IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2024 Term

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November 14, 2024

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 23-275

WEST VIRGINIA DEPARTMENT OF HUMAN SERVICES,
Defendant below, Petitioner,

v.

DAVID B., GUARDIAN AD LITEM AND NEXT FRIEND OF J.B. and M.B., and S.M., INDIVIDUALLY,
Plaintiffs below, Respondents.

Appeal from the Circuit Court of Kanawha County
The Honorable Jennifer F. Bailey, Judge
Civil Action No. 21-C-915

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: September 17, 2024
Filed: November 14, 2024

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JUSTICE HUTCHISON delivered the Opinion of the Court.

JUSTICE BUNN deeming herself disqualified, did not participate in the decision in this case.

JUDGE MICHAEL W. ASBURY sitting by temporary assignment.

JUSTICE WOOTON dissents and reserves the right to file a separate opinion.

SYLLABUS OF THE COURT

1. "'A circuit court's denial of summary judgment that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the 'collateral order' doctrine.' Syllabus Point 2, *Robinson v. Pack*, 223 W.Va. 828, 679 S.E.2d 660 (2009)." Syllabus Point, *Maston v. Wagner*, 236 W. Va. 488, 781 S.E.2d 936 (2015).

2. "This Court reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court." Syllabus Point 1, *Findley v. State Farm Mut. Auto. Ins. Co*., 213 W. Va. 80, 576 S.E.2d 807 (2002).

3. "The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition." Syllabus Point 1, *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996).

4. For purposes of qualified immunity, internal agency policies, procedures, manuals, guidelines, or similar documents that have not been legislatively

approved are not, and cannot be used to create, clearly established statutory rights or law of which a reasonable person would have known.

5. Where qualified immunity is raised by a state agency as grounds for summary judgment on a claim of oppressive conduct, the nonmoving party, in order to avoid summary judgment, must produce some admissible evidence that creates an issue of fact as to whether an official, employee, or agent of the agency acted in a manner that was an abuse of any discretionary power invested by law in the exercise of, or under color of exercising, the duties of his or her office and while doing so acted with an improper motive.

HUTCHISON, Justice:

The Plaintiffs, David B., guardian ad litem and next friend of J.B., M.B., and S.M., individually[1], (collectively the Plaintiffs), sued the West Virginia Department of Human Services (DHS).[2] After discovery, DHS sought summary judgment on all claims against it arguing it was qualifiedly immune from the Plaintiffs' claims. By order dated April 11, 2023, the circuit court denied summary judgment. DHS brought an interlocutory appeal to this Court asserting the circuit court erred in denying it qualified immunity. After reviewing the parties' briefs and the appendix record, hearing oral argument, and considering the pertinent legal authority, we conclude DHS is entitled to qualified immunity on all the claims leveled against it by the Plaintiffs. Thus, we reverse the order of the circuit court denying summary judgment and remand this case for entry of an order granting DHS summary judgment and dismissing the action against it.

[1]"Pursuant to Rule 40 of the *West Virginia Rules of Appellate Procedure*, the identities of juveniles are protected in Court documents. Initials or descriptive terms are used instead of full names to promote confidentiality." *State v. Meadows*, 231 W. Va. 10, 14 n.1, 743 S.E.2d 318, 322 n.1 (2013) (per curiam). Where using the full names of others involved in a case might also serve to identify the juveniles, we will also use initials or descriptions to identify those other persons.

[2]The DHS was previously called the Department of Health and Human Resources (DHHR). We have substituted DHS for DHHR as the proper party in this case and shall refer to the Defendant-Petitioner as DHS.

I. Facts and Procedural Background

A. The DHS Investigations

On March 24, 2015, DHS received a referral for child protective services alleging that, J.F.L., a registered sex offender, had updated his address to reflect that it was now identical to that of J.M.K. J.M.K. was the biological mother of A.A. and S.M., and was the adoptive parent of her nieces, J.B. and M.B.,[3] all of whom resided in J.M.K.'s residence. On March 24, A.A. was 15 years old, S.M. was 12 years old, J.B. was 4 years old, and M.B. was 3 years old.

Within twenty-fourhours of receiving the referral, Child Protective Services (CPS) workers initiated an investigation. During the investigation, S.M. told a CPS worker that she gets along with J.F.L. J.B. told the CPS worker that "she had a babysitter when her mom was working." When interviewed, J.F.L. admitted that he is a registered sex offender having been convicted previously of sexually assaulting his niece who was nine years old at the time. He stated that he is not restricted from being around children. He additionally stated that he is never left alone with the children and is not a caretaker of the children. The CPS worker who interviewed him characterized J.F.L. as "cooperative" and "willing to work with this worker[.]" J.M.K. was also interviewed. J.M.K. related to the CPS worker that she was aware of J.F.L.'s sex offender status. She also informed the CPS worker that

[3]A.A. is male. The other children are female.

J.F.L. was not a caretaker to the children and that she does not leave the children home alone with him. J.M.K. expressed her belief that the referral was a retaliatory act by another family member upset over J.M.K.'s adoption of the nieces. J.M.K. also told the CPS worker "that if there was an issue with [J.F.L.] being in the home with her children, that she would make [J.F.L.] leave. [She] stated that she would never put anyone or anything before her children."

The CPS worker did not substantiate maltreatment as the "[e]vidence does not indicate abuse and/or neglect according to WV Code 49-1-3."[4] While the CPS worker did "have concerns with [J.F.L.]'s past conviction[,]" the CPS worker further explained that she did "not have any evidence to suggest that [J.F.L.] is not allowed to be around children" and that "[t]he children have not made any disclosures about [J.F.L.] that would be concerning." The CPS worker found that J.M.K. "arranges appropriate supversion [sic] for the children when she is not able to be home with them." The CPS worker also found that J.M.K "has been threatened by other family members in regard to the removal of the children from her home." The CPS "[w]orker found the home to be appropriate" and that "[t]here were no children in the household identified as unsafe or maltreated."

[4]"In 2015, the West Virginia Legislature recodified Chapter 49 of the West Virginia Code relating to Child Welfare." *In re K.E.*, 240 W. Va. 220, 225 n.5, 809 S.E.2d 531, 536 n.5 (2018). "W. Va. Code § 49-1-3 was recodified in 2015 as W. Va. Code § 49-1-201." *M.H. v. C.H.*, 242 W. Va. 307, 312 n.8, 835 S.E.2d 171, 176 n.8 (2019)

On April 25, 2018, DHS received another CPS referral, this time alleging that M.B. told another girl that "someone was kissing her private parts." Again, within twenty-four hours, DHS initiated an investigation.

