

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**E.H., et al.,
Petitioners Below, Appellees**

vs.) No. 35505 (Kanawha County 81-MISC-585)

**Khan Matin, M.D., et al.,
Respondents Below, Appellees**

**West Virginia Department of Health and Human Resources,
Appellant**

FILED
April 1, 2011
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Appellant West Virginia Department of Health and Human Resources (“DHHR”) appeals the August 7, 2009 order of the Circuit Court of Kanawha County that enforced two previous consent orders of which the DHHR was a party.

Upon consideration of the parties’ briefs, oral arguments, and the record below, the Court finds no substantial question of law and does not disagree with the decision of the circuit court as to the question of law. Therefore, the Court finds that a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

This case concerns the implementation of health services to Medicaid patients with traumatic brain injuries (“TBI”). In a 2001 consent order which was the result of court-ordered mediation, the DHHR agreed to engage in good faith efforts to secure funding for a Medicaid TBI Waiver.¹ Essentially, such a waiver would permit individuals with TBI whose treatment is funded by Medicaid to receive services, such as physical therapy and visits from health aides, in their homes and communities rather than being institutionalized. Upon receipt of such funding, the DHHR agreed to promptly file with federal authorities for a Medicaid TBI.

Due to the lack of compliance with the 2001 Consent Order, the parties again engaged in mediation on TBI services in 2007. This mediation resulted in the formalization of another

¹For a more detailed statement of the facts and procedural background of this case see *State ex rel. Matin v. Bloom*, 223 W. Va. 379, 674 S.E.2d 240 (2009).

consent order in which the parties, including the DHHR, agreed that a TBI Trust Fund should be established with a dedicated source of state funding.

By order entered by the circuit court on August 7, 2009, the circuit court, after an evidentiary hearing, concluded that the DHHR violated the 2001 Consent Order by failing to engage in good faith efforts to secure funding for a Medicaid TBI Waiver and by failing to apply for a waiver. Accordingly, the circuit ordered the DHHR to, *inter alia*, apply for a TBI Medicaid Waiver by January 2010, and, upon approval of such a waiver, to implement the TBI Waiver program. With regard to the 2007 Consent Order, the circuit court concluded that the DHHR did not comply with the letter as well as the spirit of the parties' agreement, particularly with regard to developing a dedicated source of State funding for TBI services. Therefore, the circuit court ordered the DHHR to, *inter alia*, implement a TBI Trust Fund to be operational and funded by July 1, 2010, and to make a TBI system of services available to victims of TBI by July 1, 2010.²

On appeal to this Court, the DHHR puts forth several assignments of error. Specifically, the DHHR argues that the circuit court's August 7, 2009 order violates the separation of powers provision found in Article V, § 1 of the Constitution of West Virginia by ordering the creation of a specific behavioral health service, the TBI Waiver. Second, the DHHR asserts that the circuit court exceeded its scope by expanding the purpose of a May 22, 2009 evidentiary hearing to include testimony regarding the 2001 Consent Order. Finally, the DHHR avers that the circuit court violated the preemption doctrine by ordering the DHHR to create a Medicaid TBI Waiver in violation of federal and state statutes that delegate to the Bureau for Medical Services, the single State Medicaid agency, the responsibility for administering the Medicaid program in West Virginia.

With regard to the Court's standard of review of the circuit court's order, "[t]his Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*." Syllabus Point 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996).

²After the circuit court and this Court denied the DHHR's request for a stay of the August 7, 2009 order pending appeal, the DHHR proceeded to comply with the order. The appellees represent in their pleadings and during oral argument that the DHHR has made progress in implementing a program to provide community-based services to individuals with TBI.

The Court finds the DHHR's assignments of error to be devoid of merit. It is the opinion of the Court that the separation of powers doctrine and the preemption doctrine are not implicated in this case. Rather, this case concerns the enforcement of two consent orders entered into and agreed to by the DHHR. "A consent decree is a negotiated agreement that is entered as a judgment of the court and thus has attributes of both contracts and judicial decrees." *Bragg v. Robertson*, 83 F.Supp.2d 713, 717 (S.D. W. Va. 2000) (citations omitted). "[I]t is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy." Syllabus Point 1, in part, *Sanders v. Roselawn Memorial Gardens, Inc.*, 152 W. Va. 91, 159 S.E.2d 784 (1968).

The Court has carefully reviewed the provisions of both the 2001 and 2007 Consent Orders, the transcript of the May 22, 2009 evidentiary hearing held in the circuit court, and the circuit court's findings of fact and conclusions of law contained in its August 7, 2009 order. The Court concludes that the circuit court's findings of fact are not clearly erroneous, and its conclusions of law are not in error. The Court further concludes that the circuit court's final order does not constitute an abuse of discretion.

For the reasons stated above, the Court affirms the August 7, 2009 order of the Circuit Court of Kanawha County.

Affirmed.

ISSUED: April 1, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh