked diligently to address the staffing and retention issues that plague Child Protective Services. The proposals to address the problems raised have been creative and far-reaching. The DHHR has sought across-the-board pay raises, pay raises for CPS personnel, changes to employment classifications, budget increases for the entire Department, reallocation of CPS personnel on a county basis, increases to the number of CPS positions statewide, implementation of crisis teams drawn from other counties, legislative action, and emergency responses when staffing levels reach a critical stage, among other things. The solutions that have arisen are all applicable statewide. Without the involvement and efforts of Cabinet Secretary Bill Crouch and BCF Commissioner Linda Watts, no solutions would be found.

App.000143.

Also on February 28, 2020, Petitioners filed their Brief in Opposition to Making this a Statewide Action and Broadening it to Encompass Adoption and Foster Care Systems, asserting that there had been no evidence adduced in the matter up to that point to suggest the Petitioners had breached any duty with regard to staffing sufficiency statewide to detrimentally effect CPS, foster care, or adoptions. App.000150. Petitioners also asserted that the Guardians never demanded from WVDHHR the performance of any such duty or duties, and importantly, that WVDHHR has never refused to perform its duties in this regard. *Id.* Petitioners also noted that staffing data did not indicate a statewide staffing problem at that time and further noted that it had not received complaints regarding inefficiency of its operations with regard to CPS, adoptions, or foster care on a statewide basis. *Id.*

The Guardians filed a Response Brief on March 12, 2020, continuing to argue in support of expanding this action and attaching a proposed Amended Petition for Writ of Mandamus. App.000160. Petitioners submitted their Response to the Guardians’ Initial Brief on March 13, 2020, setting forth additional legal argument against broadening the scope of the action. App.000189.

On July 21, 2020, Petitioners filed a Supplemental Brief in Opposition to Making this a Statewide Action and Broadening It to Encompass Adoption and Foster Care Systems to provide the Court and the Guardians with a detailed update of the events that transpired in the 2020 legislative session, which, amid the backdrop of a pandemic, gave rise to sweeping changes to the child welfare system in West Virginia at the urging of WVDHHR. App.000197. Some of the most sweeping changes were to Article 2 of Chapter 49 of the West Virginia State Code, which pertains to the “State Responsibilities for Children.” *Id.* The areas of foster care and adoptions also underwent numerous changes. *Id.* As they had in the past, representatives of WVDHHR pushed for adequate funding to execute plans for the next fiscal year, which included making continued changes to increase the number of CPS staff, optimize CPS staff salaries, and to reiterate its sustained efforts to lower CPS worker caseloads, all with an underlying goal of increasing hiring and retention of CPS workers. *Id.* Petitioners noted that these legislative changes went into effect in June 2020 and asserted it was premature to broaden the focus of the mandamus action. Citing the separation of powers doctrine, Petitioners pointed out that the West Virginia Legislature had only recently passed the baton to the executive branch to execute the new statutory changes and asked that Petitioners be allowed the opportunity to perform their duties prior to intervention by the judiciary. *Id.*

Evidentiary hearings in this matter were held on September 24, 2020, and November 10, 2020, at which evidence was adduced regarding an audit of the WVDHHR by the Post Audit Division of the Legislature, as contained in the Post Audit Division’s Legislative Audit Report on the Department of Health and Human Resources’ Child Protective Services dated November 19, 2019, and the WVDHHR’s response to issues raised in the same, including the West Virginia Child and Family Services Review Program Improvement Plan (PIP). App.000209; App.000214.

At an evidentiary hearing on July 20, 2021, Foster Care Ombudsman Pamela Woodman-Kahler testified regarding her “The First Year in Review” report submitted March 25, 2021. Ms. Woodman-Kahler Order for Evidentiary Hearing Held July 20, 2021. Additionally, Secretary Crouch testified regarding the plan to split the Bureau for Children and Families into two separate bureaus to “have a real laser focus on the child welfare system.” Secretary Crouch explained that the first of the two bureaus, the Bureau for Family Assistance will house programs like TANF and SNAP and early care education, and the second bureau, the Bureau for Social Services, will oversee CPS, Adult Protective Services, and other social services.

Testimony was also taken from Deputy Commissioner for Field Operations for the South Tina Mitchell regarding House Concurrent Resolution 35, which was passed during the 2021 legislative session at the urging of WVDHHR. *Id.* This Resolution directed the WVDHHR to establish a continuous evaluation and improvement system that measures outcomes for children and families in the child welfare system and outcomes for children with serious emotional disorders across the bureaus and other state agencies serving children. It also directed the Department to contract with a third-party independent expert to evaluate workloads for case workers of the Bureau for Children and Families⁶, now the Bureau for Social Services, to assess the impact of the recent steps taken by the Department and the legislature to expand the number of caseworkers available to serve children in the child welfare system and determine whether additional action should be taken, and, if so, what additional action is warranted. It also provides for periodic progress reports to the legislature.

⁶ As previously noted, the former Bureau for Children and Families has been divided into two separate bureaus, with the Bureau for Social Services being the focus of this mandamus action insofar as it oversees Child Protective Services, adoptions, foster care, and similar aspects of child welfare.

II. September 29, 2021, Evidentiary Hearing

The Court held another evidentiary hearing in this matter on September 29, 2021, at which testimony was elicited from Deputy Commissioner Mitchell and newly-appointed Commissioner of the Bureau for Social Services, Jeffrey Pack. App.000225. Among his testimony, Commissioner Pack testified about how his tenure as a legislator and his ongoing relationships with legislators will be helpful to the WVDHHR's continuing efforts to improve child welfare in West Virginia and affirmed his commitment to continuing to improve CPS and child welfare in West Virginia. App.000291; App.000292. At the close of the evidence, the Guardians renewed their motion for leave to amend their mandamus petition to broaden the focus of this action statewide and to encompass issues involving the adoption and foster care units in addition to CPS. App.000231. The Court heard arguments on same. *Id.* In arguing against broadening the scope of this action, Petitioners' counsel again argued that Petitioners should be dismissed from this mandamus action altogether because mandamus "will not issue if the duty sought to be enforced has already been done or is being performed," *State ex rel. Nelson*, 154 W. Va. at 651, 177 S.E.2d at 795, and because "[m]andamus will not be granted where compliance with the mandate of the writ is impossible," *State ex rel. Board of Education v. Johnson*, 156 W. Va. 39, 43, 190 S.E.2d 483, 486 (1972):

