UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

THE STATE OF CONNECTICUT OFFICE OF PROTECTION AND ADVOCACY FOR PERSONS WITH DISABILITIES, and **JAMES MCGAUGHEY,** Executive Director of The State of Connecticut Office Of Protection and Advocacy for Persons with Disabilities Plaintiffs, v. **HARTFORD BOARD OF EDUCATION, HARTFORD PUBLIC SCHOOLS,** and **ROBERT HENRY,** in his official capacity as the Superintendent of Schools Defendants.	CIVIL ACTION NO. **304CV1338** August 11, 2004

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

I. Introduction

The State of Connecticut Office of Protection and Advocacy for Persons with Disabilities (hereinafter "OPA") and its Executive Director, James McGaughey (hereinafter "McGaughey") (collectively "Plaintiffs") have instituted this action to redress the refusal by Defendants Hartford Board of Education (hereinafter "Board"), Hartford Public Schools (hereinafter "HPS") and Robert Henry (hereinafter "Henry") (collectively "Defendants") to permit OPA to conduct an investigation into allegations of abuse and neglect at the Hartford Transitional Learning Academy (hereinafter "HTLA"), a school run by the Defendants. Defendants have refused to disclose certain directory information regarding the identity of parents or guardians of students

attending HTLA.[1] That directory information would enable the OPA to seek releases from those parents and guardians for the students' educational and other records. OPA additionally challenges Defendants' refusal to allow OPA access to the HTLA facilities at times when the students are in attendance.[2] This access authority is specifically granted to OPA pursuant to federal law.

These refusals by Defendants prevent OPA, the state and federally designated Protection and Advocacy System for persons with disabilities in Connecticut, from fulfilling its statutory mandates of investigating allegations of abuse and neglect as well as providing protection and advocacy services for individuals with disabilities. The actions of the Defendants further prevent OPA from determining whether the rights of students to be free from abuse and illegal restraint are being violated and whether there are appropriate procedures in place to prevent continued incidents of abuse and neglect.

Congress drafted the Developmental Disabilities Assistance and Bill of Rights Act ("DD Act"), 42 U.S.C. §15001, et. seq., because of the concern it had over instances of abuse of developmentally disabled persons such as those contained in the allegations in the instant matter. The DD Act established the Protection and Advocacy System ("P&A") to investigate and remedy abuse and neglect of persons with developmental disabilities, and to provide them with legal representation and advocacy services. The P&A system is a nationwide network of disability rights agencies that are mandated and designated for every state and territory of the United States. 42 U.S.C. § 15043(a)(2)(A)(i). To accomplish this goal, Congress granted broad investigative access authority to the P&As. In order to protect the rights of individuals with disabilities to be free from abuse and neglect, OPA, as the P&A for the State of Connecticut, has

[1] This directory information consists of name, address and telephone numbers of the parents or guardians of students who attend HTLA.

the authority to obtain the directory information that is being requested and to visit the HTLA facilities at times when the students are in attendance. 42 U.S.C. § 15043 (a)(2)(I)(i)-(iii), 42 U.S.C. § 15043(a)(2)(H), 45 C.F.R. § 1386.22(f) and (g).

Similarly, the Protection and Advocacy for Individuals with Mental Illness Act of 1986 42 U.S.C. §§ 10801-10827 (PAIMI) was enacted in 1986 by Congress to establish independent protection and advocacy systems (P&As) nationwide with authority to protect individuals with mental illness from abuse and neglect. 42.U.S.C. § 10801(b)(2)(A), (B). Congress established P&As in response to the myriad accounts of abuse and neglect against individuals with mental illness that were substantiated by congressional investigations. Congress found that "individuals with mental illness are vulnerable to abuse and serious injury" as well as "neglect, including lack of treatment, adequate nutrition, clothing, health care, and adequate discharge planning." 42 U.S.C. § 10801(a)(1), (3). Moreover, Congress found that "[s]tate systems for monitoring compliance with respect to the rights of individuals with mental illness vary widely and are frequently inadequate." 42 U.S.C. § (a)10801(4). Accordingly, Congress granted P&As the power to investigate incidents of abuse and neglect of persons with mental illness if the incidents are reported to P&As or P&As have probable cause to believe that incidents have occurred. 42 U.S.C. § 10805(1)(A). Similar to the DD Act, PAIMI provides a P&A with the authority to seek records and have access to facilities at times service recipients (students) are present. 42 U.S.C. § 10806, 42 U.S.C. § 10805(a)(3), 42 C.F.R. § 51.42. Additionally, the Protection and Advocacy of Individual Rights (hereinafter "PAIR") 29 U.S.C. § 794e, et seq., provides access to records and facilities in the same manner as the DD Act and PAIMI for individuals with other disabilities not specifically provided for by PAIMI and the DD Act.

