IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

SAMANTHA BURGESS; ALYSSA SKEENS; GEORGE GROVER; JESSICA HALSTEAD; AND SUNSHINE HOLSTEIN,

Petitioners Below, Petitioners,

v.

THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU FOR MEDICAL SERVICES

Respondent Below, Respondent.

Case No. 23-ICA-11
On Appeal from the West Virginia Department of Health and Human Resources, Bureau for Medical Services

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BRIEF OF INDIVIDUAL PETITIONERS

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III. ASSIGNMENTS OF ERROR

(1) The West Virginia Department of Health and Human Resources, Bureau for Medical Services (hereinafter, "BMS"), in suspending (or failing to suspend only in part) Medicaid payments to or for Petitioners, acted arbitrarily and capriciously by failing to adequately consider the facts of Holistic's billing procedures or federal regulatory provisions under 42 C.F.R. § 455.23(e) in determining whether good cause exists not to suspend Medicaid payments.

(2) BMS, in suspending (or failing to suspend only in part) Medicaid payments to or for Petitioners, has acted arbitrarily and capriciously by failing to provide adequately specific detail of the allegations in its pre-suspension notices to Petitioners.

IV. STATEMENT OF THE CASE[1]

This appeal arises from the decision of BMS to suspend all Medicaid payments to Holistic, Inc. (hereinafter, "Holistic") and its employees. Samantha Burgess, Alyssa Skeens, George Grover, Jessica Halstead, and Sunshine Holstein (hereinafter, "Petitioners")[2] are five individual medical practitioners who, at one point or another, were employed at Holistic. Petitioners' Medicaid payments have been suspended pending the completion of a fraudulent billing investigation by the Medicaid Fraud Control Unit. BMS has asserted that there are "credible allegations of fraud" which justify the Medicaid suspension. Petitioners are now seeking re-instatement of their Medicaid privileges, at least while the investigation is ongoing.

[1] Citations to the Record include the number assigned by Attorney Gary Michels, an abbreviated descriptive title, and page numbers or exhibit designations where applicable.

[2] In the interest of clarity, it should be understood that this Brief is submitted on behalf of the five individual medical practitioners, and that "Petitioners" refers to them alone, not Holistic.

The crux of Petitioners' argument on appeal is that in suspending (or failing to suspend only in part) Medicaid payments to Petitioners, BMS has acted arbitrarily and capriciously by (1) failing to adequately consider relevant facts concerning Holistic's billing procedures and applicable federal regulations under 42 C.F.R. § 455.23(e), as well as ignoring clear evidence of good cause not to suspend payments; and (2) by failing to elaborate as to the nature of the allegations which form the basis for the investigation.

As providers of medical services to the underserved and vulnerable populations of West Virginia, including treatment for substance abuse, Petitioners are essentially dependent on Medicaid payments to remain financially solvent so as to continue providing these needed services.[3] Via letters dated May 2, 2022, each Petitioner received a Notice of Intent to Suspend Medicaid Payments from BMS while employed at Holistic, informing them that their Medicaid payments would be suspended shortly thereafter.[4] Within these initial Notice Letters, Petitioners were informed that they had an opportunity to challenge the "specific findings in dispute."[5]

R. Booth Goodwin, counsel for Holistic, then requested an administrative hearing from BMS and sought clarification of the allegations—namely, just what BMS's "specific findings" were so that they *could* be challenged.[6] In response to these requests for clarification, Holistic and Petitioners were met with only more vagueness— Holistic received a second, almost identical Notice Letter reiterating that there was a "credible allegation of fraud."[7] Also included within this second Notice were short additional statements that there were "allegations of knowingly billing for services never rendered" and that "BMS reviewed all good cause exceptions to payment

[3] *See* Record No. 1, Verified Petition, at pp. 2, 8-9.
[4] *Id.* at pp. 3-4.
[5] Record No. 3, Joinder of Writ, at Ex. 1.
[6] Record No. 1, Verified Petition, at Ex. B, Ex. C, Ex. D.
[7] *Id.* at p. 4, Ex. D.

suspension allowed by statute and determined none are applicable in this instance."[8] Within these initial exchanges, BMS neither provided any specific allegations forming the basis for the investigation or suspension nor did it give any explanation as to why it found there was no good cause not to suspend payments.[9]

With the suspension looming and with no indication from BMS regarding a date for an administrative hearing, Petitioners joined in Holistic's Petition for Writ of Prohibition in the Circuit Court of Kanawha County.[10] When BMS filed its Response in Opposition to the Petition for Writ of Prohibition, BMS disclosed to Petitioners both the Investigation Report and Medicaid Fraud Referral Form.[11] After multiple filings and arguments,[12] the Circuit Court ultimately denied the Petition for a Writ.[13]

Following the Writ proceedings, Petitioners sought administrative review of the suspension decision before the West Virginia DHHR. Petitioners initially sought a Document/Desk Review Decision from BMS, which upheld the suspension.[14] Petitioners then challenged the Desk Review Decision via a request for a hearing, which was conducted before Hearing Examiner Lewis Brewer.[15] The Examiner also upheld the suspension, finding that BMS's suspension decision was not arbitrary and capricious.[16] The Examiner's Recommended Decision was formally adopted by BMS on December 7, 2022.[17]

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[8] *Id*.
[9] *See e.g., id.* at pp. 4-5, Ex. A, Ex. D.
[10] *See id.;* Record No. 2, Joinder of Writ.
[11] Record. No. 6, BMS Response in Opposition, Ex. 2, Ex. 3. *See also* Record No. 10, Holistic Reply, at p. 3 ("[U]ntil BMS filed its brief in opposition, BMS had not even provided Holistic with even a single example of a fraud allegation to which Holistic could respond.").
[12] *See generally* Record Nos. 1-10.
[13] *See* Record No. 11, Final Order.
[14] *See generally* Record No. 12, Document Desk Review.
[15] *See generally* Record No. 18, Hearing Examiner's Recommended Decision; No. 19, Transcript.
[16] Record No. 18, Hearing Examiner's Recommended Decision, at pp. 16-20.
[17] Record No. 20, Letter from Commissioner Beane.