During CPS's interview with M.B., M.B. related that "a boy at school touched her privates parts [sic] and she really didn't like it so she told him to stop." M.B. then pointed to her "butt area." M.B. "reported that she lives at home with mom, daddy, [J.B.] and [S.M.]."[5] She further reported that "daddy" never gives her a bath. M.B. also explained that the touches she receives from J.F.L that she does not like are related to corporal punishment. She also related that she is struck by her siblings either accidentally or when roughhousing. M.B. "denied getting any other touches that she doesn't like from anyone in her family."

S.M. "reported that she has a good relationship with mom and her step-dad, [J.F.L.] who she calls dad." S.M. reported feeling "very safe in her home" and that she was comfortable around J.F.L. and never had any concerns about him being around her or her sisters. During his CPS interview, J.F.L. again admitted to being a registered sex offender and reiterated that he was not barred from being around children. He stated that he did not bathe the girls because he did not want anyone to be able to say anything concerning him and the girls. He also related he is visited by the State Police to ensure he is doing well.

[5]According to J.M.K., she and J.F.L. married in approximately 2016.

J.M.K. was interviewed by the CPS as well. J.M.K. stated that she had no concerns with J.F.L. being around the girls and that she frequently spoke with her girls about sexual abuse since she is a sexual abuse survivor herself. She relayed that if she had any concerns about J.F.L. he would not be in the home. Finally, the CPS worker spoke with L.M. who was friends with J.M.K. According to L.M., she was around the family every week or two and spoke with J.M.K. daily. L.M. denied having any concerns with the family and felt comfortable with J.F.L. being around the girls.

As a result of the investigation, the CPS worker concluded that "maltreatment will NOT be substantiated on [J.F.L] and [J.M.K.] for neglect-failure or inability to supply necessary supervision." According to the CPS worker "[d]uring the course of this assessment there was no disclosure of sexual abuse by [J.F.L.]" and "[t]here is no evidence of abuse or neglect within the family at this time."

On July 22, 2020, DHS received a third CPS referral. In this referral, it was alleged that S.M. had been sexually abused in the home by J.F.L. for the preceding six years and that J.M.K. was aware of the abuse and allowed it to occur.

B. The criminal case against J.F.L.

On October 10, 2020, J.F.L. was indicted on numerous sexually related criminal counts including twenty-two counts of first-degree sexual abuse, thirty counts of second-degree sexual assault, fifty-two counts of sexual abuse by a parent, guardian, custodian, or person in position of trust, thirty counts of incest, and two counts of soliciting a minor via computer. S.M. was the victim in most of the counts while J.B. accounted for the remainder. A jury convicted J.F.L. on all counts.

C. The Plaintiffs' Civil Case against DHS.

On October 14, 2021, the Plaintiffs sued DHS and "unknown [DHS] supervisors" in the Circuit Court of Kanawha County alleging their acts and omissions resulted in S.M., J.B., and M.B. being subjected to sexual abuse by J.K.L for a protracted period. The Plaintiffs claimed that DHS and the unnamed DHS supervisors were negligent, grossly negligent, reckless, fraudulent, malicious, and oppressive. The Plaintiffs averred that DHS's employees violated several sections of the 2013 version of DHS's *Child Protective Services Policy* (the DHS Policy) that was in effect in 2015 and 2018.

Specifically, the Plaintiffs' complaint asserted that DHS violated DHS Policy's §§ 3.24,[6] 4.26,[7] 5.25,[8] 7.28,[9] and 7.3.[10]

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[6]Section 3.24 of the DHS Policy provided:

3.24 Reports Involving Registered Child Sex Offenders

West Virginia Code Section § 15-12, Sex Offender Registration Act, requires that certain sex offenders register demographic information about themselves in order that citizens may take appropriate precautions to protect its vulnerable populations. This statute also requires lifetime registration for any individual who commits a sexual crime against a child under the age of 18.

In order to help further protect children from harm by registered child sex offenders, CPS will accept for assessment referrals alleging that a registered child sex offender has unlimited and/or unrestricted access to a child under the age of 18. An example of unlimited and/or unrestricted access would be if the biological parent co-habitates with the registered child sex offender and the children also reside in the home, even if only part-time. Other examples of unlimited and/or unrestricted access include child sex offenders who: act as a caregiver, even part-time; spend the night with the non-child sex offender caregiver and is able to come and go from room-to-room at will; is a relative and the non-child sex offender parent leaves the child in the child sex offender's care, even if only one day per week. Please note that this is not to mean the children must be unsupervised for it to qualify as "unlimited and/or unrestricted". "Parttime" means someone who may be a paramour or relative, who has frequent access but is not a resident. It could also be used to describe an offender who may be present only on weekends, but not during the week.

For reports of unlimited and/or unrestricted access of a child to a registered sex offender, the worker will:

- Follow the same rules and procedures for intake as other reports of suspect child abuse or neglect

- Complete a search of the West Virginia State Police Sex Offender Registry located on the internet at http://www.wvstatepolice.com/sexoff/, making sure that (1) the individual is, indeed, listed on the registry, and

(2) that the individual was convicted and registered for a sex offense against a child under the age of 18.

- Document the results of the search in the intake assessment

The supervisor will:

- Indicate whether the referral will be accepted or screened out. If screened out, the supervisor must provide an explanation as to why the referral does not indicate that the child is being subjected to conditions that are likely to result in abuse or neglect.

[7]Section 4.26 of the DHS Policy provided:

4.26 Family Functioning Assessments where children are determined to be abused or neglected but safe

Once the Supervisor reviews the Family Functioning Assessment and/or consults with the CPS Social Worker and agrees that there is abuse or neglect but not impending danger in the home, the following must occur by either the CPS Social Worker or Supervisor:

- Contact the family to discuss the findings from the Family Functioning Assessment.

- Explain to the family that due to a finding that abuse or neglect occurred, either a Child Protective Service Social Worker will complete a services plan or a referral to an ASO Provider will be made for the completion of a needs assessment and services plan. Inform the caregivers of the issues/dynamics that may have led to the abuse or neglect as well as the expectations of Child Protective Services, the Providers when appropriate, as well as the family's expectations.