[2] HTLA maintains 2 facilities at two separate locations.

The authority of OPA to conduct investigations and to have access to records was recently upheld by the District of Connecticut in Office of Protection and Advocacy for Persons with Disabilities v. Armstrong, 266 F. Supp.2d 303 (D. Conn. 2003) (hereinafter Armstrong.). In Armstrong, the Court discussed the history of the DD Act and PAIMI and ruled that "PAMII [sic] specifically charges the State's P&A, which is an independent agency, with the duty to 'investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred.'" Id. at 310.

If the Defendants do not release the directory information to OPA or provide OPA with access to HTLA when the students are present, OPA will suffer irreparable harm because it will not be able to fulfill its statutory obligation to investigate abuse and neglect, as well as to provide protection and advocacy services to students who have been, and may still be, at risk of abuse. There will be no harm to Defendants because the release of records to a P&A does not violate the confidentiality provisions of the Family Educational and Privacy Rights Act ("FERPA"), 20 U.S.C. § 1232g, or the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400 et. seq. The public interest will not be harmed, but rather furthered by OPA having access to the directory information and the facility to prevent continued harm to students at HTLA. This Court should issue a preliminary and thereafter permanent injunction in this matter because Plaintiffs have the statutory authority to fully access the directory information. Finally, OPA will be irreparably harmed if it is prevented from pursuing its right to access the directory information and to access the facility in pursuit of its statutory duty to investigate suspected incidents of abuse and neglect.

II. Statement of Facts

Hartford Transitional Learning Academy (hereinafter "HTLA") is a school that, despite its label of "transitional," functions as a placement of last resort in the Hartford Public School system. HTLA primarily accepts children who have a label of "emotionally disturbed" and who have not experienced success at placements at other schools within the system, notably their local schools. Upon information and belief, students who are placed at HTLA have disabilities that include mental illness, developmental disabilities, brain injuries and other disabilities including cognitive disabilities.[3] Children also have a documented history of challenging negative behavior. In order to be placed at HTLA a student and his/her parents or guardians need to sign an agreement that permits the use of "time-out procedures and/or restraints." Students and their parents or guardians must also sign a form permitting the use of "reasonable force when [an HTLA staff person] believes it is necessary to (a) protect himself/herself or others from immediate physical injury; (b) obtain possession of a dangerous instrument or controlled substance upon or within the control of such student or (c) **protect property from physical damage**." (Emphasis added.) Attached hereto as Attachment 1. Hartford Public Schools "Usage of Therapeutic Physical Restraint to Maintain Safety."

As part of its regular intake process, OPA has received complaints from parents of students at HTLA. These complaints have included allegations that the students have been subjected to inappropriate restraint and seclusion. Some of these allegations have included claims that the students were injured during the restraint process. Aff. of Centeno at ¶ 4-10. Attached hereto as Attachment 2. The students had a variety of disabilities including mental illness, developmental disabilities, and other cognitive impairments.

[3] Children with brain injuries are served under the DD Act. Tennessee Protection & Advocacy, Inc. v. Wells, 371 F.3d 342 (6th Cir. 2004).

investigators would "make every effort not to disrupt the educational environment." See Letter from OPA to Robert Henry, February 10, 2004. Attached hereto as Attachment 5.

