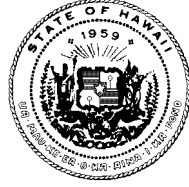


DAVID Y. IGE
GOVERNOR



CATHY BETTS
DIRECTOR

JOSEPH CAMPOS II
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN SERVICES

P. O. Box 339
Honolulu, Hawaii 96809-0339

February 14, 2022

TO: The Honorable Joy A. San Buenaventura, Chair
Committee on Human Services and the Honorable

FROM: Cathy Betts, Director

SUBJECT: SB 2422 – RELATING TO FAMILY COURT.

HEARING: Tuesday, February 15, 2022, 3:10 pm
Via Videoconference

DEPARTMENT'S POSITION: The Department of Human Services (DHS) appreciates the intent, provides comments, requests clarification, and defers to the Judiciary.

PURPOSE: The purpose of this measure is to require certain persons to immediately report a potential tort to the family court when that person has reason to believe that a child in foster custody has suffered an injury that may arise in a tort claim. Establishes procedures for the family court to follow when appointing a master to investigate a potential tort claim and when authorizing the filing of a tort claim on behalf of an injured child, including the opportunity for an injured child to obtain outside legal representation.

DHS appreciates the intent of this measure to preserve and investigate potential tort claims of minors while in foster care and to authorize the filing of a claim. However, there are existing laws and rules where changes, if any, may be more appropriately made to achieve the goals of this measure. DHS respectfully defers to the Family Courts for administration and review of its existing tort reporting process that would accomplish the purposes of this bill.

Hawaii's existing tort law is well-established and codified in Chapter 663, HRS, with statutes of limitation addressed in Chapter 657, HRS. Notably, section 657-1.8, HRS, provides

additional time for an individual to bring a claim for injuries due to sexual abuse while a minor. The Legislature may want to consider a similar provision for recovery of damages due to injuries suffered while in foster custody. Also, Rule 53 of the Hawaii Family Court Rules currently allows the Family Court to appoint "a master, referee, auditor, examiner, assessor, special master, volunteer settlement master, commissioner, or receiver ("a master") to perform specific acts and/or obtain specific evidence to assist the court." The Hawaii Supreme Court may want to consider amending its rule to clarify the process further when a child in foster custody suffers additional injuries and requires representation to recover damages.

For the Legislature's information, all serious injuries of a child in foster care that require medical attention or injuries that appear inconsistent with how they were reported to have occurred are documented and investigated by Child Welfare Services and the child's medical provider. The investigating social worker can refer the case to the Multi-disciplinary Team (MDT) to examine further whether the injury was accidental or non-accidental. The resulting report of the MDT is part of the child's record and is made available to the Court and parties. If the injuries are determined to be non-accidental or abusive, the child will be removed from the foster home and placed in another foster home if the child's family is not yet able to provide a safe home for the child.

The proposed measure requires clarification on how the measure, if passed, will be reconciled with section 346-17(m), HRS. Notably, via Act 133, Session Laws of Hawaii 2016 (Act 133), the Legislature amended Hawaii law to comply with "the Preventing Sex Trafficking and Strengthening Families Act of 2014, Public Law No. 113-18, to expand opportunities for children in foster care to participate in age or developmentally appropriate extracurricular, enrichment, cultural and social activities equal to their classmates and peers in accordance with the "reasonable and prudent parent standard."¹ Amongst other things, Act 133 amended section 346-17, HRS, and added immunity from civil liability as follows:

"(m) Any resource caregiver or child caring institution issued a certificate of approval pursuant to this section shall be immune from liability in a civil action to recover

¹See Act , https://www.capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=HB&billnumber=2350&year=2016

damages for injury, death, or loss to a person or property that results by authorizing a child in the caregiver's or institution's foster care to participate in an extracurricular, enrichment, cultural, or social activity; provided that the authorization is in accordance with the reasonable and prudent parent standard as defined in title 42 United States Code section 675(10)(A)."

The preamble of Act 133 describes the reason for immunity from civil liability as follow,

"The Preventing Sex Trafficking and Strengthening Families Act, title 42 United States Code section 675(10)(A), defines the "reasonable and prudent parent standard" as "the standard characterized by careful and sensible parental decisions that maintain the health, safety, and best interests of a child while at the same time encouraging the emotional and developmental growth of the child, that a caregiver shall use when determining whether to allow a child in foster care under the responsibility of the State to participate in extracurricular, enrichment, and social activities."

