

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

| | | |
|--|---|----------------------------------|
| Brianna Boe, <i>et al.</i> , |) | |
| |) | |
| <i>Plaintiffs</i> , |) | |
| |) | |
| United States of America, |) | |
| |) | |
| <i>Intervenor Plaintiff</i> , |) | |
| |) | |
| v. |) | Civil Action No. 2:22-cv-184-LCB |
| |) | |
| Hon. Steve Marshall, in his official |) | |
| capacity as Attorney General, |) | |
| of the State of Alabama, <i>et al.</i> , |) | |
| |) | |
| <i>Defendants</i> . |) | |

DEFENDANTS’ NOTICE REGARDING DISCOVERY SCHEDULE

Defendants submit this notice to update the Court on the progress that has been made since the scheduling hearing on May 22 and to alert the Court to issues that may need to be resolved at Monday’s hearing. As Defendants see it, there are two primary issues to discuss at that hearing.

First, though discovery with the United States has been proceeding well overall, the parties have reached an impasse over Defendants’ request to make Admiral Rachel Levine, the Assistant Secretary for Health at the Department of Health and Human Services, a “custodian” for purposes of searching for responsive documents. Admiral Levine is the face of HHS on issues of transgender healthcare. Levine

routinely speaks to physicians—including at a WPATH conference—about the purported safety and efficacy of transitioning treatments for minors. And the Admiral has repeatedly spoken publicly about making “affirming” transgender healthcare a priority for HHS. Yet the United States refuses to make Levine a custodian, claiming that the Admiral would likely not have relevant information. Given Levine’s public statements, Defendants do not understand how that could possibly be the case.

Second, WPATH filed a mandamus petition with the Eleventh Circuit on May 26 and asked that Court to rule on the petition by June 16. That date has come and gone without a decision or an order directing Defendants to answer. This Court’s March 27 order requiring WPATH to produce responsive documents is thus still in full effect—just as it has been for the last three months. WPATH should not be allowed to delay any longer. This Court should order it to begin production immediately.

I. Admiral Rachel Levine, the Assistant Secretary of Health, Should Be Made a Custodian.

Defendants and the United States have generally made good progress on discovery issues since the last hearing. As Defendants understand it, the United States has run a set of 20 agreed-upon test search terms across 11 email accounts in four

divisions¹ and has started collecting documents for review. To expedite this process, Defendants have made significant concessions, even agreeing to eschew search terms for certain divisions. *Cf.* Doc. 285 at 5. And when HHS flagged that certain search terms were returning too many documents in certain divisions and thus suggested narrowing the search terms, Defendants agreed. These compromises were made in good faith and in the hope that HHS would likewise be willing to compromise when needed.

Unfortunately, HHS has not been willing to compromise when it comes to custodians—the individuals whose email accounts will be searched with search terms to locate responsive documents. Defendants have repeatedly requested that Admiral Levine, the Assistant Secretary for Health, be made a custodian. The United States has repeatedly refused.

Defendants believe that Admiral Levine should be made a custodian for the simple reason that Levine acts as both an expert and the public face of HHS when it comes to transgender healthcare for children and adolescents. Levine is a medical doctor, a four-star admiral in the Public Health Service Commissioned Corps, a former professor of pediatrics and psychiatry at Penn State College of Medicine, and the former Physician General and Secretary of Health for Pennsylvania. According

¹ The four divisions are the National Institutes of Health (NIH), the Office of Civil Rights (OCR), the Office of the Assistant Secretary for Health (OASH), and the Substance Abuse and Mental Health Services Administration (SAMHSA).

to HHS, “Levine is an accomplished speaker and author of numerous publications on the opioid crisis, adolescent medicine, eating disorders, *and LGBT medicine*.”² Since becoming the Assistant Secretary for Health, Levine has made LGBT issues—including pediatric transitioning treatments—a priority.³

As the Assistant Secretary for Health, Levine routinely advises physicians on how to treat children and adolescents suffering from gender dysphoria. In May of last year, for instance, Levine told the Federation of State Medical Boards that “[t]here is substantial misinformation about gender-affirming care for transgender and gender diverse individuals.”⁴ Levine highlighted specific research on the topic, claiming that “[a] paper just published two months ago in the journal of the American Medical Association found that receiving gender-affirming care, including what are called puberty blockers (gonadotrophin releasing hormone agonists) and gender-affirming hormones, was associated with 60% lower odds of moderate or severe depression and 73% lower odds of suicidality over a 12-month follow up.”⁵ Levine

² Admiral Rachel L. Levine, MD, U.S. Dep’t of Health and Human Servs., <https://www.hhs.gov/about/leadership/rachel-levine.html> (last accessed June 20, 2023) (emphasis added).