On Tuesday, February 10, 2004 investigators from OPA and OCA arrived at HTLA. Faith VosWinkel from OCA and Bruce Garrison from OPA went into the school office at approximately 8:30 am, signed in and informed the clerk where they were from and that they wished to see Barbara Macauley, the principal of HTLA. The clerk asked them to wait. Aff. of Garrison at ¶ 8-10 and Aff. of VosWinkel at ¶ 8-10 attached hereto as Attachment 6.

When Macauley arrived at the office approximately 25 minutes later, she asked Mr. Garrison and Ms. VosWinkel to come into her office where Ms. VosWinkel told her that they were there to initiate an investigation into HTLA. Aff. of Garrison at ¶ 12 and Aff. of VosWinkel at ¶ 12. When Macauley expressed surprise and said she knew nothing about an investigation Ms. VosWinkel informed her that a letter had been sent to Defendant Henry. Aff. of Garrison at ¶ 13 and Aff. of VosWinkel at ¶ 13. Macauley informed Mr. Garrison and Ms. VosWinkel that she had not received a letter and asked what kind of investigation they intended to conduct. Ms. VosWinkel told her that during this particular visit they intended only to look at documents relating to policies, procedures and program descriptions of HTLA. She also stated that they planned additional visits to observe the programs at HTLA and to talk to faculty. She told Ms. McCauley that they would not be going into confidential student areas on that day. Aff. of Garrison at ¶ 14 and Aff. of VosWinkel at¶ 14.

Macauley stated that before she could let Mr. Garrison and Ms. VosWinkel into the facility she needed to check with her administration. After leaving her office for approximately 10 minutes she returned and told them that she had spoken with Assistant Corporation Counsel

Ann Bird who advised her not to let them into the facility or to review any documents. She then asked them to leave, which they did. Aff. of Garrison at ¶ 16 and Aff. of VosWinkel at ¶ 16.

On or about April 7, 2004 staff from OPA and OCA met with Defendant Henry and Macauley and other officials from Defendant HPS and with counsel for the Defendants to try to resolve the question of access to the facility for the purpose of conducting the investigation. OPA explained the areas of concern it had and explained its authority for conducting the investigation. OPA asked for directory information so that it could contact parents and guardians to seek consents for release of educational records and renewed its request for access to the facility. At the conclusion of the meeting, OPA agreed that it would provide a letter to Defendants explaining its authority. On April 12, 2004 OPA wrote to counsel for Defendants and discussed the various statutes which provided this authority, and cited to case law. OPA renewed its request for both directory information and access to the facility. See Letter from OPA to Ann Bird. Attached hereto as Attachment 7.

On May 3, 2004 counsel for Defendants responded to OPA's letter and, citing the very privacy concerns refuted in OPA's letter, refused to allow OPA access to either the directory information or the facility. See Letter dated May 3, 2004 from Ann Bird to OPA. Attached hereto as Attachment 8. On July 20, 2004 counsel for OPA wrote to counsel for Defendants attempting to resolve the matter and informing Defendants that should the matter not be resolved the case would have to be litigated. Attached hereto as Attachment 9. Counsel for Defendants responded on July 22, 2004. In that letter Defendants continued to refuse to allow Plaintiffs access to the directory information. Defendants did state that they would allow Plaintiffs access to the HTLA facility, but only when the students were not present. Plaintiffs replied to this letter

on July 27, 2004 and informed Defendants that this offer was not acceptable. Attached hereto as Attachments 10 and 11.

