

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CONSUMER ADVISORY BOARD, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil No. CV-91-321-P-GZS
)	
BRENDA M. HARVEY, et al.,)	
)	
Defendants.)	

COURT ORDER

I) **INTRODUCTION**

This action was commenced on October 23, 1991, under the caption *Consumer Advisory Board v. Glover*, Civ. No. 91-321. The Members of the Plaintiff Class are defined and identified as all persons who were or have been involuntarily confined residents of the Pineland Center at any time on or after July 3, 1975, or who were conditionally released from Pineland and in community placements at any time on or after July 3, 1975, exclusive of those individuals admitted to Pineland for a specific medical service at Benda Hospital or for respite care for less than 21 days.

This action followed an earlier action originally commenced in 1975, captioned *Wuori v. Zitnay* Civ. No. 75-80-P.

This action and the previous action relate generally to constitutionally-grounded claims by Class Members with respect to the State’s operation of the now-closed Pineland Center. On

September 28, 1994, after considerable negotiation between the parties and on full consideration of the matter, the Court entered its Decree, known as the Community Consent Decree.

The Plaintiff Class is a closed class in that Pineland no longer operates and there will be no new or additional Class Members. The current membership of the Class is approximately 755 individuals. The Consumer Advisory Board has served as Class Representative as provided in both the Community Consent Decree and in Maine Statute, 34-B M.R.S.A. § 1216. The Class and the CAB are represented by counsel previously approved by the Court. The Defendants, having been named in their official capacities, have changed over time and the caption has been amended from time to time. As a result of governmental reorganization, it is agreed that it is currently sufficient to identify only Brenda M. Harvey in her official capacity as Commissioner of the Department of Health and Human Services as the Defendant. This Order is binding on her and her senior staff and their respective successors, but only in their official capacities. *See* F.R.Civ.P. 25(d).

By Motion filed on June 22, 1998, the Defendants asked the Court to dissolve the Community Consent Decree on the basis that the State was in full compliance. In the process of preparing for hearing on the Defendants' Motion, the parties agreed to an audit to be conducted by Clarence J. Sundram, Esq., a nationally-recognized expert in these kinds of matters. Mr. Sundram's Audit Report, filed on April 26, 2000, found the State to be out of compliance in numerous respects. The State then withdrew its Motion. The Court appointed Mr. Sundram as Special Master by Order dated August 30, 2000, conferring upon Mr. Sundram broad authority to direct and assist the parties for the purpose of achieving compliance with the provisions of the Community Consent Decree.

The Court has now received and reviewed with care Mr. Sundram's Final Report. Its essential conclusion is that the State is now in substantial compliance with the requirements of the Community Consent Decree. The parties concur with Mr. Sundram's conclusion and the parties have jointly moved that the Court enter the following Order.

After full consideration of the presentations of Mr. Sundram and the parties, the Court GRANTS the joint motion of the parties and it is ORDERED ADJUDGED AND DECREED as follows:

- 1) On the basis of a series of certifications by Defendant Commissioner, supplemented by corrective actions and supplemental activities, and the Special Master's Final Report, the Court finds that Defendants are in substantial compliance with the provisions of the Community Consent Decree;
- 2) In accordance with the provisions of the Decree, the parties jointly drafted proposed legislation which was subsequently enacted into law as 2007 P.L. Ch. 356 as amended by 2007 P.L. Ch 695;
- 3) The parties agree that the protective provisions of the Decree and the necessary mechanisms for ensuring future compliance are now collectively embodied in 2007 P.L. Ch. 356 as amended by 2007 P.L. Ch 695 and those certain policies, procedures, and regulations listed currently in force ("Applicable Maine Law"), and in the supplementary requirements listed below under Subsections 5(a-i) ("Supplementary Requirements").
- 4) Accordingly, active supervision by the Court is no longer warranted and the appointment of the Special Master is hereby terminated and he is discharged with the Court's deep appreciation for his service;
- 5) Defendant and her successors and subordinates in their respective official capacities are hereby ordered to take all necessary and proper steps to maintain substantial compliance, and to refrain from any actions that would be, or cause, a material adverse change in the status quo; more specifically and without limitation, Defendant and her successors and subordinates in their official capacities are enjoined to comply in all respects with all Applicable Maine Law and with specific regard to members of the Class to comply with the following Supplementary Requirements:

Notwithstanding any contrary or inconsistent provisions in Maine statutes, regulations, policies, and procedures, Defendants shall continue to afford

Class Members the following rights in addition to those rights specified in Applicable Maine law.

