

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia ex rel.  
West Virginia Department of Health and Human Resources,

SCA EFiled: May 19 2023  
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Petitioner,

vs.

No. 23-174

Honorable Steven L. Shaffer, Judge of the Circuit Court of Preston County,

Respondent.

AND

State of West Virginia ex rel.  
West Virginia Department of Health and Human Resources,

Petitioner,

vs.

No. 23-175

Honorable David R. Janes, Judge of the Circuit Court of Marion County,

Respondent.

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RESPONSE IN OPPOSITION TO WRITS OF PROHIBITION

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## I. STATEMENT OF THE CASE

### A. The Ongoing Abuse and Neglect Crisis.

May is National Foster Care Month,<sup>1</sup> and, as this response is filed, 6,362 West Virginia children are in foster care.<sup>2</sup> Without a trace of hyperbole, our state is battling an ongoing abuse and neglect crisis. The circuit courts in all fifty-five West Virginia counties are on the front lines of this battle, including the Respondents, the Honorable Steven L. Shaffer, Judge of the Circuit Court of Preston County, and the Honorable David R. Janes, Judge of the Circuit Court of Marion County.

In 2021, the most recent year for which full statistics are available, 5,876 abuse and neglect cases were filed in our circuit courts.<sup>3</sup> In Marion County, a total of 161 abuse and neglect cases represented 14% of all cases filed in that circuit court for 2021. In Preston County, a total of 122 abuse and neglect cases represented 18% of all cases filed in that circuit court for 2021. Notably, each of these two counties alone handled more abuse and neglect cases than the total of *all* combined case types filed in some counties in 2021. In at least five counties, abuse and neglect cases commanded at least one third of those circuit courts' entire docket.

Behind each petition number and faceless case caption is a child and, in most cases, a parent. West Virginia's public policy mandates that those children and parents are afforded a baseline level of socially necessary services, safety, and security during a judicial review of what is in the best interest of the child: moving them toward reunification with their parent or toward a safer and more fruitful childhood in a different, or improved, permanent setting.

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<sup>1</sup> W. Va. Dep't Health & Hum. Res., *West Virginia Celebrates Foster Care Month* (May 3, 2023), <https://dhhr.wv.gov/News/2023/Pages/West-Virginia-Celebrates-Foster-Care-Month.aspx>.

<sup>2</sup> W. Va. Dep't Health & Hum. Res., *West Virginia Child Welfare Dashboard*, <https://dhhr.wv.gov/Pages/childwelfare/datadashboard.aspx> [<https://perma.cc/RE89-GNDJ>] (last visited May 19, 2023).

<sup>3</sup> Sup. Ct. Appeals W. Va., *The 2021 Annual Statistics Report on Circuit, Family, and Magistrate Courts*, [http://www.courtswv.gov/public-resources/press/Publications/2021\\_Statistical\\_Annual\\_Report.pdf](http://www.courtswv.gov/public-resources/press/Publications/2021_Statistical_Annual_Report.pdf).

The Petitioner, West Virginia Department of Health and Human Resources (“DHHR”), now seeks, through these petitions for a writ of prohibition, to constrict the circuit courts’ inherent and statutorily-granted authority to ensure effective administration of the child welfare system.

**B. The Child Welfare System.**

Although several stakeholders are involved throughout the lifecycle of an abuse and neglect case, the circuit courts and DHHR play central roles and bear distinct responsibilities in furthering the purpose and goals of the child welfare system. Such roles and responsibilities are delineated statutorily. In pertinent part, the child welfare system must:

- (1) Assure each child care, safety and guidance;
- (2) Serve the mental and physical welfare of the child;
- (3) Preserve and strengthen the child family ties;
- (4) Recognize the fundamental rights of children and parents;
- (5) Develop and establish procedures and programs which are family-focused rather than focused on specific family members, except where the best interests of the child or the safety of the community are at risk;
- (6) Involve the child, the child’s family or the child’s caregiver in the planning and delivery of programs and services;
- (7) Provide community-based services in the least restrictive settings that are consistent with the needs and potentials of the child and his or her family;
- (8) Provide for early identification of the problems of children and their families, and respond appropriately to prevent Abuse and Neglect or delinquency[.]

W. Va. Code § 49-1-105(b). Ultimately, “[t]he state has a duty to assure that proper and appropriate care is given and maintained.” *Id.*

Our circuit courts have an enormous and vital role within the structure of the child welfare system. The circuit courts are called upon to conduct hearings on an array of issues essential to the



functioning of the system, including, but not limited to: judicial review of agency decisions; requests for injunctive relief; and hearings on child custody, outside placement, guardianship, adoption, temporary removal, emancipation, voluntary placement, and juvenile proceedings. *See, e.g.*, W. Va. Code § 49-2-105 (providing for judicial review of DHHR agency decisions); *id.* § 49-2-120 (allowing DHHR to seek injunctive relief through judicial review when serious harm to children may result); *id.* § 49-4-101 *et seq.* (titled “Court Actions” and describing a judge’s exercise of powers, procedures for appealing decisions, provisions regarding judicial review of child custody, procedures for hearings, and other instances of judicial action within the context of the child welfare system); *id.* § 49-4-105 (stating that each circuit court “is required to determine whether or not ‘reasonable efforts’ have been made to stabilize and maintain the family situation before any child may be placed outside the home”); *id.* § 49-4-601 *et seq.* (describing the procedures for a circuit court to use in cases of Child abuse and neglect); *id.* § 49-4-701 (providing circuit courts with jurisdiction and procedural rules for juvenile proceedings).

Indeed, the circuit courts’ oversight role in the system is not only broad but vital to the system’s proper functioning. This Supreme Court of Appeals has held that “[c]hild abuse and neglect cases must be recognized as being among the highest priority for the circuit courts’ attention. Unjustified procedural delays wreak havoc on a child’s development, stability and security.” *State ex rel. D.B. v. Bedell*, 246 W. Va. 570, 874 S.E.2d 682, 683 (2022) (citing Syl. Pt. 1, in part, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991)). This Court emphasizes that the circuit courts “must accord abuse and neglect cases the highest priority and must not let them languish during the critical formative years in a child’s life.” *In re Jonathan G.*, 198 W. Va. 716, 725, 482 S.E.2d 893, 903 (1996). In fact, this Court repeatedly has stated that “a child’s welfare acts as the ‘polar star by which the discretion of the court will be guided.’” *In re Timber M.*, 231

W. Va. 44, 59, 743 S.E.2d 352, 367 (2013) (quoting *In re Clifford K.*, 217 W. Va. 625, 634, 619 S.E.2d 138, 147 (2005)). *See also* W. Va. R. P. Child Abuse & Neglect Proc. 2 (explaining that the “rules shall be liberally construed to achieve safe, stable, secure permanent homes for abused and/or neglected children and fairness to all litigants” in a manner that, *inter alia*, reduces delay, provides for judicial oversight, and encourages coordination).

### C. Socially Necessary Services.

By fostering safety, permanency, and well-being, socially necessary services are at the intersection of the state’s responsibility, *via* DHHR, to assure appropriate care, as well as the circuit courts’ requirement to determine whether reasonable efforts to maintain the family unit were made. Socially necessary services are defined as “interventions necessary to improve relationships and social functioning, with the goal of preserving the individual’s tenure in the community or the integrity of the family or social system.”<sup>4</sup> Once an abuse and neglect proceeding is instituted, DHHR must “provide supportive services in an effort to remedy circumstances detrimental to a child,” W. Va. Code § 49-4-601(d), and “[t]he local child protective services office shall be responsible for providing, directing, or coordinating *the appropriate and timely delivery of services* to any child suspected or known to be abused or neglected, including services to the child’s family and those responsible for the child’s care,” *id.* § 49-2-802(e) (emphasis added).

DHHR’s Bureau for Children and Families, Aetna Better Health of West Virginia, and Kepro, a beneficiary and family-centered care quality improvement organization, “coordinate a system to authorize services in child welfare cases called the Socially Necessary Services Program.”<sup>5</sup> These services vary from region-to-region and family-to-family, but generally include:

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<sup>4</sup> W. Va. Dep’t Health & Hum. Res., *Child Protective Services Policy*, 102 (Rev. Feb. 2019), [https://dhhr.wv.gov/bcf/policy/Documents/CPS\\_Policy.pdf](https://dhhr.wv.gov/bcf/policy/Documents/CPS_Policy.pdf).

<sup>5</sup> Kepro, *Socially Necessary Services*, <https://wvaso.kepro.com/wv-aso-socially-necessary-services>.

life skills classes, parenting classes, drug and alcohol screening, individual counseling, couples counseling, family counseling, psychological evaluations, psychiatric evaluations, competency evaluations, childcare, housing assistance, play therapy for younger children, functional family therapy, bonding assessments, addiction severity index assessments, transportation, supervision, supervised visitation, connection visitation, respite, tutoring, and reunification services.<sup>6</sup>

#### **D. Lapses in Payments.**

These critical services are too vast to be delivered by a few institutions, and DHHR has vetted and contracted with an array of socially necessary service providers. These providers are often focused, sometimes exclusively, on providing services to the state and have agreed to abide by the state's reporting, rate of pay, and oversight requirements.