- Discuss the case with the Ongoing CPS Supervisor and Open the Family for Ongoing Child Protective Services

(*See CPS Policy Section5.25 Ongoing Services to children abused or neglected but not unsafe for additional information*) (emphasis in original)

[8]Section 5.25 of the DHS Policy provided:

5.25 Ongoing Services to children abused or neglected but not unsafe

Following the completion of Family Functioning Assessment, certain cases may have a finding that child abuse or neglect occurred but there will be no identified impending danger. In those situations the case must be open for Ongoing CPS.

In instances where a child has been abused or neglected but safe and there is an identified Socially Necessary Services Provider who can complete the Needs Assessment and Service Plan, the CPS Social Worker must:

- Contact the family, letting them know the CPS Social Worker who will be assigned the case

- Complete a referral to the ASO Services Provider for the Needs Assessment and Services Plan 110165

- Thoroughly explain to the provider the reason for the referral and provide a copy of the Family Functioning Assessment

- Explain to the provider at the time of the referral that the Service Provision will terminate in 90 days

- Remind the provider that during their casework process they are to attempt to identify resources and build upon the families strengths in order for the family to meet the identified needs at case closure and after case closure

- Collect and review provider reports and contact the provider as necessary but minimally once per month to monitor the provision of services

- Contact the provider at least 5 working days prior to the 90th day of service provision reminding them the date that the services will end.

- If there is any indication that a child in the home may be unsafe or threatened with abuse or neglect, or if the provider discovers information related to unknown abusive or neglectful behaviors, a CPS referral must be made and a Family Functioning Assessment must occur to determine if any child in the home is in impending danger.

There may be instances when there is not an ASO provider to complete the Needs Assessment and Service Plan. In those situations the CPS Social Worker must:

- Thoroughly review the information collected during the Family Functioning Assessment to determine what family need may have contributed to substantiated maltreatment

- Family needs may include but are not limited to issues concerning: housing, social, education, health, mental health, recreation, spiritual, legal, financial, and transportation

- Make contact with the family within 5 working days, explaining the purpose of the Service Plan and complete the Service Plan with the family based upon information collected during the Family Functioning Assessment as well as additional information provided by the family. (*note the Family Functioning Assessment will substitute for the Needs Assessment*) (emphasis in original)

- Complete the Service Plan within 30 days of the finding of abuse or neglect

- Make face to face with all household members at least monthly in order to assist the family in completing the services plan, monitor progress, address any issues with providers or within the home, and assist the family in gaining access to the specific services in their services plan

- Through the casework process, attempt to identify resources and build upon the families strengths in order for the family to meet the identified needs at case closure

- If a potential impending danger is discovered or a new incident of possible abuse or neglect occurs, a referral for CPS must be made

- Close the case within 90 days if there are no outstanding referrals for CPS or newly discovered impending dangers.

When Child Protective Services opens a family for Ongoing Child Protective Services due to abuse or neglect being, the Supervisor must:

- Discuss service provision with the assigned CPS Worker and ensure that the Socially Necessary Services Provider or Child Protective Services Social Worker is appropriately addressing the family's needs and connecting the family with both formal and informal resources that can assist the family once the Child Protective Services Ongoing Case is closed

- If there is indication that additional abuse or neglect in the home exists, or if a child may be in impending danger and threatened with harm, ensure that a child abuse and neglect referral is made and child safety addressed

- Ensure that the case is closed within 90 days unless there are outstanding CPS referrals or newly discovered information indicating that a child may be in impending danger

[9]Section 7.28 of the DHS Policy provided:

7.28 Circumstances Requiring Termination of Parental Rights

Statute

State statute, 49-6-5b, requires that under certain circumstances the Department must: file a petition for termination of parental rights; or, must request to join in a petition for termination of parental rights filed by another party.

Definition

The Department is required to file a petition or to join in a petition to terminate rights or to otherwise seek a ruling to terminate parental rights in any pending proceeding when a parent, guardian or custodian has:

- Subjected the child, another child of the parent, or any other child residing in the same household or under the temporary or permanent custody of the parent to aggravated circumstances which include, but are not limited to, abandonment, torture, chronic abuse and sexual abuse;

- Committed murder of the child's other parent, another child of the parent, or any other child residing in the same household or under the temporary or permanent custody of the parent;

- Committed voluntary manslaughter of the child's other parent, another child of the parent, or any other child residing in the same household or under the temporary or permanent custody of the parent;

- Attempted or conspired to commit such a murder or voluntary manslaughter or been an accessory before or after the fact to either such crime; or

- Committed unlawful or malicious wounding that results in serious bodily injury to the child, the child's other parent, to another child of the parent, or any other child residing in the same household or under the temporary or permanent custody of the parent; or

- Committed sexual assault or sexual abuse of the child, the child's other parent, guardian, or custodian, another child of the parent, or any other child residing in the same household or under the temporary or permanent custody of the parent; or,

- Been required by state or federal law to register with a sex offender registry; or

- The parental rights of the parent to another child have been terminated involuntarily

Exceptions

The Department may determine not to seek termination of parental rights when:

- At the option of the Department the child has been placed with a relative;

- the Department has documented in the unified child or family case plan made available for court review a compelling reason, including but not limited to the child's age and preference regarding termination or the child's placement in custody of the Department based on any proceedings initiated under Article 5 of Chapter 49, that filing a petition would not be in the best interests of the child; or

- the Department has not provided, when reasonable efforts to return a child to the family are required, the services to the child's family as the Department deems necessary for the safe return of the child to the home.

Worker Actions

Whenever a worker is involved in a case, or learns of a case where a petition requesting termination of parental rights was filed, because a court has determined that a parent has abandoned a child, or a court has determined that a parent has committed murder or voluntary manslaughter of his or her children, has attempted or conspired to commit such murder or voluntary manslaughter or has been an accessory before or after the fact of either crime or has committed unlawful or malicious wounding resulting in serious injury to the child or to another or his or her own children or the parental rights to a sibling have been terminated then the worker must either file a petition or seek to join in the petition which has already been filed. There are no exceptions to this requirement.

Whenever a worker is involved in a case in which a child has been in foster care for 15 of the most recent 22 months, the worker must either seek termination of parental rights or document in the case plan a compelling reason for not requesting termination. There are no exceptions to this requirement.