DHS has significant concerns about placing the proposed process in chapter 587A, Hawaii Revised Statutes (HRS). The purpose of the Child Protective Act (CPA), codified as chapter 587A, is to "provide children with prompt and ample protection from the harms detailed herein, with an opportunity for timely reconciliation with their families if the families can provide safe family homes." Under the CPA and federal law, parents with children in foster care have a limited time to complete court-ordered services and demonstrate their ability to provide a safe family home. However, per section 587A-29, HRS, the court at any stage may set a show cause hearing where the child's parents have the burden to present evidence as to why the case should not be set for termination of parental rights or legal guardianship hearing. Time is of the essence.

During the 587A case, the primary focus of all parties involved should be on the child's needs and parents' successful engagement in completing their service plan. The department is required to provide "[e]very reasonable opportunity should be provided to help the child's legal custodian to succeed in remedying the problems that put the child at substantial risk of being harmed in the family home." The CPA policy and purpose acknowledges the protection of children by "providing assistance to families to address the causes of abuse and neglect" and "ensuring that families are meaningfully engaged and children are consulted in an age-appropriate manner in case planning." Section 587A-2, HRS. In addition, DHS Child Welfare

Services (CWS) must make "reasonable efforts to maintain the family unit and prevent the unnecessary removal of a child from his/her home, as long as the child's safety is assured" to remain eligible to receive federal foster care maintenance payments under Title IV-E of the Social Security Act.

Although DHS appreciates the intent to explore other possible legal opportunities for children in foster care, the department is concerned that the additional responsibilities associated with investigating potential tort claims during the chapter 587A case may frustrate the Court, CWS, and parents' efforts to provide a safe family home for the children in foster care. DHS is also concerned that if additional tort investigations are initiated during the 587A case, resource caregivers may not want to continue serving as resource caregivers for the child, resulting in the child being further traumatized by an additional move or resources caregivers will be reluctant to make prudent parenting decisions that would allow a child in care to participate in the normal age- and developmentally appropriate prosocial activities.

Thank you for the opportunity to provide testimony on this measure.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2022**

ON THE FOLLOWING MEASURE:

S.B. NO. 2422, RELATING TO FAMILY COURT.

BEFORE THE:

SENATE COMMITTEE ON HUMAN SERVICES

DATE: Tuesday, February 15, 2022 **TIME:** 3:10 p.m.

LOCATION: State Capitol, Room 225, Via Videoconference

TESTIFIER(S): Holly T. Shikada, Attorney General,
Lynne M. Youmans, Deputy Attorney General

Chair San Buenaventura and Members of the Committee:

The Attorney General appreciates the intent of this bill and provides the following comments.

The bill adds a section to the Child Protective Act (CPA), chapter 587A, Hawaii Revised Statutes (HRS), that sets up a procedure for Family Court to appoint a "master" in response to a report of potential harm to a child in foster custody. The master is tasked with gathering information, consulting with outside counsel, submitting a written report to court, and other tasks necessary to evaluate the appropriateness of filing a civil lawsuit on behalf of a child in foster custody. The bill seeks to formalize policies and procedures that were considered but not adopted by the Hawaii State Supreme Court standing committee on children in Family Court. Based on our experience with the informal process for appointing a master currently used by the Family Court, we believe there are some potential problems that need to be addressed.

First, the bill contemplates that the Family Court will appoint, when appropriate, a master to conduct a thorough investigation of a claim of harm to a child, but there is no appropriation that is requested for the Judiciary to compensate a master for the master's time and effort. There is already a Hawaii Family Court Rule, Rule 53, that empowers the Court to appoint a master to assist the Court. Rule 53 specifically requires the Court to set the compensation for the master and identify the source of payment. As contemplated in this bill, there is no source of payment for the master other than the

filing of a civil action and recovery of damages and costs through that civil action. This creates a conflict of interest because the master cannot conduct a thorough and unbiased investigation if the only available funding for the master's work is through the filing of a civil action and the recovery of money through that action. This concern can be addressed by adding an appropriation for the Judiciary to compensate a master for the master's efforts to impartially investigate a report of harm.