In late October 2022, West Virginia's Socially Necessary Services Program transitioned to a new software platform called Atrezzo.<sup>7</sup> Likewise, in early January 2023, DHHR "began transitioning its social services/child welfare system from the Families and Children Tracking System (FACTS) to the West Virginia People's Access to Help (WV PATH)."<sup>8</sup> Problems began almost immediately. As DHHR concedes, "[t]he implementation of WV PATH compounded an already existing problem with the state's administrative services organization, KEPRO, who changed its software in October 2023 [sic]." Pet'r's App. No. 23-174 at 000017; No. 23-175 at 000019–20 (Affidavit of Jeffery Pack, ¶ 5).

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<sup>6</sup> See Bureau Soc. Servs., *Socially Necessary Services Utilization Management Guidelines* (Apr. 7, 2023), <https://5627605.fs1.hubspotusercontent-na1.net/hubfs/5627605/Client%20Sites/WV%20ASO/Socially%20Necessary%20Services/SNS%20UM%204.7.23.pdf>.

<sup>7</sup> Kepro, *SNS Atrezzo Training Announcement*, <https://5627605.fs1.hubspotusercontent-na1.net/hubfs/5627605/Client%20Sites/WV%20ASO/Socially%20Necessary%20Services/SNS%20Atrezzo%20Training%20Announcement.pdf>.

<sup>8</sup> W. Va. Dep't Health & Hum. Res., *DHHR Transitions Child Welfare Information System to West Virginia People's Access to Help (WV PATH)* (Jan. 4, 2023), [https://dhhr.wv.gov/News/2023/Pages/DHHR-Transitions-Child-Welfare-Information-System-to-West-Virginia-People%27s-Access-to-Help-\(WV-PATH\).aspx](https://dhhr.wv.gov/News/2023/Pages/DHHR-Transitions-Child-Welfare-Information-System-to-West-Virginia-People%27s-Access-to-Help-(WV-PATH).aspx).

Given the strain of abuse and neglect caseloads on the circuit courts' docket, an unforced bureaucratic failure—such as neglecting to pay providers for essential services within a reasonable time—is sand in the gears of the wheels of justice. Lapses in payment lead to service delays and those service delays cause interruptions in the resolution of abuse and neglect cases. Lapses in services also jeopardize reunification efforts. Parents who are granted supervised visitation with their children do not get to see their children if the providers who supervise those visits are not available. When parents are ordered to attend counseling for substance use disorders and cannot receive those services, it perpetuates generational substance abuse as well as generational trauma. Such bureaucratic lapses threaten the economic livelihood of the service providers, who often operate on thin margins and shoestring budgets, which in turn jeopardizes the ongoing availability of socially necessary services, especially in our rural counties. Moreover, as discussed in greater detail below, the failure of DHHR to make timely payments for these services jeopardizes continued federal funding for the child welfare program statewide.

**E. The Subject Administrative Orders.**

Faced with this rising tide of concerns and consequences in abuse and neglect proceedings, and at the request of various local stakeholders, Judges Shaffer and Janes acted. Exercising their statutory authority under West Virginia Code Section 49-4-108(b), each entered an administrative order requiring payment (collectively, the “Administrative Orders”). Section 49-4-108(b) provides as follows:

At any time during any proceeding brought pursuant to this chapter, the court may upon its own motion, or upon a motion of any party, order the Department of Health and Human Resources to pay for socially necessary services rendered by an entity who has agreed to comply with §9-2-6(21) of this code. The Department of Health and Human Resources shall set the reimbursement rates for the socially necessary services: Provided, That if services are not provided within 30 days, the court may order a service to be provided by a

provider at a rate higher than the department established rate. The department may object and request to be heard, after which the court shall issue findings of fact and conclusions of law supporting its decision.

W. Va. Code § 49-4-108(b).

On February 7, 2023, Judge Janes entered an identical “Administrative Order Regarding Socially Necessary Services,” Pet’r’s App. No. 23-175 at 000001–3, in a total of seventy-eight pending abuse and neglect cases, some of which had been ongoing since 2020, *see* Resp’ts’ App. at 000041. Specifically, Judge Janes’s administrative order stated that, “on February 2, 2023, the Court became aware that [DHHR] was currently unable to enter referrals or provide payment for socially necessary services, including supervised visitations, to the families involved in ongoing abuse and neglect proceedings in Marion County, West Virginia.” Pet’r’s App. No. 23-175 at 000001. Citing his authority under Section 49-4-108, as discussed above, Judge Janes ordered DHHR to “make a direct payment to any socially necessary service provider involved in current abuse and neglect proceedings, as well as any future abuse and neglect proceedings in Marion County, West Virginia, within fifteen (15) business days of receipt of said invoices for socially necessary services.” *Id.* at 000001–2. Judge Janes likewise ordered DHHR to make full payments for socially necessary services rendered from “January 1, 2023 to present within fifteen (15) business days” from the entry of his order. *Id.* at 000002. Judge Janes reasoned that such order “serves the best interest of the children and their families, currently involved in ongoing abuse and neglect proceedings in Marion County, West Virginia,” and that the relief ordered therein “is the only way to avoid this Court having to make findings that the abuse and neglect cases in Marion County are not being properly managed and that reasonable efforts are not being made to achieve permanency.” *Id.*

Similarly, on February 10, 2023, Judge Shaffer entered a standing “Administrative Order re: Payment of Invoices for Socially Necessary Services.” Pet’r’s App. No. 23-174 at 000001–3. Like Judge Janes’s order, Judge Shaffer’s order states that “the Court became aware that the invoices submitted by service providers contracted to provide socially necessary services to adult respondents and other parties or individuals involved in Chapter 49 cases were not being timely paid by [DHHR].” *Id.* at 000001. Judge Shaffer also recognized that service providers “are stating they cannot provide services if their invoices are not timely paid by [DHHR].” *Id.* Citing his authority under Section 49-4-108(b) and recognizing that “the best interests of children and their families” involved in abuse and neglect cases “require the provision of socially necessary services,” Judge Shaffer ordered DHHR to “make a direct payment to any socially necessary service provider involved in current abuse and neglect proceedings, as well as any future abuse and neglect proceedings in Preston County, West Virginia, within fifteen (15) business days of receipt of said invoices for socially necessary services.” *Id.* at 000002. Judge Shaffer likewise ordered DHHR to make full payments for socially necessary services rendered from “January 1, 2023 to present within fifteen (15) business days” from the entry of his order. *Id.* at 000002–3. Judge Shaffer also reasoned that “failure to provide socially necessary services in cases instituted under West Virginia Code § 49-4-601 *et seq.* will result in findings by this Court that [DHHR] is not making reasonable efforts to achieve permanency and jeopardize Title IV-E federal funding.” *Id.* at 000001–2.

**F. DHHR’s Press Releases.**

Following the entry of the Administrative Orders, on February 10, 2023, DHHR issued a press release announcing—*for the first time*—that, “[a]s part of the conversion in January from the Families and Children Tracking System (FACTS) to the West Virginia People’s Access to Help

(WV PATH), payments have been manually entered with appropriate rates and are now being processed for payment.”<sup>9</sup> This release was directed to caregivers. Critically, DHHR did not discuss any ongoing disruptions in payments to socially necessary service providers or otherwise announce any anticipated interruptions. Despite DHHR’s protestations that the problem was short lived, disruptions in payments to socially necessary service providers persisted.

On February 21, 2023, DHHR issued another press release providing an “update” regarding delayed payments for “foster case families and agencies.”<sup>10</sup> DHHR’s update states that “[s]ome payments to **Socially Necessary Services Providers** (agencies) were paid last week. The remaining payments were released today.”<sup>11</sup>

On February 24, DHHR issued yet another press release in an attempt to placate foster families, stating that payments had been made to certain groups, including “Socially Necessary Services Providers,” and that “DHHR continues to work with agencies and individuals that may have missing information, such as updated W-9 forms, that may be causing a delay in their payment from being processed.”<sup>12</sup> Unfortunately, this shifts the responsibility for ongoing delays from DHHR to individuals and providers who may have missing information.

Recognizing that its lack of a confirmed payment schedule and unannounced delays wreak havoc on individuals and providers, DHHR acknowledged on March 1, 2023, that providers may have suffered late fees, overdraft charges, and other penalties resulting from its invoice issues and

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<sup>9</sup> W. Va. Dep’t Health & Hum. Res., *Phased Payment Approach to be Implemented for Certain Foster Families* (Feb. 10, 2023) (emphasis in original), <https://dhhr.wv.gov/News/Pages/Phased-Payment-Approach-to-be-Implemented-for-Certain-Foster-Families.aspx>.