MS. CYRUS: Your Honor, this action started as a mandamus action regarding CPS staffing. And so the standard for the mandamus action is proof of a requirement, that there's a showing that the Department is unwilling to address the issues; and the record in this case demonstrates the unbelievable efforts that the Department has taken over the past four years in raising CPS workers' salaries, providing the ladder – career ladder, adding more positions, and this is all now in the midst of a pandemic. They have taken great efforts. We now have, as Commissioner Pack testified, the ombudsman program ongoing, the Department also has a workload study that is being undertaken by professionals to tell the Department what more, if anything, it needs to do or should do, and Commissioner Pack testified about going to the legislature with any outcomes of that. That study is ongoing, so it would be -- it definitely would be premature to make this a statewide action on

those – on foster care, adoptions, and CPS staffing at this time. But moreover, there's no basis that's been shown that would demonstrate the Department, particularly Secretary Crouch, is unwilling to fulfill his duties to all of those areas; and, therefore, it's not appropriate.

THE COURT: Is that the standard, what their willingness is to do, is it actually what their performance is?

MS. CYRUS: In the *Brandon Lee* case, Your Honor, the discussion is, you know, is there an unwillingness of the Department but to, to fulfill its duties. And I think the record here is overwhelmingly replete with evidence that the Department is more than fulfilling its duties. I think the problem may be -- even if we do everything we possibly can do, we might not be able to keep CPS workers unfortunately because it's not a job that's easy. It's very challenging on its best day. So -- but the Department is, and Secretary Crouch has testified a number of times, he is committed to continuing the efforts; and Commissioner Pack, who is now over the bureau for these issues, has testified he's committed, and he's going to reach out to his fellow associates at the legislature to secure additional efforts.

THE COURT: Ms. Taylor, anything further? Any further argument you wish to advance?

MS. TAYLOR: Judge, I would just simply respond that being willing to do something and actually doing something and accomplish it are two different things, and I believe the standard is that they are required by law to do various programs - - do things -- get reports, get things done, and they're not. And even the ombudsman's report shows they're still not doing all of the things that are required, and the people who are suffering are my clients and Ms. Victor's clients: the children, the wards of the state. And I believe that it's not just a Kanawha County problem -- it's a statewide problem, it's a foster care and adoption problem -- and that the Court needs to continually keep on the Department to make sure that they're -- everyone, from the Secretary, who I will commend has done a wonderful job, all the way down to the social workers or the process servers are doing what they are supposed to do to protect our children.

THE COURT: Well, let me say first of all that I think you're right, Secretary Crouch is absolutely committed to this; and I'm very pleased with what I heard from the Secretary -- or Commissioner Pack today, and I want to wish him every success in his position. He has a very difficult position in state government. And I appreciate the attitude and his willingness to work with everybody that he's expressed here today. However, over the course of this case we have made a number of great strides, and I don't know that we can ever achieve perfection; but the issues that we're following here seem to be on a statewide basis, and it seems to me that it is appropriate to expand the scope of this.

Notwithstanding its ruling expanding the scope of the action over the Petitioners' objection, the Court made the following finding:

30. The Court specifically finds that the evidence presented by the parties established that the Department, Secretary Crouch, and Commissioner Pack are committed to addressing the challenges presented by West Virginia Department of Health and Human Resources staffing issues. The evidence further established that the Department has made good faith efforts to address the issues affecting the children of this State as raised in the mandamus action. The Department has promoted legislation that allowed for staff raises and special appointment incentives; increased its efforts to recruit and train staff; created significant opportunities for career advancement for its caseworkers; responded to recommendations from the Legislative Auditor and the Foster Care Ombudsman; and contracted for outside studies, all with the goal of improving the services provided through the Child Protective Services offices throughout the state.

App.000232.

Despite directly acknowledging Petitioners' active, ongoing commitment and good faith efforts to address staffing issues, the Court granted the Guardians' motion for leave to amend and refused to dismiss Petitioners from this mandamus action, holding that, "[m]andamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, *when they refuse to do so*, in violation of their duty, but it is never employed to prescribe in what manner they shall act, or to correct errors they have made." Syllabus point 1, *State ex rel. Buxton v. O'Brien*, 97 W. Va. 343, 125 S.E. 154 (1924); Syllabus Point 2, *State ex rel. Lambert v. Cortellessi*, 182 W. Va. 142, 386 S.E.2d 640 (1989); *Ney v. West Virginia Workers' Compensation Fund*, 186 W. Va. 180, 411 S.E.2d 699 (1991) (Emphasis added.) App.000233.

The Circuit Court further ordered that, "[t]he [Guardians] and the Department shall work cohesively to develop a long-term plan that will achieve all the goals of the Court, the [Guardians], and the Department as contemplated in these proceedings. The goals shall be well-established and include a plan and timeline for implementing the same." App.000235.

On December 22, 2021, the Guardians filed their Amended Petition for Writ of Mandamus, broadening the scope of this action to consider all CPS offices statewide, as well as all foster care and adoption units statewide. App.000329. On January 5, 2022, Petitioners filed their Motion to Dismiss the Amended Petition for Writ of Mandamus, reiterating the arguments made in their December 13, 2018, Motion to Dismiss and at the September 29, 2021, hearing that Petitioners' involvement in this matter is improper, as mandamus is unavailable to compel Petitioners to do that which they are already and have been doing. App.000340.

III. Emergency Hearing on January 6, 2022

On November 17, 2021, a hearing was held in a matter styled *In re: M.P.*⁷, Kanawha County Civil Action No. 21-P-382, a temporary placement proceeding, where the minor child's guardian ad litem, Jennifer Victor, asserted that "the child is residing at the DHHR" and requested "a more suitable placement" be found, "whether foster care, or a relative placement or a shelter or a mental health treatment facility." App.000362.

