

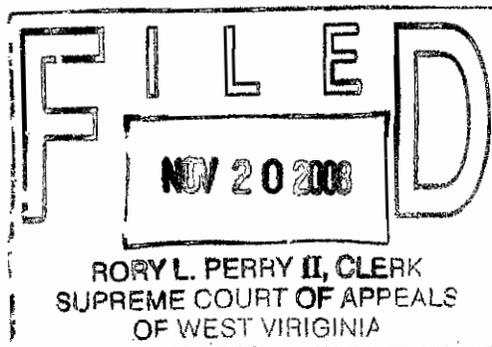
SUPREME COURT OF APPEALS OF WEST VIRGINIA

BOARD OF EDUCATION OF THE
COUNTY OF PUTNAM,

Petitioner,

v.

The Honorable J. D. BEANE, C.E.M. a minor
The Honorable LESLIE L. MAZE, in her
Capacity as Special Prosecuting Attorney of
Wood County, West Virginia, SUSAN
D. SIMMONS, in her capacity as guardian
ad litem, and WEST VIRGINIA DEPARTMENT
OF HEALTH AND HUMAN SERVICES,



Respondents.

PETITION FOR A WRIT OF PROHIBITION

1. C.E.M. is a minor student enrolled in Putnam County Schools who is eligible for and receiving special education and related services in accordance with the requirements of the Individuals with Disabilities Education Act (IDEA) and West Virginia Board of Education Policy 2419. IDEA was enacted by Congress to “ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.” 20 U.S.C. § 1400(d)(1)(A). In exchange for federal education funding, states must provide disabled children between the ages of 3 and 21 with a free and appropriate public education (FAPE). 20 U.S.C. § 1412(a)(1)(A).
2. Nursing services are considered a related service under IDEA and West Virginia Board of Education Policy 2419. Determination of the need for and scope of such services falls within the responsibility of an Individualized Education Program (IEP) team comprised

of educators, parents and other professionals. An administrative procedure exists to resolve disputes between parents and school officials upon the question of whether the special education and related services contained in a student's IEP afford the student with a FAPE under the requirements of IDEA and West Virginia Board of Education Policy 2419.

3. No party on behalf of C.E.M. has invoked the administrative procedure described in the foregoing paragraph asserting that the employment of a full-time nurse is required for C.E.M. to receive FAPE.
4. On or about July 30, 2008, Superintendent Harold Hatfield received a facsimile from Rose Ann Bullman of the West Virginia Department of Health and Human Resources that attached a copy of an Order that had been entered by the Honorable J. D. Beane in a juvenile abuse and neglect case styled *In Re C.E.M. A.K.A. C.E.S.*, Case No. 96-JA-6, Wood County Circuit Court, on July 24, 2008. A copy of this facsimile and attachment is attached hereto as Petitioner's Exhibit 1.
5. In reply to Ms. Bullman's invitation to respond to the Court's Order, counsel for the Petitioner corresponded to Ms. Bullman by letter dated July 31, 2008. The letter to Ms. Bullman explained that while Putnam County Schools was not a party to the proceedings and that the Order did not require Putnam County Schools to take any action, the Court's findings would be afforded appropriate consideration. A copy of the July 31, 2008, letter is attached hereto as Petitioner's Exhibit 2.
6. On November 14, 2008, counsel for the Petitioner received an Order entered by the Honorable J. D. Beane on November 7, 2008, requiring Petitioner to provide a full-time

nurse to C.E.M. and to pay the expense of providing such a nurse. The Order further required that a copy of the Order be provided, *inter alia*, to counsel for the Petitioner. A copy of the November 7, 2008, Order is attached as Petitioner's Exhibit 3.

7. Petitioner is not a party to *In Re C.E.M. A.K.A. C.E.S.*, Case No. 96-JA-6, Wood County Circuit Court. Petitioner has been provided with no notice of any kind in relation to any of the proceedings involved in this case, including proceedings wherein the interests of the Board of Education of the County of Putnam were apparently considered and decided *ex parte*.
8. The Wood County Circuit Court never acquired jurisdiction over the Petitioner in relation to the aforementioned Order of November 7, 2008.
9. Absent jurisdiction over the Board of Education of the County of Putnam, the Circuit Court of Wood County, West Virginia, exceeded its lawful authority in ordering the Petitioner to provide and pay for a full-time nurse for C.E.M.
10. The November 7, 2008, Order directing that a copy be provided to counsel to the Petitioner, indicates that the Respondents were on notice that the Petitioner was not subject to the jurisdiction of the Wood County Circuit Court. Moreover, the intentional disregard of fundamental notions of due process, including notice and hearing, required the Petitioner to seek the protection of this Court.