<sup>10</sup> W. Va. Dep’t Health & Hum. Res., *DHHR Provides Update on Delayed Payments for Foster Care Families and Agencies* (Feb. 21, 2023), <https://dhhr.wv.gov/News/2023/Pages/DHHR-Provides-Update-on-Delayed-Payments-for-Foster-Care-Families-and-Agencies.aspx>.

<sup>11</sup> *Id.*

<sup>12</sup> W. Va. Dep’t Health & Hum. Res., *Update Provided on Delayed Payments for Foster Care Families and Agencies* (Feb. 24, 2023), <https://dhhr.wv.gov/News/Pages/Update-Provided-on-Delayed-Payments-for-Foster-Care-Families-and-Agencies.aspx>.

instituted an “application” process to have those costs reimbursed.<sup>13</sup> Once again, this put the onus on the individuals and agencies who were harmed by DHHR’s shortcomings to take steps and jump through additional hoops to rectify the problems DHHR created.

**G. The Motions to Vacate and Stay.**

A week later, on February 28, 2023, and approximately fifteen business days after the first order was entered, DHHR e-filed a “Notice of Limited Appearance” in one (of the more than seventy) cases where Judge Janes had entered his administrative order for the limited purpose of responding to that order. Pet’r’s App. No. 23-175 at 000004–5. DHHR’s “Motion to Vacate and Stay” was e-filed shortly thereafter, again, only in a single case. *Id.* at 00006–21. Also on February 28, 2023, a similar “Motion to Vacate and Stay” regarding Judge Shaffer’s administrative order was served on Chief Justice Walker, Judge Shaffer, and the Clerk of the Circuit Court of Preston County, West Virginia. Pet’r’s App. No. 23-174 at 000004–19. The motion was not filed in Preston County because DHHR did not open a miscellaneous civil proceeding in which the motion could be filed.<sup>14</sup>

The arguments DHHR set forth in its motions to vacate and stay the Administrative Orders echo many of the same arguments in the instant petitions. Specifically, DHHR argued that: (1) the Administrative Orders violate the separation of powers; (2) the Administrative Orders exceed the circuit courts’ judicial authority; (3) the Administrative Orders fail to recognize DHHR’s efforts to resolve ongoing invoice issues, most of which had since been paid; and (4) the Administrative

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<sup>13</sup> W. Va. Dep’t Health & Hum. Res., *DHHR Announces Application for Reimbursement of Fees Related to the Foster Care Payment Delay* (Mar. 1, 2023), <https://dhhr.wv.gov/News/2023/Pages/DHHR-Announces-Application-for-Reimbursement-of-Fees-Related-to-the-Foster-Care-Payment-Delay-.aspx>.

<sup>14</sup> DHHR’s failure to open a miscellaneous civil proceeding prevented Judge Shaffer from acting upon the motion to vacate and stay, as it was essentially nothing but an *ex parte* communication.



Orders attempt to modify DHHR’s existing contracts with providers. Pet’r’s App. No. 23-174 at 000004–19; No. 23-175 at 000006–21.

With each motion, DHHR attached an Affidavit of Jeffrey Pack, the Commissioner for DHHR’s Bureau for Social Services. Pet’r’s App. No. 23-174 at 000017–18; No. 23-175 at 000019–20. In Paragraph 4 of his affidavit, Commissioner Pack admitted that, “[t]ypically, the contracts the DHHR has with its vendors do not prescribe a time period in which the DHHR is required to pay vendor invoices, just as the contracts do not require that the vendors submit invoices for payment within a certain time period after providing services, except the invoices must be submitted within one year of the services provided.” Pet’r’s App. No. 23-174 at 000017; No. 23-175 at 000019. Commissioner Pack addressed the technology issues discussed above and went on to vaguely state in Paragraph 6 of his affidavit that, “[a]s we work to address these issues, specific steps have been taken to ensure payments are continuing to be processed for our service providers.” Pet’r’s App. No. 23-174 at 000018; No. 23-175 at 000020. Finally, Commissioner Pack explained in Paragraph 7 of his affidavit that “[p]ayments to SNS [socially necessary service] Providers for any past due invoices were made in January 2023. Subsequently, payments for January 2023 invoices were made in February. This process will continue until the systems are working as planned.” Pet’r’s App. No. 23-174 at 000018; No. 23-175 at 000020.<sup>15</sup>

#### **H. The Petitions for a Writ of Prohibition.**

Notably, DHHR neither noticed either motion in the separate circuit courts for a hearing, nor opened a miscellaneous action necessary to file its “Motion to Vacate and Stay” against Judge

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<sup>15</sup> As mentioned above, mere days after the motions to vacate and Commissioner Pack’s affidavit, DHHR issued yet another press release on March 3, 2023, announcing an application for reimbursement of late fees caused by its disruptions in payments. W. Va. Dep’t Health & Hum. Res., *DHHR Announces Application for Reimbursement of Fees Related to the Foster Care Payment Delay* (Mar. 1, 2023), <https://dhhr.wv.gov/News/2023/Pages/DHHR-Announces-Application-for-Reimbursement-of-Fees-Related-to-the-Foster-Care-Payment-Delay-.aspx>.

Shaffer's standing administrative order. Rather, instead of developing the record or exercising any remedies available before the judges who issued the orders, DHHR filed twin petitions for a writ of prohibition in these now-combined cases on March 24, 2023.

## **II. SUMMARY OF ARGUMENT**

DHHR is not entitled to the extraordinary relief it seeks. The petitions fail to satisfy any of the factors the Court considers when determining whether to entertain a writ of prohibition under Syllabus Point 4 of *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). A writ would be inappropriate where (1) DHHR has other adequate means to obtain the desired relief, as DHHR's motions to vacate the Administrative Orders have not yet been decided; (2) DHHR will not be damaged or prejudiced in the absence of a writ where it allegedly has remedied the invoice issue caused by its new technology platform; (3) the Administrative Orders are not clearly erroneous as a matter of law; (4) the Administrative Orders do not represent an oft repeated error or disregard for substantive or procedural law; and (5) the Administrative Orders do not raise new problems or present an issue of first impression based on this Court's prior decisions in *Hewitt v. West Virginia Department of Health and Human Resources*, 212 W. Va. 698, 575 S.E.2d 308 (2002), and *In re Chevie V.*, 226 W. Va. 363, 700 S.E.2d 815 (2010).

Perhaps most importantly of the *Hoover* factors, neither Judge Shaffer's nor Judge Janes's orders are clearly erroneous as a matter of law. The Administrative Orders did not exceed the scope of the circuit courts' authority because West Virginia Code Section 49-4-108 provides broad latitude for circuit court judges to order DHHR to pay socially necessary service providers at any time.

Additionally, the Administrative Orders do not violate the separation of powers under the West Virginia Constitution because the abuse and neglect system was designed by the Legislature

to operate with judicial oversight of executive branch functions to ensure that the rights of children and families are protected. Furthermore, DHHR has limited statutory discretion as it relates to the payment of service providers, which is not infringed upon by the circuit court exercising its statutory authority.

The Administrative Orders do not unduly contravene contracts between the service providers and DHHR where such contracts admittedly lack provisions regarding timing for payments and otherwise cutting the circuit courts out of the payment process would be contrary to public policy.

Finally, statutory duties and public policy support an active role for the circuit courts in the administration and availability of socially necessary services where disruptions to such services could jeopardize federal funding and undermine the purposes of the child welfare system generally.

### **III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

As discussed in further detail below, the Administrative Orders are appropriate applications of the circuit courts' statutory and inherent authority. Accordingly, there is no basis to issue a Rule to Show Cause because DHHR fails to satisfy any of the *Hoover* factors for the issuance of a writ. However, if the Court finds that oral argument is appropriate, Judge Shaffer and Judge Janes request oral argument under West Virginia Rule of Appellate Procedure 20. DHHR's attempt to limit the ability of circuit judges to exercise their inherent and statutory authority to oversee abuse and neglect cases is an issue of "fundamental public importance" justifying full oral argument and a signed opinion. *See* W. Va. R. App. P. 20(a)(2).

#### IV. ARGUMENT

##### A. This Court Should Not Entertain Writs of Prohibition Because DHHR Fails to Satisfy Any of the Factors under *Hoover*.

As a threshold matter, DHHR is not entitled to the extraordinary relief it seeks. As this Court has recognized, “[a] writ of prohibition is an extraordinary remedy reserved for extraordinary causes.” *State ex rel. Yurish v. Faircloth*, 243 W. Va. 537, 542, 847 S.E.2d 810, 815 (2020). Likewise, “[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W. Va. Code 53-1-1.” Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977). *See also* Syl. Pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953) (“Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari.”).

In *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996), this Court held as follows:

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.

*Id.* at Syl. Pt. 4.

