

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

SUSAN BOUYEA, et al.,)
)
 Plaintiffs)
)
 v.)
)
JOHN R. NICHOLAS, personally and)
 in his capacity as Commissioner,)
 State of Maine Department of Health)
 and Human Services,)
)
 Defendant)

Civil Action No. 1:04-cv-28

AMENDED CONSENT ORDER

WHEREAS, Susan Bouyea brought a lawsuit in Federal Court in her own name and as a representative of a class of persons who are direct care workers (“Direct Care Workers”) employed by providers (“Providers”) of service to adults with mental retardation (“MR Clients”) under contract with the Department of Health and Human Services (the “Department”), which suit was amended to add new parties and new claims in an amended complaint entitled *Susan Bouyea and Margaret Torrance v. John R. Nicholas, Commissioner, Maine Department of Health and Human Service* (“the Lawsuit”); and

WHEREAS, Plaintiffs brought this action complaining that, under the Adult Protective Services Act, 22 M.R.S.A. § 3478, et seq. (the “APS Act”) as administered by the Department, Direct Care Workers were terminated and their choices of future employment were being burdened without being granted constitutionally required Due Process in the form of notice, hearing, and reasonable standards by which to measure their conduct; and

WHEREAS, the APS Act is structured to protect incapacitated and dependant adults, including MR Clients, and not to punish or to directly affect the employment of Direct Care Workers, but nevertheless, a culture and pattern of practice had evolved by which some MR Providers terminated Direct Care Workers when the workers were substantiated for abuse, neglect, or exploitation; and

WHEREAS, some of these terminations have occurred without regard to the culpability of the worker, and because abuse, neglect and exploitation is broadly defined in the APS Act, some Direct Care Workers may have been terminated for minor acts or omissions that do not appear to, without more, justify termination; and

WHEREAS, on or about October 15, 2004, the Plaintiffs and the Department entered into an Interim Settlement which was incorporated into an Order On Interim Settlement, dated October 20, 2004; and

WHEREAS on or about February 7, 2005, the Plaintiffs and the Department reached a Final Settlement which was incorporated into an Order on Final Settlement of the Parties, executed and entered by the Court on March 7, 2005 (the “Consent Order”); and

WHEREAS, the foregoing settlements were negotiated between Plaintiffs and the Department without the direct participation of the Consumer Advisory Board (“CAB”), the plaintiffs in *Consumer Advisory Board v. Nicholas*, Civil No. 91-321-P-C (the “Community Consent Decree case”) representing MR Clients, whose welfare may be directly affected by any changes in the APS system;

WHEREAS, Section IX.B of the Consent Order provides for retained jurisdiction by the Court to respond to any conflicts between the Consent Order and the Department’s compliance obligations under the Community Consent Decree case; and

WHEREAS, the CAB, the Plaintiffs and the Department have conferred, with the assistance of Clarence Sundram in his capacity as Special Master appointed by the Court in the Community Consent Decree case, to address concerns of the CAB as to the conflict between the Community Consent Decree and the Consent Order, and have reached agreement on appropriate modifications to the Consent Order and have incorporated these modifications into this Amended Consent Order.

NOW THEREFORE, upon joint motion of the Plaintiffs and the Department, and with the concurrence of the CAB and the Special Master, it is hereby agreed, ordered, adjudged and decreed that:

I. General Provisions

A. The standards and Due Process procedures established herein are intended to supplement the obligations of the Department under the APS Act without diminishing those obligations. It is specifically recognized that the existing statutory terms of abuse, neglect and exploitation under the APS Act are defined to encompass the wide range of events and circumstances that can result in harm or the threat of harm to the vulnerable population of incapacitated and dependant adult residents of the State of Maine, and that nothing herein shall operate to alter the Department’s obligation to investigate, report and provide adequate protective recommendations and services in response to allegations of such abuse, neglect and exploitation.