Petitioners now bring this appeal of the Examiner's Decision seeking reinstatement of their Medicaid privileges (at the very least during the pendency of the fraud investigation) and reversal of the Hearing Examiner's Decision.

V. SUMMARY OF ARGUMENT

In suspending Petitioners' Medicaid payments, BMS has acted arbitrarily and capriciously in two primary ways.

First, BMS has obstinately refused to perform its federally imposed obligation to evaluate the existence of good cause to not suspend (or to suspend only partially) Medicaid payments to Petitioners under 42 C.F.R. §455.23. Clear evidence of good cause not to suspend exists in this case, such as, for example, the fact that ***four out of the five*** **Petitioners were not even employed by Holistic during the time of the billing noted in the Investigation Report**. Additionally, BMS's initial correspondence with Petitioners also practically admits that it did not perform this necessary evaluation before deciding to suspend Petitioners' Medicaid privileges. Further, even if a suspension in some form were warranted, BMS has gone much further than necessary in refusing to consider good cause for only a partial suspension. Finally, BMS's refusal to adequately address the good cause issue has now left Petitioners subject to an impermissible "indefinite" suspension in violation of their statutory and constitutional rights.

Second, BMS's notice to Petitioners of the allegations of fraud levied against them was woefully deficient. BMS's failure to elaborate on the nature of the allegations against Petitioners has both deprived Petitioners of the ability to adequately respond to the allegations and has essentially allowed BMS to strip Petitioners of their livelihoods while avoiding accountability for its decisions. It is fundamentally unfair for BMS to suspend the Medicaid privileges of these five

individuals, who had nothing more to do with the billing process than to report to Holistic the services they provided to its patients.

Therefore, for these reasons and the more detailed ones to follow, this Court should reverse the administrative decision below, find that BMS's actions were indeed arbitrary and capricious, and reinstate Petitioners' Medicaid privileges.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument in this appeal is necessary as (1) no party has waived oral argument; (2) this appeal is not frivolous; (3) the dispositive issues have not been authoritatively decided; and (4) the decisional process in this appeal would be significantly aided by oral argument.[18]

Petitioners respectfully request this Court to set oral argument under Rule 19 for three primary reasons. First, this appeal concerns an administrative decision made by BMS that was contrary to the weight of the evidence as demonstrated within the Record. Second, this appeal involves a narrow issue of law, as only one federal regulation is meaningfully at play within the case. The third reason is in the alternative. If this Court preliminarily determines that the law governing BMS's exercise of discretion in this case is "settled," then Petitioners argue that this case presents a situation where BMS's conduct constitutes an "unsustainable exercise of discretion."[19]

This case is likely not appropriate for a memorandum decision, as Petitioners are requesting the reversal of a lower tribunal's decision.[20] Furthermore, it would likely be highly beneficial for the lower tribunals in West Virginia to receive detailed guidance on the obligations imposed on

[18] *See* W. Va. R. App. P. 18(a).
[19] W. Va. R. App. P. 19(a).
[20] W. Va. R. App. P 21(d) ("A memorandum decision reversing the decision of a lower tribunal should be issued in limited circumstances.").

the WV DHHR under 42 C.F.R. § 455.23, as there is currently no robust body of case law on this particular regulation anywhere, much less in West Virginia. Additionally, the issues presented within this appeal have the potential for far-reaching impact on the Medicaid program, on BMS procedure, and on medical providers in West Virginia and beyond.

VII. ARGUMENT

A. STANDARD OF REVIEW.

This appeal arises from the Recommended Decision of a Hearing Examiner for BMS. A West Virginia Appellate Court is to review an administrative body's findings of fact under a clearly erroneous standard, while employing a *de novo* standard on its legal determinations.[21] An agency's action is "arbitrary and capricious," and therefore unlawful, "if the agency relies on factors that Congress did not intend for it to consider, entirely ignores important aspects of the problem, explains its decision in a manner contrary to the evidence before it, or reaches a decision that is so implausible that it cannot be ascribed to a difference in view."[22]

For the reasons that follow, BMS has acted arbitrarily and capriciously as it has entirely ignored the aspects of the notice and good cause requirements mandated by federal law.

[21] *Alcan Rolled Products Ravenswood, LLC v. McCarthy,* 234 W. Va. 312, 765 S.E.2d 201 (2013).
[22] *Bedford County Mem'l Hosp. v. Health & Human Services,* 769 F.2d 1017, 1022 (4th Cir. 1985). *See also* Record No. 18, Hearing Examiner's Recommended Decision, at p. 17.

B. BMS ACTED ARBITRARILY AND CAPRICIOUSLY BY FAILING TO ADEQUATELY CONSIDER THE FACTORS RELEVANT TO A FINDING OF GOOD CAUSE NOT TO SUSPEND, OR TO SUSPEND ONLY IN PART, MEDICAID PAYMENTS TO PETITIONERS.

