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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON

8 DISABILITY RIGHTS WASHINGTON,

No. CV-09-024-JLQ

9 Plaintiff,

10 vs.

MEMORANDUM OF LAW IN  
SUPPORT OF PLAINTIFF'S  
MOTION FOR A PRELIMINARY  
INJUNCTION

11 PENRITH FARMS, JAMES BREWSTER,  
12 SHERRY BREWSTER, and STEVEN A.  
13 CARRERAS,

14 Defendants.

15 **I. INTRODUCTION**

16 Plaintiff seeks preliminary injunctive relief pursuant to Fed. R. Civ. P. 65(a)  
17 to gain immediate full and meaningful access to records and information requested  
18 from Penrith Farms. As the designated protection and Advocacy system ("P&A  
19 System") for Washington State, Disability Rights Washington has federal  
20 mandates to protect and advocate for persons with disabilities. Plaintiff, DRW  
must be allowed to fulfill its federal mandate to provide protection and advocacy  
services which include, but are not limited to, investigation of allegations of abuse

1 and neglect and advocacy to pursue remedies necessary to protect the rights of  
2 individuals with disabilities.

3 Defendants' refusal to abide by the requirements of the Developmental  
4 Disabilities Assistance and Bill of Rights Act ("DD Act"), 42 U.S.C. § 15041, *et*  
5 *seq.*, the Protection and Advocacy for Individuals With Mental Illness Act  
6 ("PAIMI Act"), 42 U.S.C. § 10801, *et seq.*, and the Protection and Advocacy for  
7 Individual Rights Act ("PAIR Act") 29 U.S.C. § 794e, and the regulations  
8 promulgated pursuant to the above referenced Acts irreparably harms Plaintiff's  
9 ability to fulfill its federal mandate to protect and advocate for the rights of people  
10 with disabilities in the State of Washington.

## 11 **II. FACTS**

12 In October 2008, DRW received a phone call someone (Caller)<sup>1</sup> concerned  
13 about the conditions faced by a family member who resided at Penrith Farms,  
14 which is a facility that provides treatment to people with mental illness. Decl.  
15 Awmiller ¶¶ 26-28. Caller reported that the resident (Resident) said he was not  
16 receiving appropriate mental health treatment, was suicidal, and Caller was told by  
17 Penrith Farms staff that Resident had attempted to steal a knife while at the facility.

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18  
19 <sup>1</sup> DRW is required to keep the identification of individuals it serves confidential.  
20 34 C.F.R. § 381.31(a).

1           On October 14, 2008, DRW staff spoke with Defendant Dr. Carreras by  
2 phone in an attempt to contact Resident to ascertain whether the individual was  
3 abused or neglected. A letter redacting the identity of Resident is attached hereto  
4 as Ex. A. DRW was told to call back several hours later because the individual  
5 was unable to speak at that time; however, when a second attempt to contact the  
6 individual was made, DRW was denied access to the individual. *Id.*

7           Since DRW was not able to reach the resident by phone, DRW staff visited  
8 Penrith Farms to speak with the resident in person on October 20, 2008. Decl. of  
9 Awmiller ¶22. The resident informed DRW's representatives about several  
10 negative experiences he had while at Penrith Farms. *Id.* at ¶¶ 23-24. The resident  
11 reported that, on the day that he arrived, he felt uncomfortable at the facility, and  
12 told staff members at Penrith Farms that he wished to leave, but was told by  
13 Penrith Farms staff that he could not leave and he must turn over his driver's  
14 license, cell phone, and other possessions. *Id.* at ¶ 23. He reported that other  
15 residents had similar experiences. *Id.* at ¶ 25. The resident also claimed that while  
16 at Penrith Farms, he and other residents are forced to work without compensation.  
17 *Id.* at ¶¶ 24-25. The resident stated he did not feel safe at the facility. DRW  
18 assisted the individual in leaving. *Id.* at ¶ 22.

19           DRW attorney Zachary Burr requested documents from the facility on  
20 December 12, 2008 pursuant to the report and probable cause of possible

1 widespread abuse or neglect. Ex. B. The request included: documents regarding  
2 reports of abuse or neglect at the facility; documents regarding investigations into  
3 abuse and neglect by the facility; contact information for guardians of any person  
4 who has a disability residing at the facility. *Id.* That request was denied by Penrith  
5 Farms and DRW made several attempts to address each issue Penrith Farms raised  
6 in a series of letters about DRW's access request. See Exs. C-G. In its final letter,  
7 Penrith Farms indicated it had no intention to provide any of the records or  
8 information requested without a court order, despite being provided with a  
9 significant amount of legal authority which clearly describes the federal access  
10 authority supporting DRW's request. Ex. G.

11 As a result of Penrith Farms' refusal to follow federal law, DRW has been  
12 denied access to conduct its investigation and has been unable to fulfill its federal  
13 mandate to investigate alleged abuse and neglect at a facility which provides  
14 treatment to individuals with mental illness, developmental disabilities, or other  
15 physical disabilities. Decl. of Stroh ¶ 10.