B. The Department recognizes that some Reportable Events under the APS Act alleging abuse, neglect or exploitation should not, solely due to the fact of a Reportable Event, result in adverse employment action on the part of Providers against Direct Care Workers who were involved in some capacity with such events. The Department also recognizes that such Reportable Events should not be reported out to employers (other than the Provider employing the Direct Care Worker at the time of the Reportable Event) or others through a state or national registry of persons substantiated or otherwise unless the Direct Care Worker has been given the protections of Due Process.

C. The parties agree Direct Care Workers are entitled to the protections of Due Process whenever adverse employment action or a burden on the future employment of a Direct Care Worker in his or her profession is likely to occur as a result of an APS investigation that “substantiates” a Direct Care Worker for conduct described in Paragraph D next below.

D. The terms “substantiated” or “substantiation” shall be used herein to mean a determination by a state APS investigator, based on a preponderance of the evidence, that a Direct Care Worker has engaged in conduct, through acts and/or omissions, as described in 1-6 below:

1. Sexual abuse or sexual exploitation as defined in 22 M.R.S.A. § 3472(15);
2. Exploitation as defined in 22 M.R.S.A. § 3472(9);
3. Intentionally, knowingly, or recklessly causing physical harm or pain or mental anguish through the infliction of injury, unreasonable confinement, intimidation or cruel punishment. (*See* definition of Abuse, 22 M.R.S.A. § 3472(1));
4. Intentionally, knowingly, or recklessly causing a threat to the protected person’s health or welfare by physical or mental injury or impairment, deprivation of essential needs, or lack of protection from these. (*See* definition of Neglect, 22 M.R.S.A. § 3472(11));
5. Intentionally, knowingly, recklessly, or negligently engaging in abuse or neglect, as defined in 22 M.R.S.A. § 3472(1 & 11), that results in serious harm, as defined in 22 M.R.S.A. § 3472(13); or
6. Any conduct that constitutes “repeated minor conduct of abuse or neglect.” “Minor conduct of abuse or neglect” is any conduct, other than conduct described in 1-5, which constitutes abuse or neglect as defined in 22 M.R.S.A. § 3472(1 & 11). Repeated minor conduct of abuse or neglect is any such minor conduct when the direct care worker has been found to have engaged in such minor conduct on two or more occasions in the nine (9) month period immediately preceding the date of the minor conduct under investigation.

For purposes of subsections 1 through 5, the terms “intentionally,” “knowingly,” and “recklessly” have the meanings set for in 17-A MRSA § 35. The conduct of a Direct Care Worker shall not be substantiated if he or she can establish by a preponderance of the evidence that the conduct at issue was the product of an objectively reasonable good faith belief that he or she was acting in the best interests of a MR Client under all the facts and circumstances.

E. The terms of this Amended Consent Order shall apply to any government entity that succeeds to the responsibility of the Department in implementing the APS Act and shall apply to any amendments to or replacement of the APS Act, including the creation of a state registry or provisions for participation in a national registry for reporting out to others determinations on allegations of abuse, neglect or exploitation, unless such amendments or replacements provide for the rights and protections provided in this Amended Consent Order.

II. Due Process Rights

A. Substantiations of Direct Care Workers that occur prior to the Effective Date of this Amended Consent Order shall be governed by the terms of the prior Consent Orders in this matter.

B. After the Effective Date of this Amended Consent Order, any Direct Care Worker substantiated or included in a state or national registry for reporting out to others determinations on allegations of abuse, neglect or exploitation, shall be given Due Process rights as provided herein.

C. The Department shall not place a Direct Care Worker on any state or national registry or disclose any finding by the Department of abuse, neglect or exploitation with respect to a Direct Care Worker outside of the Department or the Provider who employs the Direct Care Worker, with the exception of permitted or mandated disclosures under the Act (*see* 22 MRSA §§ 3474, 3478, and 3485), unless the Direct Care Worker has been substantiated and received the Due Process rights as provided herein.

III. Appeal Rights

A. Any person who has Due Process rights under Section II of this Amended Consent Order (an "Affected Person") shall be notified thereof in accordance with Section VI hereof and be granted a right to appeal.

B. An Affected Person will be given thirty (30) days after written notice is received to exercise the right of appeal.

C. The exercise of the right of appeal by an Affected Person may be by letter, fax or e-mail in accordance with instructions given in the notice by the Department of the right to appeal.

