

Case No. 05-4171

---

In the  
**United States Court of Appeals  
for the Seventh Circuit**

---

WISCONSIN COALITION FOR ADVOCACY, INC.,

Appellant,

v.

STATE OF WISCONSIN DEPARTMENT OF PUBLIC  
INSTRUCTION and ELIZABETH BURMASTER,  
State Superintendent of Public Instruction, in her official capacity.

Appellee.

---

ON APPEAL FROM A FINAL JUDGEMENT OF THE  
UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WISCONSIN,

Case No. 05-C295-C  
HON. BARBARA CRABB, PRESIDING

---

**BRIEF OF AMICUS CURIAE  
NATIONAL DISABILITY RIGHTS NETWORK  
IN SUPPORT OF APPELLANT  
AND REVERSAL OF THE TRIAL COURT RULING**

---

RICHARD A. SCHNEIDER  
*Counsel of Record*  
KING & SPALDING LLP  
191 Peachtree Street  
Atlanta, GA 30303  
(404) 572-4600

*Counsel for Amicus Curiae*

AUGUSTA M. RIDLEY  
ELIZABETH ANN PIERSON (Admitted  
in Maryland Only)  
JAN PAUL MINCARELLI (Admitted in  
Pennsylvania Only)  
KING & SPALDING LLP  
1700 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006  
(202) 737-0500

**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 05-4171

Short Caption: Wisconsin Coalition for Advocacy, Inc. v. Wis. Dep't of Pub. Instruction, et. al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief.

**Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

National Disability Rights Network  
\_\_\_\_\_

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

King & Spalding LLP  
\_\_\_\_\_

(3) If the party or amicus is a corporation:  
i) Identify all its parent corporations, if any; and

N/A  
\_\_\_\_\_

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A  
\_\_\_\_\_

Attorney's Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Attorney's Printed Name: Richard A. Schneider  
\_\_\_\_\_

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d).  
**Yes X No \_\_\_\_\_**

Address: King & Spalding LLP, 191 Peachtree Street, Atlanta, GA 30303  
\_\_\_\_\_

Phone Number: (404) 572-4889 Fax Number: (404) 572-5100

E-Mail Address: DSchneider@kslaw.com  
\_\_\_\_\_

**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 05-4171

Short Caption: Wisconsin Coalition for Advocacy, Inc. v. Wis. Dep't of Pub. Instruction, et. al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief.

**Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

National Disability Rights Network  
\_\_\_\_\_

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

King & Spalding LLP  
\_\_\_\_\_

(3) If the party or amicus is a corporation:  
i) Identify all its parent corporations, if any; and

N/A  
\_\_\_\_\_

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A  
\_\_\_\_\_

Attorney's Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Attorney's Printed Name: Augusta M. Ridley  
\_\_\_\_\_

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d).  
**Yes**\_\_ **No** X

Address: King & Spalding LLP, 1700 Pennsylvania Ave. NW, Suite 200, Washington, DC 20006-4706  
\_\_\_\_\_

Phone Number: (202) 626-2914 Fax Number: (202) 626-3737

E-Mail Address: ARidley@kslaw.com  
\_\_\_\_\_

**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 05-4171

Short Caption: Wisconsin Coalition for Advocacy, Inc. v. Wis. Dep't of Pub. Instruction, et. al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief.

**Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

National Disability Rights Network  
\_\_\_\_\_

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

King & Spalding LLP  
\_\_\_\_\_

(3) If the party or amicus is a corporation:  
i) Identify all its parent corporations, if any; and

N/A  
\_\_\_\_\_

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A  
\_\_\_\_\_

Attorney's Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Attorney's Printed Name: Elizabeth Ann Pierson  
\_\_\_\_\_

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d).  
**Yes**\_\_ **No**X

Address: King & Spalding LLP, 1700 Pennsylvania Ave. NW, Suite 200, Washington, DC 20006-4706  
\_\_\_\_\_

Phone Number: (202) 626-5598 Fax Number: (202) 626-3737

E-Mail Address: EPierson@kslaw.com  
\_\_\_\_\_

**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 05-4171

Short Caption: Wisconsin Coalition for Advocacy, Inc. v. Wis. Dep't of Pub. Instruction, et. al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief.

**Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

National Disability Rights Network  
\_\_\_\_\_

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

King & Spalding LLP  
\_\_\_\_\_

(3) If the party or amicus is a corporation:  
i) Identify all its parent corporations, if any; and

N/A  
\_\_\_\_\_

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A  
\_\_\_\_\_

Attorney's Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Attorney's Printed Name: Jan Paul Mincarelli  
\_\_\_\_\_

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d).  
**Yes**\_\_ **No**X

Address: King & Spalding LLP, 1700 Pennsylvania Ave. NW, Suite 200, Washington, DC 20006-4706  
\_\_\_\_\_

Phone Number: (202) 661-7884 Fax Number: (202) 626-3737

E-Mail Address: JMincarelli@kslaw.com  
\_\_\_\_\_

## MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to FED. R. APP. P. 29(b), National Disability Rights Network (“NDRN”) hereby moves the Court for leave to file the attached amicus brief in support of appellant and seeking reversal of the decision of the District Court in this action.

NDRN is a membership association of Protection and Advocacy Agencies (“P&As”) located in every state in the nation, as well as in the District of Columbia, Puerto Rico and the territories. Under federal law, each state or other jurisdiction is authorized to appoint a designated P&A that is vested with the authority to provide advocacy, legal representation, and protection for individuals with disabilities in each jurisdiction. *See, e.g.*, 42 U.S.C. §10801 *et seq.* The P&A system comprises the nation’s largest provider of legally based advocacy services for persons with disabilities. Every P&A has a critical interest in obtaining access to the information made available to them by federal law and regulations. That access was denied to a P&A in the case below and NDRN has a direct interest in the reversal of that incorrect decision.

The instant case involves a P&A known as the Wisconsin Coalition for Advocacy, Inc. (“WCA”), and its effort to protect and advocate for students with disabilities located within the State of Wisconsin. The issue in this case concerns a P&A’s right to obtain from the State of Wisconsin investigative files and the names of individuals who may be subject to incidents of abuse and neglect by state employees working with students with disabilities. One of the critical functions of P&As by federal statute is the investigation of incidents of abuse and neglect. To perform

that function, the P&As need access to information, including investigative files generated by the State relating to potential incidents of abuse and neglect, and need access to the names of individuals involved so that the P&A can conduct its own investigation in accordance with its statutory authority. The underlying federal statutes and regulations discussed at length in the attached brief recognize the P&A's need for this critical information and dictate that P&As should be afforded access to such information. Cases around the country regularly recognize that P&As are entitled to the kind of information sought in this case. The decision below denies access to information in violation of federal law.