³ See, e.g., Julianne McShane, *Transgender federal official Rachel Levine tells LGBTQ youths: ‘I have your back’*, NBC NEWS (June 1, 2021), <https://www.nbcnews.com/feature/nbc-out/transgender-federal-official-rachel-levine-tells-lgbtq-youths-i-have-n1268795>.

⁴ Address by Admiral Rachel L. Levine to Federation of State Medical boards, at 8:18-10:01, May 27, 2022, <https://www.youtube.com/watch?v=97lAi5VmKAA>.

⁵ *Id.*

concluded: “The positive value of gender-affirming care for youth and adults is not in scientific or medical dispute.”⁶

Likewise, in February of this year, Levine presented at a Pediatric Grand Rounds session at Connecticut Children’s Hospital.⁷ Levine encouraged the doctors to use transitioning treatments on minors, asserting that “Gender-affirming care is medical care. Gender-affirming care is mental health care. And literally, gender-affirming care is suicide prevention care.”⁸ Levine again highlighted specific medical literature, including “[a] recent NIH-funded study” that “conclusively demonstrated that gender-affirming care and hormone therapy improves the lives of non-binary and transgender adolescents.”⁹ “Thus,” said Levine, “gender-affirming care is medically necessary, safe and effective for transgender and non-binary children and adolescents.”¹⁰

Just a week ago, Levine again emphasized the purported safety and efficacy of pediatric gender transitioning treatments: “Gender-affirming care ... improves the quality of life, and it saves lives, and is based upon decades of study. It is a well-

⁶ *Id.*

⁷ See Advancing Kids: Connecticut Children’s, *Admiral Rachel Levine, MD, Urges Physicians to Expand Focus* (Feb. 14, 2023), <https://advancingkids.org/2023/02/14/admiral-rachel-levine-md-urges-physicians-to-expand-focus/>.

⁸ Connecticut Children’s Grand Rounds, 2.7.23, *Pediatric Grand Rounds, “Social Roles in Medicine: Improving Public Health Through Engagement Beyond the Clinical Setting,” ADM Rachel Levine, MD*, at 12:46-14:32, <https://podcasts.apple.com/us/podcast/2-7-23-pediatric-grand-rounds-social-roles-in-medicine/id1478948224?i=1000598494670>.

⁹ *Id.*

¹⁰ *Id.*

established medical practice.... Gender-affirming care is medically necessary, safe, and effective for transgender and non-binary youth and adults.”¹¹

Levine has also commented on the quality of the WPATH Standards of Care. At a speech given in April 2022, before the updated Standards of Care 8 were released, Levine commented:

The World Professional Association for Transgender Health published evidence-based standards of care more than a decade ago, in 2011, and is planning to release a full update this year. Rather than relying on a few cherry-picked reports to make a political argument, WPATH assesses the full state of the science and provides substantive, rigorously analyzed, peer-reviewed recommendations to the medical community on how best to care for patients who are transgender or gender non-binary. There is nothing one-sided about their approach. It is founded on a vast body of medical literature. It is free of any agenda other than to ensure that medical decisions are informed by science. This is the way medicine is supposed to be practiced, and it is the way doctors are supposed to care for their patients.¹²

Levine was even the keynote speaker at the WPATH conference last September in Canada.¹³ There again, Levine extolled the purported safety and efficacy of transitioning treatments for youth.¹⁴

¹¹ Admiral Rachel Levine, https://twitter.com/HHS_ASH/status/1668264004492328961 (June 12, 2023).

¹² *Remarks by HHS Assistant Secretary for Health ADM Rachel Levine for the 2022 Out For Health Conference* (Apr. 30, 2022), <https://www.hhs.gov/about/news/2022/04/30/remarks-by-hhs-assistant-secretary-for-health-adm-rachel-levine-for-the-2022-out-for-health-conference.html>.

¹³ See WPATH, *Schedule for 2022 WPATH conference*, <https://perma.cc/3H4M-U5X5>.

¹⁴ *Dr. Rachel Levine speaking at the WPATH symposium in Montreal, Quebec*, <https://rumble.com/v1kostf-september-19-2022.html>.