[10]Section 7.3 of the DHS Policy provided:

7.3 Aggravated Circumstances and other situations where reasonable efforts are not required

Statute

Aggravated circumstances is the term used in state statute to define certain conditions which nullify the need to make reasonable efforts to prevent removal of a child and to provide reunification services once a child has been removed. This term is found in 49-6-3(d), 49-6-5(a) and is referred to in 49-6-8(a) of the Code.

Purpose

The purpose of this statute is to define those conditions which are so harmful to children and are such an indicator of parental inability to provide proper care that preservation of the family is not required.

Definition

The Department is not required to make reasonable efforts to prevent the removal of a child or to reunite the child with the child's parent if the court determines the parent has subjected the child to aggravated circumstances which include but are not limited to abandonment, torture, chronic abuse and sexual abuse.

Other instances when reasonable efforts are not required are when the parent has:

- Committed murder of the child's other parent, guardian or custodian, another child of the parent, or any other child residing in the same household or under the temporary or permanent custody of the parent;

- Committed voluntary manslaughter of the child's other parent, another child of the parent, or any other child residing in the same household or under the temporary or permanent custody of the parent;

- Attempted or conspired to commit such a murder or voluntary manslaughter or been an accessory before or after the fact to either such crime; or,

- Committed-a felonious assault that results in serious bodily injury to the child, the child's other parent, to another child of the parent, or any other child residing in the same household or under the temporary or permanent custody of the parent;

- Committed sexual assault or sexual abuse of the child, the child's other parent, guardian, or custodian, another child of the parent, or any other child residing in the same household or under the temporary or permanent custody of the parent;

- Has been required by state or federal law to register with a sex offender registry; or

- The parental rights of the parent to another child have been terminated involuntarily.

Note: the definition of aggravated circumstances is not exhaustive. That is, a worker can present to the court information about the acts of a parent other than those described above and ask that the court consider these acts as aggravated circumstances. (emphasis in original).

The Plaintiffs also asserted a claim against DHS for negligent training and supervision claiming that DHS "failed to properly train its agents and employees" and that DHS was "aware that without proper training and supervision that minors under [DHS]'s care such as Plaintiffs faced danger to their physical and emotional well[-]being." Additionally, although the Plaintiffs affirmatively (and, indeed, emphatically) disclaimed reliance on the United States Constitution or any federal statute,[11] the Plaintiffs alleged a state constitutional tort under the West Virginia Constitution.

After extensive discovery, DHS sought summary judgment based on the doctrine of qualified immunity. During the circuit court's hearing on DHS's summary judgment motion, the Plaintiffs withdrew their state constitutional tort action. The Plaintiffs also further agreed that because they failed to substitute named defendants for the "unknown [DHS] supervisors" that the Plaintiffs could proceed only against DHS. As a result, the Plaintiffs' counsel asserted that the Plaintiffs were pursuing "straight forward negligence" claims against DHS. The Plaintiffs admitted the gravamen of their claim was

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Worker Actions

> If at any time during the Child Protective Services process it is determined that a parent has committed an act which meets the definition of an aggravated circumstance, the worker must immediately assess the parent's actions. The worker must follow the policies and protocols outlined in CPS Policy, in particular CPS Policy Section 4.26.

[11] Paragraph 61 of the Plaintiffs' complaint reads, "Plaintiffs are <u>not</u> making a claim under the United States Constitution or any federal statute." (emphasis in original).

that DHS was negligent in not seeking to terminate the parental rights of J.M.K and J.F.L. based on J.F.L.'s registry as a sex offender as required by section 7.28 of the DHS Policy.

By order dated April 11, 2023, the circuit court denied DHS's motion for summary judgment. While acknowledging that DHS had the right to raise qualified immunity, the circuit court ruled that "it will be left up to the jury to decide under the facts whether or not there were mandatory duties not followed or whether the actions of Defendant [DHS]'s agents and employees violated clearly established law." The circuit court then recognized our case law holding that "[t]here is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive." The circuit court, recognizing that this Court has never explicitly defined what is meant by the term "oppressive," nevertheless concluded that the "jury could conclude that at least some of [DHS]'s actions were oppressive[.]" The circuit court also concluded that DHS was not qualifiedly immune from the Plaintiffs' claim of negligent supervision and training.

DHS then filed this interlocutory appeal asserting that the circuit court erred in denying it summary judgment based on qualified immunity.

II. Standard of Review

"Typically, the denial of a motion for summary judgment is an interlocutory ruling not subject to appellate review." *Praetorian Ins. Co. v. Chau,* 247 W. Va. 521, 530,

881 S.E.2d 432, 441 (2022). However, we have recognized that "'[a] circuit court's denial of summary judgment that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the 'collateral order' doctrine.' Syllabus Point 2, *Robinson v. Pack*, 223 W.Va. 828, 679 S.E.2d 660 (2009)." Syl. Pt. 1, *Maston v. Wagner*, 236 W. Va. 488, 781 S.E.2d 936 (2015). Thus, DHS's appeal is properly reviewable by this Court. Accordingly, our review is plenary as "[t]his Court reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court." Syl. Pt. 1, *Findley v. State Farm Mut. Auto. Ins. Co*., 213 W. Va. 80, 576 S.E.2d 807 (2002). Our review is guided by our recognition that:

> The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.

Syl. Pt. 1, *Hutchison v. City of Huntington*, 198 W. Va. 139, 479 S.E.2d 649 (1996).

With these standards in mind, we now address the matters before the Court.

III. Discussion

DHS asserts before us, as it did before the circuit court, that it is entitled to qualified immunity on the claims leveled against it. "Qualified immunity is an immunity from suit afforded to public officials and State agencies under certain conditions." *W. Va.*

Div. of Corr. & Rehab. v. Robbins, 248 W. Va. 515, 524, 889 S.E.2d 88, 97 (2023). "[T]he purpose of qualified immunity is to allow officials to do their jobs and to exercise judgment, wisdom, and sense without worry of being sued." *W. Va. Bd. of Ed. v. Marple*, 236 W. Va. 654, 661, 783 S.E.2d 75, 82 (2015). In West Virginia, unless expressly limited by statute, "qualified immunity is necessarily broad[,]" *Maston*, 236 W. Va. at 500, 781 S.E.2d at 948, and applies to "the State, its agencies, officials, and/or employees." *Kent v. Sullivan*, 249 W. Va. 747, 901 S.E.2d 500, 505 (2024). "[T]he doctrine of qualified immunity is . . . applicable to actions brought only against state agencies, such as the [Petitioner] in the instant case." *Hess v. W. Va. Div. of Corr.*, 227 W. Va. 15, 19, 705 S.E.2d 125, 129 (2010) (per curiam).[12]