As a national association of P&As, NDRN has a very direct interest in the enforcement of the federal statutes that provide member agencies with access to critical information. The attached amicus brief demonstrates that a denial of information, like the denial at issue in this case, is a matter of national concern because it directly impacts a P&A's ability to perform its statutory functions. NDRN submits this brief to show the broad interest of P&As across the country in the issue before this Court and to explain to the Court the federal authorities and practical necessities that dictate that the information at issue here must be made available in order for P&As to perform adequately in the manner envisioned by Congress. The federal authorities, regulations, and cases discussed in the attached brief are directly relevant to showing both the need for the information at issue and that Congress intended that such information be made available to P&As.

Wherefore, NDRN respectfully requests that the Court grant this motion and allow the attached amicus brief to be filed.

Dated: January 27, 2006

Respectfully submitted,

RICHARD A. SCHNEIDER  
*Counsel of Record*  
KING & SPALDING LLP  
191 Peachtree Street  
Atlanta, GA 30303  
(404) 572-4600

AUGUSTA M. RIDLEY  
ELIZABETH ANN PIERSON (Admitted  
in Maryland Only)  
JAN PAUL MINCARELLI (Admitted  
in Pennsylvania Only)  
KING & SPALDING LLP  
1700 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006  
(202) 737-0500

*Counsel for Amicus Curiae*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ix

STATEMENT OF INTEREST OF AMICUS CURIAE ..... 1

SUMMARY OF THE ARGUMENT ..... 3

ARGUMENT ..... 7

    I. Congress Intended P&As to have Broad Access to Records Needed to Perform Their  
    Statutory Function..... 7

    II. P&As Need Access to Investigative Reports Concerning Potential Incidents of Abuse  
    and Neglect, and to the Names of Individuals Involved..... 11

        A. Courts Have Required That a State’s P&A Be Effective..... 11

        B. Courts Have Required Facilities to Provide “Directory Information” When Necessary. 12

        C. Regulations Require That the P&A Have Access to Investigative Records, the Names of  
        the individuals involved and Be Provided Guardian Information When Access is Denied. 14

    III. P&A Access Does Not Intrude on Individual Privacy Rights..... 16

        A. P&As Are Bound by Strict Confidentiality Rules. .... 16

        B. The Provision of Limited “Directory Information” Does Not Intrude on Individuals’  
        Privacy Rights and Is Consistent With Other Federal and State Laws..... 17

        C. The P&A’s Legitimate Need For the Information Sought Outweighs Any Privacy  
        Concerns ..... 18

    IV. WCA was Not Required to Exhaust Administrative Remedies..... 20

CONCLUSION..... 22

## TABLE OF AUTHORITIES

Page

### CASES

<i>Advocacy Ctr. v. Stalder</i> , 128 F. Supp. 2d 358 (M.D. La. 1999).....	11, 17, 18
<i>Advocacy, Inc. v. Brown Schools, Inc.</i> , 2001 U.S. Dist. LEXIS 16139 (W.D. Texas 2001) .....	13, 15
<i>Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.</i> , 894 F. Supp. 424 (M.D. Ala. 1995) (DD Act) .....	11
<i>Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.</i> , 97 F.3d 492 (11th Cir. 1996) .....	11
<i>Bobkoski v. Bd. of Educ. of Cary Consol. Sch. Dist. 26</i> , 1992 U.S. Dist. LEXIS 13743 (N.D. Ill. 1992).....	18
<i>Connecticut Office of Prot. &amp; Advocacy v. Armstrong</i> , 266 F. Supp. 2d 303 (D. Conn. 2003) .....	17
<i>Connecticut Office of Prot. &amp; Advocacy v. Hartford Bd. of Educ.</i> , 355 F. Supp. 2d 649 (D. Conn. 2005) appeal docketed, No. 05-1240-cv (2d Cir. March 7, 2005) .....	13, 14
<i>Connecticut Office of Prot. &amp; Advocacy v. Kirk</i> , 354 F. Supp. 2d 196 (D. Conn. 2005) .....	12
<i>Ctr. for Legal Advocacy v. Hammons</i> , 323 F.3d 1262 (10th Cir. 2003) .....	12, 17
<i>Doe v. Stincer</i> , 175 F.3d 879 (8th Cir. 1999) .....	21
<i>Georgia Advocacy Office v. Borison</i> , 520 S.E.2d 701 .....	13
<i>Hathaway v. Joint Sch. Dist. No. 1, City of Green Bay</i> , 116 Wis. 2d 388 (Wis. 1984) .....	18
<i>Iowa Prot. &amp; Advocacy Servs., Inc. v. Gerard Treatment Programs</i> , 152 F. Supp. 2d 1150 (N.D. Iowa 2001) .....	10, 19
<i>Iowa Prot. &amp; Advocacy Servs., Inc. v. Rasmussen</i> , 206 F.R.D. 630 (S.D. Iowa 2001).....	17

<i>Mississippi Prot. &amp; Advocacy Sys. v. Cotten</i> , 929 F.2d 1054 (5th Cir. 1991) (DD Act)	11
<i>Oklahoma Disability Law Ctr., Inc. v. Dillon Family and Youth Services, Inc.</i> , 879 F. Supp. 1110 (N.D. Okla. 1995)	17
<i>Pennsylvania Prot. &amp; Advocacy v. Houstoun</i> , 228 F.3d 423 (3d Cir. 2000)	12, 17
<i>Pennsylvania Prot. &amp; Advocacy, Inc. v. Royer-Greaves</i> , 1999 U.S. Dist. LEXIS 4609 (E.D. Penn. 1999)	13, 15
<i>Prot. &amp; Advocacy System, Inc. v. Freudenthal</i> , No. 05CV014J, slip op. at 9-10 (D. Wyo. Jan. 6, 2006)	9
<i>Univ. Legal Serv. v. D.C.</i> , No. 1:05-CV-00585 (TFH), slip op. at 9 (D.D.C. July 22, 2005)	21
<i>Wisconsin Coal. for Advocacy v. Wisconsin Dep't. of Pub. Instruction</i> , No. 05-C-295-C, slip op. at 10-14 (W.D. Wis. Aug. 10, 2005)	14, 20
<i>Wisconsin Coal. for Advocacy, Inc. v. Czaplewski</i> , 131 F. Supp. 2d 1039 (E.D. Wis. 2001)	17