WHEREFORE, Petitioner respectfully prays that this Honorable Court grant a writ of prohibition that would prohibit the enforcement of the November 7, 2008, Order of the Circuit

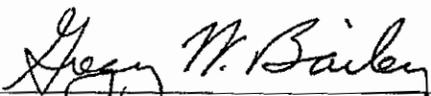
Court of Wood County, West Virginia. Petitioner also respectfully prays that it be awarded reasonable and necessary attorney fees incurred in the prosecution of this application.

Dated this 20th day of November, 2008.

Respectfully submitted,

THE BOARD OF EDUCATION
OF THE COUNTY OF PUTNAM,

Petitioner.



Gregory W. Bailey (SBID# 206)
Howard E. Seuffer, Jr. (SBID# 3342)
BOWLES RICE MCDAVID GRAFF & LOVE LLP
7000 Hampton Center, Suite K
Morgantown, West Virginia 26505
(304) 285-2500 (telephone)
(304) 285-2530 (facsimile)
Counsel for Petitioner

SUPREME COURT OF APPEALS OF WEST VIRGINIA

**BOARD OF EDUCATION OF THE
COUNTY OF PUTNAM,**

Petitioner,

v.

**The Honorable J. D. BEANE, C.E.M. a minor;
The Honorable LESLIE L. MAZE, in her
Capacity as Special Prosecuting Attorney of
Wood County, West Virginia, SUSAN
D. SIMMONS, in her capacity as guardian
ad litem, and WEST VIRGINIA DEPARTMENT
OF HEALTH AND HUMAN SERVICES,**

Respondents.

VERIFICATION

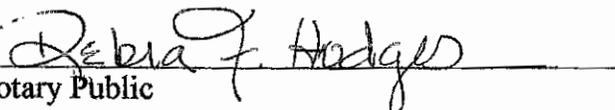
I, Harold Hatfield, Superintendent of Putnam County Schools, hereby swear or affirm that the allegations and statements contained in the forgoing Petition for a Writ of Prohibition are true insofar as they are based upon personal knowledge and insofar as they are based on information that I believe them to be true.


Harold Hatfield

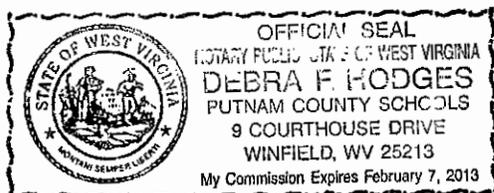
11-18-08
Date

State of West Virginia
County of Putnam

Taken and subscribed before me on this the 18th day of November 2008.


Notary Public

My commission expires: Feb. 7, 2013



SUPREME COURT OF APPEALS OF WEST VIRGINIA

BOARD OF EDUCATION OF THE
COUNTY OF PUTNAM,

Petitioner,

v.

The Honorable J. D. BEANE,
The Honorable LESLIE L. MAZE, in her
Capacity as Special Prosecuting Attorney of
Wood County, West Virginia, and
SUSAN D. SIMMONS, in her capacity
as guardian ad litem,

Respondents.

MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF PROHIBITION

A writ of prohibition “lies as a matter of right whenever the inferior court (a) has no jurisdiction or (b) has jurisdiction but exceeds its legitimate powers and it matters not if the aggrieved party has some other remedy adequate or inadequate.” West Virginia Code § 53-1-1; *State ex rel. Valley Distributors, Inc. v. Oakley*, 153 W. Va. 94, 99, 168 S.E.2d 532, 535 (1969). This is a straightforward application for intervention into action by a circuit court to compel a party, over which it had no jurisdiction, to provide and pay for a full-time nurse for a student. The Circuit Court of Wood County had no jurisdiction over the Petitioner. A circuit court must have both jurisdiction over the subject matter and the parties. The absence of either is fatal to the circuit court’s jurisdiction. *West Virginia Secondary School Activities Commission v. Wagner*, 143 W. Va. 508, 102 S.E.2d 901 (1958).

The lack of jurisdiction is compounded by a denial of fundamental due process.

“The due process of law guaranteed by the State and Federal Constitutions, when applied to procedure in the courts of the land, requires both notice and the right to be heard.’ Syllabus point 2,

Simpson v. Stanton, 119 W. Va. 235, 193 S.E. 64 (1937).” Syllabus, *Crone v. Crone*, 180 W. Va. 184, 375 S.E.2d 816 (1988).” Syllabus Point 1, *Norfolk and Western Railroad Co. v. Sharp*, 183 W. Va. 283; 395 S.E.2d 527 (1990).

The Petitioner was not provided with any notice or hearing in relation to the circuit court’s decision to order it to undertake the provision of a full-time nurse for a student. The manner in which the circuit court proceeded allowed no input of any sort from the Petitioner concerning its fulfillment of obligations to meet the needs of the student in question.