III. Argument

OPA HAS MET THE REQUIREMENTS FOR INJUNCTIVE RELIEF AND IS ENTITLED TO A PRELIMINARY INJUNCTION

Injunctive relief is available when there is no adequate remedy at law and the balance of equities favors the moving party. See 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2944 at 394 (1973 and 1992 Supp.); accord N.Y. State National Organization for Women v. Terry, 704 F. Supp. 1247, 1262 (S.D.N.Y. 1989), aff'd on other grounds 886 F.2d 1339 (2d Cir. 1989). A plaintiff seeking preliminary injunctive relief in this Circuit must demonstrate: "(1) irreparable harm and (2) either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking the injunctive relief." Malkentzos v. DeBuono, 102 F.3d 50, 54 (2d Cir. 1996), Covino v. Patrissi, 967 F.2d 73, 77 (2d Cir. 1992), citing Resolution Trust Corp. v. Elman, 949 F.2d 624, 626 (2d Cir. 1991). See also OPA v. Armstrong, 266 F. Supp.2d at 311.

Ordinarily, the purpose of the injunction is to maintain the status quo pending a trial on the merits. Abdul Wali v. Coughlin, 754 F.2d 1015, 1025 (2d Cir. 1985). However, occasionally injunctive relief may change the status quo of the parties. Id. This type of injunction is mandatory, rather than prohibitory. As a result, this Circuit has required the movant to meet a higher standard, a substantial or clear showing of likelihood of success on the merits. Furthermore, a mandatory injunction may also be issued upon a showing that "extreme or very serious damage will result" from a denial of injunctive relief. Id. This heightened standard is also required, whether the injunction is mandatory or prohibitory, where injunctive relief will

provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at trial on the merits. Tom Doherty Assocs., Inc. v. Saban Int'l, 60 F.3d 27, 34 (2d Cir. 1995), Forest City Daly Housing, Inc. v. Town of North Hempstead, 175 F.3d 144, 149 (2d Cir. 1999).

Such is this case. OPA must show a substantial or clear likelihood of success on the merits. If OPA is granted injunctive relief, Defendants will be required to release directory information to allow OPA to seek consents for release of information from parents and guardians of students at HTLA, Defendants will be required to provide OPA access to the HTLA facilities when the students are present, and Defendants will be required to permit OPA to conduct its investigation. This relief will provide OPA with substantially all the relief sought and that relief cannot be undone even if Defendants prevail at trial on the merits.

In the present case, no adequate remedy at law exists for OPA. OPA requested access to the directory information and the facility and was denied such access. It is clear that Plaintiffs cannot be made whole through money damages and will continue to suffer irreparable harm without injunctive relief. In view of the federal protection and advocacy mandates, OPA has a substantial likelihood of success on the merits of its claim. Indeed, in Armstrong the Court held that

> [i]n this case, there can be no dispute that Connecticut P&A has no other adequate remedy at law, and that it will be irreparably harmed if it is 'prevented from pursuing fully its right to access records...in pursuit of its duty to investigate circumstances providing probable cause to believe abuse or neglect may be occurring.'

Armstrong, 266 F. Supp. 2d at 311.

Armstrong is not an anomaly. Most courts that have considered whether to grant an injunction in the DD Act and PAIMI context have held that the injunction should be granted. See Alabama Disabilities Advocacy Program v. Tarwarter Developmental Ctr., aff'd, 97 F.3d

492 (11th Cir. 1996), 894 F. Supp. 424 (M.D. Ala. 1995)(permanent injunction); Mississippi Prot. & Advocacy Sys. Inc. v. Cotton, 929 F.2d 1054 (5th Cir. 1991)(mandatory injunction); Iowa Prot. & Advocacy Serv., Inc. v. Gerard Treatment Programs L.L.C., 152 F. Supp.2d 1150 (N.D. Iowa June 25, 2001), modified July 27, 2001 (preliminary injunction); Wisconsin Coalition For Advocacy v. Czaplewski, 131 F. Supp.2d 1039 (E.D. Wisc. 2001)(preliminary injunction); Washington Prot. & Advocacy Syst., Inc. v. State of Washington, No. C98-5401 RJB (W.D, Wash. July 26, 1999); Advocacy Ctr. v. Stalder, 128 F. Supp. 358 (M.D. La. 1999)(permanent injunction); Oklahoma Disability Law Ctr., Inc. v. Dillon Family & Youth Servs., Inc., 879 F. Supp. 1110 (N.D. Okla. 1995)(permanent injunction); Robbins v. Budke, 739 F. Supp. 1479 (D.N.M. 1990)(permanent injunction). This Court should likewise grant Plaintiffs injunctive relief, preliminary and permanent thereafter.