1. BMS Has Not Considered the Factors Relating to Good Cause Not to Suspend Payments, as Evidenced by the Clear Evidence of Good Cause in this Case.

Federal regulations require a State Medicaid agency to suspend Medicaid payments to providers where the agency determines that a "credible allegation of fraud for which an investigation is pending" exists.[23] However, this mandate comes with a very important caveat: the agency is required to suspend payments "*unless* the agency has good cause to not suspend payments or to suspend payment only in part."[24] The State Medicaid agency seeking to suspend a provider's Medicaid payments *must* first consider whether good cause exists *before* implementing the suspension.[25] In other words, while the decision of whether a good cause exception *justifies* a decision not to suspend payments might be discretionary, the actual *performance of the evaluation* of whether good cause exists is mandatory.[26]

The same regulation also provides six very specific factors for the agency to consider in determining whether good cause not to suspend exists.[27] They are:

> Good cause not to suspend payments. A State may find that good cause exists not to suspend payments, or not to continue a payment suspension previously imposed, to an individual or entity against which there is an investigation of a credible allegation of fraud if any of the following are applicable:

[23] 42 C.F.R. § 455.23(a)(1).
[24] *Id.* (emphasis added).
[25] *See* Victoria Transcultural Clinical Center, VTCC v. Kimsey, 477 F. Supp.3d 457, 464 (E.D. Va. 2020) ("Pursuant to 42 C.F.R. § 455.23, where, as here, there is a credible allegation of fraud, DMAS [the Virginia State Medicaid agency] is ***required*** to suspend Medicaid payments, *unless one of the regulatory good cause exceptions is found to exist.*" (bold and italic emphasis in original, additional italic emphasis added).
[26] *See id.* ("DMAS correctly notes that whether a good cause exception justifies not suspending payments is left to the discretion of the state.")
[27] 42 C.F.R. § 455.23(e).

> (1) Law enforcement officials have specifically requested that a payment suspension not be imposed because such a payment suspension may compromise or jeopardize an investigation.
>
> (2) Other available remedies implemented by the State more effectively or quickly protect Medicaid funds.
>
> (3) The State determines, based upon the submission of written evidence by the individual or entity that is the subject of the payment suspension, that the suspension should be removed.
>
> (4) Beneficiary access to items or services would be jeopardized by a payment suspension because of either of the following:
>
> > (i) An individual or entity is the sole community physician or the sole source of essential specialized services in a community.
> >
> > (ii) The individual or entity serves a large number of beneficiaries within a HRSA–designated medically underserved area.
>
> (5) Law enforcement declines to certify that a matter continues to be under investigation per the requirements of paragraph (d)(3) of this section.
>
> (6) The State determines that payment suspension is not in the best interests of the Medicaid program.[28]

Here, even when considering its discretionary power, BMS still cannot "entirely ignore aspects of the problem."[29] Frankly, BMS has "ignored the problem" at every stage of the proceedings amongst the parties so far; BMS has therefore acted arbitrarily and capriciously by refusing to recognize, or even consider, clear evidence of good cause to withhold suspension under five of the above six factors.[30]

Before analyzing the good cause factors, Petitioners would first point out that BMS's own initial correspondence with Petitioners belies their assertions that these factors were ever

[28] *Id.*
[29] *Bedford*, 769 F.2d at 1022. *See also* Record No. 18, Hearing Examiner's Recommended Decision, at p. 19.
[30] At this juncture, Petitioners do not contest Respondent's assertion that law enforcement officers have certified that the fraud investigation is ongoing. *See* Record No. 15, Affidavit of Andrew Pack, at ¶ 9.

considered before the suspension. In the first Notice Letters dated May 2, there was no analysis *whatsoever* of these factors.[31] It was only *after* Holistic demanded clarification[32] that BMS sent a new letter with the conclusory and unenlightening statement that "BMS has reviewed all good cause exceptions to payment suspension allowed by statute and determined that none are applicable in this instance."[33] This later addition to the Notice is all but an admission by BMS that it failed to consider these factors before issuing the suspension, and shows that it hastily tried to cover up its mistake in the second letter.

As to the first good cause factor, law enforcement officers did at one point recommend that the suspension not be imposed, because this recommendation was later lifted.[34] While the Fraud Control Unit may have later rescinded this recommendation, it is an indication that the Unit, at least initially, believed that this was a case where suspension was not warranted. Petitioners would posit that the Unit had it right the first time.

In response to the second factor, BMS states that, due to the "nature of the allegations of fraud," there are no alternative remedies to suspension.[35] As a preliminary matter, if BMS did indeed have information as to the "nature of the allegations of fraud," as Mr. Pack has averred, then it was required to share that information with Petitioners in its Notice Letters which were sent to them.[36]

Furthermore, Mr. Pack's averment is untrue. Petitioners have consistently pointed out the availability of alternative remedies to a suspension. Petitioners and Holistic demonstrated both

[31] *See e.g.,* Record No. 1, Verified Petition, at Ex. A.
[32] *Id.* at Ex. B.
[33] *Id.* at Ex. D.
[34] Record No. 15, Pack Affidavit, at ¶ 5 ("The Law Enforcement Exception to payment suspension is not applicable because the West Virginia Medicaid Fraud Control Unit ('MFCU') *lifted* the request not to proceed with the payment suspension.") (emphasis added).
[35] *Id.* at ¶ 6.
[36] *See* Section VII.D, *infra*.

their ability and willingness to submit to prepayment review processes (as opposed to a suspension of payments) with The Health Plan.[37] Additionally, BMS has not provided any evidence as to improper billing that is specifically attributable to the conduct of Petitioners, likely because Petitioners did not actually perform the billing while they were employed at Holistic.[38] Accordingly, there is no reason why, going forward, Petitioners could not be permitted to bill individually under their own NPI numbers and have their submissions for payment reviewed distinctly from Holistic's, or why they could not submit for Medicaid payments while employed elsewhere.