## STATUTES

20 U.S.C. §1232	18
29 U.S.C. §794e	1, 2, 7, 8
42 C.F.R. §51.41	6, 9
42 C.F.R. §51.42	14, 15
42 C.F.R. §51.43	13, 15
42 U.S.C. §10801	1, 8, 20
42 U.S.C. §10801 <i>et seq.</i>	1, 7
42 U.S.C. §10802	14
42 U.S.C. §10804	10
42 U.S.C. §10805	2, 6, 8, 10, 17

42 U.S.C. §10806.....	4, 17
42 U.S.C. §10807.....	21
42 U.S.C. §15041 <i>et seq.</i> .....	1, 7
42 U.S.C. §15043.....	2, 6, 8, 10
42 U.S.C. §15044.....	17
45 C.F.R. §1386.22.....	4, 6, 9, 13
Pub. L. No. 106-310.....	14

#### FEDERAL REGULATIONS

62 Fed. Reg. 53560 (Oct. 15, 1997) .....	10
62 Fed. Reg. 53652 (Oct. 15, 1997) .....	15

#### STATE STATUES

Wis. Stat. §118.125.....	18
Wis. Stat. §146.82.....	16

#### OTHER AUTHORITIES

Appellant’s Br.....	7, 20
APRAIS, <i>In the Name of Treatment: A Parent’s Guide to Protect Your Child Against the Use of Restraint, Aversive Interventions, and Seclusion, available at <a href="http://www.aprais.org/ParentGuide2.pdf">http://www.aprais.org/ParentGuide2.pdf</a>, (2005)</i> .....	19
General Accounting Office, <i>Improper Restraint or Seclusion Use Places People at Risk</i> (1999) .....	19
NAPAS, 2001 P&A/CAP SYSTEM ANNUAL REPORT, p. 17, <a href="http://www.ndrn.org/pub/AnnRpt/2002rpt.pdf">http://www.ndrn.org/pub/AnnRpt/2002rpt.pdf</a> .....	8

NAPAS, THE PADD PROGRAM REPORT OF ACTIVITIES FOR 2004, p. 15 (litigation chosen as intervention strategy in only 4% of cases), [http://www.ndrn.org/pub/AnnRpt/Report\\_2004/PADD04.pdf](http://www.ndrn.org/pub/AnnRpt/Report_2004/PADD04.pdf) ..... 8

NAPAS, THE PAIMI PROGRAM 2004 ANNUAL REPORT, [http://www.ndrn.org/pub/AnnRpt/Report\\_2004/PAIMI04.pdf](http://www.ndrn.org/pub/AnnRpt/Report_2004/PAIMI04.pdf) ..... 8

NDRN’s Annual Reports, available at <http://www.ndrn.org/pub/AnnRpt/default.htm> ..... 8

PROTECTION AND ADVOCACY FOR PEOPLE WITH DISABILITIES, INC., UNEQUAL JUSTICE FOR SOUTH CAROLINIANS WITH DISABILITIES: ABUSE AND NEGLECT INVESTIGATIONS (2005), <http://www.protectionandadvocacy-sc.org/Unequal%20Justice%20Report.pdf>..... 8

## STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Disability Rights Network (“NDRN”)<sup>1</sup> respectfully submits this brief in support of appellants. NDRN is the membership association of protection and advocacy agencies (“P&As”) that are located in all 50 states, the District of Columbia, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa, and the Northern Marianas Islands). P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all individuals with disabilities in a variety of settings. *See* Protection and Advocacy for Individuals with Mental Illness Act (“PAIMI”), 42 U.S.C. §10801 *et seq.*, Developmental Disabilities Assistance and Bill of Rights Act (“DD Act”), 42 U.S.C. §15041 *et seq.*, and the Protection and Advocacy of Individual Rights Act (“PAIR”), 29 U.S.C. §794e (collectively the “P&A Acts”). In fiscal year 2004, P&As served over 76,000 individuals with disabilities through individual case representation and systemic advocacy. The P&A system comprises the nation’s largest provider of legally based advocacy services for individuals with disabilities.

Through the P&A Acts, Congress gave substantial support to each state that established a P&A agency to protect the rights of individuals with disabilities so that these individuals may live a secure and stable life. *See, e.g.*, PAIMI, 42 U.S.C. §10801(b). P&As are authorized under the P&A Acts to (1) investigate incidents of abuse and neglect of individuals with disabilities if the incidents are reported to the P&A system or if there is probable cause to believe that the incidents occurred, and

---

<sup>1</sup> NDRN was previously known as the National Association of Protection and Advocacy Systems (“NAPAS”).

(2) pursue administrative legal and other appropriate remedies to ensure the protection of individuals with disabilities. 42 U.S.C. §10805(a)(1); 42 U.S.C. §15043(a)(2); 29 U.S.C. §794e(f). NDRN files this brief because it has a strong interest in furthering these federal policies and in ensuring that P&As are able to fulfill their crucial, congressionally mandated mission.

In this case, a District Court denied a P&A access to an investigative report and the names of school children with disabilities who had been potentially subject to abuse and neglect by being restrained in a locked room. The outcome of this case is of particular interest to NDRN because access to an investigative record and the names of individuals potentially subjected to abuse and neglect is essential to a P&A's ability to fulfill its mandate. In this case, the investigative records at issue are alarming because they report a practice where children with disabilities were locked in a seclusion room. This plainly falls under the rubric of potential "abuse and neglect" as defined in the P&A Acts and implementing regulations. The extent to which state investigative agencies, such as the Wisconsin Department of Public Instruction ("DPI") restrict P&As' access to names and investigative reports to protect itself and a school, such as the Abraham Lincoln Elementary School, from a P&A's oversight is an issue that is very important to P&As throughout the country and to the individuals with disabilities whom P&As protect.