1. Irreparable Harm

"Irreparable injury is the sine qua non for the grant of a preliminary injunctive relief." United States Postal Serv. v. Brennan, 579 F.2d 188, 191 (2d Cir. 1978) (citations omitted). A showing of irreparable harm is considered perhaps the single most important requirement in satisfying the standard. Pinckney v. Bd. of Educ. of the Westbury Union Free School Dist., 920 F. Supp. 393, 399 (E.D.N.Y. 1996). Ordinarily, "irreparable harm means injury for which a monetary award cannot be adequate compensation." Loveridge v. Pendelton Woolen Mills, Inc., 788 F.2d 914, 917 (2d Cir. 1986), quoting Jackson Dairy, Inc., v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979). However, a showing of irreparable injury may be presumed in certain instances of civil rights violations. Therefore, "a traditional showing of irreparable harm is not required when a plaintiff seeks equitable relief to prevent the violation of a federal statute...."

McKinney v. Town Plan and Zoning Comm'n, 790 F. Supp.1197, 1207, (D. Conn. 1992). See also Connecticut Hosp. v. City of New London, 129 F. Supp.2d. 123, 128 (D. Conn. 2001).

To illustrate, one such context where irreparable harm may be presumed is where there is a showing of a violation of the Fair Housing Act. McKinney, 790 F. Supp. at 1207, Connecticut Hosp.,129 F. Supp.2d. at 128. Although the Second Circuit has yet to rule conclusively on this issue, other circuits have. Gresham v. Windrush Partners, Ltd., 730 F.2d 1417, 1423 (11th Cir. 1984)(National Housing Act); Baxter v. City of Belleville, Ill., 720 F. Supp. 720, 734 (S.D. Ill. 1989)(Fair Housing Act); Bronson v. Crestwood Lake Section I Holding Corp., 724 F. Supp. 148, 153 (S.D.N.Y. 1989)(Fair Housing Act).

Irreparable harm may similarly be presumed in the present case as in McKinney and Connecticut Hospital. OPA seeks injunctive relief to prevent violations of the DD Act, PAIMI, and PAIR, all federal civil rights statutes. OPA, like the plaintiffs in McKinney and Connecticut Hospital, presents facts sufficient to establish that its authority under these statutes has been violated. Both the courts in McKinney and Connecticut Hospital found that irreparable injury could be presumed because the plaintiffs' rights had been violated under the Fair Housing Act. McKinney, 790 F. Supp. at 1207, Connecticut Hosp.129 F. Supp.2d at 128. The conclusions reached in those cases should apply with equal force to the application of the federal P&A statutes. OPA has the statutory authority to the access it seeks. Since Defendants have not provided such access, OPA's rights have been violated under its federal statutes. Thus, this Court should find that OPA is per se irreparably injured. Armstrong, 266 F. Supp.2d at 311.

As the Court concluded in Armstrong, OPA continues to suffer irreparable harm. Id. The harm that OPA will suffer should this Court deny injunctive relief is quite serious. OPA will lose its ability to fulfill its statutory duty to investigate suspected incidents of abuse and neglect

in pursuit of its federal mandate to protect and advocate for persons with disabilities. As stated at page 2 supra, Congress drafted the DD Act because of the concern it had over instances of abuse of developmentally disabled persons such as those contained in the allegations in the instant matter. To respond to this concern, Congress granted broad investigative access rights to the P&As.

Similarly, in 1985, Congress concluded that the rights of individuals with mental illness were not being protected and PAIMI, 42 U.S.C. §§ 10801-10827, was enacted. Under PAIMI, state systems have the authority to independently investigate either upon a report or when it has probable cause to believe such an act of abuse or neglect has occurred. 42 U.S.C. § 10801 and 42 C.F.R. § 51.41. Thus, under PAIMI, the DD ACT and PAIR P&A's also have authority to pursue administrative, legal, and other appropriate remedies to insure protection of individuals with mental illness. 42 U.S.C. § 10805(a)(1), and 42 C.F.R. § 51.31, 42 U.S.C. § 15043(a)(2)(A)(i).[4] Therefore, if OPA is not permitted to conduct its investigation and have access to the HTLA facilities at times students are present and to the directory information, OPA will be irreparably harmed in its ability to fulfill its statutory mandates.

