



May 23, 2024

U.S. MAIL & EMAIL: Brian.R.Abraham@wv.gov
Cynthia.A.Persily@wv.gov

The Honorable Jim Justice, Governor
Brian R. Abraham
Office of the Governor
State Capitol, 1900 Kanawha Blvd. E
Charleston, WV 25305

Cynthia Persily, Secretary
Department of Human Services
One Davis Square
Suite 100 East
Charleston, WV 25301

The Honorable Patrick Morrissey
State Capitol Complex, Bldg. 1, Rm E-26
1900 Kanawha Blvd. E
Charleston, WV 25305

RE: Cease & Desist Demand & Notice of Suit

Dear Governor Justice and Secretary Persily:

Pursuant to W.Va. Code §55-17-3, please accept this letter as notice of anticipated legal action against each of you and the West Virginia Department of Human Services (“DHS”) related to DHS’ violation of its Child Protective Services Policy, Chapter 49 of the Code of West Virginia, and the Child Abuse Prevention and Treatment Act (“CAPTA”) in connection with the death of a child in Boone County, West Virginia (“Boone County Death”) and your ongoing concealment of documents and information related to the Boone County Death, child abuse cases, child abuse investigations, and child abuse findings that federal and state law otherwise requires to be disclosed.

Further, please accept this letter as a demand that the Governor’s office and DHS cease and desist from any further violation of applicable law regarding the mandatory public disclosure of information and documents related to the Boone County Death, child abuse cases, child abuse investigations, and child abuse findings. *See* 42 U.S.C. § 5106a(b)(2)(B)(x); W.Va. Code §49-5-101(d) and (n); W.Va. Code §29B-1-1 *et seq.*; and *Tax Analysts v. Irby*, 900 S.E.2d 37 (W.Va.

Removing Barriers to Opportunity and Equality

The Protection & Advocacy System for the State of WV

Disability Rights of West Virginia • 5088 Washington St. W, Suite 300 • Charleston, WV 25313
800.950.5250 • 304.346.0847 • FAX 304.346.0867 • contact@drowv.org

2024). Additionally, please cease and desist from any threats, intimidation, termination, or retaliatory actions against any person and any DHS worker who fulfills DHS's mandatory duty of disclosing required documents and information related to the Boone County Death, child abuse cases, child abuse investigations, and child abuse findings.

1. DRWV's Authority & Standing

Disability Rights of West Virginia ("DRWV") is the federally mandated protection and advocacy system for West Virginia. *See* 42 U.S.C. § 10801(b) and 42 U.S.C. § 15001(b)(2). DRWV has been West Virginia's P&A since 1977. P&As were established by the United States Congress in 1975 to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&As are the largest provider of legally based advocacy services to people with disabilities in the United States.

The P&A system was established with the passage of the Developmentally Disabled Assistance and Bill of Rights Act in 1975 ("DD Act"), Pub. L. No. 94-103, 89 Stat. 486 (1975) (originally codified at 42 U.S.C. §§ 6041-6043 and currently at 42 U.S.C. §§ 15041-15045). Over the nearly four subsequent decades, Congress has expanded the authority of P&As to protect individuals with disabilities with the passage of, among other laws, the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI"), 42 U.S.C. §§ 10801 *et seq.*, and the Protection and Advocacy of Individual Rights Program of the Rehabilitation Act ("PAIR"), 29 U.S.C. § 794e. PAIMI was amended in 2000 to empower P&As to protect individuals with mental illness who reside in the community, including in their own homes, e.g., Boone County Death.

West Virginia is required to have a P&A because the state elects to receive federal funds targeted to improve community services for persons with developmental disabilities and mental illness. *See* 42 U.S.C. §§ 15023 and 15024 and 42 U.S.C. § 10801 *et seq.* As recognized by former Justice Antonin Scalia, P&As are autonomous and "must have certain structural features that ensure its independence from the State's government." *Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247, 251 (2011).

2. Mandatory Public Disclosure of Child Abuse Records & Information

When the U.S. Congress amended the Child Abuse Prevention and Treatment Act in 2010, the U.S. Senate published a report as part of CAPTA's legislative history that clearly establishes Congress' intent that requires mandatory public disclosure of child abuse information pursuant to 42 U.S.C. § 5106a(b)(2)(B)(x):

The committee believes that the duty of child protective services, required in CAPTA Sec. 106(b)(2)(x), to provide for *the mandatory public disclosure of*

information about a case of child abuse or neglect which has resulted in a child fatality or near fatality ensures improved accountability of protective services and can drive appropriate and effective systemic reform. However, the committee is aware that not all States are in compliance with these CAPTA requirements. S. REP. 111-378, S. Rep. No. 378, 111TH Cong., 2ND Sess. 2010, 2010 WL 5373817 at 12. (emphasis added)

CAPTA’s clear and unambiguous language and Congress’ clear intent is to require the mandatory public disclosure of information regarding child abuse cases, child abuse investigations, and child abuse findings to improve accountability of protective services and promote systemic reform. *See generally* Child Welfare Policy Manual, §2.1A.4 (U.S. Dept. of Health and Human Services, Administration for Children and Families, Children’s Bureau).¹

Regrettably, the Governor’s office and DHS have knowingly subverted Congress’ clear CAPTA mandate in order to evade accountability, conceal DHS misconduct, threaten bogus criminal charges, retaliate against the press and others, and prevent “appropriate and effective systemic reform.”²

CAPTA was enacted to be a shield to protect children and promote CPS accountability, but the Governor’s office and DHS have unlawfully turned CAPTA into a sword to conceal DHS’ historic and ongoing failure to protect vulnerable children. You are misusing CAPTA to preserve and promote your political careers while innocent children continue to be abused and murdered.