D. When an Affected Person exercises a right of appeal, the hearing on the appeal shall be scheduled as soon as possible, but no later than sixty (60) days after the appeal request is made, unless the Affected Person requests an extension. Affected Persons who can demonstrate an immediate and ongoing harm to their employment status must be given priority in securing a hearing and be given a hearing as soon as practical after a hearing is requested.

E. The appeal shall be a "fair hearing" that complies with the requirements of administrative Due Process as developed by the courts under the Due Process Clause of the

Fourteenth Amendment to the United States Constitution and as set forth in Maine's Administrative Procedures Act at 5 MRSA §§9051 – 9064.

F. The issue to be reviewed on appeal is limited to the substantiation of the Direct Care Worker, but if the substantiation is not upheld, the Hearing Officer may make a subsidiary finding of whether the alleged conduct constitutes minor conduct of abuse or neglect. A finding that the alleged conduct did not constitute minor abuse or neglect is final and may not be used in determining repeated minor conduct of abuse or neglect. A finding that the alleged conduct did constitute minor abuse or neglect is not final agency action and is not appealable under Rule 80C, unless the finding is made in an appeal of a substantiation of repeated minor conduct of abuse or neglect pursuant to section I.D.6, and shall not be given presumptive effect in any future appeal. Whenever an appeal does involve the review of substantiation for repeated minor conduct of abuse or neglect, the Department shall have the burden of proof on all instances of minor conduct of abuse or neglect. The decision on appeal may affirm, modify or reverse the substantiation but shall not alter or affect any protective measures recommended in the investigative report (other than those recommending disciplinary action) and no protective measures shall be stayed pending an appeal.

G. The MR Client, his/her guardian, the Office of Advocacy and the Disability Rights Center shall also receive notice of the hearing and may request the status of an intervenor at the hearing.

H. The decision of the hearing officer in a fair hearing shall be issued within forty-five (45) days of the completion of the hearing process. The Commissioner may reserve final decision making authority at his or her option, and if this right is reserved, parties shall have at least twenty (20) days to submit any exceptions or objections to any Recommended Decision and then the Commissioner will have thirty (30) days to issue a final decision. A final decision from this process, including subsidiary findings as to minor conduct as provided in Paragraph F. above, shall be final agency action for purposes of 5 M.R.S.A. §8002.4, appealable to the Superior Court in accordance with 5 M.R.S.A. §11001, *et seq.* and Rule 80C of the Maine Civil Rules of Procedure.

IV. Standards

A. At any hearing described in Section III above, the Department shall have the burden of proving the elements of the substantiation by a preponderance of the evidence.

B. A decision through the hearing process to reverse the substantiation does not affect or displace any protective recommendations made by the Department, provided that the identity of an Affected Person will not be disclosed to any person or for any purpose outside of the Department except by court order.

V. Remedies

A. An Affected Person who is successful in reversing a substantiation, shall be treated by the Department for all purposes as if no substantiation or protective recommendation had occurred, except in cases where the Direct Care Worker prevails because

his or her conduct did not meet the conduct definitions set forth in Section I.D. hereof and there is a finding that the conduct meets the definition of “minor conduct of abuse or neglect” as set forth in Section I.D.6 hereof. In such case, the findings of the Department may be considered for purposes of Section I.D.6 hereof, providing for conduct that constitutes repeated minor conduct of abuse or neglect.

B. If an Affected Person is successful in reversing a substantiation, the record of substantiation of such a person shall be immediately expunged by the Department from any state or national registry and the substantiation that was reversed shall not be disclosed outside the Department to any person or entity without a court order. A record of the reversed substantiation may be maintained by the Department for internal purposes only, provided that an Affected Person is not in any manner prejudiced by the retention of such records.

C. Such a person will be notified of the foregoing upon the successful completion of the appeal.

D. The remedies provided for in this Section V shall apply to an Affected Person who exercises a right to appeal where the Department chooses not to challenge the appeal.