Prior to Armstrong, the Eastern District of Wisconsin recognized the serious harm to a P&A's statutory duty to investigate suspected incidents of abuse and neglect if it were deprived of its statutory right to access requested records in pursuit of its mandate to investigate. In Wisconsin Coalition For Advocacy v. Czaplewski, the plaintiff successfully argued that the defendant's refusal to provide records which the plaintiff was entitled frustrated its ability to carry out its mandate to investigate abuse and neglect. Czaplewski, 131 F. Supp.2d 1039, 1050 (E.D. Wisc. 2001). The court in Czapleswki cited to a variety of specific harms to its ability to

[4] PAIR is based upon the DD Act, this argument is also relevant with respect to PAIR. 29 U.S.C. § 794e(f)(2).

conduct a timely investigation. Most relevant to the instant case the court held that "[p]erhaps most importantly, the residents on whose behalf it must act bear the risk of injury or death." Id. at 1051. The court was persuaded that the defendant's refusal to provide the plaintiff with records that it was entitled to review as part of its responsibilities "in a very real and readily identifiable way, pose[s] a threat to the plaintiff's being able to discharge its obligations. And no amount of damages will remedy that sustained harm." Id. In the instant case, OPA is, at this time, asking only for directory information and facility access, thus making the argument in favor of disclosure even more compelling.

Defendants have prevented OPA from performing its federal mandates and from taking steps to protect these young people from abuse and neglect. OPA has the authority and the obligation to investigate the allegations regarding HTLA. Interference with OPA's efforts to carry out its federal mandate harms OPA and the individuals it is empowered to protect. If a P&A is denied records for a claim it is investigating, it suffers direct injury to its statutory interest. Armstrong, 266 F. Supp.2d at 311, Stalder, 128 F. Supp. 2d at 362.

2. Substantial Likelihood of Success on the Merits

The second step of the inquiry for injunctive relief requires that the plaintiff demonstrate a substantial or clear showing of likelihood of success on the merits, where: (a) an injunction will alter, rather than maintain, the status quo, or (b) an injunction will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at the trial on the merits. See Saban Int'l, 60 F.3d at 34 and Abdul Wali, 754 F.2d at 1025. Here, OPA has met the requirement of showing a substantial likelihood that it will prevail on the merits.

OPA is a federally funded protection and advocacy system mandated to provide protection and advocacy services for persons with disabilities. See supra at 2-3. In pursuit of OPA's federal authority to investigate suspected incidents of abuse and neglect, PAIMI and the DD Act mandate that OPA be given access to records when incidents of abuse or neglect are reported, or when the P&A makes a probable cause determination that abuse or neglect may have occurred. 42 U.S.C. § 10805(a)(4)(A), (B), 42 U.S.C. § 15043(a)((1)(I), 29 U.S.C. § 794e(f)(2). In this case the only records OPA is seeking is the directory information so OPA may contact parents and guardians to seek consent for the release of records. Defendants have violated the DD Act, PAIMI and PAIR by refusing to provide OPA with this information.

