

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION**

**B.P.J., by her next friend and mother,
HEATHER JACKSON,**

Plaintiff,

vs.

**Civil Action No. 2:21-cv-00316
Hon. Joseph R. Goodwin**

**WEST VIRGINIA STATE BOARD OF
EDUCATION; HARRISON COUNTY BOARD
OF EDUCATION; WEST VIRGINIA
SECONDARY SCHOOL ACTIVITIES
COMMISSION; W. CLAYTON BURCH in his
official capacity as State Superintendent; and,
DORA STUTLER in her official capacity as
Harrison County Superintendent, PATRICK
MORRISEY in his official capacity as Attorney
General, and THE STATE OF WEST VIRGINIA,**

Defendants.

**JOINT MOTION FOR ENTRY OF A
PARTICULARIZED PROTECTIVE ORDER**

NOW COME the parties herein, by counsel, and, pursuant to Federal Rules of Civil Procedure 26(c) and Local Rules of Procedure Rule 26.4(b) move this Honorable Court for entry of the attached proposed Protective Order on the basis that discovery in this case involves Plaintiff's medical, counseling and school records which likely contain information protected by federal law. As described below, the proposed Protective Order has modest modifications from the Court's standard form protective order tailored to the circumstances of this case.

Federal Rule of Civil Procedure Rule 26(c) provides that "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]" Fed. R. Civ. P. 26(a). A protective order prohibiting the parties seeking discovery from "publishing, disseminating, or using the information in any way except where necessary to prepare for and try the case" does not offend the First Amendment "where . . . entered

on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources.” *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984).

The parties anticipated at the beginning of the discovery process in this matter that the medical and school records of the Plaintiff may be subject to discovery in this case and that such records should be subject to a protective order because they are likely protected under federal law and in order to protect Plaintiff’s privacy and/or to avoid any improper or unnecessary embarrassment. *See, e.g.*, Family Educational Rights & Privacy Act (FERPA), 20 U.S.C. § 1232g; Protection of Pupil Rights Amendment, 34 CFR Part 99; Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 CFR Parts 160, 164. Because the privacy of Plaintiff’s educational, mental health, and medical records are protected by federal law, protection of the same in this litigation would advance the interests of federal law and would shield Plaintiff from embarrassment, thus satisfying the requirements of the Federal Rules and the First Amendment.

There is also good cause to allow the modest modifications from the Court’s standard form protective order in this case. In preparing the proposed Protective Order, the parties began with the Court’s standard form set forth on the website and made modifications to tailor it to the specific circumstances of this case. First, the parties made modest modifications to the provisions regarding who may view documents under the Protective Order and in what manner. One modification would afford Plaintiff and Defendants the same rights as counsel under the proposed Protective Order. Because many of the records potentially subject to the protective order in this case are Plaintiff’s own medical and educational records, the parties deemed it appropriate to grant Plaintiff access to these records. On grounds of reciprocity, the parties deemed it appropriate to allow Defendants the same. The parties also made modifications to address the practical impacts of the quick pace with which discovery is taking place in this case by allowing Plaintiff and

Defendants' professional staff to access and process Confidential documents at the same level as counsel. Furthermore, given the still-pending status of the Proposed-Intervenor in this case, the parties clarified that the preferred form's usage of the term "consultant" did not include Proposed-Intervenor, and, as such, Proposed-Intervenor could not view Confidential documents unless Proposed-Intervenor is formally added as a party.

Second, the parties made modifications to address the practical impact of the Defendants' insurance coverage. Defendants are represented by counsel whose retention is accomplished in whole or in part through insurance coverage. *See, e.g.*, Defendant West Virginia Secondary School Activities Commission's Initial Disclosures (10.4.21) (ECF 101). The proposed protective order would allow counsel to report to the clients and to the insurer. However, Defendants' insurer is governed by both West Virginia and Pennsylvania regulations relative to document retention, whether those documents are actual records or reports of counsel relative to same. West Virginia C.S.R. § 114-15-4.2(b) defines the required period of claim file retention for an insurance company:

- b. All insurer records within the scope of this rule must be retained for the lesser of:
 1. The current calendar year plus five (5) calendar years;
 2. From the closing date of the period of review for the most recent examination by the commissioner; or
 3. A period otherwise specified by statute as the examination cycle for the insurer.