After hearing limited commentary from two Kanawha County Assistant Prosecuting Attorneys, one Kanawha County CPS Worker, and one guardian ad litem who works in Kanawha County regarding children being temporarily housed in the Kanawha County CPS Office, the Court ordered that "this child not be placed in [the Kanawha County Child Protective Services Office and] . . . prohibit[ed] any future conduct of such." App.000374. While prohibiting the child from staying overnight at the CPS office, the Circuit Court specifically encouraged the use of hotels, stating, "So if y'all need to go out and rent hotel rooms, you better go do it." *Id.*

Subsequently, when asked to clarify the cases to which the order applies, the Circuit Court responded, "[a]s far as I'm concerned, it relates to every, every child in their care in the state of

⁷ Because the matter involves a minor and is sealed, the party is identified by initials herein.

West Virginia.” App.000376. The Circuit Court’s written Order entered November 19, 2021, states in relevant part as follows:

The DHHR shall not house any child who is in its care, temporarily or permanently at any local DHHR office. This type of placement lacks the necessary sleeping, hygiene, and educational facilities for any child’s care, and poses a safety hazard for both children and DHHR personnel. This order shall apply to DHHR throughout the State of West Virginia.

App.000384.

On November 30, 2021, the Guardians filed their Motion for Emergency Hearing in this mandamus action seeking an emergency hearing on the issue of children in WVDHHR custody staying at local CPS offices throughout the state. App.000386. Specifically, the Guardians asserted the following as grounds for their Motion for Emergency Hearing:

that they learned recently of an emergency situation requiring the attention of the Court and the parties. It appears that the Kanawha County Child Protective Services (“CPS”) division, and other county CPS offices as well, are obliged to house children in local division offices overnight. This situation arises nearly every night because of the absence of suitable accommodations elsewhere. This practice is neither safe nor hygienic.

Id.

Accordingly, the Guardians sought an emergency hearing in the mandamus action “to establish a plan and timeline to investigate this problem and to develop a solution.” *Id.* Notably, nothing in the Circuit Court’s Order in the *In re M.P.* matter, the Guardians’ Motion for Emergency Hearing or the Notice of Hearing on same mentioned or sought relief regarding children in WVDHHR custody staying in hotels overnight. *Id.*; App.000389.

On January 4, 2022, Petitioners filed their Response in Opposition to the Guardians’ Motion for Emergency Hearing, advising that WVDHHR was in the process of drafting a motion to reopen the *In re: M.P.* matter to seek reconsideration of the Court’s Order therein and asserting that the insertion of this issue into this mandamus action was improper insofar as whether or not

children are temporarily housed at WVDHHR offices as a last resort has nothing to do with hiring or retaining staff. App.000392. On January 5, 2022, WVDHHR filed its Motion to Reopen and Reconsider in the *In re: M.P.* matter.⁸ App.000399.

Over Petitioners' objection, the Court held an emergency hearing⁹ in this mandamus action on January 6, 2022, at which the Court heard testimony from the WVDHHR Commissioner for the Bureau for Social Services Jeffrey Pack, Kanawha County CPS Community Services Manager Michael Hale, and Kanawha County Social Services Coordinator Sandra Wilkerson establishing that having children stay overnight at a local WVDHHR office is a practice of absolute last resort and that the WVDHHR was seeking relief from the Court's blanket Order in *In re: M.P.* prohibiting that practice because, at times, it would be impossible to comply with the Court's Order due to the limitations of placements available, due to the unique circumstances in which individual children come into the care of the WVDHHR, and due to the unique challenges posed by individual children. Despite this testimony, at the close of the hearing on January 6, 2022, the Court not only reiterated its prior order from *In re: M.P.* banning the temporary housing of children in WVDHHR custody at WVDHHR offices statewide but, unexpectedly and without warning, made a more restrictive order prohibiting children in WVDHHR custody from staying at hotels for more than two consecutive nights as well.

Following the hearing, Petitioners filed a Motion to Stay pursuant to Rule 62(i) of the West Virginia Rules of Procedure, explaining that Petitioners feel they have no choice but to seek a Writ of Prohibition with the Supreme Court of Appeals of West Virginia seeking relief from the Court's

⁸ To date, this Motion has not been ruled upon. However, because the Circuit Court has decided to insert the issue of temporarily housing children in WVDHHR custody at WVDHHR offices and at hotels into this mandamus action, it is anticipated this Motion will be denied as moot.

⁹ This "emergency hearing" very quickly became an evidentiary hearing, over the objection of Petitioners herein that it was not noticed at such.

verbal Order at the January 6, 2022, hearing because Petitioners cannot guarantee compliance with the verbal Order. App.000403. Petitioners filed their Supplemental Motion to Stay Court's Verbal Order on January 6, 2022, to supplement the record from the January 6, 2022, hearing to advise the Circuit Court that compliance with the Court's ban on hotel stays in excess of two consecutive nights would similarly be impossible due to the limitations of placements available and due to the unique challenges posed by individual children. App.000409.

To date, this Motion for Stay has not been ruled upon.

Pursuant to Rule 16 of the West Virginia Rules of Appellate Procedure, Petitioners request that this Court issue a Writ of Prohibition, prohibiting the Respondent, the Honorable Louis H. "Duke" Bloom, from permitting this mandamus action from continuing against Petitioners and broadening it to encompass statewide staffing issues within CPS as well as foster care and adoption units. Petitioners further request that this Court issue a Writ of Prohibition, prohibiting the Honorable Louis H. "Duke" Bloom, from inserting the issues of children staying overnight at Child Protective Services offices and hotels into this mandamus action and prohibiting the Honorable Louis H. "Duke" Bloom, from enforcing his Order that, throughout the State of West Virginia, the WVDHHR shall not house any child who is in its care, temporarily or permanently, at any local WVDHHR office at any time or at any hotel for more than two consecutive nights.

SUMMARY OF ARGUMENT

The Circuit Court committed clear error and exceeded its legitimate powers when, instead of dismissing Petitioners from this mandamus action, it granted leave to the Guardians to amend their Petition to broaden the focus of the action statewide and to adoption and foster care units.

Further, the Circuit Court committed clear error and exceeded its legitimate powers when it found that the issues of children in WVDHHR custody staying overnight at WVDHHR offices

and hotels overnight fell within the scope of this mandamus action and issued an Order effectively banning such practices.