Your recent actions are a continuation of the historic pattern of DHS and DHS’ predecessor withholding CPS information and barring CPS staff from communicating with legislators³; concealing information that children in DHS’ custody and control are placed in hotels and at Camp Virgil Tate⁴; concealing information that children were detained in unsafe

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https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=68

2 <https://dhhr.wv.gov/News/2024/Pages/DoHS-Secretary-Releases-Statement-Regarding-Investigation-in-Boone-County.aspx>

3 West Virginia Senate Finance Meeting, January 31, 2022 at 16:20:40 <https://sg001-harmony.sliq.net/00289/Harmony/en/PowerBrowser/PowerBrowserV2/20220131/-1/56186#agenda>

4 <https://www.wowktv.com/news/west-virginia/west-virginia-housing-some-foster-kids-in-hotels-other-locations/> and https://www.register-herald.com/news/state_region/foster-care-kids-describe-cps-foster-experiences--with-video/article_a3668e8a-77f3-11ed-8287-b313ec2d5b00.html

and abusive placements⁵; stonewalling⁶; and terminating the former DHS general counsel (and current Senate staffer) for disclosing a non-PII and non-PHI record related to the parents who locked up their two adopted children in a Sissonville barn and used them as slaves.⁷ DHS' recent retaliatory threats of criminal charges against DHS staff who fulfill their mandatory duty of public disclosure is inexcusable and an attempt to conceal Secretary Persily's and her leadership team's reckless failure to keep children safe.

Additionally, in press briefings and public statements you both have alluded to DHS counsel and the advice of DHS counsel as a basis for DHS' violation of applicable law and concealment of child abuse related documents and information:

1. Governor Justice – “We’ve got basically attorneys that are with [DHS] and they screw it up. And, when they give us information, then we’ve got to act on the information they give us.”⁸
2. Secretary Persily – “Our lawyers have traditionally interpreted the state and federal statutes as us not being allowed to disclose any information except to very limited groups ... and we advised the governor as such, and we take full responsibility for that.”⁹

You both asserted that you relied upon the advice of DHS counsel in taking your actions and/or failing to disclose documents and information otherwise required by CAPTA. As such, your defense of violating CAPTA and its mandatory public disclosure provision is the advice of counsel. If so, and if you have relied in good faith on the advice of counsel, you have waived the attorney-client privilege by asserting reliance on counsel's advice to evade your public disclosure duty under CAPTA. *State ex rel. U.S. Fidelity & Guar. Co. v. Canady*, 460 S.E.2d 677, syl. no. 8 (W.Va.1995) (“A party may waive the attorney-client privilege by asserting claims or defenses that put his or her attorney's advice in issue.”) and *Nicholas v. Bituminous Cas. Corp.*, 235

⁵ <https://mountainstatespotlight.org/2021/09/21/west-virginia-foster-care-out-of-state-homes/>

⁶ <https://westvirginiawatch.com/2024/01/26/lack-of-information-about-tragic-foster-care-cases-prompts-oversight-bill-in-house-of-delegates/>

⁷ [https://westvirginiawatch.com/2024/02/16/judge-demands-records-says-cps-failed-to-adequately-investigate-kids-locked-in-sissonville-shed/#:~:text=By%3A%20Amelia%20Ferrell%20Knisely%20%2D%20February,16%2C%202024%206%3A00%20am&text=West%20Virginia%20Watch\)-.A%20federal%20judge%20says%20Child%20Protective%20Services%20failed%20to%20respond,to%20water%20or%20a%20toilet.](https://westvirginiawatch.com/2024/02/16/judge-demands-records-says-cps-failed-to-adequately-investigate-kids-locked-in-sissonville-shed/#:~:text=By%3A%20Amelia%20Ferrell%20Knisely%20%2D%20February,16%2C%202024%206%3A00%20am&text=West%20Virginia%20Watch)-.A%20federal%20judge%20says%20Child%20Protective%20Services%20failed%20to%20respond,to%20water%20or%20a%20toilet.)

⁸ <https://westvirginiawatch.com/2024/05/08/justice-walks-back-his-comments-that-cps-wasnt-aware-of-boone-teen-found-dead-in-her-home/>

⁹ <https://www.wsaz.com/2024/05/10/wsaz-obtains-documents-audio-whistleblower-letter-case-boone-co-teen-who-died-alleged-neglect/>

The Honorable Jim Justice, Secretary Persily, and
The Honorable Patrick Morrisey

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F.R.D. 325, 333 (N.D.W.Va.2006) (“Invoking reliance on the advice of counsel defense constitutes a waiver of the work product doctrine.”).

I will be sending under separate cover a spoliation notice and notice to preserve electronically stored information. In the interim, DRWV welcomes the opportunity to work cooperatively with you to ensure compliance with the mandatory public disclosure requirements of CAPTA and DHS’ duty to keep children safe. If such efforts fail or your misconduct continues DRWV will file suit.

Please contact me if you have any questions about this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael J. Folio", with a long horizontal flourish extending to the right.

Michael J. Folio
Legal Director