Participation of Amicus Curiae will assist the Court in understanding the national and historical perspective of P&As and the importance of access to information as part of their responsibility for investigating abuse and neglect. The

lower court interpreted the P&A Acts as requiring a P&A to know the names of the individuals involved and obtain their authorization before the P&A may request access to an investigative report of an incident of potential abuse and the names of the individuals involved. In so ruling, the court mistakenly applied statutory provisions governing access to individual student records (which sometimes do require authorization) to the entirely separate issue of the P&A's right to obtain investigatory reports and the names of potentially abused individuals when the P&A has determine that there is probable cause of abuse and neglect. The latter right is not conditioned on some pre-knowledge of names nor on authorization by some student, parent, or guardian. The District Court's erroneous interpretation, if allowed to stand, will severely hinder the ability of a P&A to investigate incidents and protect and advocate on behalf of individuals with disabilities. Consequently, the disposition of this case is likely to have far-reaching effects on the quality of P&As' oversight not only in Wisconsin, Illinois, and Indiana, but also throughout the country.

### **SUMMARY OF THE ARGUMENT**

The District Court's holding that a P&A must have the names of individuals subjected to abuse and neglect before it can investigate such incidents is erroneous. The ruling is contrary to the purpose of the P&A Acts, and, in effect, it prevents a P&A from carrying out its statutory mandate to protect individuals with mental illness or developmental disabilities when the P&A receives a complaint of abuse or neglect of unidentified victims. The ruling is contrary to well settled law, including

both the majority of courts and the P&A Acts' regulations that grant P&As access to the names of individuals potentially subjected to abuse and neglect and investigative reports relating to incidents of abuse and neglect. Furthermore, the ruling was contrary to PAIMI and its implementing regulations as they relate to exhaustion of remedies.

Congress recognized that individuals with mental illness or developmental disabilities are particularly susceptible to abuse and neglect. With this in mind, the P&A Acts balance the need for active monitoring of facilities that provide services to these individuals and the need to investigate suspected incidents of abuse and neglect with a respect for the privacy and autonomy of these individuals. This balance is achieved because, under PAIMI, a P&A is required to strictly safeguard the confidentiality of information to the same extent required of mental health providers under federal and state law, 42 U.S.C. §10806(a), under the DD regulations, a P&A is required to maintain the confidentiality of information in clients records and the names and identities of those who report abuse and neglect. 45 C.F.R. §1386.22 (e).

Where states or facilities have imposed restrictions on a P&A's monitoring and investigation activities, rendering the P&A's efforts to protect individuals with mental and developmental disabilities ineffective, courts have held that such restrictions violate the P&A Acts. Courts have also interpreted the access to records provisions of the P&A Acts broadly where such access is necessary for the P&A to carry out its investigation of suspected incidents of abuse and neglect.

The root of the error in this case is that the District Court confused two distinct topics – (a) the first topic is the matter at hand – getting access to investigative reports, including the names of the individuals involved, where the P&A has determined that there is probable cause of abuse and neglect. This is a statutory right that the P&A has that is in no way conditioned on knowing the names of or having authorization from the students involved; and (b) the decidedly separate topic (which is not at issue) of getting access to individual student records, which is in some cases conditioned on getting authorization from the student or guardian. The Court mistakenly concluded that the statutory provisions requiring certain authorizations for individual student records governed the entirely separate matter of requests for investigative files and the names of students involved in incidents of potential abuse and neglect or their guardians.

The P&A here did not seek individual student records – it sought an investigative file and the names of potentially abused students. The materials sought in this case are governed by the P&As’ general right to conduct investigations when the P&A receives reports of abuse and neglect, or determines that there is probable cause of abuse and neglect. The underlying regulations plainly recite that P&As are entitled to investigative reports, and P&As are clearly entitled to know the names of individuals involved in incidents of abuse and neglect so that they can conduct investigations, request their individual records, contact the individuals to get authorizations, and perform all of the other functions assigned to a P&A. The District Court simply focused on the wrong statutory provisions (the

ones governing access to individual student records) and overlooked the provisions of the regulations that define the broad role of the P&As and grant them access to information and names – including investigative reports on incidents of potential abuse and neglect – needed to perform its statutory mandate to investigate abuse and neglect and protect the rights of individuals with disabilities. *See* 42 U.S.C. §10805(a)(1); 42 U.S.C. §15043(a)(2)(A); 42 C.F.R. §51.41(c)(2); 45 C.F.R. §1386.22 (b)(2).

Congress found that state systems for monitoring compliance with respect to the rights of individuals with disabilities vary widely and are frequently inadequate. This is especially obvious in recent cases of secluding or restraining children with mental illness or developmental disabilities. P&As have played a significant role in exposing, preventing, and stopping this practice. Without access to individuals subjected to these practices or other forms of abuse and neglect, P&As will be rendered helpless in their fight to stop shocking incidents of abuse and neglect. Consequently, the District Court’s decision should be overruled.

The District Court did not address defendant’s argument that the Family Educational Rights and Privacy Act (“FERPA”) somehow justified its denial of access to the information requested in this case. The issue should thus not be reached by this court and is not addressed in this amicus brief. NDRN notes that various courts have recognized that FERPA does not limit a P&A’s right of access to information. *See* Appellant’s Br. 20-21.

## ARGUMENT

### **I. Congress Intended P&As to have Broad Access to Records Needed to Perform Their Statutory Function.**

Congress enacted the DD Act in 1975 after an exposé by rookie reporter Geraldo Rivera revealed the inhumane and dangerous living conditions at New York's Willowbrook State School, at that time the world's largest institution for individuals with developmental disabilities. 42 U.S.C. §15041 *et seq.* (until 2000 codified at 42 U.S.C. §§6041-43). In 1986, protection was extended to persons with mental illness by the passage of PAIMI. 42 U.S.C. §10801 *et seq.* The PAIR Act extended the protections that PAIMI and the DD Act created to individuals with disabilities who do not fall within the groups protected by those acts. 29 U.S.C. §794e. PAIR provides that P&As operating under PAIR “have the same general authorities, including access to records . . . as are set forth in” the DD Act. 29 U.S.C. §794e(f)(2).

Recognizing the vulnerability of these populations, the P&A Acts condition federal funding for each state on the establishment of an effective protection and advocacy system to protect and advocate the rights of individuals with mental illness and developmental disabilities. Under the P&A Acts, the P&A is authorized to investigate incidents of abuse and neglect when it receives a complaint or determines that there is probable cause to believe such incidents occurred, and to pursue “administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the state.” 42 U.S.C. §10805(a)(1); *see also* 42 U.S.C. §15043(a)(2)(A)(i) (similar language); 29 U.S.C. §794e(f)(3) (similar language).