In fact, it appears that BMS's Medicaid suspension practices have grown even more draconian since its suspension decisions were overruled in *Pressley Ridge*.[39] Rather than use the pre- or post- payment review processes available to it under 42 C.F.R. § 447.45, it seems that BMS now prefers the "scorched earth" approach to suspensions and has instead opted to just *suspend first and ask questions later.*

To the third factor, because BMS stubbornly refuses to elaborate on the allegations of fraud, Petitioners are effectively prevented from submitting any written documentation rebutting said allegations. Put simply, if BMS does not give Petitioners something to respond to, then they cannot respond. It is this factor that most accurately captures Petitioners' entire argument: how can Petitioners contest the "specific findings in dispute," which BMS informed them it was their right to do, if they do not even know what the "specific findings" are?[40]

[37] *See* Record No. 1, Verified Petition, at p. 9-10.
[38] *See* Record No. 10, Holistic Reply, at Ex. H ¶ 7 (Affidavit of Shawn Blankenship).
[39] *See* Pressley Ridge Schools, Inc. v. Stottlemeyer, 947 F. Supp. 929, 940 (S.D. W. Va. 1996). For a discussion of this case and its implications, *see* Section VII.C, *infra*.
[40] *See* Record No. 1, Verified Petition, at Ex. A.

By extension, this reality is also evidence that BMS failed to consider this factor before it suspended the payments. If Petitioners were not afforded the opportunity to provide "written documentation" for BMS to evaluate and either accept or reject, then this factor could not have been considered when BMS made the suspension decision.

In spite of BMS's reticence, Petitioners, on multiple occasions, provided persuasive written evidence that the suspension should be removed. Specifically, the owner of Holistic, Shawn Blankenship, attested via affidavit that the employees at Holistic *were not actually the ones billing for services rendered there*—billing was handled by a professional third-party.[41]

Perhaps the most significant fact to consider in regard to this factor, however, is that *four out of the five Petitioners were not even employed at Holistic* during the time period in which BMS alleges the fraud occurred.[42] Therefore, Petitioners did not even have to provide documentation to BMS to show that good cause existed. BMS already had all the documentation it needed to make that determination; it just refused to acknowledge it. BMS has therefore suspended the Medicaid payments of four of the Petitioners for billing events that were ***literally impossible for them to have participated in.***

Fourth, while employed at Holistic, Petitioners provided much-needed medical services to a consistently vulnerable and needy population. Petitioners almost cannot believe that they have to point this out to the Bureau for *Medical* Services, but West Virginia has *far and above* the highest mortality rate in the nation in the nation for drug overdoses,[43] and this crisis has only gotten

[41] *See* Record No. 10, Holistic Reply, at Ex. H ¶ 7.
[42] *See* Record No. 6, BMS Response in Opposition, at Ex. 3. The dates of the alleged conduct were reported to have occurred from 12/1/2015 through 11/30/2018.
[43] https://www.cdc.gov/nchs/pressroom/sosmap/drug_poisoning_mortality/drug_poisoning.htm (last visited March 30, 2023). According to the 2020 data, West Virginia's opioid mortality rate is 81.4, almost double that of Kentucky, which has the next-highest rate at 49.2.

worse in the wake of the COVID-19 pandemic.[44] West Virginia needs "all hands on deck" to combat this crisis, and every provider of substance abuse services is a necessary one. For Cynthia Parsons, the BMS *Program Director for Behavioral Health Services*, to suggest that suspending Petitioners' services would not jeopardize access to this type of care is almost laughable and borders on the intellectually dishonest.[45]

Fifth, suspension of Petitioners' Medicaid payments is absolutely not in the best interests of the Medicaid program. Petitioners would point out that BMS's own mission statement expresses the sentiment that BMS "is committed to administering the Medicaid Program, while maintaining accountability for the use of resources, *in a way that assures access* to appropriate, medically necessary, and quality health care services for *all* members . . ."[46] BMS's shotgun-suspension approach that it has directed toward Petitioners demonstrates its willingness to remove access to care for some of West Virginia's most vulnerable populations on a whole-sale, no exceptions basis—all in the name of "accountability." The Medicaid program's purpose is to provide a means for society's less fortunate to receive necessary medical care. Petitioners took great professional satisfaction in providing that needed care, but, as a result of BMS' arbitrary and capricious decision making, they can no longer do so.

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[44] *See e.g., A city wrestled down an addiction crisis. Then came COVID-19*, ASSOCIATED PRESS, Apr. 8, 2021, https://apnews.com/article/pandemics-public-health-coronavirus-pandemic-financial-markets-covid-19-pandemic-5e461d0ac79466f3c228b633bfea8b09 ("As the COVID-19 pandemic killed more than a half-million Americans, it also quietly inflamed what was before it one of the country's greatest public health crises: addiction. The Centers for Disease Control and Prevention estimates that more than 88,000 people died of drug overdoses in the 12 months ending in August 2020 — the latest figures available**. That is the highest number of overdose deaths ever recorded in a year**.") (emphasis added).