Second, the requirement that the parties to a CPA proceeding report any reasonable belief of harm to a child in foster custody and seek the appointment of a master who may have incentive to file a civil action to be compensated for the master's work, may shift the focus of the CPA proceeding. The purpose of the CPA is to help reunite abused or neglected children safely with their parents or, if that is not possible, to find a safe and stable permanent home with another family. If the focus of the CPA proceeding becomes the discovery and prosecution of a separate civil tort action, it requires parties like Child Welfare Services (CWS) and the resource caregiver families to adopt a defensive posture in anticipation of mitigating potential liability. The proceeding would then shift focus away from the needs of the families and children who are the subject of the CPA proceedings to the prosecution of tort litigation. The wording of the bill suggests that, even if a child safely reunifies with the child's family, the CPA proceedings may need to remain open for periodic review hearings on the tort action set pursuant to the provision on page 5, line 6, of the bill. Monitoring and facilitating tort litigation is not the expertise or focus of a CPA proceeding.

Third, the bill seems to duplicate what should already be a function of a child's court appointed Guardian Ad Litem (GAL). The GAL is empowered, by section 587A-16(c), HRS, to investigate the child's situation and report to the Court about actions that should be taken on a child's behalf. Those actions can certainly include an order authorizing the GAL to contact civil attorneys to act on behalf of the child when appropriate.

Finally, if CPA proceedings become an avenue for finding causes of action against these families, it may discourage people from opening their homes to children in need or alter their behavior towards those children. If any injury to a child in foster

custody could result in the filing of a civil action, resource caregiver families may have to limit a child's ability to participate in activities like organized sports or rigorous outdoor activity for fear of an injury. It could also limit the pool of available families to nurture and foster the growth of children who need that care the most.

Thank you for the opportunity to provide comments on this bill.



The Judiciary, State of Hawai‘i

**Testimony to the Thirty-First Legislature
2022 Regular Session**

Senate Committee on Human Services
Senator Joy A. San Buenaventura , Chair
Senator Les Ihara, Jr., Vice Chair

Tuesday, February 15, 2022 at 3:10 p.m.
State Capitol, Conference Room 225 & Videoconference

by

Matthew J. Viola
Senior Judge, Deputy Chief Judge
Family Court of the First Circuit

Bill No. and Title: Senate Bill No 2422, Relating to Family Court.

Purpose: Requires certain persons to immediately report a potential tort claim to the family court when that person has reason to believe that a child in foster custody has suffered an injury that may arise to a tort claim. Establishes procedures for the family court to follow when appointing a master to investigate a potential tort claim and when authorizing the filing of a tort claim on behalf of an injured child, including the opportunity for an injured child to obtain outside legal representation.

Judiciary's Position:

The Judiciary respectfully opposes Senate Bill No. 2422. We agree with the bill’s intent that our family courts should establish policies and procedures that assist children in foster care in obtaining legal representation to pursue civil tort claims for personal injuries. However, we disagree that such a process should be enacted by a statute that may work against the child’s best interests for the following reasons:

1. The “legal culture” in each circuit is different due to size of the population, the number of attorneys who practice in that circuit, and how connections and referrals are made. The family courts in each circuit should have the flexibility to promulgate protocols that match their unique legal cultures and available



Senate Bill No. 2422, Relating to Family Court
Senate Committee Human Services
Tuesday, February 15, 2022 at 3:10 p.m.
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resources. For example, the first circuit family court has already established a protocol that is appropriate in the first circuit. This is an issue where one size does not fit all. Each circuit needs the flexibility to effectively tailor a protocol that will work best for the children under its jurisdiction. A statewide statute does not allow for this necessary flexibility.