West Virginia applies two standards to determine if a state agency, agent, official, or employee is protected by qualified immunity. First, "[a] litigant may pierce the shield of qualified immunity by showing that a government official has violated a clearly established statutory or constitutional right." *Maston*, 236 W. Va. at 501, 781 S.E.2d at 949. Second, a litigant may pierce the shield of qualified immunity by showing that the government official's, employee's, or agent's acts or omissions were fraudulent, malicious, or oppressive. *See W. Va. Div. of Nat. Res. v. Dawson*, 242 W. Va. 176, 190, 832 S.E.2d 102, 116 (2019) ("Throughout the history of our qualified immunity case law, this Court

[12]The state may waive qualified immunity if it is expressly waived in an applicable state insurance policy. The Plaintiffs do not argue that the DHS insurance policy waived DHS's qualified immunity. *See W. Va. Dep't of Env't Prot. v. Dotson*, 244 W. Va. 621, 627 & n.10, 856 S.E.2d 213, 219 & n.10 (2021).

has continually and consistently held that one way to defeat qualified immunity is by alleging that the acts or omissions of a public official or employee were fraudulent, malicious, or oppressive."). The first test is based upon federal law, while the second is in addition to the federal law-based test. *Hupp v. Cook*, 931 F.3d 307, 326 (4th Cir. 2019) (citation omitted) ("[West Virginia's] qualified immunity doctrine borrows heavily from the analogous federal qualified immunity jurisprudence but also requires an additional finding that the defendant's alleged conduct not be 'fraudulent, malicious, or otherwise oppressive' to the plaintiff."). We now turn to applying these two standards to the case at bar.

A. Clearly Established Statutory Right or Law.

In applying the first qualified immunity standard, we employ a two-stage test:

> A public official or State agency may claim to be qualifiedly immune from suit only when "the acts or omissions which give rise to the suit . . . involve . . . discretionary governmental functions." If they do, then the public official or State agency is entitled to qualified immunity *unless* "the plaintiff has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known . . . . "

Robbins, 248 W. Va. at 524, 889 S.E.2d at 97 (footnotes omitted) (emphasis in original).

The first part of this test is easily met in this case as we have recognized that "there is no dispute that the investigative process of [DHS] in child abuse and neglect proceedings requires the exercise of discretion." *Crouch v. Gillispie*, 240 W. Va. 229, 234, 809 S.E.2d 699, 704 (2018); *see also White by White v. Chambliss*, 112 F.3d 731, 736 (4th Cir. 1997) (observing that a state social worker's decision whether to remove a child is a "discretionary judgment").

We next turn to the second part of the test: have the Plaintiffs demonstrated that the acts or omissions which give rise to the suit violated clearly established statutory or constitutional rights or laws of which a reasonable person would have known? The Plaintiffs assert that this answer is 'yes' based upon DHS's alleged violation of the DHS policy.[13] DHS argues that "internal policies and procedures that have not been subject to

[13]Plaintiffs in this Court raise several constitutional rights they claim DHS violated and that were clearly established. But, having affirmatively (and, indeed, emphatically) declined in their complaint to rely on the United States Constitution, and having affirmatively withdrawn their state constitutional tort claim during the summary judgment hearing in circuit court, they have waived these constitutional arguments, and they cannot rely on them in this Court. *See, e.g.*, *Maynard v. Gen. Elec. Co*., 486 F.2d 538, 539 (4th Cir. 1973) ("[W]e will not consider new causes of action raised for the first time on appeal[.]"); *Linz v. City of Brea*, 19 F.3d 1440 (9th Cir. 1994) (memorandum) (unpublished) (text available at 1994 WL 96336, at *1) ("Linz waived his claim based on being handcuffed too tightly. During Linz's deposition his attorney said that the 'claim stops at the point in time after they drew the blood.' He objected to questions about the subsequent period which included the time when Linz was allegedly handcuffed too tightly, and said '[w]e are withdrawing that part of the complaint.' Linz may not resurrect the handcuffing claim on appeal.").

The Plaintiffs also claim that "some actions can be so obvious that there is no requirement for there to be a specific case, statute, or regulation on point to meet the

legislative approval cannot form the basis of a well-established right."[14] We agree with DHS.

Statutory rights or statutory law are those rights or laws found in a statute. *See, e.g., Black's Law Dictionary* 1708 (11th ed. 2019) (defining "statutory" as "**1.** Of, relating to, or involving legislation <statutory interpretation>. **2.** Legislatively created <the law of patents is purely statutory>. **3.** Conformable to a statute <a statutory act>."). And it

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clearly established law requirement." While we do not necessarily disagree with this observation, nevertheless the Plaintiffs must identify some predicate body of law from which the alleged right at issue emanates. As the United States Court of Appeals for the Fourth Circuit has explained, "[w]e observe that the 'exact conduct at issue need not' previously have been deemed unlawful for the law governing an officer's actions to be clearly established. Instead, we must determine whether *pre-existing law* makes 'apparent' the unlawfulness of the officer's conduct." *Sims v. Labowitz*, 885 F.3d 254, 262–63 (4th Cir. 2018) (citations omitted) (emphasis added). In the instant case, the Plaintiffs have abandoned their constitutional arguments and are limited to the DHS policy, which we find is not law.

Finally, to the extent that the Plaintiffs purport to rely on this Court's case law which they characterize as supporting their position, we observe that most of these cases post-date 2018. For qualified immunity purposes, a right must be clear at the time of the defendant's acts or omissions. "[T]he court must decide whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Thus, cases decided after the alleged misconduct are of no use in the qualified immunity analysis. *See, e.g., Brosseau v. Haugen*, 543 U.S. 194, 200 n.4 (2004) (per curiam) (citations omitted) ("The parties point us to a number of other cases in this vein that postdate the conduct in question, i.e., Brosseau's February 21, 1999, shooting of Haugen. These decisions, of course, could not have given fair notice to Brosseau and are of no use in the clearly established inquiry.").