Further, Defendants' insurance company was organized under the laws of the State of Pennsylvania. Pursuant to 41 Pa.B 5849, then, insurance companies are required to maintain each claim file for seven (7) years after that claim file is closed. The parties further proposed an alternative procedure whereby Defendants' insurance carriers could retain a copy of the confidential information protected subject to a continuing duty and obligation to maintain the confidentiality of the confidential information, including storing it in a sealed or restricted manner that only allows access to the confidential information to the attorneys, staff, and/or claims

personnel responsible for this Civil Action (or their successors). Also included in that alternative plan was that the confidential information would not be used for any other purpose or in any other proceeding unless prior written approval is obtained from Plaintiff, or as otherwise permitted by this Protective Order, or by further order of this Court. Because of the logical realities of litigation and provision of a defense, the parties seek leave to revise the form Protective Order to allow for inclusion of the insurers.

WHEREFORE, for all of the reasons set forth herein, the parties seek leave of Court to enter the attached proposed protective order, which has modest modifications tailored to the circumstances of this case.

Respectfully submitted:

Agreed to by counsel:

THE STATE OF WEST VIRGINIA

**PATRICK MORRISEY,
ATTORNEY GENERAL**

/s/ Curtis R. A. Capehart

Curtis R. A. Capehart (WV Bar # 9876)

Deputy Attorney General

Douglas P. Buffington, II (WV Bar # 8157)

Chief Deputy Attorney General

David C. Tryon (visiting attorney)*

Special Assistant

State Capitol Complex

Building 1, Room E-26

Charleston, WV 25305-0220

Curtis.R.A.Capehart@wvago.gov

Telephone: (304) 558-2021

Facsimile: (304) 558-0140

*Counsel for Defendant, STATE OF
WEST VIRGINIA*

/s/ Katelyn Kang (per consent)

Katelyn Kang

Cooley LLP

55 Hudson Yards

New York, NY 10001-2157

kkang@cooley.com

Counsel for Plaintiff

/s/ Roberta F. Green(per consent)

Roberta F. Green

Shuman McCuskey & Slicer PLLC

P.O. Box 3953

Charleston, WV 25339-3953

rgreen@shumanlaw.com

*Counsel for Defendant, West Virginia
Secondary School Activities Commission*

*Admitted in Ohio. Practicing under the supervision of West Virginia attorneys.

/s/ Susan L. Deniker (per consent)

Susan L. Deniker
Step toe & Johnson PLLC
400 White Oaks Boulevard
Bridgeport, WV 26330
susan.deniker@step toe-johnson.com

*Counsel for Defendants, Harrison County
Board of Education and Dora Stutler*

/s/ Kelly C. Morgan (per consent)

Kelly C. Morgan
Michael W. Taylor
Kristen V. Hammond
Bailey & Wyant, PLLC
500 Virginia Street East, Suite 600
P.O. Box 3710
Charleston, WV 25337-3710
kmorgan@baileywyant.com
mtaylor@baileywyant.com
khammond@baileywyant.com

*Counsel for Defendants, West Virginia
State Board of Education and W. Clayton
Burch*

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official capacity as State Superintendent; and,
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Harrison County Superintendent, PATRICK
MORRISEY in his official capacity as Attorney
General, and THE STATE OF WEST VIRGINIA,**

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2021, the *Joint Motion for Entry of A
Particularized Protective Order* was served on all counsel of record via the CM/ECF system.

/s/ Curtis R. A. Capehart

Curtis R. A. Capehart

Deputy Attorney General

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Defendants.