In the face of reports of doctors failing to treat mental health comorbidities before prescribing transitioning treatments, Levine has also opined on the informed-consent process used at American pediatric gender clinics. According to *Reuters*, “Levine, the U.S. assistant secretary for health, said that clinics are proceeding carefully and that no American children are receiving drugs or hormones for gender dysphoria who shouldn’t. ‘It’s not like anyone who arrives automatically gets medical treatment,’ she said.”¹⁵

These are just a few examples of Admiral Levine’s public statements that, *along with their inputs*, would be responsive to Defendants’ RFPs seeking (for instance) communications “concerning the effects of Transitioning or the treatment of Minors for Gender Dysphoria or a Related Condition on the well-being or health of Minors” (RFP 7) and “concerning the informed consent process for treating Minors for Gender Dysphoria or a Related Condition” (RFP 8).

Levine also oversees two offices within OASH that relate directly to research protections: the Office of Human Research Protections and the Office of Research Integrity. Defendants have specifically asked for information regarding the ongoing TransYouth study funded by the National Institutes for Health (RFP 18)—the same study Levine referenced as “conclusively” demonstrating the safety and efficacy of

¹⁵ Chad Terhune et al., *As More Transgender Children Seek Medical Care, Families Confront Many Unknowns*, *REUTERS* (Oct. 6, 2022), <https://www.reuters.com/investigates/special-report/usa-transyouth-care/>.

transitioning treatments for “non-binary and transgender adolescents.”¹⁶ According to the latest publication from the study, 315 youth who identified as transgender or non-binary were given cross-sex hormones and followed for two years. Two of the participants committed suicide after beginning cross-sex hormones.¹⁷ Given these tragic outcomes, it is likely that the investigative offices under Levine’s control—and thus Levine—will have responsive information regarding the study (RFP 18), the reporting of adverse events (RFP 25), and the informed consent process (RFP 8).

Last, as Assistant Secretary for Health, Levine oversaw the publication of a document entitled “Gender-Affirming Care and Young People,” which was published last year by the Office of Population Affairs within the Office of the Assistant Secretary for Health.¹⁸ This document is the subject of RFP 30.

The United States nevertheless refuses to designate Admiral Levine as a custodian. According to the United States, “[a]s the Assistant Secretary, [Levine’s] work is too broad and high level for searches of her email account or documents to

¹⁶ Connecticut Children’s Grand Rounds, 2.7.23, *Pediatric Grand Rounds*, “Social Roles in Medicine: Improving Public Health Through Engagement Beyond the Clinical Setting,” ADM Rachel Levine, MD, at 12:46-14:32 <https://podcasts.apple.com/us/podcast/2-7-23-pediatric-grand-rounds-social-roles-in-medicine/id1478948224?i=1000598494670>.

¹⁷ See Diane Chen et al., *Psychosocial Functioning in Transgender Youth after 2 Years of Hormones*, NEW ENGLAND J. OF MEDICINE (Jan. 19, 2023), <https://www.nejm.org/doi/full/10.1056/NEJMoa2206297>; see also Letter from Sen. Cassidy and Sen. Tuberville to Hon. Lawrence Tabak, Acting Director, National Institutes of Health (June 6, 2023), https://www.help.senate.gov/imo/media/doc/nih_trans_letter.pdf.

¹⁸ Office of Assistant Secretary for Health, Office of Population Affairs, *Gender-Affirming Care and Young People* (Mar. 2022), <https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf>.

result in relevant information pertaining to this lawsuit.” Ex. A, Email to counsel, May 23, 2023. This is an astounding claim to make about someone who is the face of HHS on matters of pediatric transgender healthcare, regularly discusses specific studies when speaking to physicians (and WPATH) about the safety and efficacy of transitioning treatments for minors, oversees an office that has created and published information regarding transitioning treatments, and supervises two other offices that would have a role in investigating suicides and other adverse events in an NIH-funded study that Levine has specifically referenced in a speech. Moreover, as the United States noted in the same email, “information flows up the chain of command within the division,” so senior personnel like Levine “are the personnel that are most likely to have relevant emails/documents regarding the work within their sphere.” *Id.* It is hard to imagine how Levine would *not* have sufficient responsive documents to overcome the burden of searching for them.

The United States also argues that “giving speeches isn’t relevant to the underlying subject matter of the litigation” and that the studies Levine “may have relied on to inform the content of those speeches” is not relevant, either. Ex. A, Email to counsel, June 21, 2023. These assertions miss the mark as well. It is not the mere act of giving speeches that makes Levine a relevant custodian, as though Levine were simply a mouthpiece for the Office of the Assistant Secretary for Health. Levine *is* the Assistant Secretary for Health. And Levine’s speeches are filled with specific

content about the purported safety and efficacy of transitioning treatments for youth and the WPATH standards of care. This content and their inputs are obviously responsive to Defendants' RFPs, and they are indicative of the work being conducted and reviewed by OASH.