[14]DHS asserts that we have decided this point in its favor in *Crouch v. Gillispie*, 240 W. Va. 229, 809 S.E.2d 699 (2018). We made no such ruling in *Crouch*. At best we assumed for arguments' sake that the interim guidelines at issue in that case could create clearly established law. "[A]n assumption is not controlling precedent." *Gonzalez v. Hasty*, 269 F. Supp. 3d 45, 63 (E.D.N.Y. 2017), *aff'd*, 755 F. App'x 67 (2d Cir. 2018).

is well established that "a statute is a law passed by the legislature or an enactment of the legislature, and a determination of what the law will be in the future by legislative act." 82 C.J.S. *Statutes* § 1 at 23 (2022) (footnotes omitted); *see, e.g., Roy Anderson Corp. v. 225 Baronne Complex, L.L.C.,* 251 So. 3d 493, 502 (La. Ct. App. 2018) ("A statute is a legislatively created law."); *Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 896 So. 2d 787, 791 (Fla. Dist. Ct. App. 2005) ("A statute is a form of positive law enacted by the legislative branch of government."); *Battershell v. Bowman Dairy Co.*, 185 N.E.2d 340, 345 (Ill. App. Ct. 1961) ("Statute is the term applied to laws enacted by the legislature."); *Werner v. Pioneer Cooperage Co.*, 155 S.W.2d 319, 324 (Mo. Ct. App. 1941) (defining "a statute [as] being a law enacted by the State Legislature[.]").

The DHS policy was not passed by the Legislature as a statute. Nor did the Legislature pass the DHS policy as a legislative rule pursuant to the West Virginia Administrative Procedures Act, *see* W. Va. Code §§ 29A-3-1 to -20—which we have recognized as statutory enactments. "[L]egislative rules in West Virginia are authorized by acts of the Legislature and we have treated them, as they should be, as statutory enactments." *Appalachian Power Co. v. State Tax Dep't,* 195 W. Va. 573, 584, 466 S.E.2d 424, 435 (1995). Hence, "[o]nce a disputed regulation is legislatively approved, it has the force of a statute itself." *Id*. at 585, 466 S.E.2d at 436; *see also* Syl. Pt. 2, in part, *W. Va. Health Care Cost Rev. Auth. v. Boone Mem'l Hosp.*, 196 W. Va. 326, 472 S.E.2d 411 (1996) ("Once a disputed regulation is legislatively approved, it has the force of a statute itself. Being an act of the West Virginia Legislature, it is entitled to more than mere

deference; it is entitled to controlling weight."); *Penn Virginia Operating Co., LLC v. Yokum*, 242 W. Va. 116, 120, 829 S.E.2d 747, 751 (2019) ("A legislative rule has the force of a statute[.]"); *Summers v. W. Va. Consol. Pub. Ret. Bd.*, 217 W. Va. 399, 405, 618 S.E.2d 408, 414 (2005) (per curiam) ("[L]egislative rules have the force and effect of statutes[.]"); *Feathers v. W. Va. Bd. of Med.*, 211 W. Va. 96, 102, 562 S.E.2d 488, 494 (2001) ("[W]hen regulations enacted by an agency have been legislatively approved, they have the force of statutes and are interpreted according to ordinary canons of statutory interpretation."); *Men & Women Against Discrimination v. Fam. Prot. Servs. Bd.*, 229 W. Va. 55, 60, 725 S.E.2d 756, 761 (2011) (per curiam) ("In considering the validity of legislative rules . . . we give those rules the same weight as we would give a statute.").[15]

The Plaintiffs counter that the DHS Policy is an interpretation and effectuation of West Virginia statutory and decisional law, and we should treat the DHS policy on par with a statute or legislative rule. We disagree for two related reasons.

[15]We recognize that under the West Virginia Administrative Procedures Act a legislative rule is valid either if it is submitted to the legislative rule-making review committee for approval, or the Legislature expressly exempts such a rule from legislative rule-making review and approval under West Virginia Code § 29A–1–3(d). Syl. Pt. 13, *Simpson v. W. Va. Off. of Ins. Comm'r*, 223 W. Va. 495, 678 S.E.2d 1 (2009). The parties do not argue that the DHS policy is an exempt legislative rule, so we do not address that issue. Likewise, the West Virginia Constitution may vest certain state agencies with an independent constitutional rule-making authority. That situation is also not before this Court.

First, "statutory rights are simply a matter of grace bestowed by the legislature." 82 C.J.S. *Statutes* § 4 at 26-27 (2022) (footnote omitted). Thus, administrative agencies cannot create statutory rights in West Virginia except through promulgation of legislative rules as contemplated by our Administrative Procedures Act.

Second, we have recognized that an administrative agency's interpretation of statutes in internal agency policies, manuals, guidelines, or other such documents simply lack the force and effect of law. *See, e.g.*, *W. Va. Consol. Pub. Ret. Bd. v. Wood*, 233 W. Va. 222, 228 n.9, 757 S.E.2d 752, 758 n.9 (2014) (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000)) (recognizing that an agency's statutory "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all . . . lack the force of law[.]"); *see also Schweiker v. Hansen*, 450 U.S. 785, 789 (1981) (holding that the Social Security Administration's Claims Manual "has no legal force," and does not bind the agency). Lacking the force and effect of law, internal agency policies, manuals, guidelines, or other such documents cannot form the basis of clearly established statutory rights or law for purposes of qualified immunity.[16]

[16]The Plaintiffs also observe, as did the circuit court, that that the DHS Policy introduction states the policy was based on, *inter alia*, a consent decree entered in the case of *Gibson v. Ginsberg*. A copy of this consent decree is not included in the appendix record before us. To the extent the Plaintiffs wished to rely on this consent decree, they were obligated to ensure it was admitted in the trial proceedings and made a part of the appendix record before us. *See, e.g.*, *State v. Honaker*, 193 W. Va. 51, 56 n.4, 454 S.E.2d 96, 101 n.4 (1994) ("We serve notice on counsel that in future appeals, we will take as nonexisting

We therefore hold that for purposes of qualified immunity, internal agency policies, procedures, manuals, guidelines, or similar documents that have not been legislatively approved are not, and cannot be used to create, clearly established statutory rights or law of which a reasonable person would have known. That being the case, the circuit court erred in denying the DHS summary judgment on the clearly established qualified immunity standard and we reverse its judgment on this ruling.[17]

Having concluded that DHS is entitled to qualified immunity on our first standard, we now turn to whether DHS is entitled to qualified immunity under our second standard, which requires us to assess whether there was proof of fraudulent, malicious, or otherwise oppressive conduct. *See, e.g., Ayersman v. Wratchford*, 246 W. Va. 644, 656, 874 S.E.2d 756, 768 (2022) ("Given that the Wratchfords cannot establish a violation of clearly established constitutional or statutory laws or rights, the only way they can overcome the presumption of qualified immunity for Mr. Ayersman is to demonstrate that his conduct in investigating the fire was fraudulent, malicious, or oppressive.").