[45] *See* Record No. 15, Affidavit of Andrew Pack, at ¶ 8.

[46] https://dhhr.wv.gov/bms/Pages/default.aspx (emphasis added) (last visited 3/28/2023).

2. BMS Has Not Considered the Factors Relating to Good Cause to Suspend Only in Part, as Evidenced by the Clear Existence of Good Cause in this Case.

The "good cause" inquiry does not end after consideration of a whether a full suspension is warranted; the State Medicaid agency must also consider whether good cause exists to implement only a *partial* suspension of Medicaid payments before making a decision.[47] Almost identical to the good cause considerations related to a full suspension, there are specific factors for the State Medicaid agency to evaluate in determining whether a partial suspension is warranted:

> Good cause to suspend payment only in part. A State may find that good cause exists to suspend payments in part, or to convert a payment suspension previously imposed in whole to one only in part, to an individual or entity against which there is an investigation of a credible allegation of fraud if any of the following are applicable:
>
> (1) Beneficiary access to items or services would be jeopardized by a payment suspension in whole or part because of either of the following:
>
> > (i) An individual or entity is the sole community physician or the sole source of essential specialized services in a community.
> >
> > (ii) The individual or entity serves a large number of beneficiaries within a HRSA–designated medically underserved area.
>
> (2) The State determines, based upon the submission of written evidence by the individual or entity that is the subject of a whole payment suspension, that such suspension should be imposed only in part.
>
> (3)(i) The credible allegation focuses solely and definitively on only a specific type of claim or arises from only a specific business unit of a provider; and
>
> > (ii) The State determines and documents in writing that a payment suspension in part would effectively ensure that

[47] 42 C.F.R. § 455.23(a), (f).

> potentially fraudulent claims were not continuing to be paid.
>
> (4) Law enforcement declines to certify that a matter continues to be under investigation per the requirements of paragraph (d)(3) of this section.
>
> (5) The State determines that payment suspension only in part is in the best interests of the Medicaid program.[48]

BMS has also ignored clear evidence of good cause to suspend Medicaid payments only partially. To use an analogy, BMS employed the proverbial hacksaw to the allegations aimed at Petitioners when a scalpel would have more than sufficed. In addition to the reasons provided in the preceding section in regard to the full suspension good cause factors, there are, specific to the partial suspension factors, several reasons why only a partial suspension would be warranted:

To the first and fifth factors, while no suspension is warranted in this case, a partial suspension would certainly be in closer alignment with the best interests of the Medicaid program instead of a full one. As has been expressed repeatedly, the bulk of Petitioners' practice is directed toward the vulnerable and underserved populations of West Virginia, particularly those suffering from the ravages of substance abuse.[49] Restricting Petitioners' access to Medicaid payments will not only deprive them of their livelihoods, but also result in disruptions in continuity of care and will restrict access to needed services for these patients.[50] At the very least, Petitioners should be permitted to receive Medicaid payments either while billing under their own NPI numbers or be permitted to receive payments at a different place of employment.

As to the third factor, the Investigation Report flagged multiple *specific* CPT codes during the investigator's review of Holistic's records, did not contain any indication of widespread

[48] *Id.*
[49] *See e.g.,* Record No. 1, Verified Petition, at p. 8-9.
[50] *Id.*

fraudulent billing practices, and Shawn Blankenship provided detailed explanations in response to the investigator.[51] There is therefore no reason why, if BMS truly remains concerned about Holistic's billing practices concerning these codes, that the payments for just these particular codes could not be suspended.

Additionally, not a single Petitioner was involved in the billing process at Holistic—billing was performed by a professional third-party.[52] There is no reason then, even if suspension at Holistic were somehow warranted, that the Petitioners could not be separated from this suspension and be permitted to work elsewhere under their own NPI codes while the investigation of Holistic's billing practices is conducted.

Therefore, because BMS has not conducted its mandatory good cause analysis, and because ample good cause exists to rescind the suspension entirely, Petitioners would request that this Court reverse the Examiner's decision and rescind the suspension. In the alternative, Petitioners would request that only a partial suspension be imposed—with the conditions being that Petitioners be permitted to receive Medicaid payments while employed somewhere other than Holistic, or that only payments for the particular CPT codes noted in the Investigation Report be restricted.

C. By Refusing to Consider Good Cause, BMS Has Acted Arbitrarily and Capriciously by Essentially Making This an Indefinite Suspension In Violation of Petitioners' Statutory and Constitutional Rights.