Accordingly, this Court should stay further proceedings in the Circuit Court of Kanawha County, West Virginia, issue a Rule to Show Cause as to why a Writ of Prohibition should not be granted, schedule this action for Rule 19 argument, enter an order granting the Writ of Prohibition, prohibit the lower court from enforcing the Order regarding Evidentiary Hearing Held September 29, 2021 and the Order regarding Emergency Hearing Held January 6, 2022, and direct the Circuit Court to dismiss Petitioners from the mandamus action pending in the circuit court.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument in this matter under Rule 19 will aid this Court in its decision process. This case involves issues of settled law that are narrow in scope and involves the circuit court's clear legal error in applying that settled law. W. Va. R. App. P. 19(a)(1) and (4).

ARGUMENT

I. Standard

This Court's original jurisdiction is recognized in West Virginia Code § 53-1-1, *et seq.* and Rule 16 of the West Virginia Rules of Appellate Procedure. "The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W.Va. Code § 53-1-1. A writ of prohibition is proper whenever an inferior court does not have jurisdiction or has jurisdiction but exceeds its legitimate powers. *State ex rel. Farber v. Mazzone*, 213 W. Va. 661, 664, 584 S.E.2d 517, 520 (2003).

Petitioners seek a writ of prohibition because the Circuit Court exceeded its legitimate powers and committed clear legal error when it permitted this mandamus action to continue against

Petitioners and expanded it beyond the four corners of the Guardians' Petition for Writ of Mandamus to include statewide issues involving CPS, foster care, and adoptions.

In such instances, this Court has established the following standard of review for issuing a writ of prohibition:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt.4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996); *see also* Syl. Pt. 2, *State ex rel. West Virginia Nat'l Auto Ins. Co. v. Bedell*, 223 W.Va. 222, 672 S.E.2d 358 (2008); Syl. Pt. 1, *State ex rel. Blake v. Hatcher*, 218 W. Va. 407, 624 S.E.2d 844 (2005); Syl. Pt. 1, *State ex rel. Cosenza v. Hill*, 216 W. Va. 482, 607 S.E.2d 811 (2004); Syl. Pt. 2, *State ex rel. Isferding v. Canady*, 199 W. Va. 209, 483 S.E.2d 555 (1997).

The first two factors unquestionably are present here. This matter has been pending for nearly five years at this point, and Petitioners have moved to dismiss time and again without any clear ruling from the Circuit Court on those motions. Instead, the Circuit Court has repeatedly expanded the scope of this action to encompass more and more aspects of WVDHHR operations to the point of deeming temporary housing of children in WVDHHR custody at WVDHHR offices and hotels as falling within this mandamus matter that has throughout its existence focused on maintaining adequate staffing levels. The Circuit Court's imposition on so many aspects of the

day-to-day operations of the WVDHHR is violative of the separation of powers doctrine, as is the Circuit Court's order forcing the WVDHHR to work "cohesively" with the Guardians "to develop a long-term plan that will achieve all the goals of the Court, the [Guardians], and the Department[,]" along with a "timeline for implementing the same." App.000235. The details of and timeline for any plan to address the issues raised by the Guardians fall squarely within the discretion of Secretary Crouch as the chief officer of the WVDHHR, and the WVDHHR's decisions as to how to carry out its duties should not be subject to the Guardians' input or approval.

The third and most important factor – that the lower tribunal's order is clearly erroneous as a matter of law – exists here. The evidence adduced in this matter has indisputably demonstrated that, even prior to Ms. Victor's oral motion for contempt, Petitioners were taking steps to attempt to address the staffing shortage that had been resulting in less than efficient handling of child abuse and neglect cases. Furthermore, despite the innumerable efforts Petitioners have undertaken over the last nearly five years, between the Coronavirus Pandemic and the Opioid Crisis, it has proven impossible to consistently maintain optimal staffing levels. It is well-settled that mandamus is unavailable to compel the performance of official duties which are being performed and that mandamus is similarly unavailable where compliance with the mandate of the writ is impossible. *See State ex rel. Nelson*, 154 W. Va. at 651, 177 S.E.2d at 795 (mandamus "will not issue if the duty sought to be enforced has already been done or is being performed,"); *State ex rel. Board of Education v. Johnson*, 156 W. Va. 39, 43, 190 S.E.2d 483, 486 (1972) ([m]andamus will not be granted where compliance with the mandate of the writ is impossible"). Likewise, the foregoing demonstrates a persistent disregard for procedural and substantive law.

With regard to the Circuit Court's Order regarding the practice of temporary housing of children in WVDHHR custody at WVDHHR offices or hotels, the third and fourth factors are

present as well. Although there has been evidence adduced in this matter that no CPS workers have quit their jobs as a result of these temporary housing practices, the Circuit Court has ruled that these practices fall within the scope of a mandamus action that has focused entirely on maintaining staffing. Likewise, the parties were deprived the opportunity to present evidence on the issue of housing children overnight at hotels because the Guardians moved for an emergency hearing to “establish a plan and timeline to investigate [the WVDHHR’s practice of housing children in WVDHHR custody at WVDHHR offices overnight] and develop a solution.” Nevertheless, the Circuit Court ruled that the WVDHHR cannot house children in WVDHHR custody in hotels for more than two consecutive nights and cannot house children in WVDHHR custody at WVDHHR offices for any length of time whatsoever. According to the Circuit Court’s prior order banning housing of children at WVDHHR offices, the Circuit Court found that these accommodations were unacceptable because “[t]his type of placement lacks the necessary sleeping, hygiene, and educational facilities for any child’s care, and poses a safety hazard for both children and DHHR personnel,” but hotels clearly have accommodations for sleeping and hygiene. Additionally, the two consecutive days limitation is arbitrary and capricious.

With regard to the fifth factor, the Circuit Court’s ban on housing children in WVDHHR custody temporarily at WVDHHR offices or for more than two consecutive nights at a hotel creates the potential for conflicting directives from other circuit court judges, who order WVDHHR to take custody of children who are in unsafe situations.