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all facts that do not appear in the designated record and will ignore those issues where the missing record is needed to give factual support to the claim.").

[17]DHS Policy § 7.28 states that it is based on West Virginia Code § 49-6-5b. We have taken it upon ourselves to determine if that statute required DHS to file for parental rights termination when the sole ground was that a parent, guardian, or custodian has been required by state or federal law to register with a sex offender registry. We have reviewed West Virginia Code § 49-6-5b (2014) applicable in 2015 and West Virginia Code § 49-4-606 (2017) (a recodification of West Virginia Code § 49-6-5b) applicable in 2018. Neither contains any reference to sex offender registration as a ground mandating DHS to file for, join in, or otherwise seek in any pending proceeding, the termination of parental rights.

B. Oppressive Acts

Even where an agency is entitled to qualified immunity based on the lack of clearly established law, we have recognized that "under West Virginia immunities law, qualified immunity does not shield a public official from suit whose acts are 'fraudulent, malicious, or otherwise oppressive.'" *Robbins*, 248 W. Va. at 524 n.28, 889 S.E.2d at 97 n.28 (quoting Syl. in part, *State v. Chase Sec., Inc.*, 188 W. Va. 356, 424 S.E.2d 591 (1992)). In this case, the Plaintiffs elected not to pursue relief from DHS employees for their allegedly oppressive acts. Regardless, those remain germane to our analysis of DHS's claim to qualified immunity because under West Virginia law, the qualified immunity of an agency is inexorably intertwined with that of its officers, employees, and agents based on the doctrine of *respondeat superior*. That is, if a "public official or employee was acting within the scope of his duties, authority, and/or employment," when he allegedly oppressed the plaintiff, "the State and/or its agencies may be held [vicariously] liable for" the official or employee's oppressive acts. Syl. Pt. 12, in part, *W. Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014). On the other hand, if the public official was "acting outside of the scope of his duties, authority, and/or employment," when he allegedly oppressed the plaintiff, "the State and/or it agencies are immune from vicarious liability . . . ." *Id*. Stated plainly, a state agency may be held liable for its employee's oppressive acts only if the employee so acted within the scope of his employment. *See id*. at 506, 766 S.E.2d at 765 ("We can perceive no stated public policy which is justifiably advanced by allocating to the citizens of West Virginia the cost of wanton official or

employee misconduct by making the State and its agencies vicariously liable for such acts which are found to be manifestly outside of the scope of his authority or employment.").

The Plaintiffs sole focus in this case is whether DHS may be held vicariously liable for its unnamed employees allegedly *oppressive* acts. The Plaintiffs admit that this Court has never addressed what is meant by "oppressive" in the qualified immunity context. DHS also recognizes that we have never defined what is meant by the term "oppressive." It points out, though, that we have denied summary judgment in a qualified immunity case where we concluded that "there is evidence in the record that could lead a jury to infer a malicious or oppressive *motive*." *Dawson*, 242 W. Va. at 191, 832 S.E.2d at 117 (emphasis added). It then contends that this is consistent with "the commonly accepted definition of 'oppression' [that] explicitly requires that the oppressor be *motivated* by some untoward end[.]" Pet'r's Br. at 23 (emphasis in original) (citing "Oppression," *Black's Law Dictionary* (11th ed. 2019)). And DHS then argues the Plaintiffs have failed to show that DHS's actions or inactions were motivated to an untoward end. We think DHS is correct.

We begin by observing that the term "oppression" had a specific meaning at common law. At common law, oppression was a misdemeanor that,

> in general, consist[ed] in the inflicting upon any person, *from an improper motive*, of any illegal bodily harm, imprisonment, or any injury other than extortion, by a public officer while exercising, or under color of exercising, his office. 10 Halsbury's L of Engl 3d ed p 615. The crime has also been defined as the abuse of any discretionary power invested by law in a public officer committed in the exercise of, or under color of exercising, the duties of his office *with an improper motive*. 2 Wharton, Criminal Law 12th ed § 1898.

Annotation, *What Constitutes Offense of Official Oppression*, 83 A.L.R.2d 1007 § 2 at 1008 (1962) (emphasis added); *see also United States v. Claymore*, 978 F.2d 421, 423 (8th Cir. 1992) ("[O]fficial oppression . . . consists, in general, of inflicting upon any person, from an improper motive, bodily harm or any injury by a public officer while exercising or under color of exercising his office."). Moreover, it has been observed that "[q]ualified immunity is not available if a public official acted with an improper motive[.]" 1 *Civ. Actions Against State & Loc. Gov't* § 4:12 (Westlaw March 2024 update); *see also* 14A C.J.S. *Civil Rights* § 785 at 732 (2017) (footnote omitted) ("An official will also not be entitled to qualified immunity . . . where the official demonstrates a bad or corrupt motive[.]")).The common law doctrine of oppression properly informs our state qualified immunity jurisprudence given this terms deep historical roots.[18]

With that established, we now consider the interplay between "oppression," qualified immunity, and our summary judgment standard.

We initially recognize that we have stated that "[p]articularly in 'complex cases . . . where issues involving motive and intent are present,' summary judgment should

[18]We hasten to point out that our decision today does not make oppression a crime. *See State ex rel. Atkinson v. Wilson*, 175 W. Va. 352, 355, 332 S.E.2d 807, 810 (1984) ("[T]here exists a distinction between a court's power to evolve common law principles in areas in which it has traditionally functioned, i.e., the tort law, and in those areas in which the legislature has primary or plenary power, i.e., the creation and definition of crimes and penalties.").

not be utilized as a method of resolution." *Kelley v. City of Williamson*, 221 W. Va. 506, 510, 655 S.E.2d 528, 532 (2007) (per curiam) (quoting *Masinter v. WEBCO Co.*, 164 W. Va. 241, 243, 262 S.E.2d 433, 436 (1980)). We think that this absolutist position goes too far. We have observed that "under our modern approach, we have found that simply because a case implicates intent and motive does not render summary judgment perforce unavailable." *Berardi v. Meadowbrook Mall Co.*, 212 W. Va. 377, 382 n.3, 572 S.E.2d 900, 905 n.3 (2002) (per curiam); *see also Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 61, 459 S.E.2d 329, 338 (1995) ("Courts take special care when considering summary judgment in [cases] [where] state of mind, intent, and motives may be crucial elements. It does not mean that summary judgment is never appropriate."); *Conrad v. ARA Szabo*, 198 W. Va. 362, 370, 480 S.E.2d 801, 809 (1996) ("[W]e refuse to hold that simply because motive is involved that summary judgment is unavailable[.]").