STIPULATED PROTECTIVE ORDER

By signing this Protective Order, the parties have agreed to be bound by its terms and to request its entry by the presiding district or magistrate judge. It is hereby **ORDERED** as follows:

I. DISCOVERY PHASE

A. If a party, or a non-party producing information in this civil action, or an attorney for the party or non-party, has a good faith belief that certain documents or other materials (including digital information) subject to disclosure pursuant to a request or court order, are confidential and should not be disclosed other than in connection with this action and pursuant to this Protective Order, the party, non-party, or attorney shall clearly mark each such document or other material as “**CONFIDENTIAL.**” The individual or entity designating the document or materials as “**CONFIDENTIAL**” must take care to limit any such designation to specific documents or materials that qualify for protection under the appropriate standards. Mass, indiscriminate, or routine designations are prohibited. Designations that are shown to be clearly

unjustified or that have been made for an improper purpose (*e.g.*, to unnecessarily encumber or delay the case development process or impose unnecessary expense and burden on another party) expose the designating individual or entity to sanctions. If it comes to the attention of the designating individual or entity that a document or other material has been improperly marked as “**CONFIDENTIAL**,” the designating individual or entity must promptly notify all parties that the erroneous designation is being withdrawn and must replace the improperly designated document or material with a copy that is not marked “**CONFIDENTIAL**”.

B. If a party or an attorney for a party disputes whether a document or other material should be marked “**CONFIDENTIAL**,” the parties and/or attorneys shall attempt to resolve the dispute with the designating individual or entity. If they are unsuccessful, the party or attorney challenging the “**CONFIDENTIAL**” designation shall do so by filing an appropriate motion.

C. No party or attorney or other person subject to this Protective Order shall distribute, transmit, or otherwise divulge any document or other material which is marked “**CONFIDENTIAL**,” or the contents thereof, except in accordance with this Protective Order. Court personnel are not subject to this Protective Order while engaged in the performance of their official duties.

D. Any document or other material which is marked “**CONFIDENTIAL**,” or the contents thereof, may be used by a party, or a party’s attorney, expert witness, consultant, or other person to whom disclosure is made, only for the purpose of this action. Nothing contained in this Protective Order shall prevent the use of any document or other material which is marked “**CONFIDENTIAL**,” or the contents thereof, at any deposition taken in this action.

E. If a party or attorney wishes to disclose any document or other material which is marked “**CONFIDENTIAL**,” or the contents thereof, to any person other than:

1. Plaintiff B.P.J.,
2. Her next friend and mother, Heather Jackson,

3. Counsel of record for Plaintiff, their professional staff, or their litigation vendors, or
4. Defendants, Counsel of record for Defendants, their professional staff, their insurers, or their litigation vendors;

but is actively engaged in working on this action on behalf of Plaintiff or Defendants (*e.g.*, expert witness, expert consultant), the person making the disclosure shall do the following; provided, however, that any such disclosure shall only be made to such person for purposes of litigating this case:

5. Provide a copy of this Protective Order to the person to whom disclosure is made;
6. Inform the person to whom disclosure is made that they are bound by this Protective Order;
7. Require the person to whom disclosure is made to sign an acknowledgment and receipt of this Protective Order;
8. Instruct the person to whom disclosure is made to return any document or other material which is marked “**CONFIDENTIAL**,” at the conclusion of the case, including notes or memoranda made from “**CONFIDENTIAL**” material; and
9. Maintain a list of persons to whom disclosure was made and the “**CONFIDENTIAL**” materials which were disclosed to that person.

II. POST-DISCOVERY PHASE

A. If any party, non-party, or attorney wishes to file, or use as an exhibit or as evidence at a hearing or trial, any “**CONFIDENTIAL**” document or material, they must provide reasonable notice to the party that produced the document or material. The parties and/or attorneys shall then attempt to resolve the matter of continued confidentiality by

either (a) removing the “**CONFIDENTIAL**” marking, or (b) creating a mutually acceptable redacted version that suffices for purposes of the case. If an amicable resolution proves unsuccessful, the parties and/or attorneys may present the issue to the court for resolution. The proponent of continued confidentiality will have the burden of persuasion that the document or material should be withheld from the public record in accordance with (a) Local Rule of Civil Procedure 26.4, (b) the Administrative Procedures for Electronic Filing in the Southern District of West Virginia § 12, and (c) controlling precedent. *See, e.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8–9 (1986); *Virginia Dep’t. of State Police v. Washington Post*, 386 F. 3d 567, 575 (4th Cir. 2004).