As such, Petitioners seek a Writ of Prohibition prohibiting the Circuit Court’s execution of these Orders and dismissing Petitioners from this mandamus action to allow the Petitioners to continue performing their duties without continued oversight by the Circuit Court or input from the Guardians.

II. Discussion

A. The Circuit Court committed clear legal error and exceeded the scope of its authority in permitting this mandamus action to continue against these Petitioners and broadening it to encompass statewide staffing issues within Child Protective Services as well as foster care and adoption units.

The law in West Virginia is clear that the remedy of mandamus is an extraordinary one that is “available only in limited and exceptional circumstances.” *State ex rel. Charleston Bldg. Comm’n v. Dial*, 198 W. Va. 185, 191, 479 S.E.2d 695, 701 (1996). “[S]ince 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).

“Attempting to further limit the extraordinary remedy of mandamus, [the West Virginia Supreme Court of Appeals has] established additional guidelines which a party requesting mandamus must satisfy before [the Supreme Court] will grant such relief[:].” “A writ of mandamus will not issue unless three elements coexist – (1) The existence of a clear right in the petitioner to the relief sought; (2) the existence of a legal duty on the part of respondent to do the thing which petitioner seeks to compel; and (3) the absence of another adequate remedy at law.” *Dial*, 198 W. Va. at 191, 479 S.E.2d at 701 (quoting Syl. pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969)).

In their Amended Petition for Writ of Mandamus, the Guardians assert that they “have a clear legal right to file a mandamus requiring the Respondents to perform their legal duty to properly staff, train and operate the CPS Division statewide, so as to protect the children who are affected by abuse and neglect proceedings.” Petitioners have never contended that they do not have a duty to properly staff, train, and operate CPS offices statewide so as to protect the children affected by abuse and neglect proceedings.

Indeed, to the contrary, well before Ms. Victor made her oral motion for contempt on June 14, 2017, Petitioners, under the leadership of Secretary Crouch, who had just taken office in January, 2017, were taking steps to address the issue of inadequate staffing, which is at the heart of the Guardians' complaints and directly impacts training and operation. Importantly, "a writ of mandamus will not be issued to compel the performance of an act which the defendant has not refused to perform." *State ex rel. Nelson v. Ritchie*, 154 W. Va. 644, 652, 177 S. E. 2d 791, 795 (1970).

The purpose of a mandamus action is to compel a public office or officer to discharge a legal duty that the public office or officer has *refused* to discharge:

It is well settled that "mandamus lies to require the discharge by a public officer of a nondiscretionary [sic] duty." Syllabus Point 3, *State ex rel. Greenbrier County Airport Authority v. Hanna*, 151 W. Va. 479, 153 S.E.2d 284 (1967). A non-discretionary or ministerial duty in the context of a mandamus action is one that "is so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance[.]" Syllabus Point 3, in part, *Walter v. Ritchie*, 156 W. Va. 98, 191 S.E.2d 275 (1972). Also, "mandamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, *when they refuse so to do*, in violation of their duty, but it is never employed to prescribe in what manner they shall act, or to correct errors they have made." Syllabus Point 1, *State ex rel. Buxton v. O'Brien*, 97 W. Va. 343, 125 S.E. 154 (1924).

Nobles v. Duncil, 202 W. Va. 523, 534-535, 505 S.E.2d 442, 453-454 (1998)(Emphasis added.)

The purpose of a mandamus action is to compel a public office or officer to discharge a legal duty that the public office or officer has refused to discharge. *See, Hickman v. Epstein*, 192 W. Va. 42, 44, 450 S.E.2d 406, 408 (1994) ("The function of a writ of mandamus is to enforce the performance of official duties arising from the discharge of some public function, or imposed by statute"); Syl. pt. 1, *State ex rel. Allstate Ins. Co. v. Union Pub. Serv. Dist.*, 151 W. Va. 207, 151 S.E.2d 102 (1966) ("Mandamus is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies.").

In 55 C.J.S., *Mandamus*, Section 10b, the text contains these statements: “As a rule, mandamus will not issue if the duty sought to be enforced has already been done or is being performed. The office of the writ is *only to compel action by the unwilling*, and if the act has already been done the writ would be fruitless. Also *the writ will not lie to compel performance of an act which respondent shows a willingness to perform without coercion.*” [Likewise,] “[m]andamus will not issue to compel a party to perform an act which he has already begun to do, and it is apparent that he will in good faith perform.”

Nelson, 154 W. Va. at 651, 177 S.E.2d at 795 (citing Syl. pt. 2, *State ex rel. Hall v. County Court of Mercer County*, 100 W. Va. 11, 129 S.E.2d 712 (1925))(Emphasis added.)

“Mandamus will not issue to compel a party to perform an act which he has already begun to do, and it is apparent that he will in good faith perform.” Syl. pt. 2, *State ex rel. Hall v. County Court of Mercer County*, 100 W. Va. 11, 129 S.E.2d 712 (1925). Mandamus “will not be employed ‘to require acts which are being performed or have been performed, or will be performed without coercion.’” *State ex rel. Public Serv. Comm’n v. Indian Creek Gas Co.*, 154 W. Va. 835, 839, 179 S.E.2d 574, 576 (1971) (quoting 52 Am. Jur. 2d, *Mandamus*, Section 36, and citing *State ex rel. Hedrick v. Board of Commissioners of the County of Ohio*, 146 W. Va. 79, 118 S.E.2d 73 (1961); *State ex rel. Beckley Newspapers Corp. v. Hunter*, 127 W. Va. 738, 34 S.E.2d 468 (1945); *Monongalia Improvement Co. v. Morris*, 106 W. Va. 243, 145 S.E.2d 387 (1928); 52 Am. Jur. 2d, *Mandamus*, Section 89, 55 C.J.S. *Mandamus*, Section 10b).

The record is replete with evidence that, over the past four and a half years during the pendency of this matter, the Petitioners have been neither “unwilling” nor “refusing” to perform their duties. To the contrary, throughout the long history of this case, Petitioners have continuously and tirelessly worked to address any staffing and efficiency issues in Kanawha County CPS and statewide, even since before Ms. Victor’s oral or written Petition for Contempt. Indeed, the Court has stated in this very matter as follows:

One thing that is absolutely not in doubt, at least in my mind, and I believe Ms. Taylor shares my position, that I have no doubt in the good faith of the Department, and I have been impressed with their vigor in addressing this very difficult situation. The opioid epidemic has hit the Department hard, and I applaud their efforts in attempting to meet these unlimited needs with limited resources.

