

SUPREME COURT OF APPEALS OF WEST VIRGINIA

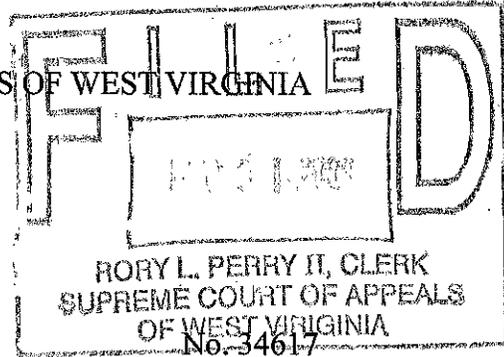
STATE OF WEST VIRGINIA ex rel.  
BOARD OF EDUCATION OF THE  
COUNTY OF PUTNAM,

Petitioner,

vs.

The Honorable J.D. BEANE,  
Judge of the Circuit Court of Wood County,

Respondent.



**COPY**

RESPONSE TO RULE TO SHOW CAUSE

This day comes Leslie L. Maze, Special Prosecuting Attorney, and counsel for the Respondent, West Virginia Department of Health and Human Resources, and provides the following response to the issuance of the rule to show cause in the above-styled matter.

Statement of Facts

C.E.M. was born prematurely on May 29, 1995, and remained hospitalized until after the filing of the underlying abuse and neglect proceeding on February 15, 1996, in the Wood County Circuit Court. The abuse and neglect proceeding was filed in the Wood County Circuit Court, because both parents of the minor child resided in Wood County. Pursuant to said abuse and neglect proceeding, C.E.M. was placed in permanent foster care in a foster home in Putnam County, West Virginia, by Order entered on April 16, 1997. C.E.M. had resided in that same foster home since his release from the hospital at approximately eight (8) months of age and continues to reside in that same foster home to date.

C.E.M. has attended Putnam County Schools since the beginning of his educational career. C.E.M. has always been enrolled in special education classes due to his severe physical and mental disabilities, which are more specifically set forth in the letter written by C.E.M.'s physician, Pamela S. Stallo, M.D., previously filed with the Court. From the beginning of his educational career until the 2008-2009 school year, C.E.M. has always been provided a full-time nurse by the Putnam County Board of Education. In fact, C.E.M. repeated the fifth grade at the elementary school, because there was no full-time nurse available for him if he was promoted to the middle school.

Beginning in the 2008-2009 school year, C.E.M. was promoted to the middle school. A full-time nurse is still not available at the middle school. Rather, the nurse which would provide any necessary medical care to C.E.M. divides her time between two schools and is approximately ten (10) minutes away at various times. C.E.M.'s medical condition as set forth in the letter written by Pamela S. Stallo, M.D., remains unchanged to date and is not expected to improve. A ten (10) minute response for medical personnel could cause significant issues if C.E.M. has one of his frequent seizures which require the administration of rectal Valium and oxygen.

After being denied the provision of a full-time nurse, the Circuit Court of Wood County entered an Order on July 25, 2008, which made specific findings that C.E.M. required the assistance of a full-time nurse due to his severe medical conditions. The Circuit Court of Wood County then entered a subsequent Order on November 10, 2008, which directed the Putnam County Board of Education to provide the full-time nurse for the care of C.E.M. while C.E.M. is in the care of Putnam County Schools.

Argument of Law

The Petitioner submits that the Wood County Circuit Court did not have proper jurisdiction over this matter to issue the Order directing the Putnam County Board of Education to provide a full-time nurse for the care of C.E.M. The Respondent disputes such an argument and submits that the Wood County Circuit Court has jurisdiction in this matter and properly entered said Order, without exceeding its legitimate powers.

The Wood County Circuit Court has the original jurisdiction in the underlying abuse and neglect proceeding, based upon Wood County being the county of residence for both biological parents of C.E.M., pursuant to the provisions of West Virginia Code Section 49-1-1 et seq., and Rule 4a of the West Virginia Rules of Procedure for Child Abuse and Neglect. As a result, the Wood County Circuit Court has maintained jurisdiction over C.E.M. in this proceeding.

Pursuant to West Virginia Code Section 49-6-5(a)(5), upon a finding that the abusing parent is presently unwilling or unable to provide adequately for the child's needs, the Wood County Circuit Court has the ability to Order services to meet the special needs of a child in the Court's jurisdiction under an abuse and neglect proceeding in which the minor child has been committed to the custody of the West Virginia Department of Health and Human Resources. In the present case, C.E.M. is currently in the legal custody of the West Virginia Department of Health and Human Resources with physical placement in permanent foster care in a specialized foster home in Putnam County, West Virginia. In the disposition of this matter, the Wood County Circuit Court has entered an Order which has directed the Putnam County Board of Education to provide C.E.M. with a full-time nurse, as has always been provided to C.E.M. by the Putnam County Board of Education, to meet his special medical needs. The Wood County

Circuit Court has the legitimate power to Order said services pursuant to the provisions of West Virginia Code Section 49-6-5(a)(5). Entry of said Order did not exceed the legitimate powers of the Wood County Circuit Court as is required for the award of a writ of prohibition.

West Virginia Code Section 49-1-1 sets forth the purpose of the child welfare laws of this State. The primary purpose of the child welfare laws is to assure each child care, safety and guidance. See West Virginia Code Section 49-1-1(a)(1). The second primary purpose of the child welfare laws is to serve the mental and physical welfare of each child. See West Virginia Code Section 49-1-1(a)(2). The Supreme Court of Appeals further recognized that the "primary goal in cases involving abuse and neglect, as in all family matters, must be the health and welfare of the children." In re: Katie S., 198 W. Va. 79, 479 S.E.2d 589 (1996). The best interests of the minor child have historically been the preeminent concern in abuse and neglect cases.