VI. Notification

A. Beginning of the Effective Date of this Amended Consent Order, the Department shall provide notice to all persons substantiated of their Due Process rights provided for in Section II and their Appeal Rights provided for in Section III.

B. Such Affected Persons will be provided a summary of the substantiation findings when initially notified thereof.

C. If an Affected Person exercises a right to appeal, the Department shall promptly provide such person with the full report of substantiation, which shall be adequate to prepare a defense and give sufficient due process notice of the facts and circumstances upon which the substantiation is based and upon which the hearing will be limited thereto. The Department retains the right to review the report and remove information that is otherwise confidential under state law so long as the report meets the standard set forth in this paragraph; provided, however, that the Department shall not present any evidence in an appeal of a substantiation provided for in this Agreement that has been removed without disclosing the information to the Affected Person.

D. The Department shall also provide information to the Affected Person regarding the hearing process, including the right to request an expedited hearing as provided in this Order.

VII. Protections Pending Appeal

A. After a substantiation and pending an opportunity of an Affected Person to exercise a right of appeal and, if an appeal is requested, pending such an appeal, an Affected Person shall not be included on any state or national registry and no report will be made to any Provider, state agency or national organization or any other person or entity, that there has been a substantiation, except to the Provider, who employs the Affected Person, or to any person by court order or as permitted or mandated under the Act (*see* 22 MRSA §§ 3474, 3478, and 3485).

B. The Department shall provide by policy or rule and by contract that: (1) MR Providers are free to make any and all employment decisions concerning Direct Care Workers, unless otherwise specifically directed; (2) that a Reportable Event of abuse, neglect or exploitation, which does not result in a substantiation, shall not be the cause, on its own, of an adverse employment action; and (3) that MR Providers are free to make adverse employment decisions pending an appeal of substantiation or after an appeal is sustained so long as the decision is independent of the fact of substantiation.

VIII. Procedures

A. The Department agrees to provide information to Affected Persons regarding the relief outlined in this Amended Consent Order. The Department agrees to, and it is so ordered, to work with the Provider association to provide information about this settlement to affected direct care staff. The Department has the discretion to determine the best mechanism for providing this information, whether by pamphlet, posters, training or other means of providing information regarding this order. The Department shall do so within 90 days of this order.

B. The Department shall implement the terms of this Amended Consent Order with forms and procedures that fairly and effectively implement the terms thereof.

C. Counsel for Plaintiffs may apply to the Court while jurisdiction over this matter is retained if they object to the Department's procedures and are unable to resolve their objections with the Department.

IX. Attorneys Fees

A. All attorneys' fees for work and expenses by Plaintiffs counsel have been paid or waived through December 31, 2004.

B. Plaintiffs' counsel shall be entitled to reasonable attorneys fees for work after December 31, 2004 to complete this Amended Consent Order.

C. Plaintiffs counsel shall also be entitled to reasonable attorneys fees for work to enforce the Amended Consent Order.

X. Retained Jurisdiction.

A. The terms of this Settlement Agreement shall be incorporated into an order of the Court.

B. The Court shall retain jurisdiction to enforce this Amended Consent Order through July 1, 2006.

XI. Effective Date of This Amended Consent Order

The effective date of this Amended Consent Order (the "Effective Date") shall be date that it is endorsed by the Magistrate Judge as provided next below.

IT IS SO ORDERED.

Dated: May 31, 2005

/s/ Margaret J. Kravchuk
Magistrate Judge

SEEN and AGREED To:

/s/ Rufus E. Brown
Rufus E. Brown, Esq.
Brown & Burke
Counsel for Plaintiffs
Dated: May 31, 2005

/s/ Christopher C. Leighton
Christopher C. Leighton
Deputy Attorney General
Counsel for the Defendant
Dated: May 31, 2005

/s/ Jack Comart
Jack B. Comart, Esquire
Maine Equal Justice Partners, Inc.
Counsel for Plaintiffs
Dated: May 31, 2005

/s/ Bruce A. McGlaufflin
Bruce A. McGlaufflin, Esquire
Petruccelli, Martin & Haddow
Counsel for the Community Advisory Board, Civil No. 91-321-P-C
Dated: May 31, 2005