In addition, both PAIMI and the DD Act provide that P&A's shall have access to facilities in order to conduct investigations. 42 U.S.C. § 10805(a)(C)(3), 42 U.S.C. § 15043(a)(2)(H), 42 C.F.R. § 51.42, 45 C.F.R. § 1386.22(f) and 29 U.S.C. § 794e(f)(2). This access to facilities expressly includes the right to have access to service recipients "at all times necessary to conduct a full investigation of an incident of abuse or neglect. This authority shall include the opportunity to interview...the person thought to be the victim of such abuse." 42 C.F.R. § 51.42(b). See also 45 C.F.R. § 1386.22(f) and (g).[5] This position has been supported by case law. See Mississippi Protection and Advocacy Syst. v. Cotten, 1989 WL 224953 (S.D. Miss. Aug. 7 1989) *8, Robbins v. Budke, 739 F. Supp. 1479, 1489 (D.N.M. 1990). Neither must the P&A seek permission of a parent or guardian before speaking to service recipient. Iowa Protection and Advocacy Serv., Inc. v. Res-Care Premier, Inc. No. 4-02-CV-10012 (S.D. Iowa July 8, 2002) (unpublished), slip opinion at 7-8, attached hereto as Attachment 12, Iowa

[5] While both the DD Act and PAIMI speak in terms of "residents," neither statute requires that an individual must actually reside in a facility to receive services from a P&A. See text infra at 16-17.

Protection and Advocacy Syst., Inc. v. Gerard Treatment Programs L.L.C., 152 F. Supp.2d 1150, 1171 (N.D. Iowa 2001).

In 1975, prior to enacting PAIMI, Congress adopted the Developmental Disabilities and Bill of Rights Act (DD Act) to protect the human and civil rights of individuals with developmental disabilities. 42 U.S.C. §§ . 15001 et seq. Congress later enacted PAIMI in 1986 in response to congressional hearings and investigations evidencing abuse and neglect in state psychiatric facilities. 42 U.S.C. §§ 10801-10827. Protection and advocacy systems were established to ensure that these vulnerable populations were protected. Armstrong, 266 F. Supp.2d at 309.

OPA is designated as an "eligible system." 42 U.S.C. §10802(2), 42 U.S.C. § 15043(a), 29 U.S.C. § 794e(m), Conn. Gen. Stat. § 461-10. It is mandated to investigate and pursue legal remedies for abuse and neglect of persons with disabilities, and to provide them with legal representation and advocacy services. See, e.g. 42 U.S.C. § 10805(a)(1)(A) and (B), 42 U.S.C. 15043(a)(2)(A)(i) and (B), § 29 U.S.C. § 794e(f)(3). Federal statutes and regulations require that protection and advocacy systems have access to facilities and to records of individuals with mental illness, developmental disabilities and other disabilities. See 42 U.S.C. § 10805(a)(C)(3), 42 U.S.C. § 10806, 42 U.S.C. § 15043(a)((1)(I), 42 U.S.C. § 15043(a)((1)(H), 42 C.F.R. § 51.41-42, 45 C.F.R. § 1386.22(f) 29 U.S.C. § 794e(f)(2).

Courts have consistently held that the DD and PAIMI Acts require states to permit the P&A agency to operate effectively, and with broad discretion and independence in gaining access to facilities and records.[6] See supra text at 9-10 and accompanying citations. The court in Cotton expounded upon this obligation as follows:

[6] It was Congress' intent that the DD and PAIMI Acts be applied in a like manner. *See* S.Rep.No. 109, 99th Cong., 1st Sess. 3 (1986); S.Rep. 113, 100th Cong., 1st Sess. 24 (1987), 1987 U.S.C.C.A.N. 781, 803-04; Alabama

> The Act not only describes the range of services to be provided by the protection and advocacy systems, it also states that the systems **must have the authority** to perform these services. The state cannot satisfy the requirements of the [DD Act] by establishing a protection and advocacy system which has this authority in theory, but then taking action which prevents the system from exercising that authority.

Mississippi Prot. & Advocacy Sys. Inc. v. Cotton, 929 F.2d 1054, 1058 (5th Cir. 1991)(emphasis in original). As the court noted in Alabama Disabilities Advocacy Program v. Tarwarter Developmental Ctr., any other reading "would attribute to Congress an intent to pass an ineffective law." Tarwater, 894 F. Supp. at 429.