Intimately connected with the good cause issue within this case is the uncertain duration of Petitioners' Medicaid payment suspension. In addition to the requirements already discussed, the Medicaid payment suspension regulation also requires that "[a]ll withholding of payment actions under this section will be *temporary*. . ."[53] Therefore, indefinite suspensions of payments are

[51] *See* Record No. 6, BMS Response in Opposition, at Ex. 2.
[52] *See* Record No. 10, Holistic Reply, at Ex. H ¶ 7.
[53] 42 C.F.R. § 455.23(c)(1).

prohibited; BMS may only suspend payments in accord with the strictures set forth in 42 C.F.R. § 455.23.[54]

For example, in *Pressley Ridge Schools, Inc. v. Stottlemeyer,* BMS suspended and pended Medicaid payment for two particular types of Behavioral Management services provided by Pressley Ridge[55] via the prepayment review process under 42 C.F.R. § 447.45(f).[56] The Southern District Court held that BMS had violated 42 C.F.R. § 455.23 because it had used the prepayment review provision to suspend the payments "indefinitely."[57] The Court further held that BMS violated its own regulations when it refused to grant Pressley Ridge an administrative hearing that Pressley Ridge had requested on the suspension and pending of its payments.[58]

Here, BMS can hardly dispute that the pending fraud investigation could take *years* to complete—it has, after all, already been close to a year since the first Notice Letters were sent out and over three years since the Investigation Report was completed.[59] Petitioners are now left only to guess as to how long it will be until they can (if ever) resume making a living. Additionally, BMS, just like in *Pressley Ridge,* refused to provide Petitioners or Holistic with an initial administrative hearing when it was first requested on May 3, 2022.[60] Accordingly, BMS's actions have resulted in violations to Petitioners' recognized statutory and Constitutional rights.[61]

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[54] Pressley Ridge Schools, Inc. v. Stottlemeyer, 947 F. Supp. 929, 940 (S.D. W. Va. 1996).
[55] Pressley Ridge was a provider of mental health care to children in West Virginia. *Id.* at 932.
[56] *Id.* at 935-936.
[57] *Id.* at 940 ("Defendants violated this provision [42 C.F.R. § 455.23] when they suspended payments to Pressley Ridge indefinitely for Behavioral Management Services . . . *Suspension of payments is authorized only by 42 C.F.R. § 455.23 and can be instituted only in accordance with its provisions.*") (emphasis added).
[58] *Id.* at 939.
[59] *See* Record No. 1, Verified Petition, at Ex. A; Record No. 6, BMS Response in Opposition, at Ex. 2.
[60] *See* Record No. 1, Verified Petition, at Ex. B ("We most certainly disagree with this decision and plan to request-at the least- an administrative hearing and stay of the May 16 suspension date.").
[61] *Accord* Alexandre v. Ill. Dept. of Healthcare & Family Services, Case No., 20 C 6745, 2021WL 4206792, at *9 (S.D. Ill. Sept. 15, 2021). ("For these reasons, the court rules that a trier of fact could find that, in the year and a half that Dr. Alexandre's Medicaid payments have been suspended, that suspension crossed the line from 'temporary' to 'indefinite.' Hence, Dr. Alexandre has adequately alleged that she has a property interest in withheld payments for which she is owed due process of law.").

Petitioners' entitlements to Medicaid payments are protected under the Fourteenth Amendment's Due Process Clause by the requirement that "decisions regarding entitlements to government benefits must be made according to 'ascertainable standards' that are applied in a rational and consistent manner."[62] BMS has therefore failed to afford Petitioners an initial opportunity to address the alleged lack of good cause in an initial hearing, and has consistently refused to provide any meaningful explanation as to why good cause does not exist in this case. Accordingly, BMS has undoubtedly acted in an arbitrary and capricious manner because it has neither provided Petitioners with any "ascertainable standards" on which it based the decision to suspend their Medicaid payments, nor has it given them a full and fair opportunity to discover what those standards might be.[63]

D. BMS Acted Arbitrarily and Capriciously by Failing to Provide Petitioners with Adequately Specific Detail of the Allegations in its Pre-Suspension Notices to Petitioners.

The same regulation governing the substance of Medicaid suspensions also contains provisions regarding the notice that must be provided surrounding said suspensions.[64] More specifically, "the notice [of suspension] must include . . . the *general allegations as to the nature of the suspension action* but need not disclose any specific information concerning an ongoing investigation."[65] Therefore, while the agency is not required to disclose specific information relating to an ongoing investigation, it must, at the bare minimum, provide notice of the "general allegations" as to the suspension's nature.

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[62] *See Pressley Ridge*, 947 F. Supp. at 940 (citation omitted).
[63] *See Alexandre,* 2021WL 4206792, at *7 ("[W]here the governing statutes and regulations provide that withholding may be 'temporary' only, a provider can 'regain' his property interest in the withheld funds if the investigation continues indefinitely.") (internal citation and quotations omitted.)
[64] *See generally* 42 C.F.R. § 455.23(b).
[65] *Id.* at § 455.23(b)(2), (b)(2)(ii) (emphasis added).

1. **Applicable Case Law: *Alexandre* and *Snyder***

For example, in *Alexandre v. Ill. Dept. of Healthcare & Family Services,* the Medicaid payments of an Illinois physician, Dr. Alexandre, were suspended for up to three years pending an investigation by Illinois' Medicaid agency (referred to as "HFS").[66] Dr. Alexandre's only initial notice of the suspension was a letter from HFS, which noted a preliminary finding of "billing irregularities" in her practice.[67] When Dr. Alexandre requested clarification and additional information as to the nature of the "billing irregularities," her requests were denied.[68] Even after Dr. Alexandre filed suit against HFS, and HFS was ordered to provide her with information regarding the fraud investigation, HFS's only response was a short email stating that "the investigation remains actively ongoing and pertains to a variety of fraud allegations, including allegations of receiving kickbacks and administering expired vaccines."[69] After some lengthy discussion about whether Dr. Alexandre possessed a cognizable property interest in the suspended payments, the District Court held that HFS had violated her due process rights by suspending her payments "without providing any substantive information about the purported 'billing irregularities' on which the suspension [was] based."[70]