DHHR's reliance on *State ex rel. West Virginia Department of Health and Human Resources v. Bloom*, 247 W. Va. 433, 880 S.E.2d 899 (2022), is misplaced. The writ of mandamus in *Bloom* was established by a narrowly tailored, *agreed* mandamus order that eventually ballooned into requests for statewide enforcement. By contrast here, although the orders in these combined cases command compliance, the Administrative Orders are neither mandamus writs nor orders to show cause for contempt. The Administrative Orders derive from the circuit courts' authority granted in West Virginia Code Section 49-4-108 and separately involve only two counties. Further, as will be expanded on below, DHHR's classification of these orders as *ex parte* writs of mandamus is an obvious ploy to mutate the Administrative Orders into foes easier to challenge on a petition for writ of prohibition and obfuscate DHHR's failure to first remedy its concerns in the circuit courts.

Because DHHR fails to satisfy *any* of the factors set forth in *Hoover*, its petitions should be denied.

**1. DHHR has other adequate means to obtain the desired relief where motions to vacate the Administrative Orders have not yet been decided.**

The first *Hoover* factor weighs against the issuance of a writ where DHHR has other adequate means to obtain its desired relief. Namely, DHHR's respective motions to vacate the Administrative Orders have not yet been decided. Contrary to DHHR's contentions, if DHHR has not yet received a ruling from Judge Janes, it is because DHHR did not set its motion for a hearing or otherwise comply with West Virginia Trial Court Rule 22.04, which states that "[a]ny motion requiring immediate disposition shall be called to the attention of the court by the party filing such motion." W. Va. Trial Ct. R. 22.04.

Likewise, if DHHR has not yet received a ruling from Judge Shaffer, it is because DHHR did not file a miscellaneous action to docket the motion, as it was advised to do.<sup>16</sup> Once again, contrary to DHHR's contention, miscellaneous actions most certainly are not "unheard of" in our judicial system. *See Brozik v. Parmer*, No. 16-0238, 2017 WL 65475, at \*2 n.3 (W. Va. Jan. 6, 2017) (discussing a miscellaneous action to execute a judgment); *see also Rodrick v. Kauffman*, 455 F. Supp. 3d 546, 547 (M.D. Tenn. 2020) ("In general, miscellaneous actions are used for administrative matters that require resolution through the judicial system.").

Thus, DHHR finds itself making a circular argument. It contends that the first *Hoover* factor is satisfied because the circuit courts have not ruled on the motions to vacate. Yet, the motions to vacate have never been ruled on because of DHHR's failure to notice its own motions for hearing. Simply put, DHHR's failure to pursue the necessary steps to obtain adequate remedies does not mean that adequate remedies do not exist.

Furthermore, DHHR cannot argue that the Administrative Orders are non-appealable interlocutory decisions when it did not inform the circuit courts that it intended to seek extraordinary relief or request that the circuit courts enter an order containing findings of fact and conclusions of law. Such actions are conditions precedent to seeking a writ of prohibition.

As this Court held in *State ex rel. Allstate v. Gaughan*, 203 W. Va. 358, 508 S.E.2d 75 (1998):

A party seeking to petition this Court for an extraordinary writ based upon a non-appealable interlocutory decision of a trial court, must request the trial court set out in an order findings of fact and conclusions of law that support and form the basis of its decision. In making the request to the trial court, counsel must inform the trial court specifically that the request is being made because counsel intends to seek an extraordinary writ to challenge the court's ruling.

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<sup>16</sup> That Judge Shaffer decided to issue a standing order, rather than the same order in multiple cases, was well within his inherent authority to control his docket. *See State ex rel. Almond v. Rudolph*, 238 W. Va. 289, 296, 794 S.E.2d 10, 17 (2016) ("This Court has consistently protected the right and authority of a trial court to manage its docket . . .").

When such a request is made, trial courts are obligated to enter an order containing findings of fact and conclusions of law. Absent a request by the complaining party, a trial court is under no duty to set out findings of fact and conclusions of law in non-appealable interlocutory orders.

*Id.* at Syl. Pt. 6.

Syllabus Point Six of the *Gaughan* decision is more than a mere procedural technicality, it is an important prerequisite to extraordinary writs because it creates an adequate record for appellate review. Without the findings of fact and conclusions of law, the appellate court is denied an adequate record of the ruling below. Here, DHHR failed to request a hearing on its motions to vacate, failed to comply with *Gaughan*, and, as a result, cannot argue that it has no adequate remedy below.

Because DHHR had other adequate remedies available at law, its petitions should be denied.

## **2. DHHR will not be damaged or prejudiced.**

The second *Hoover* factor further weighs against the issuance of a writ where DHHR has conceded that it will not be damaged or prejudiced by the Administrative Orders. Although DHHR equivocates throughout its petitions, arguing on one hand that it is impossible to comply with the Administrative Orders, while claiming that it has already remedied the invoice issues on the other, if DHHR indeed “has made exhaustive efforts to remedy what was a temporary and unforeseen delay in payments due to a software malfunction,” *see, e.g.*, Pet’r’s Br. No. 23-174 at 7, then it strains the imagination to comprehend how DHHR possibly could be prejudiced, having purportedly satisfied the situations the Administrative Orders were designed to address.

As this Court recognized in *State ex rel. Jaguar Land Rover Ltd. V. King*, No. 19-0222, 2019 WL 5681486 (W. Va. Nov. 1, 2019), a party is not aggrieved, and therefore not entitled to

prohibitory relief, where it has performed the action a disputed order compelled it to take. *Id.* at \*4. In *Jaguar*, the petitioner sought prohibitory relief from a discovery order. *Id.* This Court explained that the petitioner had agreed to identify and provide materials pursuant to the parties' approved Core Documents Agreement. As such, this Court reasoned that "it is difficult to conceive how [the petitioner] could be damaged or prejudiced by requiring it to provide information it either has an obligation to disclose or has agreed to provide . . . ." *Id.* So too here, if DHHR has in fact made the payments the Administrative Orders commanded it to make, its petitions should be denied where it could not be prejudiced.

It is also not persuasive on a petition for writ of prohibition to argue that there is no duration on the orders or that a different time frame for payment might be more reasonable. As DHHR is well aware, these are discretionary calls which could be addressed through proceedings and procedures at the circuit court level. DHHR's petitions for a writ of prohibition argue that Judge Shaffer and Judge Janes exceeded their authority in entering the Administrative Orders, irrespective of whether DHHR had one business day or one hundred business days to pay. DHHR's prejudice, if any from the date selected for payment or the duration of the orders, is first addressable in a circuit court proceeding, not a writ of prohibition.

**3. The Administrative Orders are not clearly erroneous as a matter of law.**

In addition, the third *Hoover* factor is not satisfied where the circuit courts' Administrative Orders were not erroneous as a matter of law. As discussed at length in Section IV.B below, the Administrative Orders did not exceed the scope of the circuit courts' authority because West Virginia Code Section 49-4-108 provides broad authority for circuit court judges to order DHHR to pay socially necessary service providers at any time. Also, the Administrative Orders do not violate the separation of powers under the West Virginia Constitution because the abuse and



neglect system in West Virginia is founded upon on the concept of judicial oversight of executive branch functionality.

This Court repeatedly has stated “that circuit court judges must take whatever steps are necessary to monitor abuse and neglect cases pending before them in a diligent and expeditious fashion.” *In re Brian D.*, 194 W. Va. 623, 635, 461 S.E.2d 129, 141 (1995). DHHR is subject to judicial review and circuit court decisions on virtually every aspect of its involvement in the abuse and neglect process. Additionally, DHHR has limited statutory discretion as it relates to payment of service providers, which is not infringed upon by the circuit court exercising its statutory authority. Finally, the Administrative Orders do not interfere with contracts between the service providers and DHHR where the statute provides the circuit court with authority to order payment and the contracts do not supply conflicting requirements. In the absence of clear legal error, DHHR’s petitions should be denied.

**4. The Administrative Orders do not represent an oft repeated error or disregard for substantive or procedural law.**

The fourth *Hoover* factor also weighs against the issuance of a writ because the Administrative Orders do not embody an oft repeated error or disregard for substantive or procedural law. If, as DHHR contends, the pervasive issues surrounding the invoices which spurred the Administrative Orders are the result of an isolated technology transition event, then, manifestly, the Administrative Orders could not present an oft repeated error. In any event, DHHR’s petitions demonstrate a disregard for substantive law where it has denied the circuit courts’ valid actions under West Virginia Code Section 49-4-108. Likewise, it is DHHR that flouted the proper procedures by hastily filing the instant petitions, rather than setting its motions to vacate for a hearing and developing the record below before seeking extraordinary relief from this Court.

These Administrative Orders are also the first time either court has taken affirmative steps to cure a growing cascade of concerns surrounding parents' and children's access to socially necessary service providers in abuse and neglect proceedings. These orders were not entered in October 2022 when the first computer payment problems arose; instead Judge Shaffer and Judge Janes carefully construed their authority and gave DHHR time to correct its errors.