B. Within thirty days after the conclusion of the action, each party shall gather the “**CONFIDENTIAL**” materials, copies thereof, and related notes and memoranda, including materials given by that party to any other individual, and shall return them to the party or attorney who originally disclosed them, with a certificate of compliance with the terms of this Protective Order, unless: (1) the document has been offered into evidence or filed without restriction as to disclosure; (2) the parties agree to destruction in lieu of return; (3) as to documents bearing the notations, summations, or other mental impressions of a receiving party or the party’s expert witness or consultant, that party elects to destroy the documents and certifies to the producing party that it has done so; or (4) otherwise required or allowed by law.¹ Notwithstanding the above requirements to return or destroy documents, counsel may retain attorney work product, including drafts of preliminary reports submitted by an expert or consultant, which includes information produced as

¹ The Court recognizes that, under West Virginia law, W. Va. C.S.R. § 114-15-4.2(b) defines the required period of claim file retention for an insurance company. However, the Court also recognizes that Defendants’ insurance company was organized under the laws of the State of Pennsylvania. According to 41 Pa.B 5849, insurance companies are required to maintain each claim file for seven (7) years after that claim file is closed. Therefore, the applicable claim file retention period in this matter will be seven (7) years after the conclusion of this lawsuit.

“**CONFIDENTIAL**,” so long as that work product does not duplicate verbatim substantial portions or the text or images of confidential documents. Any such work product retained by counsel shall continue to be “**CONFIDENTIAL**” and shall be subject to this protective order. The counsel may use said work product in other litigation provided that the counsel does not use or disclose the confidential documents.

As an alternative procedure, Defendants’ insurance carriers may retain a copy of the confidential information protected by this Protective Order subject to the following conditions: That a continuing duty and obligation shall exist to maintain the confidentiality of the confidential information; that the confidential information be stored in a sealed or restricted manner that only allows access to the confidential information to the attorneys, staff, and/or claims personnel responsible for this Civil Action (or their successors); and that the confidential information will not be used for any other purpose or in any other proceeding unless prior written approval is obtained from Plaintiff, or as otherwise permitted by this Protective Order, or by further order of this Court.

Agreed to by counsel:

THE STATE OF WEST VIRGINIA

**PATRICK MORRISEY,
ATTORNEY GENERAL**

/s/ Curtis R. A. Capehart

Curtis R. A. Capehart (WV Bar # 9876)

Deputy Attorney General

Douglas P. Buffington, II (WV Bar # 8157)

Chief Deputy Attorney General

David C. Tryon (visiting attorney)*

Special Assistant

State Capitol Complex

Building 1, Room E-26

Charleston, WV 25305-0220

Curtis.R.A.Capehart@wvago.gov

Telephone: (304) 558-2021

Facsimile: (304) 558-0140

*Counsel for Defendant, STATE OF
WEST VIRGINIA*

*Admitted in Ohio. Practicing under the supervision
of West Virginia attorneys.

/s/ Susan L. Deniker (per consent)

Susan L. Deniker

Steptoe & Johnson PLLC

400 White Oaks Boulevard

Bridgeport, WV 26330

susan.deniker@steptoe-johnson.com

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/s/ Katelyn Kang (per consent)

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Cooley LLP

55 Hudson Yards

New York, NY 10001-2157

kkang@cooley.com

Counsel for Plaintiff

/s/ Roberta F. Green(per consent)

Roberta F. Green

Shuman McCuskey & Slicer PLLC

P.O. Box 3953

Charleston, WV 25339-3953

rgreen@shumanlaw.com

*Counsel for Defendant, West Virginia
Secondary School Activities Commission*

/s/ Kelly C. Morgan (per consent)

Kelly C. Morgan

Michael W. Taylor

Kristen V. Hammond

Bailey & Wyant, PLLC

500 Virginia Street East, Suite 600

P.O. Box 3710

Charleston, WV 25337-3710

kmorgan@baileywyant.com

mtaylor@baileywyant.com

khammond@baileywyant.com

*Counsel for Defendants, West Virginia State
Board of Education and W. Clayton Burch*

It is so ordered:

Judge Joseph R. Goodwin