### 16 **III. ARGUMENT**

#### 17 **A. The Plaintiff meets the Requirements for a Preliminary 18 Injunction**

19 In order for a preliminary injunction to issue, the Court must determine that  
20 (1) plaintiff has exhibited a strong likelihood of success on the merits; (2) the  
possibility of irreparable injury to plaintiff if preliminary relief is not granted; (3)

1 such a balance of hardships favoring the plaintiff; and (4) advancement of the  
2 public interest. *National Resources Defense Council, Inc v. Winter*, 518 F.3d 658,  
3 (9<sup>th</sup> Cir. 2007). Plaintiff meets these requirements for a preliminary injunction.

4 1. DRW is Likely to Succeed on the Merits of its Claim that Penrith  
5 Farms' Actions were Unlawful.

6 (a) As part of its investigation, DRW has a right to records and contact  
7 information for residents and their guardians.

8 DRW, as the P&A System for the State of Washington, has a right to access  
9 records and contact information it needs to conduct a full and meaningful  
10 investigation. When Congress enacted the DD and PAIMI Acts, it found that  
11 individuals with developmental disabilities and mental illness were vulnerable to  
12 abuse and neglect and needed the services of P&A systems as a check upon the  
13 activities of facilities such as Penrith Farms. 42 U.S.C. §§ 10801, 15001. Each  
14 P&A system is mandated under the aforementioned Acts, to investigate and  
15 remedy abuse and neglect of persons with mental, developmental, and physical  
16 disabilities, and provide them with legal representation and advocacy services. *See*  
17 *e.g.*, 42 U.S.C. § 10801. The DD, PAIMI, and PAIR Acts mandate that designated  
18 P&A systems such as Disability Rights Washington have access to those  
19 individuals and their records which “includes but is not limited to any reports,  
20 whether formal or informal, written or oral, received by the system including  
media accounts, newspaper articles, telephone calls (including anonymous calls),

1 from any source alleging abuse or neglect of an individual with a developmental  
2 disability.” *See e.g.*, 45 C.F.R. § 1386.19.

3 DRW’s mandate also authorizes investigating incidents of possible abuse  
4 and neglect which are supported by probable cause which is defined as: “a  
5 reasonable ground for belief that an individual with a developmental disability or  
6 mental illness has been, or may be, subject to abuse or neglect.” The individual  
7 making such determination may base the decision on reasonable inferences drawn  
8 from his or her experience or training regarding similar incidents, conditions or  
9 problems that are usually associated with abuse or neglect. 45 C.F.R. § 1386.19.  
10 42 U.S.C. § 1080. Furthermore, it is inappropriate for Defendants to question the  
11 grounds of probable cause as DRW is “the final arbiter of probable cause for the  
12 purpose of triggering its authority to access all records for an individual that may  
13 have been subject to abuse or neglect.” *Arizona Center for Disability Law v. Allen*,  
14 197 F.R.D. 689, 695.

15 The complaint and probable cause standards constitute two different legal  
16 standards, either one of which is sufficient to invoke P&A investigatory authority,  
17 DRW received a complaint alleging repeated abuse and neglect through a phone  
18 call regarding an individual residing at Penrith Farms, and Resident also reported  
19 he could not leave because the facility had taken his identification and his cell  
20 phone, he had no money and was thousands of miles from home. Decl. of

1 Awmiller ¶¶ 15, 23. DRW was also able to establish probable cause for an  
2 investigation through several conversations with the caller as well as subsequent  
3 conversations with the resident. Decl. of Awmiller ¶ 20. In addition to the  
4 concerns raised by the caller, the resident made additional allegations and spoke to  
5 the systemic nature of Defendants’ acts. *Id.* Based on the conversations with the  
6 caller and resident, and interactions with the staff before and during a DRW staff  
7 visit to the facility, DRW found reasonable ground to believe that individuals with  
8 disabilities at Penrith Farms may have been, and may still be, subject to abuse and  
9 neglect. DRW thus satisfies the requirements for initiating an investigation of  
10 possible abuse and neglect supported by a report and probable cause. 45 C.F.R. §  
11 1386.19

12 2. DRW and the residents of Penrith Farms will continue to suffer  
13 irreparable harm if DRW does not receive the records.