As such, DHHR's requests should be denied.

**5. The Administrative Orders do not raise new problems or present an issue of first impression.**

Finally, the fifth *Hoover* factor is not satisfied because the Administrative Orders do not raise new problems or present issues of first impression. Rather, as discussed in greater detail below, this Court previously recognized the circuit courts' statutory authority to order DHHR to make payments. *See e.g., Hewitt v. West Virginia Dep't of Health & Hum. Res.*, 212 W. Va. 698, 702, 575 S.E.2d 308, 312 (2002); *In re Chevie V.*, 226 W. Va. 363, 370, 700 S.E.2d 815, 822 (2010). For these reasons alone, DHHR's petitions should be denied.

In sum, none of the five *Hoover* factors weigh in favor of entertaining a writ here.

**B. The Circuit Courts Did Not Commit Any Legal Error—Let Alone Clear Legal Error—by Entering the Administrative Orders.**

Neither Judge Shaffer's nor Judge Janes's orders are clearly erroneous as a matter of law. The Administrative Orders did not exceed the scope of the circuit courts' authority because West Virginia Code Section 49-4-108 evinces a legislative history supporting broad latitude for circuit court judges to order DHHR to pay socially necessary service providers. The Administrative Orders also do not violate the separation of powers under the West Virginia Constitution. The abuse and neglect system in West Virginia is founded upon on the concept of judicial oversight: DHHR's processes and decisions are subject to judicial review throughout the abuse and neglect

process. Additionally, DHHR has limited statutory discretion as it relates to payment of service providers, which is not infringed upon by the circuit court exercising its statutory authority. Finally, these Administrative Orders do not unduly contravene contracts between the service providers and DHHR because cutting the circuit court out of the payment process would be contrary to public policy and DHHR admits that such contracts do not contain terms regarding the timing of payment. This Court should deny the petitions for a writ of prohibition in the absence of the weighty factor of clear error.

**1. The Administrative Orders did not exceed the scope of Judge Shaffer's and Judge Janes's authority.**

DHHR argues that West Virginia Code Section 49-4-108 offers the circuit courts no authority for their actions, but that argument is misguided. Section 49-4-108 demonstrates broad statutory authority for the limited actions of the circuit courts here.

In *Hewitt v. West Virginia Department of Health and Human Resources*, 212 W. Va. 698, 702, 575 S.E.2d 308, 312 (2002), this Court examined then-Section 49-7-33, which would later be reorganized as Section 49-4-108 in 2015. *See* 2015 W. Va. Acts 612 (effective February 16, 2015; operative May 17, 2015). Although *Hewitt* was attempting to determine the authority of the circuit court to order payment of expert fees associated with abuse and neglect proceedings prior to the establishment of Section 49-7-33, its creation was critical to the arguments of the parties regarding whether DHHR was required to pay Dr. Hewitt. For instance, DHHR made a similar separation of powers argument to the one it makes today:

Based on the enactment of West Virginia Code § 49-7-33, DHHR argues that the circuit court's entry of the August 16, 2001, order constitutes a separation of powers issue in that the order disregards the agency's authority to establish the rate for expert fee payments consistent with the Medicaid rate for such services.

*Hewitt*, 212 W. Va. at 702, 575 S.E.2d at 312.

“DHHR argue[d] that ‘it has the right as an Executive Branch Agency to determine what its payment obligations are.’” *Id.* at 703 n.9, 575 S.E.2d at 313 n.9. This Court rejected that argument as “not realistically reflect[ing] the situation presented by the necessary interworkings of the judicial branch and the executive branch in instances of cases involving children who require the services of this state.” *Id.* Section 49-7-33 (now Section 49-4-108) does not grant DHHR exclusive authority regarding payment for professional services rendered by a health care professional to a child or other party. *Id.* at 702–03, 575 S.E.2d at 312–13. “Critically, however, a circuit court still retains the ultimate authority for entry of all orders directing payment of expert witness fees in abuse and neglect matters.” *Id.* at 703, 575 S.E.2d at 313. Section 49-7-33 “only operate[s] as a restriction on the amount that can be charged when DHHR is ordered by the trial court to pay for health care services in connection with matters arising under articles five and six of chapter 49.” *Id.*

Part of the rationale for the *Hewitt* Court’s endorsement of an active role for the judiciary when ordering the payment of a professional’s fees changed following *Hewitt*. See *In re Chevie V.*, 226 W. Va. 363, 370, 700 S.E.2d 815, 822 (2010) (noting legislative change in then-Section 49-6-4). However, this Court later reaffirmed the principles in *Hewitt* and the plain text of then-Section 49-7-33:

Pursuant to the plain language of W. Va. Code § 49-7-33 (2002) (Repl. Vol. 2009), a circuit court “may . . . order the West Virginia Department of Health and Human Resources to pay for professional services” incurred in a child abuse and neglect proceeding. Such “professional services include, but are not limited to, “evaluation, report preparation, consultation and preparation of expert testimony” by an expert witness. W. Va. Code § 49-7-33.

Syl. Pt. 5, *Chevie V.*, 226 W. Va. 363, 700 S.E.2d 815 (alteration in original). The *Chevie V.* Court also reiterated the conclusion in *Hewitt* that DHHR had “the sole authority to determine the fee

schedule by which professionals will be paid under W. Va. Code § 49-7-33.” *See id.* at Syl. Pt. 6. Thus, as of 2010, this Court had determined that the circuit courts and DHHR both played a role in the payment of fees in abuse and neglect cases, with DHHR’s exclusive authority limited to rate setting.

Chapter 49 was recodified in 2015, and West Virginia Code Section 49-7-33 became Section 49-4-108. *See* 2015 W. Va. Acts 612. Even still, the Legislature was explicit that “each specific reenactment of a substantively similar prior statutory provision will be construed as continuing the intended meaning of the corresponding prior statutory provision and any existing judicial interpretation of the prior statutory provision.” W. Va. Code § 49-1-102. Thus, the principles we can rely on from *Hewitt* and *Chevie V.* were still applicable as of 2015.

Following the recodification in 2015, the statute remained the same until 2019, when it was amended again in House Bill 2010. *See* H.B. 2010, 84th Leg., Reg. Sess. (W. Va. 2019). Pursuant to that Act, the West Virginia Legislature—the body charged with expressing the will of the people—*broadened* the circuit courts’ authority in ordering payment beyond that discussed in *Chevie V.* First, Section 49-4-108 now applies not just to court actions, but to any professional service provided in child welfare, as the Legislature amended the word “article,” wherein Article 4 deals with “Court Actions,” to “chapter,” which is applicable to all articles for Chapter 49. *See* H.B. 2010, Comm. Substitute at 18–19. A section (b) was added, and the exclusivity of DHHR in rate setting was trimmed. *Id.*

West Virginia Code Section 49-4-108 now reads:

(a) At any time during any proceedings brought pursuant to this chapter, the court may upon its own motion, or upon a motion of any party, order the Department of Health and Human Resources to pay the Medicaid rates for professional services rendered by a health care professional to a child or other party to the proceedings. Professional services include, but are not limited to, treatment,

therapy, counseling, evaluation, report preparation, consultation and preparation of expert testimony. A health care professional shall be paid by the Department of Health and Human Resources upon completion of services and submission of a final report or other information and documentation as required by the policies implemented by the Department of Health and Human Resources: Provided, That if the service is covered by Medicaid and the service is not provided within 30 days, the court may order the service to be provided by a provider at a rate higher than the Medicaid rate. The department may object and request to be heard, after which the court shall issue findings of fact and conclusions of law supporting its decision.

(b) At any time during any proceeding brought pursuant to this chapter, the court may upon its own motion, or upon a motion of any party, order the Department of Health and Human Resources to pay for socially necessary services rendered by an entity who has agreed to comply with §9-2-6(21) of this code. The Department of Health and Human Resources shall set the reimbursement rates for the socially necessary services: Provided, That if services are not provided within 30 days, the court may order a service to be provided by a provider at a rate higher than the department established rate. The department may object and request to be heard, after which the court shall issue findings of fact and conclusions of law supporting its decision.

W. Va. Code § 49-4-108.

Section 49-4-108(a) is explicit that the circuit court, *sua sponte*, may “order the Department of Health and Human Resources to pay the Medicaid rates for professional services rendered by a health care professional to a child or other party to the proceedings.” *Id.* Subsection (b) grants the circuit courts the same explicit powers related to those “socially necessary services rendered by an entity who has agreed to comply with § 9-2-6(21) of this code.”<sup>17</sup> W. Va. Code § 49-4-108(b). “[T]his statutory language [is] plain and capable of but one construction.” *Chevie V.*, 226 W. Va. at 372, 700 S.E.2d at 824. “When a statute is clear and unambiguous and the legislative intent is

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<sup>17</sup> Section 9-2-6(21) discusses the power of the Secretary of DHHR to ensure compliance with federal and state grant funding sources by requiring providers to certify that their bills or claims are accurate and that the entity has complied with all policies and laws. Should there be an issue, the entity agrees to repay DHHR, with intentional findings leading to termination of the service provider agreement.

plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.” *Id.* at Syl. Pt. 3.