In authorizing the establishment of independent P&As, Congress recognized that state systems for protecting the rights of individuals with disabilities vary widely and are frequently inadequate. *See* 42 U.S.C. §10801 (a)(4). Unfortunately, investigative activities of P&As around the country show that this is still true.<sup>2</sup>

The vast majority of investigations undertaken by P&As do not end in litigation, but in the resolution of issues to the mutual satisfaction of the individuals with mental illness or developmental disabilities, guardians, facility management, and state agencies.<sup>3</sup> Cooperative resolution is facilitated when service providers acknowledge that federal law gives P&As broad access to facilities, individuals, and records to carry out their statutory mandate.<sup>4</sup>

Significantly, Section 51.41(c) of the PAIMI regulations outlines a P&A's right of access to investigatory information. 42 C.F.R. §51.41 (stating "access to records shall be extended promptly to all authorized agents of a P&A system"); *see also Prot. & Advocacy System, Inc. v. Freudenthal*, No. 05CV014J, slip op. at 9-10 (D.

---

<sup>2</sup> *See generally* PROTECTION AND ADVOCACY FOR PEOPLE WITH DISABILITIES, INC., UNEQUAL JUSTICE FOR SOUTH CAROLINIANS WITH DISABILITIES: ABUSE AND NEGLECT INVESTIGATIONS (2005), <http://www.protectionandadvocacy-sc.org/Unequal%20Justice%20Report.pdf>; NAPAS, THE PAIMI PROGRAM 2004 ANNUAL REPORT, [http://www.ndrn.org/pub/AnnRpt/Report\\_2004/PAIMI04.pdf](http://www.ndrn.org/pub/AnnRpt/Report_2004/PAIMI04.pdf); NAPAS, 2001 P&A/CAP SYSTEM ANNUAL REPORT, p. 17, <http://www.ndrn.org/pub/AnnRpt/2002rpt.pdf>.

<sup>3</sup> *See* NAPAS, THE PAIMI PROGRAM 2004 ANNUAL REPORT, p. 10 (legal remedies chosen as intervention strategy in only 2% of cases); *see also* NAPAS, THE PADD PROGRAM REPORT OF ACTIVITIES FOR 2004, p. 15 (litigation chosen as intervention strategy in only 4% of cases), [http://www.ndrn.org/pub/AnnRpt/Report\\_2004/PADD04.pdf](http://www.ndrn.org/pub/AnnRpt/Report_2004/PADD04.pdf)

<sup>4</sup> *See, e.g.*, the many instances recounted in NDRN's Annual Reports, available at <http://www.ndrn.org/pub/AnnRpt/default.htm>, in which P&As were able to access the information necessary to fully investigate and work cooperatively with state agencies and facilities to improve conditions and train staff members.

Wyo. Jan. 6, 2006) (holding that the P&A had the right to access patients' record under Section 51.41 as well as the P&A Acts) (attached). The regulation defines the information to be made available to include "reports prepared by an agency charged with investigating abuse and neglect . . . that describe . . . (i) abuse[,] neglect, or injury occurring at the facility." 42 C.F.R. §51.41(c)(2). The regulation affords access to information concerning reports of incidents of abuse and investigations thereof, including "records which describe persons who were interviewed . . . and the related investigative findings." *Id.*; see also 45 C.F.R. §1386.22 (b)(2)(iv). This is the very type of information that was sought by and denied to the P&A in this case.

In addition to the foregoing general investigatory information, the regulations track the PAIMI statute's provisions affording the P&A access to individual records in certain circumstances depending upon the existence of authorizations and other factors. See 42 C.F.R. §51.41(b). It is critical to emphasize that the terms governing access to individual records do not apply to access to general investigatory information, such as reports of incidents of potential abuse and neglect and the names of persons involved. In the instant case, the P&A sought and was entitled to investigatory information; it did not seek the kinds of individual records governed by the authorization provision of 42 C.F.R. §51.41(b).

It should be noted that PAIMI balances the need for active monitoring of facilities that provide care and treatment to individuals with mental illness and investigation of suspected abuse and neglect with respect for the privacy and autonomy of individuals with mental illness by requiring that a P&A obtain

authorization from such individuals or their legal guardian before accessing individual records, where possible. *See* 42 U.S.C. §10805(a)(4)(A). If an individual is unable to authorize access and does not have a guardian other than the state, the P&A may access his records if it has received a complaint or otherwise determined there is probable cause to believe he has been subjected to abuse and neglect. 42 U.S.C. §10805(a)(4)(B). Even when an individual with mental illness has a guardian, if the guardian refuses to authorize access or fails to act to protect the individual, the P&A may access the individual's records if it receives a complaint or determines there is "probable cause to believe the health or safety of the individual is in serious and immediate jeopardy."<sup>5</sup> 42 U.S.C. §10804(a)(4)(C). The commentary to the PAIMI regulations reiterates that a P&A must have access to "all relevant records." 62 Fed. Reg. 53560 (Oct. 15, 1997).

The language of the DD Act likewise entitles a P&A to all records that are relevant to its investigation, *see* 42 U.S.C. §15043(a)(2)(B), as well as "other records that are relevant to conducting an investigation." 42 U.S.C. §15043(a)(2)(J). These records must be provided "not later than 3 business days" after a written request by the system. *Id.*

---

<sup>5</sup> To override a guardian's refusal to sign an authorization, a P&A must either have received a complaint or meet this higher probable cause requirement. It has been held that a guardian's failure to consent to access by the P&A may by itself constitute a "failure or refusal to act on behalf of the individual." *Iowa Prot. & Advocacy Servs., Inc. v. Gerard Treatment Programs*, 152 F. Supp. 2d 1150, 1165 (N.D. Iowa 2001).

## II. P&As Need Access to Investigative Reports Concerning Potential Incidents of Abuse and Neglect, and to the Names of Individuals Involved.

### A. Courts Have Required That a State's P&A Be Effective.

---

Where states and facilities have imposed restrictions on the P&A's monitoring and investigative activities, thereby limiting the efficacy of the system's efforts to protect individuals with mental and developmental disabilities, courts have held such restrictions violate the P&A Acts. *Mississippi Prot. & Advocacy Sys. v. Cotten*, 929 F.2d 1054, 1059 (5th Cir. 1991) (DD Act) ("The state cannot satisfy the requirements of [the Act] by establishing a protection and advocacy system which has this authority in theory, but then taking action which prevents the system from exercising that authority."). The P&A Acts require an effective system of advocacy. *Advocacy Ctr. v. Stalder*, 128 F. Supp. 2d 358, 367 (M.D. La. 1999) (PAIMI); *Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.*, 894 F. Supp. 424, 429 (M.D. Ala. 1995) (DD Act), *aff'd*, *Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.*, 97 F.3d 492 (11th Cir. 1996).