App.000123. The Order from that hearing noted that the Circuit Court commended Cabinet Secretary of the WVDHHR, Bill J. Crouch, and Commissioner for the Bureau for Children and Families, Linda Watts, for the progress made by the WVDHHR in this matter. App.000093.

The Guardians have even given Petitioners credit for the efforts they have made in attempting to increase staffing to improve efficiency in the delivery of child welfare throughout the state:

The DHHR, through Bill Crouch, Cabinet Secretary, and Linda Watts, Commissioner for the Bureau for Children and Families (“BCF”), and the rest of the DHHRs management team, have worked diligently to address the staffing and retention issues that plague Child Protective Services. The proposals to address the problems raised have been creative and far-reaching. The DHHR has sought across-the-board pay raises, pay raises for CPS personnel, changes to employment classifications, budget increases for the entire Department, reallocation of CPS personnel on a county basis, increases to the number of CPS positions statewide, implementation of crisis teams drawn from other counties, legislative action, and emergency responses when staffing levels reach a critical stage, among other things. The solutions that have arisen are all applicable statewide. Without the involvement and efforts of Cabinet Secretary Bill Crouch and BCF Commissioner Linda Watts, no solutions would be found.

App.000143.

In fact, despite citing the proper legal standard regarding the requirement that a mandamus action requires a “refusal” of the agency to perform its duties, the Circuit Court made the following finding in the very Order from which Petitioners now seek relief:

30. The Court specifically finds that the evidence presented by the parties established that the Department, Secretary Crouch, and Commissioner Pack are committed to addressing the challenges presented by West Virginia Department of Health and Human Resources staffing issues. The evidence further established that the Department has made good faith efforts to address the issues affecting the children of this State as raised in the mandamus action. The Department has

promoted legislation that allowed for staff raises and special appointment incentives; increased its efforts to recruit and train staff; created significant opportunities for career advancement for its caseworkers; responded to recommendations from the Legislative Auditor and the Foster Care Ombudsman; and contracted for outside studies, all with the goal of improving the services provided through the Child Protective Services offices throughout the state.

App.000232. This acknowledgment by the Circuit Court underscores that the standard to maintain a mandamus action against the Petitioners has not been met because, not only is it undisputed the Petitioners are neither “unwilling” nor “refusing” to perform their duties, but they had also begun addressing the staffing issues even before this action began and have undertaken valiant efforts over the past four and a half years since, even in the face of a pandemic. Thus, a mandamus action should not lie against them.

Additionally, “[t]he purpose of mandamus is to compel one to perform a legal duty imposed by law, but such duty must be one which he is capable of performing. Mandamus will not be granted where compliance with the mandate of the writ is impossible.” *State ex rel. Board of Education v. Johnson*, 156 W. Va. 39, 190 S.E.2d 483 (1972) (citing 55 C.J.S., *Mandamus*, Section 14; 52 Am. Jur. 2d, *Mandamus*, Section 37, 12 M.J., *Mandamus*, Section 8).

Here, the record is clear that Petitioners have been faithfully doing everything in their power to address increase and maintain staffing to ensure efficient delivery of child welfare services throughout the State of West Virginia. Despite all these efforts, Petitioners have had only limited success in achieving and maintain optimal staffing levels. In sum, it has proven simply impossible for Petitioners to increase and maintain staffing levels the Guardians seek to mandate in this matter. Therefore, the relief they seek is unavailable.

Having said that, however, Petitioners remain wholeheartedly committed to continuing their efforts to increase and maintain staffing throughout the State regardless of their involvement in this mandamus action.

Additionally, even were it not impossible to maintain 100% staffing, mandating staffing at that level would run afoul of the Separation of Powers doctrine. “The separation of powers doctrine requires that the specific functions of the legislative, executive, and judicial branches of government are to be kept distinct.” *In re Brandon Lee H.S.*, 218 W. Va. 724, 730, 629 S.E.2d 783, 789 (2006). It is critical to note that determining who to hire to fill vacant staffing positions is a discretionary decision, as is what employment incentives to offer. Article V, Section I of the West Virginia Constitution affords WVDHHR, as a state agency and part of the executive branch of government, the ability to make discretionary choices with regard to its personnel decisions, hiring decisions, staffing allocations, compensatory structures, and multiple other human resources-type decisions. This Court has recognized that separation of powers precludes courts from exercising administrative duties relating to the executive branch. *See In re Brandon Lee H.S.* 218 W. Va. at 731, 629 S.E.2d at 790; *State ex rel. Canterbury v. County Court*, 151 W.Va. 1013, 1019, 158 S.E.2d 151, 156 (1967). “Administrative agencies are active players in the division of powers, while always subjected to properly enacted and valid laws and constitutional constraints, their actions are entitled to respect from both the legislature and the courts.” *Frymier-Halloran v. Paige*, 193 W. Va. 687, 694, 458 S.E.2d 780, 787 (1995).

Likewise, Circuit Court’s order that “[t]he [Guardians] and the Department shall work cohesively to develop a long-term plan that will achieve all the goals of the Court, the [Guardians], and the Department as contemplated in these proceedings [and that t]he goals shall be well-established and include a plan and timeline for implementing the same” also runs afoul of the separation of powers doctrine by infringing upon Secretary Crouch’s discretionary powers in his position at the helm of WVDHHR. App.000235. Additionally, the use of a mandamus action to

allow the Court to monitor the WVDHHR's implementation of any plan is improper. *See* App.000322.

The Guardians are not entitled to the relief they seek, and the Circuit Court's Order mandating a court-monitored plan to which the Guardians and the Court must agree is an abuse of power and usurps the powers of Secretary Crouch afforded by the West Virginia Constitution. As such, the Circuit Court committed clear error and exceeded its legitimate powers when, instead of dismissing Petitioners from this mandamus action, it granted leave to the Guardians to amend their Petition to broaden the focus of the action as to CPS staffing statewide, as well as adoption and foster care units statewide, and order the Petitioners to enter into a court-monitored "plan" subject to the approval of the Guardians and the Court.