14 Denying a P&A access to records constitutes irreparable harm because “the  
15 P&A is being prevented from pursuing fully its right to access records...in pursuit  
16 of its duty to investigate circumstances providing probable cause to believe abuse  
17 or neglect may be occurring.” *Iowa Protection and Advocacy Services, Inc. v.*  
18 *Rasmussen*, 206 F.R.D. 630, 635 (S.D. Iowa, 2001); *See also Wisconsin Coalition*  
19 *for Advocacy, Inc. v. Czaplewski*, 131 F. Supp.2d 1039, 1051 (E.D. Wisc. 2001);  
20 *Advocacy Center v. Stalder*, 128 F. Supp.2d 358, 367-68 (M.D. La. 1999). As a  
result of Penrith Farms’ refusal to release the records and contact information,

1 DRW's function as a P&A is frustrated. If the records are not turned over, DRW  
2 cannot conduct a full investigation. *See Wisconsin Coalition for Advocacy, Inc. v.*  
3 *Czaplewski*, 131 F. Supp.2d, 1051. As noted in *Advocacy Inc. v. Tarrant County*  
4 *Hospital District*, 2001 WL 1297688, 4 (N.D. Tex, 2001):

5 When a facility...denies or places restrictions on an advocacy  
6 agency's access to records, the mandatory provisions relating to  
7 authority to investigate incidents of abuse and neglect are rendered  
8 nugatory. *Mississippi Prot. & Advocacy Sys., Inc. v. Cotton*, 929 F.2d  
9 1054, 1059 (5<sup>th</sup> Cir. 1991). This not only hampers redress of past and  
10 current abuse and neglect, but has a detrimental effect on the  
11 advocacy agency's future performance of its statutory mandate. *Id.*  
12 [The P&A system] must have the authority to pursue legal,  
13 administrative and other remedies to ensure that the rights of the  
14 mentally ill are not violated. 42 U.S.C. 108065(a)(1). Timely access  
15 to records is essential for effective communication, *Robbins v. Budke*,  
16 730 F. Supp. 1479 (D.N.M. 1990), and access to patient records is  
17 necessary for the P&A system to serve its clients, evaluate client  
18 concerns, and determine whether a client has a legal claim.  
19 *Id.*

20 In addition to the harm DRW will suffer directly, residents at the facility  
may continue to be irreparably harmed by possible unchecked abuse and neglect.  
The sooner the investigation can take place, the sooner DRW can determine  
whether abuse and neglect is taking place, and advocate to end any abuse or  
neglect that may be substantiated.

### 3. Penrith Farms Will Not be Harmed by Disclosing the Records and Information Because There Will Be No Illegal Breach of Confidentiality.

In its previous refusals to comply with DRW's requests, Penrith Farms  
claimed that the Health Insurance Portability and Accountability Act (HIPAA)



1 prevents disclosure. *Ohio Legal Rights Service v. The Buckeye Ranch, Inc. et al*,  
2 365 F. Supp.2d 877 (S.D. Ohio 2005); *Protection and Advocacy System, Inc. v.*  
3 *Freduenthal*, 412 F. Supp.2d 1211, 1218 (D. Wy. 2006). HIPAA itself provides  
4 that protected information may be disclosed when otherwise required by law. 45  
5 C.F.R. § 164.512(a). The United State Department of Health and Human Services  
6 which oversees compliance with HIPAA as well as the DD and PAIMI Acts gave  
7 further guidance reaffirming the need to cooperate with P&A investigations and  
8 not use HIPAA “as a reason not to comply with its other legal obligations.”  
9 <http://www.hhs.gov/hipaafaq/permitted/require/909.html>. Attached hereto as Ex.

10 H. Federal courts have confirmed that protection and advocacy systems are  
11 allowed access under the “required by law” exception to HIPAA. Therefore,  
12 Defendants are still bound by the DD and PAIMI Acts to provide the information  
13 when requested by the P&A systems and will not suffer harm by disclosing the  
14 information. 849 F. Supp. at 1202.

15 4. The Public Interest Will be Furthered, Not Harmed, by Granting  
16 DRW Access to the Records and Contact Information.

17 Congress drafted the DD and PAIMI Acts because of concern it had over  
18 abuse and neglect of individuals with developmental disabilities and mental illness  
19 such as those contained in the allegations in the instant matter. As the court noted  
20 in *Iowa Protection and Advocacy v. Rasmussen*, “(t)o shield from independent  
review valuable records of this type of appraisal would directly contradict the

1 expressly stated public policy of Congress.” 206 F.R.D. at 635. Therefore, Penrith  
2 Farms’ denial of DRW’s access undermines the public interest which outweighs  
3 any potential harm to Penrith Farms.

4 **IV. CONCLUSION**

5 For the reasons stated above, Plaintiff respectfully requests this Court issue a  
6 preliminary injunction requiring Penrith Farms to provide DRW with the names,  
7 addresses, and telephone numbers of the all residents as well as the names,  
8 addresses, and telephone numbers of any guardians those residents may have.  
9 DRW also requests the Court issue an injunction directing Penrith Farms to  
10 provide DRW all internal and external investigation reports in its possession  
11 relating to allegations of abuse and neglect by staff against residents. Finally,  
12 Plaintiff requests this Court also issue a preliminary injunction forbidding Penrith  
13 Farms from further impeding DRW’s investigation as it develops.

14 Dated this 29<sup>th</sup> day of January, 2009.

15 Respectfully Submitted,

16 **DISABILITY RIGHTS WASHINGTON**

17 s/David R. Carlson

18 David R. Carlson, WSBA # 35767  
19 Attorney for Plaintiff  
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