Instead of designating Levine as a custodian, HHS has offered to produce to Defendants materials that it will produce to a third party in response to a FOIA request concerning Admiral Levine's communications. Ex. A, Email to counsel, June 21, 2023. This is not the "compromise" HHS purports it to be. For one, the search terms would not be tailored to Defendants' RFPs, nor would they be same terms HHS is using for the other custodians. They would be someone else's search terms tailored for someone else's search. For another, the "compromise" would apparently force Defendants to forfeit their right to come to this Court to resolve any discovery disputes arising from the production. Rather than being able to challenge HHS's withholding of documents pursuant to a claim of deliberative-process privilege, for instance, Defendants would be forced to depend on the third party to litigate disputes *that party has* in separate administrative and legal proceedings governed by different legal standards and timeframes. *Cf. Stonehill v. IRS*, 558 F.3d 534, 539 (D.C. Cir. 2009) ("[N]ot all documents available in discovery are also available pursuant to FOIA."); *FTC v. Grolier Inc.*, 462 U.S. 19, 28 (1983) ("It is not difficult to imagine litigation in which one party's need for otherwise privileged documents would be

sufficient to override [a] privilege but that does not remove the documents from the category of the *normally* privileged [under FOIA].”). Needless to say (or perhaps not), when confronted with discovery obligations imposed by being a party to litigation, it is no answer for the government to simply produce materials it happens to be gathering for someone else under a different law and for different purposes unless those materials are sure to be the same. That is unlikely to be the case here. Admiral Levine should be made a custodian in this litigation.

II. WPATH Should Begin Document Production Now.

It has now been three months since this Court denied WPATH’s motion to quash and ordered WPATH to comply with Defendants’ Rule 45 subpoena. *See* Doc. 263. WPATH has pursued every appellate option, first by seeking certification and a stay from this Court (which the Court denied, Doc. 281), then by seeking a writ of mandamus from the Eleventh Circuit, Doc. 289. In its mandamus petition, WPATH asked the Eleventh Circuit to rule by June 16. Doc. 289-1 at 18. That date has come and gone, and the Eleventh Circuit has not even called for an Answer, which it would have to do before granting WPATH’s petition. *See* Fed. R. App. P. 21(b)(1).

As the Court noted at last month’s hearing, WPATH is bound by this Court’s order even as it waits for the Eleventh Circuit to act. WPATH agreed. *See* 5/22 Tr. 14 (“THE COURT: Well, I hope you are prepared to produce [discovery] now awaiting a hopeful decision from the Eleventh Circuit, because I think my order is good

until you get something different. MR. LANNIN: We are, Your Honor. Absolutely.”). WPATH also explained that, “since the moment [the Court] denied [WPATH’s] motion to quash, WPATH has been working to gather” responsive documents. *Id.* at 15. According to WPATH, “[m]any hundreds of attorney hours have been spent gathering and then redacting the documents in accord with [the Court’s] order.” *Id.*

Despite these assurances, WPATH has yet to begin producing documents. And Defendants understand from a meet-and-confer phone call on June 21 that WPATH does not plan to produce documents unless and until the Eleventh Circuit denies its petition. That is untenable. Not only is this Court’s existing order “good” until WPATH “get[s] something different,” but WPATH *already has* documents that are ready to be produced. As counsel for WPATH told the Court in March, WPATH has gathered “drafts of earlier chapters, comments to those drafts, comments that members made, comments they received, how they were addressed,” and other materials “that are sitting on a hard drive now.” 3/21 Tr. 11. That was three months ago. WPATH has continued to gather responsive materials since then. There is no reason WPATH should be allowed to wait any longer before producing the materials it has already gathered and reviewed.

Indeed, for discovery to remain on track under the current discovery schedule (which was modified in part because of WPATH’s delay), WPATH needs to begin

a rolling production *now*. That is because the documents WPATH produces will inform future discovery needs and could lead to additional disputes. For instance, Defendants noted at the last hearing that WPATH has refused to use custodians or search terms to meet its discovery obligations. 5/22 Tr. 7-9. Defendants understand that WPATH's position has shifted and that WPATH now agrees to produce discovery—if ordered to do so (again)—by, among other things, running designated search terms through a single custodian's email account. Defendants agree this is a step in the right direction, but remain concerned that third-party subpoenas may be necessary for other potential custodians Defendants have suggested. That decision, though, will depend on whether the documents produced by WPATH are sufficient. That obviously cannot be determined until WPATH produces the documents, so it should begin doing so now.