Courts have also broadly interpreted the access to records provisions of PAIMI where access is necessary to effectuate the P&A's ability to carry out an investigation of incidents in which individuals with mental illness were subjected to abuse and neglect. Thus, the Third Circuit, in an opinion by Judge Alito, held that a P&A was entitled to peer review records under the clear statutory language of PAIMI, in spite of regulatory language that purported to preserve state law protections of such records from disclosure. *Pennsylvania Prot. & Advocacy v.*

*Houstoun*, 228 F.3d 423, 428 (3d Cir. 2000). This reasoning has now been followed by the Tenth Circuit and at the District Court level in the Second Circuit. *Ctr. for Legal Advocacy v. Hammons*, 323 F.3d 1262, 1270 (10th Cir. 2003); *Connecticut Office of Prot. & Advocacy v. Kirk*, 354 F. Supp. 2d 196, 201 (D. Conn. 2005).

Furthermore, P&As cannot effectively investigate abuse and neglect without access to names and investigative reports. Without these names the investigation is stymied for lack of information, thus limiting the protection that the P&A can provide to these susceptible individuals, especially when the gatekeeper of the information is often the alleged abuser. P&As usually do not know if the parents (in this case) were presented with an accurate picture. P&As need the names of the parents and DPI's investigative report so the P&A can do its own independent investigation, compare it with DPI's investigation, and make sure an accurate picture of these incidents of abuse and neglect is portrayed to prevent further abuse and neglect.

B. Courts Have Required Facilities to Provide “Directory Information” When Necessary.

---

Where disputes over access to names have resulted in litigation, courts have ordered facilities to provide identifying information, as well as names and contact information for guardians, when this information was needed to carry out an investigation into abuse and neglect. In *Advocacy, Inc. v. Brown Schools, Inc.*, the court held that the school must provide the name and contact information for the parents of a deceased child when access to records was refused. 2001 U.S. Dist.

LEXIS 16139, at \*13 (W.D. Tex. 2001). The court in *Pennsylvania Prot. & Advocacy, Inc. v. Royer-Greaves* held that when a general request for access to all records was denied, the P&A was entitled to a list of guardians with contact information under §1386.22 (I) of the DD Act regulations, even when the P&A had not yet found sufficient probable cause to obtain access to an individual's records. 1999 U.S. Dist. LEXIS 4609, \*28-30 (E.D. Pa. 1999); *see also* 45 C.F.R. §1386.22(I) (analogous to 42 C.F.R. §51.43 of the PAIMI regulations). The court held "[t]he practical result of this ruling is that all a P&A need[s] to do [] to receive a list of guardians is ask for it." *Pennsylvania Prot. & Advocacy, Inc.*, 1999 U.S. Dist. LEXIS 4609 at \*33.

More recently, in *Connecticut Office of Prot. & Advocacy v. Hartford Bd. of Educ.*, the court held that the P&A was entitled to names and contact information for guardians under PAIMI and PAIR, and that federal statutes protecting the privacy of student records did not prevent the release of such directory information. 355 F. Supp. 2d 649, 661-64 (D. Conn. 2005) *appeal docketed*, No. 05-1240-cv (2d Cir. Mar. 7, 2005); *see also Georgia Advocacy Office v. Borison*, 520 S.E.2d 701, 705 (providing a court procedure that gave the P&A access to the names of potential abused persons where the P&A had probable cause to believe that abuse and neglect had occurred, although it was unable to identify persons involved and thus needed access to the names).

In spite of the abundant case law relating to P&A access, the District Court failed to cite to any decision in support of its interpretation of PAIMI and the DD

Act. *See Wisconsin Coal. for Advocacy v. Wisconsin Dep't. of Pub. Instruction*, No. 05-C-295-C, slip op. at 10-14 (W.D. Wis. Aug. 10, 2005) (attached).

C. Regulations Require That the P&A Have Access to Investigative Records, the Names of the individuals involved and Be Provided Guardian Information When Access is Denied

---

Section 51.41 of the PAIMI regulations, as noted above, summarizes a P&A's right of access to investigatory information and individual records. Section 51.42(b) of the PAIMI regulations outlines a P&A's right of access to individuals with mental illness in the course of investigating incidents of abuse and neglect, including minors and the victims of such incidents, as well as others who may have knowledge of the incident.<sup>6</sup> This right to interview individuals in the course of an investigation does not require authorization, but is to be provided "upon request" if a report or complaint is made to the P&A, or if the P&A determines that there is probable cause to believe an incident has or may have occurred. 42 C.F.R. §51.42(b). The District Court's holding makes it impossible for a P&A to have the access to individuals necessary for a full investigation of incidents of abuse and neglect, as provided for by §51.42(b). *See Wis. Coal. for Advocacy*, No. 05-C-295-C, slip op. at 11.

Section 51.43 deals directly with a denial of access; when a denial occurs, the P&A must be given a written statement of reasons promptly, including, where the

---

<sup>6</sup> The regulations use the word "resident," which was essentially interchangeable with "individuals with mental illness" before the amendment of PAIMI in 2000 to include persons who live "in a community setting, including their own home." Children's Health Act of 2000, Pub. L. No. 106-310, codified at 42 U.S.C. §10802(4). *See also Connecticut Office of Prot. & Advocacy v. Hartford Bd. of Educ.*, 355 F. Supp. 2d 649, 657-58 (D. Conn. 2005). The regulations have not yet been revised to reflect the 2000 amendment to the PAIMI statute.

denial is for lack of authorization, the name, address, and telephone number of the individual's guardian. In commentary, the Department of Health and Human Services agreed that a P&A need not provide justification concerning its need for guardian information and that this information should be provided promptly. 62 Fed. Reg. 53652 (Oct. 15, 1997); *see also Advocacy, Inc. v. Brown Schools, Inc.*, 2001 U.S. Dist. LEXIS 16139, at \*10 (W.D. Tex. 2001) (the "lack of authorization" that triggers an obligation to provide the guardian's name and contact information may be based on the refusal of the guardian to consent to access or an assertion that the statute does not authorize access).