In the face of plain authority for the circuit court to order DHHR *to pay* the set fee for the services provided, DHHR argues there is no authority for the circuit court to say *when*; thus, the Administrative Orders setting a time frame for payment are clearly erroneous. This interpretation of Section 49-4-108 is inapposite even in simple parlance, much less jurisprudential interpretation. For instance, the statute does not outline the method of payment either (i.e., via check, direct deposit, ACH transfer, wire transfer, or cash), but that has never been a stumbling block for DHHR. DHHR, as an administrative agency is a creature of statute, so “they must find within the statute warrant for the exercise of any authority which they claim.” Syl. Pt. 4, *McDaniel v. W. Va. Div. of Lab.*, 214 W. Va. 719, 591 S.E.2d 277 (2003). “They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.” *Id.* The only express power granted to DHHR in Section 49-4-108(a) is the power to request a hearing if the circuit court adopts a rate beyond the Medicaid rate. As to Section 49-4-108(b), dealing with socially necessary services, DHHR has the power to “set the reimbursement rates.” DHHR does not and cannot argue any implied power authorizes it to solely establish when it must pay an entity for a socially necessary service.

Importantly, DHHR does cite to West Virginia Code Section 49-2-101, which notes the Bureau of Social Services will be continued within DHHR and lays out, in the broadest strokes, what the role of the Bureau is: caring for and taking custody of certain children. However, “[t]he general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.” Syl. Pt. 4, *In re Chevie V.*, 226 W. Va. 363, 700 S.E.2d 815 (2010). Section 49-4-108 deals with the specific

issue of payment for services in child welfare cases, and nothing within the statute implies that it is clearly erroneous for a court to order the timing of payment.

In fact, Section 49-4-108 states that “at any time” the circuit court may order DHHR to pay for a service. Thus, DHHR’s argument is that—even though the circuit court has the express authority to “at any time” enter an order to make it pay a bill for a service—it can *ignore* that court order until it is ready, on its own, to make that payment. That is not how court orders work, and that is not how the Legislature intended Section 49-4-108 to work. Judge Shaffer and Judge Janes had the authority, based on West Virginia Code Section 49-4-108 to enter orders of payment for services within a specified amount of time.<sup>18</sup> The Administrative Orders do not exceed that authority.

**2. The Administrative Orders do not violate the separation of powers under the West Virginia Constitution.**

The legislative grant of authority keeps the *tete-a-tete* between the circuit courts and DHHR out of constitutional concern. Article III, Section 8-7 of the West Virginia Constitution notes that circuit court judges have “such other jurisdiction, authority or power, original or appellate or concurrent, as may be prescribed by law.” W. Va. Const. art. III, § 8-7. As described in dozens of different Code sections, the circuit courts play a vital role, essentially overseeing DHHR in virtually every aspect of proceedings under the rubric of our child welfare system. *See, e.g.*, W. Va. Code § 49-4-101 *et seq.* and other Code sections cited *infra*. Court oversight regarding the best interests of the child is so fundamental that “the circuit court retains jurisdiction to oversee the

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<sup>18</sup> Orders like the ones at issue in this matter are rare. Circuit courts are reluctant to second guess the functioning of DHHR, particularly considering the many critical functions DHHR is tasked with carrying out. However, once DHHR fails to perform its duties in providing compensation for services, it cannot be surprised that the Courts overseeing those actions would enter orders to prevent the system from failing.



custodial placement of children subject to abuse and neglect proceedings at the close of those proceedings.” Syl. Pt. 3, in part, *In re T. M.*, 242 W. Va. 268, 835 S.E.2d 132 (2019).

Indeed, this Court repeatedly has recognized the crucial and hands-on role delegated by the Legislature (through statute) to the circuit courts in the abuse and neglect system. This Court has held that:

courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family.

*In Int. of Carlita B.*, 185 W. Va. 613, 616, 408 S.E.2d 365, 368 (1991).

Even broader than the circuit courts’ participation in the multi-disciplinary team setting, the judiciary’s role in overseeing the actions of DHHR has been recognized in West Virginia for decades, as the children who appear before circuit judges in abuse and neglect proceedings are considered “wards” of the court:

This Court has explained that “we remain mindful that . . . whenever a child appears in court, he is a ward of that court. W. Va. Code § 49-5-4 (1996)<sup>[19]</sup>; *Mary D. v. Watt*, 190 W. Va. 341, 438 S.E.2d 521 (1992). Courts are thus statutorily reposed with a strong obligation to oversee and protect each child who comes before them.” *In re B.H.*, 233 W. Va. 57, 65, 754 S.E.2d 743, 751 (2014) (internal citations omitted).

*State ex rel. Ridge v. W. Va. Dep’t of Health & Hum. Res.*, 238 W. Va. 268, 274, 793 S.E.2d 918, 924 (2016) (first alteration in original) (footnote added); *see also id.* 238 W. Va. at 275, 793 S.E.2d

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<sup>19</sup> As discussed above, Chapter 49 was recodified 2015. Then-Section 49-5-4 read: “A person under the age of eighteen years who appears before the circuit court in proceedings under this article shall be considered a ward of the court and protected accordingly.” Nearly identical language now appears in West Virginia Code Section 49-4-701(a), which reads: “A person under the age of eighteen years who appears before the circuit court in proceedings under this article is a ward of the court and protected accordingly.” W. Va. Code § 49-4-701(a).

at 925 (holding that, if a child is “at risk,” the Court may “take such action as it deems appropriate and necessary to protect that child” (citation omitted)).<sup>20</sup>

In remanding the *Ridge* case to the circuit court for further proceedings, this Court held:

Any significant change to children’s residential services is the concern of the judicial branch and will benefit from cooperation among all three branches of government. The children of this State benefit from such cooperative efforts, and this Court is exceedingly discouraged both by the apparent absence of collaboration and communication among the Petitioners and the Respondents in this matter and the DHHR’s alleged refusal to work with the Juvenile Justice Commission in embarking upon dramatic policy changes that could vitiate the quality of care for children in residential care facilities.

*Id.* at 275, 793 S.E.2d at 925. Thus, this Court repeatedly has recognized the judiciary’s role in virtually every aspect of the abuse and neglect system, including oversight of DHHR operations when those operations affect the rights of the children in the system.

In addition to the broad authority the Legislature delegated to the judicial branch in overseeing abuse and neglect proceedings, the specific issue here (payment of service providers) also is prescribed by law to circuit judges. *See, e.g.*, W. Va. Code § 49-4-108. Critically, DHHR does not argue that the law itself is unconstitutional.

Rather, DHHR cites general platitudes regarding the separation of powers and argues that an order determining when it must pay entities that provide socially necessary services encroaches on its discretion as an administrative agency. But as noted earlier, “[a]n administrative body is vested with only that power specifically granted to it by the Legislature.” *State ex rel. State Farm Mut. Auto. Ins. v. Marks*, 230 W. Va. 517, 529, 741 S.E.2d 75, 87 (2012). “The legislature may

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<sup>20</sup> The *Ridge* case is particularly informative, as it involved the balancing of the right of DHHR to contract with service providers and the judiciary’s mandate to protect the rights of children. The writ was granted as moulded against DHHR and the case was transferred to the Circuit Court of Kanawha County for further proceedings in order to develop a more robust record. 238 W. Va. at 274, 793 S.E.2d at 924.

not vest an administrative agency with uncontrolled discretion.” *Id.* at 529, 741 S.E.2d at 87. Here, as to socially necessary services, DHHR is vested with limited ability to set the rates for the service providers. But the circuit courts have the overriding authority to order DHHR to pay the service providers, and, if there is a lapse in services, to agree with the service providers on the rates, which could be considerably higher than Medicaid rates. The Legislature incentivized DHHR to exercise its rate-setting authority or otherwise lose it. But there is no corresponding executive power to exclude judicial oversight in ordering when DHHR needs to pay these providers.

In other words, by the plain text of Section 49-4-108, the circuit courts have the *discretion* to order payment. Accordingly, the circuit courts may elect to exercise that discretion, through orders presently on review, or the circuit courts may elect not to take any action, allowing DHHR and the providers to reach mutually acceptable payment schedules. That shift in discretion to the circuit courts and away from the agency is what sets this case apart from cases like *In re Brandon H.S.*, 218 W. Va. 724, 629 S.E.2d 783 (2006), where this Court held that “the extreme nature of [staffing irregularities in the Bureau of Social Services] does not justify an invasion of the executive branch’s province to set the salaries of its employees.” *Id.* at 731, 629 S.E.2d at 790.