B. The circuit court committed clear legal error and exceeded the scope of its legitimate powers in determining that the issues of children staying overnight at Child Protective Services offices and hotels is within the scope of this mandamus action.

Throughout, the focus of this mandamus action has been on the hiring and retention of staff for its various child welfare offices. At the inception of this action, the matter had centered on staffing of the Kanawha County CPS Office. However, as discussed above, at a hearing on September 29, 2021, over Petitioners' objection, the Circuit Court permitted the Guardians to broaden the scope of this mandamus action to include issues of staffing statewide and included staffing of adoption and foster care units within the WVDHHR as well. Nonetheless, the gravamen of the Guardians' complaint against Petitioners has always traced back to the issue of maintaining staffing levels. Whether or not children are temporarily housed at WVDHHR offices or hotels as a last resort has nothing to do with hiring or retaining staff. Furthermore, nothing in the Petition for Writ of Mandamus or the more recently filed Amended Petition for Writ of Mandamus asserts that housing of children at WVDHHR offices or at hotels has reduced or otherwise impacted

staffing in any DHHR office. Accordingly, inserting the issues of these practices of temporarily housing children in WVDHHR custody at WVDHHR offices and hotels was improper and an abuse of the Circuit Court's authority as those issues fall far afield of the focus of this action and the allegations before the Circuit Court contained in the Amended Petition for Writ of Mandamus. As such, Petitioners move this Court to issue a Writ of Prohibition prohibiting the Circuit Court from inserting these issues into this mandamus action.

C. The circuit court committed clear legal error and exceeded the scope of its legitimate powers ordering that, throughout the State of West Virginia, the Department of Health and Human Resources shall not house any child who is in its care, temporarily or permanently, at any local Department of Health and Human Resources office at any time or at any hotel for more than two consecutive nights.

On November 30, 2021, the Guardians filed their Motion for Emergency Hearing in this mandamus action seeking an emergency hearing on the issue of children in WVDHHR custody staying at local CPS offices throughout the state. App.000386. Specifically, the Guardians asserted the following as grounds for their Motion for Emergency Hearing:

that they learned recently of an emergency situation requiring the attention of the Court and the parties. It appears that the Kanawha County Child Protective Services ("CPS") division, and other county CPS offices as well, are obliged to house children in local division offices overnight. This situation arises nearly every night because of the absence of suitable accommodations elsewhere. This practice is neither safe nor hygienic.

Id.

The Guardians pointed out in their Motion that, "the Court abolished this practice by order entered November 19, 2021, in *In re: M.P.*, Kanawha County Civil Action Number 21-P-382. Specifically, the Court ordered that,

The DHHR shall not house any child who is in its care, temporarily or permanently, at any local DHHR office. This type of placement lacks the necessary sleeping, hygiene, and educational facilities for any child's care, and poses a safety hazard

for both children and DHHR personnel. This order shall apply to the DHHR throughout the State of West Virginia.”

Id.

Accordingly, the Guardians sought an emergency hearing “to establish a plan and timeline to investigate this problem and to develop a solution.” *Id.* Notably, nothing in the Guardians’ Motion for Emergency Hearing or their Notice of Hearing on same mentioned or sought relief regarding children in WVDHHR custody staying in hotels overnight. *Id.*; App.000389. Furthermore, at the hearing in the *In re: M.P.* case, the Court ordered that “this child not be placed in [the Kanawha County Child Protective Services Office and] . . . prohibit[ed] any future conduct of such. So[,] if y’all need to go out and rent hotel rooms, you better go do it.” App.000374 – App.000375. This language from the Circuit Court clearly suggests the Circuit Court found no problem with temporarily housing children in WVDHHR custody at hotels and was, in fact, encouraging it as a solution.

At the hearing on January 6, 2022, testimony was elicited from Community Services Manager Michael Hale, Social Services Coordinator Sandra Wilkerson, and Commissioner of Bureau for Social Services Jeffrey Pack establishing that having children stay overnight at a local WVDHHR office is a practice of absolute last resort and that the WVDHHR was seeking relief from the Court’s Order in *In re: M.P.* because, at times, it would be impossible to comply with the Court’s Order due to the limitations of placements available, due to the unique circumstances which children come into WVDHHR custody, and due to the unique challenges posed by individual children.

Because Petitioners had no notice that the issue of temporarily housing children in WVDHHR custody in hotels overnight was in dispute, Petitioners elicited no testimony from the

witnesses relative to that issue. Likewise, Petitioners' counsel does not recollect the Guardians or the Court eliciting testimony on that topic specifically.¹⁰

Despite the lack of testimony on the issue of housing children overnight at hotels and the testimony from all three WVDHHR representatives that it would be impossible to guarantee compliance with a prohibition on housing children at WVDHHR offices overnight, at the close of the hearing on January 6, 2022, the Court not only reiterated its prior order with regard to banning the temporary housing of children at WVDHHR offices but made a more restrictive order prohibiting children staying at hotels for more than two consecutive nights as well.

Initially, Petitioners object to the Circuit Court's Order as violative of Petitioners' due process rights, as they were denied opportunity to present evidence on the issue of housing children overnight at hotels due to lack of notice that banning such practice was under consideration. To satisfy the requirements of due process, a party must be afforded proper notice and a meaning opportunity to be heard. *State ex rel. Graves v. Daugherty*, 164 W. Va. 726, 728, 266 S.E.2d 142, 143 (1980). Proper "[n]otice contemplates meaningful notice which affords an opportunity to prepare a defense and to be heard upon the merits." *State ex rel. Hawks v. Lazaro*, 157 W. Va. 417, 202 S.E.2d 109, 124 (1974). In the civil context, the standards for due process dependent upon the circumstance. *Sly. pt. 2, North v. Board of Regents*, 160 W. Va. 248, 233 S.E.2d 411 (1977). The Supreme Court of Appeals of West Virginia has announced three general principles in regard to due process: (1) "the more valuable the right sought to be deprived, the more safeguards will be interposed;" (2) due process must generally be given before deprivation occurs unless a compelling public policy dictates otherwise;" and (3) "a temporary deprivation of rights may not require as large a measure of due process protection as a permanent deprivation." *Id.* Here, the rights deprived

¹⁰ As indicated previously, the transcript of the proceeding has been requested but is not yet available.

are afforded to the WVDHHR to make discretionary determinations based on the available placements, the circumstances under which the children came into WVDHHR's care, and the unique needs of the children in WVDHHR's care.