2. The connections and referral strategies evolve over time. Sometimes, the changes can occur quickly (for example, a key appellate ruling that might change the landscape of tort liability). Sometimes a change might be more “organic”, such as a reputable personal injury law firm from one circuit setting up an office in another circuit. Modifying a court protocol to reflect these changes can be done fairly quickly. Amending a statute to respond to changes is, properly, more complicated and may take a number of years to accomplish. Any delay in adopting changes to a protocol may work against the best interests of a child in foster care.
3. Flexibility is needed to tailor the process to the needs of a specific child in a specific case. A protocol simply does not have the full force of a statute and is therefore easier to deviate from when circumstances require deviation in the child’s best interest. For example, in a particular case, a guardian ad litem may be able to do what Senate Bill No. 2422 requires a master to do. Or, an attorney may have good tactical or strategic reasons to delay an independent investigation or may determine that being “tethered” to an existing chapter 587A case is simply not the best way to proceed with the civil lawsuit. A court protocol provides the injured child with the flexibility that a statute cannot.
4. Flexibility is also needed with respect to the use of scarce family court resources. Senate Bill No. 2422 requires the family court to appoint a master to investigate and report on potential tort claims and to appoint legal counsel in appropriate cases. The compensation for court appointed masters and legal counsel will require significant additional funding from the Legislature.

We hope that we have clearly illustrated why the Judiciary respectfully opposes this bill. The policies championed in this bill do not require additional statutory provisions. Lawyers can file lawsuits on behalf of foster children and can access existing laws and rules of court on their behalf. The different circuits should be free to establish their own protocols tailored for their circuits and will have the flexibility to fine tune them over time and based on additional experience. The Judiciary supports the foster child’s ability to sue for damages and, in fact, will keep working on encouraging all of our systems to channel appropriate cases to reputable law firms for evaluation and appropriate follow up.

Thank you for the opportunity to testify in this matter.

Senator San Buenaventura,

I strongly support SB2422. The following two reports and my personal experience with families whose concerns of abuse in foster care are typically ignored justify the need for this bill.

From the Hawaii Free Press:

Bill Would End Foster Care Abuse Coverups, Andrew Walden, January 29, 2022

“In the wake of the Isabella Kalua case, legislators are reintroducing bills requiring any injury to a foster child be reported in real time to a Family Court judge instead of being covered up internally by CWS.

SB 2422 and HB 2301 are modelled on a ‘protocol’ mandated in Oahu’s First Circuit Family Court by Family Court Chief Judge Robert Browning. According to Steve Lane, Special Master in the Peter Boy Kema case, Judge Browning’s protocol is not being obeyed by CWS workers and guardians ad litem even on Oahu. Injuries are alleged to have been recorded by CWS at least twice prior to Isabella Kalua’s disappearance”.

Testimony from an anonymous whistleblower:

“I used to work at Kahi Mohala hospital on the children and adolescent units. I have seen first hand what state appointed and approved foster parents have been doing to these children (maybe not all, but a bunch! Because I’ve seen a bunch!). I had kids being discharged then readmitted.. over n over we call them frequent flyers and a lot were coming in from their foster homes with major issues and then come to find out! They were being physically, sexually and verbally abused! I had this one boy who came in at 7, he was a frequent flyer.. this boy got huge cigar burn scars all over his arms done by his foster father! And lord knows what else he didn't disclose. Anyways, we have a treatment team meeting, discuss issues, disposition and lo and behold! The state GAL, AND cws worker decides to send the boy back to the SAME abusers! That went on for awhile..thru out the 5 years I worked there. I was so taken back by it all..I couldn't sleep at night sometimes thinking of what could be happening. and how often it was happening..with more than one kid, a bunch. So sad. We did our best trying to advocate for these children but somehow we were always the last opinions to be considered although we spent the most time with our clients. Anyways. I'm glad I'm not the only one that knows all these things..I feel terrible about it, like nothing will ever be fixed with that department.”

SB-2422

Submitted on: 2/14/2022 11:26:20 AM

Testimony for HMS on 2/15/2022 3:10:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Dara Carlin, M.A.	Individual	Support	No

Comments:

Stand in Support.

FOSTER CHILDREN IN HAWAII AND THEIR RIGHT TO COUNSEL

Thank you for allowing me to offer testimony on behalf of Senate Bill 2422. My interest in this subject is prompted by my 25 years plus as licensed foster parent, my 3 years as a VGAL with the Family Court and my service as a Special Master with Family Court where I have represented the interests of abandoned and abused children, including helping them secure access to counsel when they suffer harm. As some of you may know, I recently served *pro bono* as the Special Master in the Peter Boy Kema case.

What I have found most striking in my experience is that in the land of milk and honey where there are probably more licensed attorneys per square foot than almost any country in the world, our most vulnerable population, the children who are wards of the State and or in foster care have virtually no access to counsel if they suffer harm as a result of third party tort liability.