Instead, this matter is more akin to cases such as *State ex rel. State Farm Mut. Auto. Ins. v. Marks*, 230 W. Va. 517, 741 S.E.2d 75 (2012), where insurers argued that, because the Department of Insurance regulated their ability to use their insured’s medical records, the circuit courts lacked the authority to regulate those issues in discovery. *Id.* at 528, 741 S.E.2d at 86. This Court noted, however, that an agency’s power is limited, and, when it intrudes on exclusive judicial authority, it is the agency’s power that must yield under the separation of powers doctrine—not that of the courts. *See id.* at 530, 741 S.E.2d at 88 (“While we can abide by the Insurance Commissioner’s enforcement of its privacy regulations, we simply cannot condone a construction of such rules that

would permit an agency's standards to serve as a substitute for a valid protective order issued by a court of this State with the exclusive authority to do so."); *see also* *McDaniel v. W. Va. Div. of Lab.*, 214 W. Va. 719, 728–29, 591 S.E.2d 277, 286–87 (2003) (recognizing that the Legislature granted numerous powers to the Division of Labor, but, in the absence of express statutory authority or implicit delegation of power, the agency could not award damages).

Contrary to DHHR's contention that it alone can decide when to make payments for socially necessary services, DHHR is the one encroaching on judicial authority where the circuit courts are expressly authorized by law to order payment for such services as part of any abuse and neglect proceeding. *See* Syl. Pt. 2, *Appalachian Power Co. v. Pub. Serv. Comm'n of W. Va.*, 170 W. Va. 757, 296 S.E.2d 887 (1982) ("Where there is a direct and fundamental encroachment by one branch of government into the traditional powers of another branch of government, this violates the separation of powers doctrine contained in Section 1 of Article V of the West Virginia Constitution."). Accordingly, DHHR's argument that "[p]ayment of vendor services is a discretionary function of the DHHR, and it takes place within the parameters of the DHHR's applicable contracts," *see, e.g.*, Pet'r's Br. No. 23-174 at 14, is a misstatement of law—at least as to payment for social necessary services in child abuse and neglect proceedings—where Section 49-4-108(b) gives the circuit courts the discretion to order payment at any time. Accordingly, the judicial branch is not encroaching on the exclusive authority of the executive branch, and there is no separation of powers concern.

### **3. The Administrative Orders do not improperly amend existing contracts between DHHR and its providers.**

In its final argument in support of a writ of prohibition, DHHR argues that the Administrative Orders entered by the circuit courts here improperly amend the contracts between it and the service providers. Tellingly, DHHR cites no legal authority for any of its points regarding

its exclusive contractual authority. Moreover, the record before the Court shows that DHHR does not have an established time in its contracts in which to pay socially necessary service providers. *See* Pet'r's App. No. 23-174 at 000017; No. 23-175 at 000019 (Affidavit of Jeffery Pack, ¶ 4). It may, in fact, be the absence of such a term that led Judge Shaffer and Judge Janes to see an immediate need to exercise their discretion under Section 49-4-108 and order payment of the services within fifteen business days of receiving an invoice.

The absence of a provision regarding timing of payment in a contract generally triggers at least a term of reasonableness. “Under West Virginia law, commercial reasonableness is a ‘gap filler,’ invoked only when a disputed issue is not addressed in explicit terms by the parties.” *Homeland Training Ctr., LLC v. Summit Point Auto. Rsch. Ctr.*, 594 F.3d 285, 291 (4th Cir. 2010). And “where a contract fixes no definite time for performance, the law usually implies that performance shall be within a reasonable time.” *See First Nat’l Bank of Bluefield v. Clark*, 191 W. Va. 623, 447 S.E.2d 558, 562 (1994). Here, then, DHHR’s contracts with socially necessary service providers would include an implicit term of payment within a reasonable time.<sup>21</sup>

That implied term of payment, however, does not prevent a circuit court from ordering DHHR to pay by a time certain or otherwise determining what is a reasonable time by order requiring payment. “As a general rule, this Court enforces private agreements between parties, to the extent that such agreements do not conflict with the applicable law.” *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W. Va. 33, 38, 614 S.E.2d 680, 685 (2005). A contract that prohibits a court from ordering the timing that payment should be made by DHHR would contravene West Virginia Code Section 49-4-108—the applicable law. Section 49-4-108 plainly gives the circuit

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<sup>21</sup> Notably, DHHR never argued before either circuit judge that fifteen business days was an unreasonable period, or, prior to the instant petitions, that it was impossible to comply with the Administrative Orders. DHHR could have done so by raising those issues at a hearing. As discussed above, it did not pursue those routes.

courts the ability to order payment at any time. Indeed, such an order could, conceivably, require *immediate* payment if warranted in a circuit court's discretion. It would be a violation of public policy for DHHR to enforce an agreement with a socially necessary service provider that *prohibited* judicial intervention to direct payment.

Statutes cannot generally be amended by contractual agreements. *See, e.g., Deel v. Sweeney*, 181 W. Va. 460, 462, 383 S.E.2d 92, 94 (1989) (insurance contracts cannot contravene statutory minimums of coverage). And even private contracts must yield to unequivocal public policy. For instance, in *Finch v. Inspectech, LLC*, 229 W. Va. 147, 157, 727 S.E.2d 823, 833 (2012), this Court determined that regulations regarding home inspectors created the state's public policy and exculpatory clauses in the inspectors' contracts with property owners would be unenforceable because of that statutory policy of regulation. *Id.* ("This standard of conduct renders unenforceable exculpatory clauses in home inspection contracts that purport to exempt home inspectors for their failure to comply with such conduct standards."). Likewise, in *Rich v. Simoni*, 235 W. Va. 142, 150, 772 S.E.2d 327, 335 (2015), this Court held that "a fee-sharing agreement between a lawyer or a law firm and a non-lawyer that violates the provisions of Rule 5.4 of the West Virginia Rules of Professional Conduct is void as against public policy and wholly unenforceable."

To hold that the circuit courts cannot set a time for payment by order would contravene the public policy of the state, as expressed in Section 49-4-108, which plainly permits the circuit courts to take such action. For DHHR to suggest otherwise is the clearly erroneous position, not the other way around as DHHR argues. DHHR has not taken the initiative to set a standard term regarding payment timing itself. But even if it had, DHHR cannot amend the scope of Section 49-4-108 to

zero out the court system's powers to order payment for services that a private party contracted with an executive branch agency to provide.

Furthermore, DHHR's position is that the Administrative Orders exceeded the authority of the circuit judges who entered them—not simply that the judges abused their discretion in determining that fifteen business days is reasonable. Section 49-4-108 provides West Virginia courts with that discretion to order payment of socially necessary service providers at *any* time. Exercising that authority through well-reasoned and measured Administrative Orders does not violate the contracts DHHR has with those providers.

DHHR has fallen short of demonstrating that Judge Shaffer's and Judge Janes's Administrative Orders were clearly erroneous. As such, this Court should deny DHHR's petitions for this Court's writ of prohibition against the circuit courts' Administrative Orders.

**C. Statutory Duties and Public Policy Support the Circuit Courts' Watchful Eyes over the Administration and Availability of Socially Necessary Services.**

In a perfect world, every child would live in a loving home with all of his or her social, emotional, and physical needs met, and no child would need the services DHHR is obligated to provide. Regrettably, that is neither the world in which we live, nor the world in which DHHR and the circuit courts must both exercise their authority. Given our current circumstances, “[t]here cannot be too much advocacy for children.” *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 570, 490 S.E.2d 642, 657 (1997) (Workman J., concurring). “The public has a legitimate interest in protecting abused and neglected children[.]” *Id.* That is especially true of the circuit courts.

DHHR's laissez-faire, “we’ll get to it when we get to it” attitude regarding payment is not commensurate with West Virginia’s abuse and neglect reality. Nor is it in step with West Virginia’s public policy in this arena. The gravity of the situation and DHHR’s failure to treat it with the care and attention it deserves undoubtedly have acute consequences that support Judge Shaffer’s and

Judge Janes’s exercise of their statutory authority in such situations where DHHR’s inaction jeopardizes federal funding, undermines the child welfare system’s purposes, and otherwise necessitates judicial intervention.

**1. Delays in payments and disruptions in services may preclude “reasonable efforts” findings and jeopardize federal funding.**

If left unchecked, DHHR’s delays in payments for socially necessary services may preclude “reasonable efforts” findings and jeopardize federal funding. “Title IV-E of the Social Security Act is the largest federal funding stream for child welfare activities.”<sup>22</sup> For fiscal year 2023, West Virginia was estimated to receive \$126,000,000 across various Title IV-E programs, including adoption assistance, foster care, and guardianship assistance.<sup>23</sup> Under 45 C.F.R. §1356.21(b), judicial determinations that “reasonable efforts” were made to prevent a child’s removal from the home are required for Title IV-E funding. This requirement also is reflected throughout West Virginia law. *See* W. Va. Code § 49-4-105 (“A hearing by a circuit court of competent jurisdiction is required to determine whether or not ‘reasonable efforts’ have been made to stabilize and maintain the family situation before any child may be placed outside the home . . . .”); W. Va. Trial Ct. R. 28.01 (“After any juvenile delinquency or abuse and neglect proceeding has been initiated or transferred to circuit court, any party may contest the making or refusal to make ‘reasonable effort’ and ‘contrary to the welfare’ findings required by Title IV-E of the Social Security Act, by any magistrate court, juvenile referee or circuit court at the initial stages of such proceeding.”).