- a. Class Members may choose to have case management services provided by state employees without regard to the class member's eligibility for MaineCare.
- b. Defendants shall assure the provision to Class Members of the supports and services identified in their plans, including professional services and family support services [to be included here only if not incorporated into policy or regulation].
- c. Defendants shall assure that Class Members receive at least annual medical and dental examinations, unless the Class Member's physician recommends otherwise, and eyeglasses shall be provided as needed to any Class Member unable to pay for them.
- d. The personal planning process shall designate an individual to monitor the quality of medical and dental care a Class Member receives.
- e. Should a Class Member successfully appeal a denial of a grievance pursuant to M.R.Civ.P. Rule 80C, counsel for the Class Member may be awarded a reasonable attorney's fee payable by the Department in addition to costs if the Court finds that the Department's position on appeal was not substantially justified.
- f. Defendants shall assure that respite services are available to Class Members and their families. The minimum amount of respite available per family desiring it shall be at least 12 days each year. For purposes of this paragraph, "family" means, in the first instance, the Class Member's biological or adoptive parents and includes, where appropriate, individuals with whom the Class Member resides or intends to reside where the individual plays a significant unpaid role in the person's well-being.
- g. The correspondent of a class member shall have access to all living, work, and program areas and to all records related to the Class Member for whom she or he is the correspondent (not including personnel records), and to the personnel of any institution, facility, agency, or other provider administered by the Defendants where the Class Member for whom she or he is correspondent resides or participates in work or a program.

- h. Defendants shall include information about these supplemental requirements in all trainings regarding services to persons with mental retardation whenever such trainings are provided to Department staff, provider staff, or other persons serving or supporting Class Members.
- i. The Commissioner shall make budget requests in accordance with the state budget process for funds reasonably calculated to meet these obligations to Class Members.

The foregoing Supplementary Requirements are designed to supplement the protective provisions set forth in Applicable Maine Law. Future changes in Applicable Maine Law provisions may serve as grounds for a request to the Court to amend the supplementary provisions in accordance with the standards stated below for seeking relief before this Court.

It is further ORDERED, ADJUDGED AND DECREED as follows. The Court retains jurisdiction for purposes of enforcement of this Injunction in accordance with the following provisions:

- 7. James R. Crotteau, Esq., an attorney licensed to practice law in Maine and a resident of Lamoine, Maine, is hereby appointed as the Class Representative(s) with authority to represent the Class in further proceedings in this Court.
 - a. The Class Representative shall have the same right to receive reports as the Maine Developmental Services Oversight and Advisory Board under 2007 P.L. Ch. 356 as amended by 2007 P.L. Ch 695, and will have the same rights of access to records and programs as the Consumer Advisory Board has enjoyed under the Decree and statute and can make requests for further information to the Department and the Office of Advocacy.
 - b. The Class Representative shall not act as an independent monitor of the Department, but shall develop collaborative relationships with the Department, the Office of Advocacy, the Protection and Advocacy Agency and the Maine Developmental Services Oversight and Advisory Board to keep informed.
 - c. The Class Representative shall be available to class members, families, correspondents and guardians to hear their concerns, but shall refer matters of individual concern to the Office of

Advocacy or the Protection and Advocacy Agency, designated pursuant to 5 M.R.S.A. § 19502, as appropriate.

- d. The Class Representative shall be compensated for this service at the rate of \$120/hour plus mileage and reasonable costs and expenses, including fees for professional services relating to any subsequent proceedings in this Court on behalf of the Class.

8. The current counsel of record for the Plaintiffs shall continue to serve as Class Counsel until relieved or discharged by the Court;

9. The parties have established an estimated yearly budget of \$20,000 for compensation of the Class Representative and Class Counsel, excluding fees and costs associated with future litigation. This shall serve as an estimate only and as an expression of the parties' current expectations regarding the ongoing monitoring services to be provided by Class Representative and Class Counsel. Should the fees and expenses exceed the estimated budget, the Department may file a motion to deny payment and the Class Representative and Class Counsel will have the burden to demonstrate that payment is warranted because the services rendered were reasonably necessary to protect and serve the best interests of the Class.

10. Issues relating to individuals, and not of general applicability to the Class or a large segment of the Class, shall be addressed in the grievance and appeal procedures established in the course of the Special Master's oversight, with recourse as appropriate under Maine law to the Superior Court;

11. The Court may exercise its retained jurisdiction to remedy any failure of substantial compliance. In considering a request to reinstate active Court supervision or to order any judicial remedy, the Court will consider whether there has been a materially adverse change in the circumstances or the state of affairs found to exist by the Special Master in the Special Master's Final Report and as further described in the Commissioner's Certifications upon which the Special Master's Final Report rests, or a showing that there is an imminent threat of such a change. On a showing of an actual or imminent materially adverse change of circumstances for the Class or a substantial segment of the Class, the Court may employ any appropriate judicial remedy for the purpose of restoring and continuing the substantial compliance conditions, as they existed at the time of this Order, or their functional equivalent, with due regard to changing circumstances. In making any such determination, the Court will be guided by the objectives and principles of the Community Consent Decree as further refined and expressed in the Certificates of Compliance and the Special Master's several Reports to the Court, but the Court will be neither obligated nor forbidden to use any specific provision of the 1994 Decree in aid of the Court's analysis. The Decree is

hereby terminated and cannot furnish directly enforceable legal obligations, but shall continue to serve as a guide to the Court for interpreting the policies, principles, practices, services and supports contemplated and discussed by the Decree that are now embodied in the Applicable Maine Law and Supplementary Requirements as set forth herein.

SO ORDERED.

Dated at Portland, Maine this _____ day of _____, 2009.

Hon. George Z. Singal
United States District Judge