In stark contrast, in *NSCH Rural Health Clinic v. Snyder*, the Court of Appeals of Mississippi held that an initial notice of suspension sent to the plaintiff health clinic was sufficient under the federal regulations.[71] North Sunflower, the plaintiff clinic, had its Medicaid payments suspended by the Mississippi Division of Medicaid ("DOM") pending the results of a Medicaid

[66] Case No., 20 C 6745, 2021WL 4206792, at *1 (S.D. Ill. Sept. 15, 2021). For a detailed summary of *Alexandre*, its implications, and the holdings most germane to this case, Petitioners would direct the Court to Record No. 16, Holistic's Post-Evidentiary Brief, at pp. 11-12.
[67] *Alexandre,* 2021WL 4206792, at *1. Notably, Dr. Alexandre provided services to an underserved population, just as Petitioners do. *Id.* at *2.
[68] *Id.*at *1-2.
[69] *Id.* (internal quotations omitted).
[70] *Id.* at *10.
[71] 321 So.3d 565, 571-572 (Ct. App. Miss. 2020).

fraud investigation concerning billing practices at some of North Sunflower's outreach clinics.[72] North Sunflower challenged the notice, alleging that the only notice it received surrounding the fraud allegations was the "general allegation of fraud set forth in the DOM's initial notice letter" and that "there were no further details disclosed regarding the allegation that led to the Medicaid suspension."[73] Relatedly, the appeals court specifically noted that the "appellate record is devoid of any specific detail concerning the initial fraud allegation that resulted in the reimbursement suspension."[74] Nevertheless, the court still held that the notice was "appropriate" and was in compliance with 42 C.F.R. § 455.23(b)(2)(ii), which requires the agency to give notice of the "general allegations" to the suspended party.[75] In support of this holding, the court noted that "the regulation's obvious goal was to protect the integrity and confidentiality of an ongoing criminal investigation."[76]

Here, Petitioners' case is almost identical to that of *Alexandre*. The *Alexandre* Court specifically found that HFS's "one-sentence response" noting allegations of "kickbacks" and "administering expired vaccines" constituted "minimal information" and was deemed insufficient notice to Dr. Alexandre of the nature of the allegations or the basis for her Medicaid suspension.[77] Similar to Dr. Alexandre's predicament, when Holistic asked for clarification on the nature of the allegations against it and Petitioners, all they received was a barebones response from BMS about its good cause analysis and a wholly conclusory and unenlightening statement that the investigation "concerns allegations of knowingly billing for services never rendered."[78]

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[72] *Id.* at 567-568.
[73] *Id.* at 569.
[74] *Id.* at 569-570.
[75] *Id.* at 571-572.
[76] *Id.* at 571.
[77] *Alexandre,* 2021WL 4206792, at *10.
[78] Record No. 1, Verified Petition, at Ex. D.

Snyder is also inapposite to this case and should not be followed by this Court for three critical reasons.

First, Petitioners here are not seeking protected details of the ongoing fraud investigation. From the beginning, Petitioners' only request has been one for enough information about the nature of the allegations so that Petitioners could prepare a meaningful defense. If Petitioners (and other medical providers) are to be protected from arbitrary and capricious behavior, then this Court cannot allow BMS to take away Petitioners' livelihoods for an indefinite period and then hide its reasons for doing so behind the mask of a "confidential investigation."

Second, *Snyder* provided no analysis whatsoever of the content of the initial notice letter sent to North Sunflower *because it did not even have that information before it*.[79] *Snyder*'s reasoning is therefore because it upheld the notice as "appropriate" even though it had *no idea* as to what the contents of the original notice were, nor did it have any specific information as to the nature of the fraud allegations directed toward North Sunflower.

Thirdly, *Snyder*'s overly generous deference to agency decision making is simply bad policy and even runs the risk of violating the Constitution.[80] The *Snyder* approach would give BMS almost plenary authority to suspend Medicaid payments, and at the same time would allow it to avoid having to provide meaningful justification of its actions to the providers whose lives it up-ends. *Snyder's* holding is not rule that is respective of providers' due process rights; furthermore, it sets a dangerous precedent for future cases involving suspensions. If BMS is not required to explain itself to providers, one can only imagine the Medicaid "snipe hunts" that may ensue. The risk of innocent providers caving to pressure from BMS's unchecked suspension power and admitting fault where a meritorious challenge exists is all too real. If *Snyder* is given the

[79] *Snyder*, 321 So.3d at 569-570.
[80] *See generally Alexandre,* 2021WL 4206792.

persuasive weight it was in the lower proceedings, BMS would be permitted to take away Medicaid payments with just a boilerplate letter and hollow recitals from the Code of Federal Regulations. This approach cannot stand; to uphold it here would do a disservice to West Virginia's medical providers and the patients they serve.

2. BMS's Notices Fail to Even Meet the Federal "General Allegation" Standard

Here, the Notice Letters provided to Petitioners fail to meet even the "general allegations" threshold.[81] It is particularly worth noting that, for the purposes of the regulations governing Medicaid suspensions, an "allegation" is considered "credible" only when it has "indicia of reliability and the State Medicaid agency has reviewed all allegations, facts, and evidence carefully and acts judiciously on a case-by-case basis."[82] BMS has provided virtually no "indicia" that the allegations are credible, *especially* as to Petitioners individually.