CONCLUSION

The Court should (1) order HHS to designate Admiral Levine as a custodian for search terms, and (2) order WPATH to begin production immediately.

Date: June 21, 2023

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed this document using the Court's CM/ECF system on June 21, 2023, which will serve all counsel of record.

s/ A. Barrett Bowdre
Counsel for Defendants

Exhibit A

Email Correspondence

Bowdre, Barrett

From: Brian Barnes <BBarnes@cooperkirk.com>
Sent: Wednesday, June 21, 2023 2:49 PM
To: Murphy, Amie (CRT)
Cc: Cheek, Jason (USAALN); LaCour, Edmund; Wilson, Thomas; Davis, Jim; Seiss, Ben; Christopher Mills; Pete Patterson; David Thompson; Jeffrey P. Doss; Amie A. Vague; AOrr; Jennifer Levi; Sarah Warbelow; Cynthia Weaver; Andy Pratt; Misty Peterson; Brent Ray; Abigail Terry; Michael Shortnacy; Scott McCoy; Melody H. Eagan; Adam Reinke; Diego Soto; Jessica Stone; Montag, Coty (CRT); Marshall, Margaret (USAALN); Williams, Renee (CRT); Toyama, Kaitlin (CRT); Bowdre, Barrett; John Ramer
Subject: RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

This message has originated from an **External Source**. Please use proper judgment and caution when opening attachments, clicking links, or responding to this email.

Hi Amie,

We think it's important for HHS to search Admiral Levine's emails using the search terms it is using for other custodians. We also don't see this proposal as much of a compromise given that any member of the public could request these same FOIA materials and would be legally entitled to them.

At this point I think that we are at an impasse on the issue of using Admiral Levine as a custodian, but I'd be happy to jump on the phone if you think that further conversations around this issue would be productive.

Brian

From: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>
Sent: Wednesday, June 21, 2023 1:52 PM
To: Brian Barnes <BBarnes@cooperkirk.com>
Cc: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <Jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <Margaret.Marshall@usdoj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>
Subject: RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Brian,

We disagree that Admiral Levine should be named as a record custodian because giving speeches isn't relevant to the underlying subject matter of the litigation. Further, we don't see how the studies she may have relied on to inform the

content of those speeches would be relevant. Defendants have already requested the studies that HHS has funded on the topic, and HHS is in the process of producing those.

Nevertheless, without waiving our objection to relevance, we are authorized to propose a compromise. HHS received a FOIA request from a third-party organization for all of Admiral Levine's communications on gender-affirming care since she was sworn-in to office on October 19, 2021. HHS is willing to produce all the documents it produces to the third-party on or before the October 30, 2023 deadline. Attached is a copy of the FOIA request.

Please let us know whether you have any questions about this proposal.

Amie

From: Murphy, Amie (CRT)

Sent: Wednesday, June 21, 2023 9:20 AM

To: Brian Barnes <BBarnes@cooperkirk.com>

Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>

Subject: RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Brian,

We are discussing this with HHS and will get back to you shortly.

Amie

From: Brian Barnes <BBarnes@cooperkirk.com>

Sent: Tuesday, June 20, 2023 4:19 PM

To: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>

Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer

<jramer@cooperkirk.com>

Subject: [EXTERNAL] RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Amie,

Thanks for meeting on the phone with us on Friday. Although we think it would have been better had we been able to participate in the process to narrow the search terms, we can agree to the narrowed search terms if HHS agrees to make Admiral Levine a custodian for searching emails at OASH. Otherwise, we intend to seek a ruling from the Court on the custodian issue at Monday's hearing. Please let us know if this compromise works by tomorrow at 1 pm CT so we can alert the Court as needed.

Best regards,

Brian

From: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>

Sent: Thursday, June 15, 2023 2:54 PM

To: Brian Barnes <BBarnes@cooperkirk.com>

Cc: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <Jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <Margaret.Marshall@usdoj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>

Subject: RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Hi Brian,

We're happy to get on a call to discuss the issues raised in your email. Unfortunately, times are a bit limited today and tomorrow with everyone trying to squeeze meetings in before the long weekend. For tomorrow, I can offer up 10-11 or 3-5.

Let me know what might work for you.

Amie

From: Brian Barnes <BBarnes@cooperkirk.com>

Sent: Thursday, June 15, 2023 10:19 AM

To: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>

Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <Jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty

Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>

Subject: [EXTERNAL] RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Hi Amie,

Thanks for the update. I think it probably makes sense to get on the phone this week to talk through some things and see where we are. Is there a time in the next day or two that works for you?

