

No. 16-0738 – State of West Virginia ex rel. Pressley Ridge, et al. v. West Virginia Department of Health and Human Resources, et al.

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

BENJAMIN, Justice, dissenting:

I join Justice Loughry's dissenting opinion for the reasons set forth therein. I share the concerns of my colleagues about the best interests of children in West Virginia, particularly those with needs currently being served by the respondents. However, I agree with Justice Loughry that mandamus relief is not only unwarranted, but also unwise in this instance.

I write to expand on the first footnote in Justice Loughry's dissenting opinion – a footnote focusing on the procedural history of this matter. Initiated in the seeking of extraordinary relief in mandamus before the circuit court, no appeal to this Court was sought by the respondents below from the circuit court's refusal to issue a writ. As a preliminary matter, the attempt at the circuit court level to force an administrative agency to engage in rule-making in this case is itself legally and constitutionally problematic. As noted in Justice Loughry's dissenting opinion, the issuance of a writ by this Court requires that the party seeking the writ demonstrate its legal right to the relief being requested. I fail to see that legal right. More importantly, the failure to appeal the matter below in an expedited fashion simply compounds the problem before this Court: petitioners still do not demonstrate their legal right to the relief being requested; the same constitutional problems of having courts require rulemaking in the contract area is still

present; and it appears that petitioners are simply getting another “bite at the apple.” I respectfully dissent for these reasons and the reasons set forth in Justice Loughry’s dissenting opinion.