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<sup>22</sup> W. Va. Dep’t Health & Hum. Res., *Title IV-E Eligibility Policy Manual*, 5 (Rev. Oct. 2019), [https://dhhr.wv.gov/bcf/policy/Documents/IV-E\\_Policy\\_%20Revised\\_10.25.2019.pdf](https://dhhr.wv.gov/bcf/policy/Documents/IV-E_Policy_%20Revised_10.25.2019.pdf).

<sup>23</sup> W. Va. Dep’t Rev., *West Virginia Consolidated Report of Federal Funds FY 2023*, 157 (Dec. 2021), <https://budget.wv.gov/reportsandcharts/federalfunds/Documents/FedFunds2023.pdf>.



The judicial determination requirement is subject to eligibility reviews under 45 C.F.R. §1356.71. These reviews periodically monitor the Title IV-E agency’s compliance in meeting title IV-E eligibility requirements, validate the accuracy of the agency’s claims for reimbursement of Title IV-E payments made on behalf of children in foster care, and identify and recover improper payments.<sup>24</sup> Given the significant and desperately-needed funding at stake, the circuit courts have a vested interest in assuring that “reasonable efforts” are, in fact, being made in abuse and neglect cases. Reliable socially necessary services are crucial to that determination.

**2. Without reliable socially necessary services, the child welfare program fails.**

Moreover, without the reliable provision of socially necessary services, the child welfare program cannot satisfy its purposes under West Virginia Code Section 49-1-105(b). Parents’ rights are undermined where they cannot visit their children or receive the tools necessary for reunification. Children’s best interests are harmed by delays in the resolution of abuse and neglect cases, especially where, ultimately, a permanent home remains out of reach because services are not being provided. Indeed, DHHR’s own press release admitted that the caregivers for nearly 2,300 children in foster care would not receive payments on time as a result of this issue. These payments are designed to provide for basic physical needs, such as food on the table and a roof overhead.<sup>25</sup> If foster parents do not receive their funds on time, in many cases that means mortgage payments might be missed or food and necessities might not be provided for these children. These outcomes are unacceptable, and, where payments are issued in a timely and reasonable manner, entirely avoidable.

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<sup>24</sup> U.S. Dep’t Health & Hum Servs. Child.’s Bureau, *Title IV-E Foster Care Eligibility Reviews Fact Sheet*, <https://www.acf.hhs.gov/cb/fact-sheet/title-iv-e-foster-care-eligibility-reviews-fact-sheet>.

<sup>25</sup> W. Va. Dep’t Health & Hum. Res., *Phased Payment Approach to be Implemented for Certain Foster Families* (Feb. 10, 2023), <https://dhhr.wv.gov/News/Pages/Phased-Payment-Approach-to-be-Implemented-for-Certain-Foster-Families.aspx>.

**3. DHHR’s communications about the source of the problem demonstrate judicial intervention is likely the only solution.**

Prior to entering his administrative order, Judge Shaffer already had inquired about the delays in payment. For instance, on January 18, 2023, Judge Shaffer received a letter from DHHR that a system fix regarding payment was implemented on January 12 and 13. Resp’ts’ App. at 000001. DHHR told Judge Shaffer problems with the PATH system were “initial issues that must be worked out.” *Id.* When conducting his review in ongoing cases, however, Judge Shaffer was still being told by otherwise compliant parents in “case after case” that services were not being provided. *Id.* at 000009. And, in a February 10, 2023 press release, DHHR referred to it as a “phased payment approach,” and did not provide an apology to the families affected.<sup>26</sup> Days after his Administrative Order, Judge Shaffer held a hearing on February 17, 2023, in Case Nos. 22-JA-113, -144, and -115, where representatives from DHHR testified that the payment delays were caused by cascading problems with new software installation and would be fixed. Resp’ts’ App. at 000022. But, DHHR issued a press release on February 24, 2023, in an attempt to placate foster families, stating that the issue was related to “missing information, such as updated W-9 forms.”<sup>27</sup> DHHR’s inconsistent positions about why these payments are not being made timely demonstrate that Court intervention was not only appropriate, but probably the only way this issue would ever be solved in a timely manner.

What is laid bare by the facts here is that a contractual party who included no timed obligation to pay in its adhesion contracts chose not to pay until ordered to do so by the circuit

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<sup>26</sup> W. Va. Dep’t Health & Hum. Res., *Phased Payment Approach to be Implemented for Certain Foster Families* (Feb. 10, 2023), <https://dhhr.wv.gov/News/Pages/Phased-Payment-Approach-to-be-Implemented-for-Certain-Foster-Families.aspx>.

<sup>27</sup> W. Va. Dep’t Health & Hum. Res., *Update Provided on Delayed Payments for Foster Care Families and Agencies* (Feb. 24, 2023), <https://dhhr.wv.gov/News/Pages/Update-Provided-on-Delayed-Payments-for-Foster-Care-Families-and-Agencies.aspx>.

court, all while telling the service providers, foster families, and others who rely on these payments to take care of children that it was a paperwork issue or a phased payment approach. Then, when Judge Shaffer and Judge Janes entered their orders, DHHR started paying providers, giving updates, and offering an “application” to receive reimbursement for past due fees. However, DHHR now argues this Court should prohibit circuit courts from using their statutory discretion in Section 49-4-108 to ever require timely payment by DHHR again. The circuit courts’ authority under the statute to require payment by DHHR is essential to the provisioning of services to West Virginia children and families.

## **V. CONCLUSION**

This case is the exemplar of why parties should not use the writ mechanism as a first option, particularly where, as here, not a single factor under *Hoover* is satisfied. In any event, the Administrative Orders were not legally erroneous because Judge Shaffer and Judge Janes were acting well within the bounds of their role overseeing abuse and neglect proceedings and their statutorily-granted authority under West Virginia Code Section 49-4-108(b) to order payment for socially necessary services.

Far from impetuous, the Administrative Orders were a measured approach to the problem DHHR created and exacerbated, especially considering Judge Shaffer and Judge Janes could have ordered services to be delivered by a provider at a cost higher than DHHR’s established rate for such services as necessitated by lapses in services.

Furthermore, these are not cases where the circuit courts compelled a corporation to pay a shorted vendor or rewrote the terms of private parties’ bargained for contracts. Exposed to the sterilized statutory lexicon, it is easy to lose sight of the fact that these services are designed to improve the wellbeing of the most vulnerable people in our society—struggling families of

children and parents. And not just any children, but child survivors of abuse and neglect. Some of these children are separated from their families and cannot see their siblings or parents except in a supervised setting, and that cannot happen if the supervisors are not paid. For other children, judges, lawyers, social workers, and service providers are the only adults in their lives who care about them aside from their schoolteachers. This care is often expressed through a well-crafted plan of services to help these children overcome the issues that led them to the judicial system in the first place. These children and their families are all too often seen as numbers in a new computer program whose permanency—either with their biological parent or adopted parent—is delayed by system malfunctions or a “phased payment approach.”

Commissioner Pack did not aver that DHHR lacked the money to pay these providers for their services. Judge Shaffer and Judge Janes simply called upon DHHR to process the invoices and pay what it owes, so that continued services for families, and the associated federal funding for those services, would not be jeopardized over a software glitch. Their Honors’ discretion to order such payments was the precise exercise of authority the Legislature afforded the circuit courts broadly through the child welfare code and expressly on this issue in West Virginia Code Section 49-4-108. For these and all the foregoing reasons, Judge Shaffer and Judge Janes pray that this Court deny the West Virginia Department of Health and Human Resources’ petitions for a Writ of Prohibition.

Dated: May 19, 2023

*/s/ Marc E. Williams*

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

State of West Virginia ex rel.  
West Virginia Department of Health and Human Resources,

Petitioner,

vs.

No. 23-174

Honorable Steven L. Shaffer, Judge of the Circuit Court of Preston County,

Respondent.

AND

State of West Virginia ex rel.  
West Virginia Department of Health and Human Resources,

Petitioner,

vs.

No. 23-175

Honorable David R. Janes, Judge of the Circuit Court of Marion County,

Respondent.

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that the foregoing “Response in Opposition to Writs of Prohibition” was electronically filed using the File & ServeXpress system on the 19th day of May, 2023, which shall send automatic notification to the following:

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