According to Toni Schwartz, the Public Information Officer of the Department of Human Services, 2745 children went through the foster care system in Hawaii in 2010. In earlier years the numbers approached 5,000. Of the children in foster care, a significant number of them are also wards of the State of Hawaii. That is, they have no responsible adult or parent to serve as their legal guardian. The State of Hawaii is their legal guardian and that duty is largely discharged by the DHS social worker assigned to the child and the attendant family court case.

If your child, who is not in foster care, suffers an injury or harm at the hands of another, such as an automobile accident, schoolyard fall etc., you as the parent may choose to consult a lawyer on your child's behalf to see if the child has a claim for damages. In the event a lawyer decides there is a claim, he will appoint you to serve as your child's *prochien ami*, or next friend, so that the claim can be filed in court. In Hawaii a minor under 18 years of age cannot hire a lawyer on their own and can only be represented if the court approves a responsible adult or parent to act on his or her behalf.

If a child in foster care who is also a ward of the State of Hawaii is involved in an accident or otherwise suffers harm, the paradigm changes dramatically. First of all, if there are physical injuries involved requiring medical care, the State of Hawaii steps in and pay the medical bills through the Department of Human Services MedQuest program. However, there is no one present in the child's life at this point that has the legal authority to act on the child's behalf and in their best interest to investigate if there is a claim for damages.

If there is a Volunteer Guardian Ad Litem involved with the child, the local office has taken the position that it is outside the authority of the VGAL to act in this area or to even investigate a possible claim for the child. The Department of Social Services has taken the position in at least several cases that it isn't their responsibility to even report such an injury let alone seek an independent voice to represent the best interests of the child and investigate a possible claim. Most troublesome of all, if the State of Hawaii

discovers there is insurance, they will seek to “represent” the child in a claim for damages but only to the extent that they are able to recover back the “out of pocket” expenses they incurred by extending the MedQuest benefits to the injured child.

The State of Hawaii is certainly entitled to try and assert their lien rights in such a case by attempting to secure reimbursement for their medical costs. However, they ethically cannot do that while standing in the child’s shoes, pretending to be the child’s lawyer on one hand, and their own lawyer on the other. The old adage that you cannot serve two masters applies here. The child should be entitled to their own independent voice and counsel who would seek full recovery for any claims of damage they might have against a third party who caused the injury, not simply limited to recovering their medical expenses for the purpose of reimbursing the State of Hawaii. That is the Attorney General’s job, but not as the lawyer for the child.

Under the present system an entire class of children has been fundamentally disenfranchised of their right to counsel in the event they suffer injury at the hands of another because they had the misfortune of becoming wards of the State through no fault of their own.

While there is a provision in the Family Court Rules for the family court judge to appoint what is described as a Special Master under Rule 66 to act in the child’s best interest in investigating such claims and securing a *prochien ami* and or counsel to represent the child, there are other systems in place that appear to offer the same remedy, more efficiently and comprehensively. In some California jurisdictions for example, their Juvenile Courts automatically appoint litigation or civil counsel in the event that a ward of the jurisdiction suffers harm.

The Dependency Court Tort Policy in the Juvenile Division of the Los Angeles County Superior Court has proven to be both effective and efficient, As proposed by HB 2301 there are no administrative costs attendant to the program and between March of 1992 and February of 2008 more than \$18,000,000 was recovered including millions of dollars reimbursed to the county and State for the costs of medical and related services that would have otherwise been lost.

The provisions afforded in Senate Bill 2422 and House Bill 2301 are a sensible and cost efficient way to address this long standing inequity. At no additional cost to the State, it provides counsel to otherwise disenfranchised minor children who suffer harm and in many cases results in a significant recovery of otherwise lost costs incurred by the State in paid medical and related expenses.

Steve Lane

TESTIMONY IN SUPPORT OF SB2422 (RELATING TO FAMILY COURT)
BEFORE THE SENATE COMMITTEE ON HUMAN RESOURCES
FEBRUARY 15, 2022, AT 3:10PM VIA VIDEOCONFERENCE

LATE

Chair San Buenaventura, Vice Chair Ihara, and Members of the Committee:

My name is David Case. I am a retired lawyer living on the Kona side of Hawai'i Island. I sometimes represented families and minor children caught up in the child welfare service ("CWS") system of another state. Most CWS systems have similar procedures for removing minors from their parental homes and placing them in foster care with the goal of returning them to their own homes as quickly as possible. While the minors are in foster care, they are wards of the state, which is responsible for overseeing their welfare.