Even if the Court had jurisdiction, the exhaustion of established administrative remedies is generally required as a requisite to judicial intervention into matters arising from disputes involving the provision of special education and related services. *See, Ronnie Lee S. v. Mingo County Board of Education*, 201 W. Va. 667, 500 S.E.2d 292 (1997).

This Court has consistently required jurisdiction over a party as a requisite to the exercise of judicial authority.

The Department of Health and Human Resources acted in derogation of the Petitioner’s fundamental right to due process of law by electing to deny Petitioner notice and an opportunity for hearing in relation to the relief contained in the circuit court’s November 7, 2008, order and intentionally abused the authority of the circuit court to obtain an order against a party over which the Court had no jurisdiction. Such conduct triggers and entitlement to an award of attorney’s fees. *Nelson v. The West Virginia Public Employees Ins. Board*, 171 W. Va. 445, 300 S.E.2d 86 (1983).

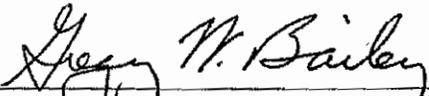
WHEREFORE, based upon the forgoing argument, Petitioner respectfully prays that this Honorable Court grant a writ of prohibition that would prohibit the enforcement of the

November 7, 2008, order of the Circuit Court of Wood County, West Virginia. Petitioner also respectfully prays that it be awarded reasonable and necessary attorney's fees incurred in the prosecution of this application.

Respectfully submitted,

THE BOARD OF EDUCATION
OF THE COUNTY OF PUTNAM,

Petitioner.



Gregory W. Bailey (SBID# 206)
Howard E. Seuffer, Jr. (SBID# 3642)
BOWLES RICE MCDAVID GRAFF & LOVE LLP
7000 Hampton Center, Suite K
Morgantown, West Virginia 26505
(304) 285-2500 (telephone)
(304) 285-2530 (facsimile)
Counsel for Petitioner

SUPREME COURT OF APPEALS OF WEST VIRGINIA

**BOARD OF EDUCATION OF THE
COUNTY OF PUTNAM,**

Petitioner,

v.

The Honorable J. D. BEANE, C.E.M. a minor;
The Honorable LESLIE L. MAZE, in her
Capacity as Special Prosecuting Attorney of
Wood County, West Virginia, SUSAN
D. SIMMONS, in her capacity as guardian
ad litem, and WEST VIRGINIA DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Respondents.

**MEMORANDUM LISTING NAMES AND ADDRESSES OF PERSONS UPON WHOM A
RULE TO SHOW CAUSE IS TO BE SERVED, IF GRANTED**

The Honorable J. D. Beane
Judge, 4th Judicial Circuit
Wood County Judicial Building
2 Government Square, Rm. 321
Parkersburg, West Virginia 26101-5353

Leslie L. Maze, Esquire
Post Office Box 278
Elizabeth, West Virginia 26143

Susan D. Simmons, Esquire
Simmons & Simmons LC
Rt 3 Box 252A
Elizabeth, West Virginia 26143

West Virginia Department of Health and Human Resources
Bureau for Children and Families, Region I
Post Office Box 1547
Parkersburg, West Virginia 26102

Date: November 20, 2008

CERTIFICATE OF SERVICE

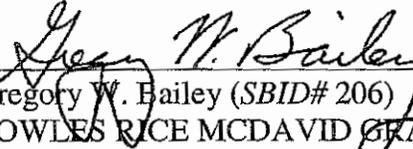
The undersigned, counsel for the Putnam County Board of Education, hereby certifies that on the 20th day of November, 2008, a true copy of the foregoing document titled "PETITION FOR A WRIT OF PROHIBITION and MEMORANDUM IN SUPPORT OF WRIT OF PROHIBITION" was served upon the respondents by placing same in the United States mail, postage prepaid and addressed as follows:

The Honorable J. D. Beane
Judge, 4th Judicial Circuit
Wood County Judicial Building
2 Government Square, Rm. 321
Parkersburg, West Virginia 26101-5353

Leslie L. Maze, Esquire
Post Office Box 278
Elizabeth, West Virginia 26143

Susan D. Simmons, Esquire
Simmons & Simmons LC
Rt. 3 Box 252A
Elizabeth, West Virginia 26143

West Virginia Department of Health and Human Resources
Bureau for Children and Families, Region I
Post Office Box 1547
Parkersburg, West Virginia 26102



Gregory W. Bailey (SBID# 206)
BOWLES RICE MCDAVID GRAFF & LOVE LLP
7000 Hampton Center, Suite 4
Morgantown, West Virginia 26505
(304) 285-2500 (telephone)
(304) 285-2530 (facsimile)
Counsel for Petitioner