The Wood County Circuit Court is simply attempting to ensure that C.E.M. receives the necessary medical care for his own safety and to ensure that his physical welfare is protected. C.E.M. is clearly a child with severe special needs that require specialized medical treatment, which exceed beyond the training of a classroom teacher or teacher's aide. Provision of a nurse ten (10) minutes away severely threatens the welfare of C.E.M. and is not in the best interests of C.E.M. The Wood County Circuit Court recognized the necessity of a full-time nurse for C.E.M.

The Putnam County Board of Education has acknowledged the extraordinary special needs of C.E.M. by providing C.E.M. with a full-time nurse for his entire educational career until the 2008-2009 school year. The Putnam County Board of Education further acknowledged the necessity of the full-time nurse for C.E.M. when the school system held

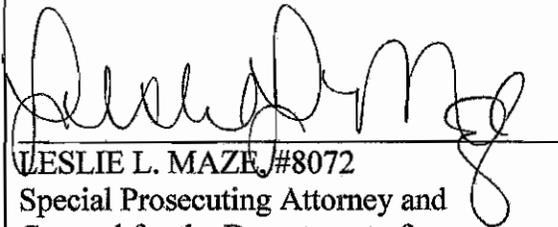
C.E.M. from promotion to the middle school for an additional year so that C.E.M. could continue to receive the services from a full-time nurse at the elementary school. Given that C.E.M.'s medical condition remains unchanged, the Putnam County Board of Education cannot now justify that C.E.M. does not require this specialized care simply because he now attends a different school. However, the Putnam County Board of Education, as reflected in Petitioner's Exhibit 1, made a determination "that the assistance of a full-time nurse is not required at this time. Should the medical condition of the student change in a material way, the issue may be revisited." There is absolutely no medical evidence to justify the determination of the Putnam County Board of Education that a full-time nurse is not required at this time. Rather, the medical recommendation of Dr. Pamela S. Stallo, C.E.M.'s physician, is quite the contrary. C.E.M.'s medical condition has remained unchanged for his entire educational career in Putnam County Schools. Yet the Putnam County Board of Education has made the determination that a full-time nurse is not required, when the full-time nurse has been provided for C.E.M. for the past several years.

Furthermore, the argument of the Putnam County Board of Education that this matter should proceed administratively through the Individualized Education Plan process is ironic, because C.E.M. had a full-time nurse provided by Putnam County Schools at the last Individualized Education Plan meeting. The decision to not provide the full-time nurse for C.E.M. was made arbitrarily by the Putnam County Board of Education after the Individualized Education Plan was formalized.

Conclusion

The Wood County Circuit Court did not exceed its legitimate powers in Ordering the Putnam County Board of Education to provide a full-time nurse to meet the special needs of C.E.M. The Wood County Circuit Court acted in the best interests of C.E.M. and acted to protect the health, safety and welfare of C.E.M. Wherefore, the Respondents respectfully request the Honorable Court deny the Petitioner's Petition for a Writ of Prohibition and relief requested therein.

Respectfully Submitted,



WESLIE L. MAZE, #8072

Special Prosecuting Attorney and  
Counsel for the Department of  
Health and Human Resources

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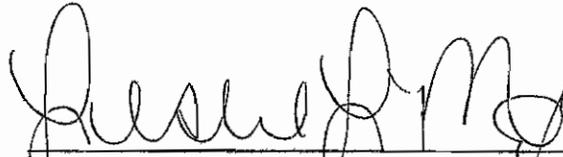
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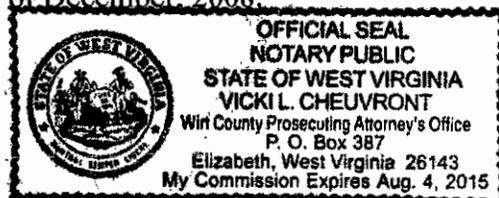
VERIFICATION

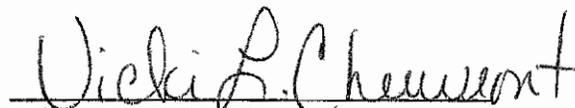
I, Leslie L. Maze, Special Prosecuting Attorney, do hereby affirm that the allegations and responses contained within the foregoing Response to Rule to Show Cause are true insofar as they are based upon personal knowledge or insofar as they are based upon information that I believe them to be true.

  
Leslie L. Maze, #8072  
Special Prosecuting Attorney

STATE OF WEST VIRGINIA,  
COUNTY OF WIRT, TO-WIT:

The foregoing instrument was acknowledged before me by Leslie L. Maze on this 29<sup>th</sup>  
day of December, 2008.



  
NOTARY PUBLIC

My commission expires: August 4, 2015

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CERTIFICATE OF SERVICE

I, Leslie L. Maze, Special Prosecuting Attorney, do hereby certify that I served the foregoing Response to Rule to Show Cause upon the Petitioner, Board of Education of Putnam County, by mailing a true and exact copy thereof to its counsel, Gregory W. Bailey, at his address of Bowles, Rice, McDavid, Graff & Love, 7000 Hampton Center, Suite K, Morgantown, West Virginia, 26505 on this 29<sup>th</sup> day of December, 2008.



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