Further, the Circuit Court's Order with regard to housing children in hotels because the Circuit Court's prior order banning housing of children at WVDHHR offices stated that the Circuit Court found that these accommodations were unacceptable because "[t]his type of placement lacks the necessary sleeping, hygiene, and educational facilities for any child's care, and poses a safety hazard for both children and DHHR personnel." However, hotels clearly have accommodations for sleeping and hygiene. There was no testimony developed on the issue of what, if anything, would make hotel stays in excess of two consecutive days pose a "safety hazard for children and DHHR personnel." Additionally, the two consecutive days' limitation is arbitrary and capricious, as it is unclear why the Circuit Court appears to deem hotel accommodations deficient after two consecutive days.

No testimony or other evidence was adduced at the January 6, 2022, hearing or since that time that would refute the testimony of the WVDHHR representatives at the hearing to the effect that compliance with the Court's Order in *In re: M.P.* would be impossible at times given the lack of other available placements.

Likewise, Petitioners supplemented the record from the January 6, 2022, hearing by providing the Affidavit of Commissioner Jeffrey Pack, which advises that, just as Petitioners cannot guarantee compliance with the first portion of the Circuit Court's Order with regard to housing children overnight at WVDHHR offices, Petitioners likewise cannot guarantee compliance with the Circuit Court's Order banning the practice of housing children in hotels overnight for more than two consecutive nights. As Commissioner Pack testified with regard to

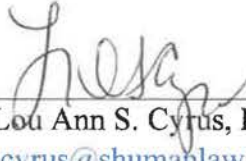
the reasons behind the WVDHHR's need to sometimes house children overnight as a last resort at local WVDHHR's offices, likewise, as a next to last resort, it is sometimes necessary for the WVDHHR to house children overnight at hotels for more than two consecutive nights while an appropriate placement is being located. While the WVDHHR takes steps to ensure placement of children in suitable placements as swiftly as possible, due to the limitations of placements available and due to the unique challenges posed by individual children, it is sometimes necessary for the WVDHHR to house children in a hotel more than two consecutive nights; thus, while the Petitioners do not wish to violate the Circuit Court's Order, it is simply impossible for them to comply with the court's verbal Order at the hearing of January 6, 2022.

Accordingly, Petitioners respectfully request that this Court issue a Writ of Prohibition prohibiting the execution of the Circuit Court's verbal Order on January 6, 2022 banning the housing of children in WVDHHR custody at WVDHHR offices overnight and at hotels for more than two consecutive nights.

CONCLUSION

Petitioners West Virginia Department of Health and Human Resources, Secretary Bill J. Crouch, and Kanawha County Child Protective Services Division request that this Court issue a Writ of Prohibition, prohibiting the Circuit Court from permitting this mandamus action from continuing against Petitioners and broadening it to encompass statewide staffing issues within Child Protective Services as well as foster care and adoption units. Petitioners further request that this Court issue a Writ of Prohibition, prohibiting the Circuit Court from inserting the issues of children staying overnight at Child Protective Services offices and hotels into this mandamus action and prohibiting the Circuit Court from enforcing its Order that, throughout the State of West Virginia, the Department of Health and Human Resources shall not house any child who is in its

care, temporarily or permanently, at any local Department of Health and Human Resources office at any time or at any hotel for more than two consecutive nights.



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Counsel for Petitioners

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. _____

**STATE OF WEST VIRGINIA ex rel.
WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
BILL CROUCH, SECRETARY, and
KANAWHA COUNTY CHILD PROTECTIVE
SERVICES DIVISION,**

Petitioners,

v.

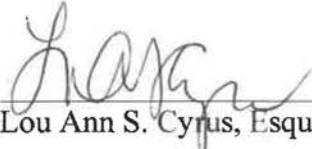
**The Honorable Louis H. bloom,
Judge, Circuit Court of Kanawha County, and
JENNIFER R. VICTOR and
JENNIFER N. TAYLOR,
*Guardians ad litem for the Circuit
Court of Kanawha County,***

Respondents.

VERIFICATION

I, Lou Ann S. Cyrus, after first being duly sworn upon oath, respectfully state that I am counsel for Petitioners named in the foregoing Petition for Writ of Prohibition; that I am familiar with the contents of the related Appendix; and that the facts and allegations set forth in the Petition are true and accurate to the best of my knowledge and belief.





Lou Ann S. Cyrus, Esquire (WVSB #6558)

Taken, sworn to and subscribed before me this 13 day of January, 2022.

My commissions expires: 9-08-2025



Notary Public

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. _____

**STATE OF WEST VIRGINIA ex rel.
WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
BILL CROUCH, SECRETARY, and
KANAWHA COUNTY CHILD PROTECTIVE
SERVICES DIVISION,**

Petitioners,

v.

**THE HONORABLE LOUIS H. BLOOM,
Judge, Circuit Court of Kanawha County, and
JENNIFER R. VICTOR and
JENNIFER N. TAYLOR,
*Guardians ad litem for the Circuit
Court of Kanawha County,***

Respondents.

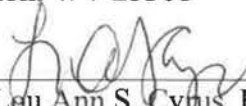
CERTIFICATE OF SERVICE

I, Lou Ann S. Cyrus, counsel for Petitioners, hereby certify that I have served a true and accurate copy of the foregoing "Petition for Writ of Prohibition" upon the parties whom a rule to show cause should be served by placing said copies in the United States mail, with first-class postage prepaid, on this day, January 13, 2022, addressed separately as follows:

Jennifer R. Victor, Esquire
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Co-Counsel for Respondent

Hon. Louis H. "Duke" Bloom, Circuit Judge
Thirteenth Judicial Circuit
Circuit Court of Kanawha County
Judicial Annex, Fifth Floor
111 Court Street
Charleston, WV 25301



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