If the minors are injured while they are state wards, the state would normally be expected to take steps to recover compensation for their injuries, since the minors are legally and otherwise incapable of representing themselves. But this is where most CWS systems falter. They are after all only supposed to have the children in state custody for a short period of time, but often these periods are extended and repeated until the children age out of the system. That is why it is so important to have procedures in place, such as those SB2422 would require, to recover compensation for children who, through no fault of their own, are injured while in state hands.

They may be injured in an automobile or other accident for which some third party may have been negligent. They may also be injured while in foster care or some other state placement, for which the state may bear ultimate responsibility. In either case they should have competent, independent legal representation. There are a couple of options to do that. Some states have established a separate system of legal representation to represent children in these circumstances. These are often underfunded and over worked with predictable results.

SB2422 would rely on private counsel appointed by the Children's Court to take on this responsibility. These independent attorneys are ethically obligated to "zealously represent" their clients and would be paid under a Court Supervised contingency fee arrangement at no cost to the state. It is the way most personal injury claims are handled in the United States, and the State of Hawaii's minor wards should be entitled to nothing less.

I urge you to approve SB2422 for a second reading and refer it to the Senate Judiciary Committee.

With Aloha,



David S. Case
78-6980 Kaluna St, Apt 102
Kailua-Kona, HI 96740-2822
(808) 494-9588

POTTS & POTTS

HAWAI'I TRIAL ATTORNEYS

February 9, 2022

Via Electronic Mail

HMScommittee@capitol.hawaii.gov

Senate Committee on Human Services
Attn: Senator Joy A. San Buenaventura
Hawai'i State Capitol
415 S. Beretania St., Rm. 213
Honolulu, Hawai'i 96813

Re: SB2422 – Relating to Family Court

Dear Senator San Buenaventura:

I am writing this letter to express my wholehearted support for this very worthy Bill which is intended to provide long needed protection to the thousands of foster children who are being cared for by foster families appointed by the State of Hawai'i's Department of Human Services through its Child Protective Services Division ("CPS"). The purpose of this Bill is to make the provisions of the Family Court Tort Protocol relating to these foster children a mandatory legal requirement through the enactment of SB2422. This Tort Protocol was adopted several years ago by the Honorable Mark Browning who at the time was the Chief Circuit Court Judge for the First Circuit Family Court. As such, Judge Browning's Protocol would not have had any legal effect on any of the other judicial circuits in this state. In addition, even in the First Circuit, it seems to have been regarded as an optional remedy by CPS. In fact, to my knowledge, this Protocol has not yet been used by any state employee working at CPS.

The legislative enactment of SB2422 would require that all state employees involved in the foster placement responsibilities of CPS notify the appropriate authorities at Family Court whenever there is an injury to a foster child which appears to be the result of abuse or criminal conduct.

As an attorney who has practiced law in the State of Hawai'i since 1971, and who has been involved in several major personal injury cases involving abused children under the protection of the state, this Bill can only be described as a major step in the right direction. Similar tort protocol programs have been tried in other jurisdictions, specifically the Juvenile Division of the Los Angeles Superior Court, and have proven to be quite successful. It is now time that Judge Browning's Tort Protocol receive the full faith and credit that it deserves through the enactment of this Bill. This will be a huge step towards providing otherwise disenfranchised minor children who suffer harm while in foster custody the right to be compensated for their

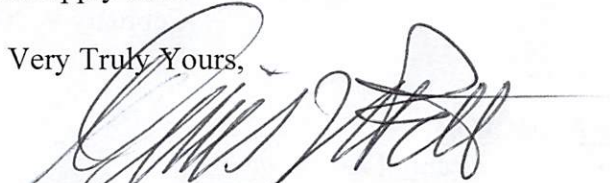
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Senator Joy A. San Buenaventura
February 9, 2022
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injuries. There is an old saying that society is judged by the manner in which it treats the most vulnerable of its citizens which certainly would apply here.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Dennis W. Potts", written over a horizontal line.

DENNIS W. POTTS
TREVOR S. POTTS

DWP: cm