Regarding your last update, we're a bit concerned that the process is becoming unilateral. From your email it appears that HHS itself determined that some of the searches resulted "in an unreasonable number of documents," without letting us know how many documents it thought was "unreasonable." Then HHS determined for itself how to alter the search terms we had agreed on, again without allowing us to be part of that process. Then HHS determined for itself to run the new terms it had chosen, also without any input from us. Only after that process was complete did HHS provide us notice of what it had already done. It seems to us we should have input into that process. How many documents did the original search terms ping? What number does HHS consider to be "unreasonable"? We don't know, and it apparently doesn't matter to HHS that we don't know. We think that's a problem.

We also don't agree with your assessment that the change in the Boolean modifiers "increased the chance that the terms produced relevant documents." We fear that, instead, by using a "NEAR(5)" restriction, the new search terms HHS chose *exclude* relevant documents by requiring all the relevant terms to be closely stacked against one another. If we need to narrow the search terms, we can of course discuss ways to do that. But we are not comfortable with HHS simply determining the need for revised search terms and choosing the new terms all by itself. This should be a collaborative process.

We have similar concerns with the rejection of our suggestion to use custodians and search terms for OASH. In the spirit of compromise, we had agreed to use a "go get" method for SAMHSA, but suggested making Admiral Levine a custodian and using search terms for OASH. In response, you informed us that HHS had already moved forward with the "go get" for OASH and thus had rejected our suggestion (apparently without even considering the compromise we had proposed). We remain concerned that a "go get" for OASH is insufficient. As you know, Admiral Levine is often the face of HHS regarding transitioning treatments for youth. Over and over Admiral Levine has spoken publicly, *as the Assistant Secretary for Health*, in favor of the safety and efficacy of those treatments. Just this week the Admiral stated in a public address: "Gender-affirming care is medical care. Gender-affirming care is mental health care. Gender-affirming care is literally suicide prevention care. It improves the quality of life, and it saves lives, and is based upon decades of study. It is a well-established medical practice...Gender-affirming care is medically necessary, safe, and effective, for transgender and non-binary youth and adults." https://twitter.com/HHS_ASH/status/1668264004492328961. Admiral Levine has made many similar speeches and statements as the Assistant Secretary for Health. Such statements *and their inputs* would seem to be responsive to our RFP asking for communications "concerning the effects of Transitioning or the treatment of Minors for Gender Dysphoria or a Related Condition on the well-being or health of Minors."

Similarly, Admiral Levine has publicly discussed the informed-consent process used by gender clinics. As one news report put it: "Levine, the U.S. assistant secretary for health, said that clinics are proceeding carefully and that no American children are receiving drugs or hormones for gender dysphoria who shouldn't. 'It's not like anyone who arrives automatically gets medical treatment,' she said." Chad Terhune et al., *As More Transgender Children Seek Medical Care, Families Confront Many Unknowns*, Reuters (Oct. 6, 2022), <https://www.reuters.com/investigates/special-report/usa-transyouth-care/>. Again, this statement and its inputs would seem to be responsive to our RFP asking for communications "concerning the informed consent process for treating Minors for Gender Dysphoria or a Related

Condition.” Given these statements – and many, many more like them – we do not understand how HHS has determined that the Admiral Levine would not be an appropriate custodian.

Finally, there appear to be offices within OASH that also seem likely to us to have responsive information. For instance, in a number of RFPs we asked about communications and documents related to ongoing research studies, the reporting of adverse events, and the informed consent process. And we know that there have been adverse events—including two suicides—in specific studies we mentioned in the RFPs that HHS is funding. See Letter to Lawrence Tabak (June 6, 2023), https://www.help.senate.gov/imo/media/doc/nih_trans_letter.pdf. We would expect the Office of Human Research Protections and the Office of Research Integrity would have information relevant to these RFPs. Why is this not the case?

Again, we think a phone call to discuss these issues would be helpful. Please let me know if you are available tomorrow or Thursday for a call.

Best regards,

Brian

From: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>

Sent: Thursday, June 8, 2023 3:31 PM

To: Brian Barnes <BBarnes@cooperkirk.com>

Cc: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <Jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <Margaret.Marshall@usdoj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>

Subject: RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Good afternoon, Brian-

I'm writing with an update. HHS has completed its test searches of email accounts for NIH and the OS divisions (OCR, OASH, and SAMSHA) using the 20 search terms selected by Defendants. By and large, most of the terms did not result in an unreasonable number of documents. A few of the terms, however, needed to be modified, so HHS did so by changing the Boolean modifiers. This change increased the chance that the terms produced relevant documents without change to the substance of the terms themselves.