Thus, while courts should be cautious in granting summary judgment in cases dealing with motive, *Hanlon v. Chambers*, 195 W. Va. 99, 105, 464 S.E.2d 741, 747 (1995), "[s]ummary judgment will not be defeated, however, simply because issues of motive or intent are involved." *Meister v. Georgia-Pac. Corp.*, 43 F.3d 1154, 1159 (7th Cir. 1995). "'[E]ven in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation.'" *Johnson v. Killmer*, 219 W. Va. 320, 323, 633 S.E.2d 265, 268 (2006) (per curiam) (quoting *Medina–Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990)). That guidance is

particularly relevant in the context of DHS's motion for summary judgment because "unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition." Syl. Pt. 1, in part, *Hutchison*, 198 W. Va. at 144, 479 S.E.2d at 654. Consequently we hold that where qualified immunity is raised by a state agency as grounds for summary judgment on a claim of oppressive conduct, the nonmoving party, in order to avoid summary judgment, must produce some admissible evidence that creates an issue of fact as to whether an official, employee, or agent of the agency acted in a manner that was an abuse of any discretionary power invested by law in the exercise of, or under color of exercising, the duties of his or her office and while doing so acted with an improper motive. *See, e.g., Smith v. Stafford*, 189 P.3d 1065, 1074 (Alaska 2008) ("Where qualified immunity is raised by the moving party as grounds for summary judgment, the nonmoving party, in order to avoid summary judgment, must present some admissible evidence that creates an issue of fact as to whether the official acted in bad faith or with an evil motive.").

In the case before us, the Plaintiffs' entire appellate argument concerning whether DHS may be held liable for its unnamed employees' allegedly oppressive actions consists of the assertion in their appellate brief that "the trial court held the facts were sufficient for the jury to conclude whether or not the [DHS]'s actions were oppressive and, therefore, also denied qualified immunity on this ground." The Plaintiffs have produced no evidence before this Court or in the circuit court suggesting that the DHS employees who investigated the CPS referrals acted or failed to act because of an improper motive. As

such, the circuit court erred in denying DHS summary judgment on this ground and we reverse its judgment.

C. Negligent Supervision and Training

DHS asserts that it is qualifiedly immune from the Plaintiffs' negligent supervision and training claims and that the circuit court erred by denying it summary judgment on these grounds. We agree.

We observe that training and supervision are discretionary governmental functions. "This Court has consistently found training and supervision to be discretionary governmental functions[.]" *W. Va. Dep't of Hum. Servs. v. A.R.*, 249 W. Va. 590, 900 S.E.2d 16, 25 (2024); *see, e.g., A.B.*, 234 W. Va. at 514, 766 S.E.2d at 773 ("We believe that the broad categories of training, supervision, and employee retention, as characterized by respondent, easily fall within the category of 'discretionary' governmental functions."); *W. Va. State Police, Dep't of Mil. Affs. & Pub. Safety v. J.H. by & through L.D.*, 244 W. Va. 720, 740, 856 S.E.2d 679, 699 (2021) (similar); *Robbins*, 248 W. Va. at 528, 889 S.E.2d at 101 ("[T]raining and supervising are discretionary functions[.]"). Nevertheless, if the Plaintiffs can demonstrate that DHS violated a clearly established right or law with respect to its training or supervision of its CPS workers who were involved in this case, DHS would not enjoy qualified immunity. *A.B.*, 234 W. Va. at 515, 766 S.E.2d at 774. We do not believe the Plaintiffs have made such a showing.

First, the Plaintiffs have failed to identify any statute or legislative rule that required any particular training of CPS workers by the DHS.

Second, and perhaps more importantly, the Plaintiffs' argument rests on the premise that the DHS failed to train its CPS workers on the DHS Policy and that its supervisors allowed violations of the policy to occur. But, as we have decided, the DHS policy does not clearly establish a right. We faced a similar issue in *A.B.* where we found a state agency qualifiedly immune.

In *A.B.*, A.B. was an inmate at a West Virginia Regional Jail and Correctional Facility Authority (WVRJCFA) jail. She was allegedly sexually assaulted by a guard. A.B. claimed that the WVRJCFA failed to train its employees concerning the federal Prison Rape Elimination Act (PREA), 42 U.S.C. § 15601, *et seq*. We rejected this claim finding that the PREA did "'"not grant prisoners any specific rights."'" *A.B.*, 234 W. Va. at 515, 766 S.E.2d at 774 (quoting *De'lonta v. Clarke*, No. 7:11-cv-00483, 2013 WL 209489, at *3 (W.D. Va. Jan. 14, 2013) (quoting *Chinnici v. Edwards*, No. 1:07-cv-229, 2008 WL 3851294, at *3 (D. Vt. Aug. 12, 2008)). "As such, neither the PREA, nor the standards promulgated at its direction, provide[d] respondent with an adequate basis upon which to strip the WVRJCFA of its immunity." *Id*., 766 S.E.2d at 774. Like the PREA, the DHS policy does not grant the Plaintiffs any substantive rights and does not strip DHS of its qualified immunity. Nor do we find, considering our above conclusions, that DHS was

fraudulent, malicious, or oppressive in supervising or training its employees. Consequently, the circuit court erred in denying DHS summary judgment on the Plaintiffs' negligent training and supervision claims and its decision must be reversed.[19]

[19]DHS also claims the circuit court erred by permitting the Plaintiffs to file a reply to DHS's summary judgment motion exceeding the twenty-page limit contained in West Virginia Trial Court Rule 22.01. Given our resolution of this appeal, we do not address this claim.

IV. Conclusion

For the foregoing reasons, we reverse the Circuit Court of Kanawha County's judgment of April 11, 2023, and remand this case with directions to the circuit court to enter an order granting DHS summary judgment and dismissing the action against it.

Reversed and remanded with directions.