The most specific information Petitioners have received regarding the allegations are the documents that were provided in conjunction with BMS' Response in Opposition to the Petition for Writ of Prohibition.[83] Yet even the Referral Form or Investigation Report do not sufficiently apprise Petitioners of the allegations against them. Additionally, regardless of the content of these documents, they were disclosed *long* after suspension was imposed—in direct violation of 42 C.F.R. § 455.23(b)(1)(i).[84]

In the course of the proceedings thus far, BMS has never provided copies of any allegedly fraudulent billing statements, nor has it ever explained, even in the most "general" sense, just what "fraudulent" conduct has supposedly been engaged in by Petitioners. Even the affidavit of Andrew

[81] *See* Record No. 2, Joinder of Writ, at Ex. 1.
[82] 42 C.F.R. § 455.2. *See also Alexandre,* 2021WL 4206792, at *4 (citing the same).
[83] *See* note 11, *supra*.
[84] This subsection requires that the state agency must give notice of its suspension of program payments within "five days of taking such action unless requested in writing by a law enforcement agency to temporarily withhold such notice."

Pack, submitted *after* the hearing before Examiner Brewer, provides no information whatsoever as to the substance of the allegations.[85] Mr. Pack merely recites that there are "allegations of fraud from an MCO," that said allegations are "credible," and . . . nothing more.[86]

Contrary to Mr. Pack's assertions, merely saying that an allegation is "credible" does not actually make it so. However, that is exactly what BMS has done since the first Notice Letters were mailed. In response, Petitioners would simply ask—what makes these particular allegations "credible?" Is it their specificity? The sheer number of alleged instances? The particular source of the information? The nature of the alleged misconduct itself? The extent of documentation of the allegedly fraudulent conduct? Petitioners are not asking for protected information regarding the fraud investigation,[87] but they need at least some basic information surrounding the allegations to able to respond adequately. To do otherwise deprives them of their rights to be informed of any potential charges that could be levied against them.

By analogy, to further illustrate BMS's deficiencies in complying with the notice requirements, there is a reason that the West Virginia Rules of Civil Procedure require claims of fraud to be plead "with particularity."[88] Here, the only explanation for the suspension which Petitioners were initially provided with was a single (and wholly conclusory) statement that there was a "credible allegation of fraud" and that the allegations concerned "knowingly billing for services never rendered."[89] While BMS may have more leeway in Medicaid fraud allegations than it would have in pleadings alleging fraud before the circuit courts, the fact remains that it is patently unfair to expect Petitioners to be able to adequately respond to BMS' allegations when they have

[85] *See* Record No. 15, Affidavit of Andrew Pack, at ¶ 12.
[86] *See id.*
[87] *See* 42 C.F.R. §455.23(b).
[88] W. Va. R. Civ. 9(b).
[89] Record No. 1, Verified Petition, at Ex. D.

not been adequately informed of what they have supposedly done wrong. No court of law would expect a defendant to be able to respond to such barebones allegations of fraud,[90] let alone impose such a harsh penalty on a defendant before the proceedings were concluded. Why should the case be different here?

In short, Petitioners are still left only to guess as to what the "nature of the suspension action"[91] is; BMS refuses to tell them. Further, even if this court determines that, after disclosure of the Investigation Report and Medicaid Fraud Referral Form, BMS's notice is now be considered legally sufficient, the deadlines to disclose such information have *long* since passed.[92] Heretofore, BMS has not provided any evidence of a law enforcement recommendation that notice should have been withheld from Petitioners,[93] therefore, BMS should have provided more specific information on the allegations as early as *five days* after Petitioners' Medicaid payments were suspended. Petitioners have therefore been subject to a drawn-out legal battle just trying to figure out what it is BMS says they did wrong—the quintessential example of a due process violation.

Such flat-out refusal to comply with an explicit notice requirement is the textbook definition of "arbitrary and capricious" conduct. As the *Alexandre* court so succinctly put it, the "Fourteenth Amendment guarantee of due process requires that [Respondents] do more."[94] BMS has had ample opportunity to "do more" but has either resisted or outright refused Petitioners' reasonable requests at every step. Accordingly, this Court should reverse the Hearing Examiner's

[90] *See e.g.,* Basham v. General Shale, 377 S.E.2d 830, 835-836 (W. Va. 1988) (holding that the petitioners' claims for fraud failed to state a cause of action under Rule 9(b) "because the petitioners do no more than express their opinion that the respondent fraudulently sold them defective brick.")
[91] 42 C.F.R. § 455.23(b).
[92] *See id.* at § 455.23(b)(2)(ii).
[93] Indeed, any assertion that law enforcement recommended the withholding of notice is directly contradicted by the fact that BMS provided its first notice letter ***prior to*** the original suspension date of May 16, 2023. *See* Record No. 1, Verified Petition, at Ex. A.
[94] *Alexandre,* 2021WL 4206792, at *10.

decision and should re-instate Petitioners' Medicaid payments in their entirety during the pendency of the fraud investigation, or at least revise it to a partial suspension.

VIII. CONCLUSION

This Court should reverse the below administrative decision and reinstate Petitioners' Medicaid privileges retroactively because, by adopting the Hearing Examiner's decision, BMS erroneously concluded that its actions were not arbitrary and capricious through its refusal to adequately consider the existence of good cause, and through its failure to provide adequate notice to Petitioners.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 4, 2023, a true and correct copy of the foregoing ***"BRIEF OF PETITIONERS***" was served upon counsel of record by filing it with the court's electronic filing system, which will deliver a copy to the following counsel of record:

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