For NIH and the OS Divisions, the modified terms are as follows:

(gender NEAR(3) dysphoria) AND (youth OR child* OR adolescent* OR minor* OR kid* OR teen* OR boy* OR girl*) **AND** NEAR(5) (transition* OR treat* OR care OR affirm*)

(gender NEAR(3) affirming) AND (youth OR child* OR adolescent* OR minor* OR kid* OR teen* OR boy* OR girl*) **AND** NEAR(5) (transition* OR treat* OR care OR hormon*)

(consent AND (youth OR child* OR adolescent* OR minor* OR kid* OR teen* OR boy* OR girl*) ~~AND~~ NEAR(5) ((gender NEAR(3) affirming) OR (puberty NEAR(3) Block*) OR hormone OR CSH)

("United Kingdom" OR UK) AND (youth OR child* OR adolescent* OR minor* OR kid* OR teen* OR boy* OR girl*) AND (transgender OR "gender affirming") ~~AND~~ NEAR(5) (transition* OR treat* OR care)

For NIH only, the modified terms are as follows:

(Hormone NEAR(3) therapy) AND (transition* OR transgender OR affirm*) ~~AND~~ NEAR(5) (youth OR child* OR adolescent* OR minor* OR kid* OR teen* OR boy* OR girl*)

For the OS Divisions only, the modified terms are as follows:

(wpath ~~AND~~ NEAR(5) (youth OR child* OR adolescent* OR minor* OR kid* OR teen* OR boy* OR girl* OR guidelines OR "soc8"))

(adverse AND (transgend* NEAR(5) (youth OR child* OR adolescent* OR minor* OR kid* OR teen* OR boy* OR girl*) ~~AND~~ NEAR(5) (trans* OR gender OR gat OR gac)))

In the interest of time, HHS verified these terms by rerunning them through the email accounts, and has begun collecting documents. We will continue to update you.

Best,

Amie

From: Murphy, Amie (CRT)

Sent: Wednesday, May 31, 2023 1:05 PM

To: 'Brian Barnes' <BBarnes@cooperkirk.com>

Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>

Subject: RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Thanks, Brian.

HHS has already begun moving forward with the “go get” method for OASH in order to meet the Court’s benchmarks. As Lena mentioned during the call, the potentially responsive information that OASH has is fairly circumscribed and mostly relates to Admiral Levine’s speech at the 2022 WPATH Scientific Symposium and the OPA two-pager on Gender Affirming Care and Young People. Of course, the search is not yet complete, so there may be more. Given what they are finding so far, however, we believe the burden of using search terms for their network drives far outweighs the need in this instance. The same thought applies to searching Admiral Levine’s emails.

Amie

From: Brian Barnes <BBarnes@cooperkirk.com>
Sent: Tuesday, May 30, 2023 1:25 PM
To: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>
Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <Jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>
Subject: [EXTERNAL] RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Hi Amie,

Following up on our call last week, we are not inclined to use a “go get” for OASH. As I mentioned on the call, it seems like Admiral Levine and her office serve as the face of the Administration on many of the issues relevant to this case, so we think using search terms for that office makes sense. We also still think it makes sense to designate Admiral Levine as a custodian. In the spirit of compromise, however, we will agree to use a “go get” for SAMHSA. Happy to discuss further if that would be helpful.

Best regards,

Brian

From: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>
Sent: Friday, May 26, 2023 10:24 AM
To: Brian Barnes <BBarnes@cooperkirk.com>
Cc: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <Jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica

Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <Margaret.Marshall@usdoj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>

Subject: RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Thanks, Brian. Please let us know your thoughts on OASH so we can proceed on that front early next week. Have a nice holiday weekend everyone!

From: Brian Barnes <BBarnes@cooperkirk.com>

Sent: Thursday, May 25, 2023 1:47 PM

To: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>

Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>

Subject: [EXTERNAL] RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Hi Amie,

Thanks for the call earlier today. I've attached a list of search terms with the 20 terms that we would propose HHS start with highlighted. This is without prejudice to Defendants proposing to add or modify search terms once we see a hit report for the 20 terms we have highlighted.

Best regards,

Brian

From: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>

Sent: Tuesday, May 23, 2023 6:30 PM

To: Brian Barnes <BBarnes@cooperkirk.com>

Cc: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <Margaret.Marshall@usdoj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer

<jramer@cooperkirk.com>

Subject: RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Hi Brian—

I agree that it would make sense to get on a call this week to discuss custodians and additional divisions for the “go get.” In the meantime, we spoke with HHS and want to provide you with our thoughts on the concerns that you raise in your email. Also, I’m attaching an updated list of custodians, which includes the representative from SAMHSA that we mentioned in our brief.