Based on a similar provision in the DD Act and as noted above, the court in *Pennsylvania Prot. & Advocacy, Inc. v. Royer-Greaves* held that when a general request for access to all records was denied, the P&A was entitled to a list of guardians with contact information. 1999 U.S. Dist. LEXIS 4609, at \*33 (E.D. Pa. 1999); *see also* 45 C.F.R. §1386.22 (I). This was true even though the P&A did not have probable cause to see the records of any individual consumers and it was not alleged that any of the consumers were clients of the P&A. *Pennsylvania Prot. & Advocacy, Inc.*, 1999 U.S. Dist. LEXIS 4609 at \*33.

The implementing regulations are not alone in interpreting the PAIMI statute to require the facility to provide names and contact information of guardians when the P&A is investigating incidents of abuse and neglect: the Wisconsin legislature has also concluded that the P&A is entitled to this information. The Wisconsin patient confidentiality statute provides that "patient health care records *shall* be released

upon request without informed consent” to staff members of the designated P&A agency for the purpose of protecting and advocating the rights of an individual with developmental disabilities or mental illness. Wis. Stat. §146.82(2)(a)9.b. (2005) (emphasis added). The restrictions contained in 9.c. and d., limiting the information that the P&A can obtain without informed consent when the patient has a guardian and requiring the P&A to notify the guardian of his right to object, “do not apply if the custodian of the record fails to promptly provide the name and address of the parent or guardian.” Wis. Stat. §146.82(2)(a)9.e.<sup>7</sup> Clearly, the Wisconsin legislative provision is supportive of the view that a P&A is entitled to seek access to records even when it does not know the name of the individual at risk, for the purpose of protecting and advocating the rights of persons with developmental disabilities or mental illness.

### III. P&A Access Does Not Intrude on Individual Privacy Rights.

#### A. P&As Are Bound by Strict Confidentiality Rules.

---

In cases where P&As have argued the P&A Acts preempt state law, courts have decided in favor of P&As.<sup>8</sup> An important factor in the courts’ preemption

---

<sup>7</sup> Under §146.82(2)(a)9.c., the limited information that the P&A may obtain without informed consent when a patient has a guardian includes: “the nature of an alleged rights violation, if any; the *name*, birth date and county of residence *of the patient*; information regarding whether the patient was voluntarily admitted, involuntarily committed or protectively placed and the date and place of admission, placement or commitment; and the name, address and telephone number of the guardian of the patient and the date and place of the guardians [sic] appointment....” (emphasis added).

<sup>8</sup> See *Ctr. for Legal Advocacy v. Hammons*, 323 F.3d 1262, 1272 (10th Cir. 2003); *Iowa Prot. & Advocacy Servs., Inc. v. Rasmussen*, 206 F.R.D. 630, 639 (S.D. Iowa 2001); *Wisconsin Coal. for Advocacy, Inc. v. Czaplewski*, 131 F. Supp. 2d 1039, 1048-49 and n.3 (E.D. Wis. 2001); *Advocacy Ctr. v. Stalder*, 128 F. Supp. 2d 358, 366-67 (M.D. La. 1999); *Connecticut Office of Prot. & Advocacy v. Armstrong*, 266 F. Supp. 2d 303, 319-20 (D. Conn. 2003).

analysis has been the fact that P&As are themselves bound by strict confidentiality rules and must maintain the confidentiality of the records to the same extent as the provider of the service. *See Advocacy Ctr. v. Stalder*, 128 F. Supp. 2d 358, 366 (M.D. La. 1999) (finding that there is no reason to suspect that the confidentiality will be breached where the P&A system must maintain the confidentiality of the records to the same extent as the provider of the service); *see also Pennsylvania Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423, 428-29 (3d Cir. 2000). In addition, because of their advisory council structure and ties to the disability rights advocacy community, P&As are deeply committed to practices that respect the privacy and independence of individuals with disabilities.<sup>9</sup>

B. The Provision of Limited “Directory Information” Does Not Intrude on Individuals’ Privacy Rights and Is Consistent With Other Federal and State Laws

---

In the school context, typically, “directory information” by itself does not implicate substantial privacy concerns and is uniquely within the custody and control of the facility that provides services or treatment to individuals with disabilities. Both FERPA and the Wisconsin statute protecting the confidentiality of

---

<sup>9</sup> 42 U.S.C. §10806(a); *see also Oklahoma Disability Law Ctr., Inc. v. Dillon Family and Youth Services, Inc.*, 879 F. Supp. 1110, 1112 (N.D. Okla. 1995); 42 U.S.C. §10805(a)(6) (The chair and at least 60% of the membership of the advisory council of a P&A must include individuals who have received or are receiving mental health services or who are family members of such individuals.); 42 U.S.C. §15044(a).

student records recognize the lower level of privacy protection owed to directory information in the school context.<sup>10</sup>

Admittedly, here the P&A is seeking directory information about specific students who were subjected to abuse rather than general directory information. It would indeed be ironic if that fact alone made it *more* difficult for the entity responsible for protecting such students to obtain the information needed to conduct an effective investigation. In addition, as stated above, the confidentiality of student records will not be breached because the P&A is required to strictly safeguard the confidentiality of the information. *Advocacy Ctr.*, 128 F. Supp. 2d at 366.

#### C. The P&A's Legitimate Need For the Information Sought Outweighs Any Privacy Concerns

---

The charge that Congress has made to P&As to protect individuals with disabilities is particularly crucial in the case of children with mental illness or developmental disabilities. P&As have played a role in the growing consensus against secluding or restraining individuals with disabilities, particularly children with disabilities. *See generally* General Accounting Office, *Improper Restraint or*

---

<sup>10</sup> 20 U.S.C. §1232g(b)(1) (prior written consent of parents not needed to publish directory information); Wis. Stat. §118.125(2)(j) (school permitted to release name and address of students without prior consent, after notifying parents or guardians of the directory data policy and giving parents the chance to opt-out). The Wisconsin Supreme Court ordered the release of a list of parents and their addresses to an education association, holding that the list was a public record and not a pupil record entitled to confidential treatment under Wis. Stat. §118.125. *Hathaway v. Joint Sch. Dist. No. 1, City of Green Bay*, 116 Wis. 2d 388, 400-01 (Wis. 1984). *See also Bobkoski v. Bd. of Educ. of Cary Consol. Sch. Dist. 26*, 1992 U.S. Dist. LEXIS 13743, at \*9 (N.D. Ill. 1992) (distinguishing student names, addresses and phone numbers from other student records, and noting that disclosure of such “directory information” does not raise the same privacy concerns).

*Seclusion Use Places People at Risk* (1999) (noting that P&As had investigated many deaths associated with restraint or seclusion, and discussing the risks that restraints and seclusion pose to individuals with disabilities); *see also* APRAIS, *In the Name of Treatment: A Parent's Guide to Protect Your Child Against the Use of Restraint, Aversive Interventions, and Seclusion*, available at <http://www.aprais.org/ParentGuide2.pdf>, at 13 (2005) (noting, in discussion of alternatives to restraint and seclusion, the role of P&As in investigating abuse and neglect and informing the public of rights).

The horror of recent cases in which children with disabilities have died while under restraint or seclusion, *see, e.g., Iowa Prot. & Advocacy Servs., Inc. v. Gerard Treatment Programs*, 152 F. Supp. 2d 1150, 1153 (N.D. Iowa 2001) (discussing institution's denial of access to a site where a child died of "cardiopulmonary arrest while being restrained"); General Accounting Office, *Improper Restraint or Seclusion Use Places People at Risk*, at 7 (1999) (listing incidents in which children died while under restraint and noting that children "are subjected to restraint and seclusion at higher rates than adults and also are at greater risk of injury"), has underscored the necessity of allowing P&As to fulfill their statutory mandate of protecting these vulnerable individuals. This is especially true in the case at bar, where many of the children are "non-verbal or have limited verbal abilities," thereby leaving these children even more vulnerable because they do not have the ability to communicate this abuse and/or neglect to even their parents. Appellant's Br. 15.

The P&A in this case sought information for the purpose of identifying the students who had been subjected to seclusion incidents at the Abraham Lincoln School. These seclusion incidents occurred under conditions that, as described by appellees themselves, were clearly in violation of state and federal law. *Wisconsin Coal. for Advocacy*, No. 05-C-295-C, slip op. at 10-14. Identifying information is within the exclusive custody and control of the school and DPI – without it, the P&A cannot investigate these incidents. Had DPI simply complied with the regulations requiring it to supply the investigatory report and names of the school children involved, this litigation could have been avoided. Whether the school or DPI believed that an internal investigation had resolved the abusive situation is irrelevant; federal law acknowledges that state oversight is often inadequate and requires that the P&A be able to conduct an independent investigation. 42 U.S.C. §10801 (a)(4). Efforts by the school or state to remedy the abusive situation do not deprive the P&A of its right, and indeed its duty, to investigate based on the complaints it received, as well as the probable cause substantiated by appellees’ own findings.

In addition, as numerous courts have recognized, any confidentiality concerns are addressed by the provisions of the P&A Acts that make the P&A subject to the same confidentiality protections as the school itself.

#### **IV. WCA was Not Required to Exhaust Administrative Remedies**

The District Court erroneously found that WCA did not exhaust administrative remedies, citing 42 U.S.C. §10807. First, that section only requires

exhaustion when a P&A brings a claim on behalf of an individual. *See* 42 U.S.C. §10807(a). The instant case was not brought on behalf of an individual – it was brought by WCA in its own name in pursuit of its own right to records. *See Doe v. Stincer*, 175 F.3d 879 (8th Cir. 1999). The P&A has standing in its own right to seek access to records. *Univ. Legal Serv. v. D.C.*, No. 1:05-CV-00585 (TFH), slip op. at 9 (D.D.C. July 22, 2005) (attached). In addition to the statute not applying by its own terms, there is no administrative remedy to exhaust in this case, besides asking the Department for the records, which was done. The exhaustion ruling thus must be reversed.

## CONCLUSION

In conclusion, it was a violation of federal law for the Wisconsin DPI to deny the P&A access to the investigative file on the underlying incident of abuse and the names of the school children involved. If the District Court's erroneous interpretation of access rights under P&A Acts is allowed to stand, the efforts of P&As everywhere to fully and independently investigate incidents of abuse and neglect against unidentified victims will be stymied, and the intent of Congress in enacting the protection and advocacy system will be frustrated.

Dated this 27th day of January, 2006.

---

RICHARD A. SCHNEIDER  
*Counsel of Record*  
KING & SPALDING LLP  
191 Peachtree Street  
Atlanta, GA 30303  
(404) 572-4600

AUGUSTA M. RIDLEY  
ELIZABETH ANN PIERSON (Admitted  
in Maryland Only)  
JAN PAUL MINCARELLI (Admitted  
in Pennsylvania Only)  
KING & SPALDING LLP  
1700 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006  
(202) 737-0500

*Counsel for Amicus Curiae*

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

I, Richard A. Schneider, hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5830 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

---

Richard A. Schneider  
Attorney for Amicus Curiae

Dated: \_\_\_\_\_

## CERTIFICATE OF SERVICE

I, Richard A. Schneider, hereby certify that the original and three copies of the foregoing Motion of The National Disability Rights Network for Leave to File Brief as *Amicus Curiae* in Support of Appellant, along with fifteen copies of the accompanying brief, were sent by first class mail to the United States Court of Appeals for the Seventh Circuit on January 27, 2006. I further certify that, on the same day, two copies of this motion, together with the accompanying Brief *Amicus Curiae*, were sent by first class mail to:

Thomas C. Bellavia  
Assistant Attorney General  
Wisconsin Department of Justice  
Post Office Box 7857  
Madison, WI 53707-7857  
*Attorney for Appellee*

Jeffrey Spitzer-Resnick  
Wisconsin Coalition for Advocacy  
16 N. Carroll St., Suite 400  
Madison, WI 53703  
(608) 267-0214  
*Attorney for Appellant*

---

Richard A. Schneider  
Attorney for Amicus Curiae

Dated: \_\_\_\_\_

**ATTACHMENT**

**TAB**

*Prot. & Advocacy System, Inc. v. Freudenthal*,  
No. 05CV014J (D. Wyo. Jan. 6, 2006)

A

*Wisconsin Coal. for Advocacy v. Wisconsin Dep't. of  
Pub. Instruction*, No. 05-C-295-C (W.D. Wis. Aug. 10, 2005)

B

*Univ. Legal Serv. v. D.C.*, No. 1:05-CV-00585 (TFH)  
(D.D.C. July 22, 2005)

C