First, Maura Calsyn and Dylan Nicole de Kervor are lawyers but they do not work in OGC, so it is not their role to provide legal advice to HHS or any of the divisions.

Second, HHS does not think that it makes sense to add Admiral Rachel Levine to the list of custodians. As the Assistant Secretary, her work is too broad and high level for searches of her email account or documents to result in relevant information pertaining to this lawsuit.

HHS is considering whether there is someone to add to the list of custodians from OCR.

Regarding the seniority of the persons on the list, information flows up the chain of command within the division, so these are the personnel that are most likely to have relevant emails/documents regarding the work within their sphere. It is unnecessary to add anyone less senior.

HHS agrees to your suggestion for using a “go get” for the studies cited in RFPs 18 and 19.

On your last point about using the “go get” method for additional divisions within HHS, HHS suggests starting by adding SAMHSA and HRSA. They are still considering whether it makes sense to add others. They can answer any questions regarding these choices on our call.

Lastly, in light of the hearing, HHS intends to begin running email searches by the end of the week. They will start with 20 terms and, since it appears that you have no objection to the custodians that are on the current list, those custodians. We can add custodians if it makes sense to do so after our call. Please let us know which 20 terms from the two most recent versions of the list (yours and ours) you would like them to run by this Thursday.

Please let me know your availability for a call. We can meet during the following times:

Wednesday, 5/24 – 11:00-11:30, 12-12:30

Thursday, 5/25 – 10:30-4

Friday, 5/26 – 10-11:30

Amie

From: Brian Barnes <BBarnes@cooperkirk.com>

Sent: Monday, May 22, 2023 2:30 PM

To: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>

Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty

Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>

Subject: [EXTERNAL] RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Hi Amie,

Thanks for sending the list of suggested custodians. I think it will make sense for us to hop on the phone to discuss in the days ahead, but I first wanted to send along some thoughts and reactions in writing to hopefully help make our next discussion more productive.

First, we noticed that a couple of the suggested custodians (Maura Calsyn and Dylan Nicole de Kervor) are lawyers. That's not a problem per se, but before proceeding with them we wanted to confirm that their work on the relevant issues doesn't primarily involve giving legal advice. Obviously we should avoid using custodians whose responsive documents are likely to be covered by the attorney-client privilege.

Second, we wanted to raise the question whether it makes sense to add the Assistant Secretary for Health (Rachel Levine) to the list of custodians. While we were glad to see a member of her immediate team (Calsyn) included on the list, it seems to us that also including Levine herself would be sensible given her work on the relevant issues.

Third, we think it would make sense to add a custodian from the Office of Civil Rights who worked there on the relevant issues in 2019 and 2020. In the summer of 2020, OCR said in the Federal Register that "there is no medical consensus to support one or another form of treatment for gender dysphoria." 85 Fed. Reg. 37160, 37198 (June 19, 2020). That statement suggests that OCR was doing work on this issue in 2019 and 2020 that could be quite important to the case.

Fourth, all of the proposed custodians appear to be quite senior – mostly directors of various offices and senior advisors. We think it makes sense to have some senior people included on the list of custodians (see suggestion above about adding Admiral Levine). But we also suggest adding at least some more mid-level staff to the list. Obviously the thing we're trying to get at with this discovery is factual information about the safety and efficacy of certain treatments for gender dysphoria, and our concern is that some important information of that sort might not filter all the way up to the most senior people in a given office.

Fifth, it isn't clear to us that the list of proposed custodians includes anyone who is likely to have the documents responsive to RFPs 18 and 19. Those two RFPs ask about HHS-funded studies that started in 2015 and 2011, respectively. Rather than adding custodians to reach all the way back to that time period, one possibility we wanted to float is a targeted "go get" on those studies that would supplement the responsive materials that are returned via whatever custodians and search terms we ultimately settle on.

Finally, consistent with this morning's hearing and in the spirit of compromise, we're open to using a "go get" method for additional operating divisions at HHS. We'd be eager to hear from you about which of the remaining operating divisions you think are the strongest candidates for that approach. I think it would also help us get comfortable using that approach for additional operating divisions if you could tell us a bit more about the process you would contemplate using. It's not likely that our side will be willing to go along with abandoning the use of search terms for all of the operating divisions, but we appreciate the burdens involved and want to meet you half way on this issue.

Best regards,

Brian