It is also clear that as a public school serving children with disabilities, HTLA is a "facility" within the definition of the P&A statutes. The P&A Acts do not limit P&A access authority to any particular setting, such as residential facilities. For example, under the DD Act, P&As have "access at reasonable times to any individual with a developmental disability in a location in which services, supports, or other assistance are provided to such an individual, in order to carry out the purposes of this [Act]." 42 U.S.C. § 15043(a)(2)(H). PAIMI has a similar provision. 42 U.S.C. § 10805(a)(C)(3). Public non-residential schools fall within this definition because they are "locations" providing "services, supports or other assistance" to children with disabilities.[7] Moreover, P&As have the authority and duty to ensure the protection of the rights of any individual with a developmental disability within a state, regardless of his or her living arrangement or location where the services are provided. 42 U.S.C. § 15043(a)(2)(A)(i). Similarly, following amendments in 2000, the PAIMI Act extends coverage to persons residing in the community, repealing the former requirement that the individual must reside in a "facility"

Disabilities Advocacy Program v. Tarwater Developmental Ctr., 894 F. Supp. 424, 428 (M.D. Ala. 1995), affirmed, 97 F.3d 492 (11th Cir. 1996).

[7] In addition to providing traditional classroom educational services to special education students school districts are required under IDEA to provide appropriate "related services" which include, but are not limited to, psychological services, physical and occupational therapy, counseling services, health and social work services, and parent counseling and training. 34 C.F.R. § 300.24(a).

to receive P&A services. 42 U.S.C. § 10802(4)(B)(ii). Finally, as noted above, Congress expressly stated that P&As should be actively involved in monitoring and investigating the provision of education to students with disabilities. *See* 42 U.S.C. §§ 15001(a)(1) and 15002(2) and (10).

OPA, as the P&A, has the authority to have access to the names and contact information of all the students' parents and guardians at HTLA and to have access to the facilities at times the students are present. 42 U.S.C. § 10806, 42 U.S.C. § 15043(a)(1)(I), 42 C.F.R. §51.41 and 42, 45 C.F.R. 1386.22. Courts have found that P& A requests for information such as names, address and phone numbers of individuals for whom the P&A has probable cause to believe have been or may be abused or neglected, are well within the access authority of P & As, as such information is necessary in order for the P & A to effectively and fully carry out its mandate such investigations. See, e.g., Georgia Advocacy Office v. Borison, et al., 520 S.E.2d. 701 (1999) (where Georgia P & A had probable cause to believe that drug trial participants had been abused and neglected, the appellate court remanded to superior court with instructions to release all relevant records, including the names, addresses and other contact information for all relevant study participants to P & A).

Similarly, in Pennsylvania Protection & Advocacy, Inc. (PP&A) v. Royer- Greaves School for the Blind, 1999 WL 179797 (E.D. Pa. March 25, 1999), the Court held that the Pennsylvania Protection and Advocacy Inc. was entitled to a list of guardians provided by the school, even though the Protection and Advocacy Agency was unable to provide a sufficient basis of complaints or probable cause to warrant access, and the residents were not clients of the P&A. The Court ruled that even if there was reasonable grounds for denial of records, the facility still had to provide the P & A with the names and contact information for all of the

students' guardians. Id. at *10. The Court acknowledged that this was a broad power for the P&A, but also that requiring the facilities to turn over the guardians' contact information made sense. Id. In order to obtain authorization, "the P & A must be able to contact the guardian. But if it does not have the guardians name and contact information, it cannot do so, leaving the P & A with no ability to obtain consent.[8] Requiring that the facility release the contact information remedies this dilemma." Id.

Thus, in the instant case, HTLA is obligated to release the parent and guardian's contact information to OPA. While under the DD Act and PAIR, OPA has the authority to access this contact information without a sufficient basis of complaints or probable cause, in this case, OPA has received a complaint to the system, and has determined that there is probable cause. OPA has also determined there is probable cause to suspect abuse and neglect given the failure of HTLA to implement individualized behavioral intervention plans that would lessen the need to utilize restraint and seclusion. See Aff. of Garrison at ¶ 18-20 and Aff. of Centeno at ¶ 4-10. OPA thus meets the elements necessary to obtain the requested guardian contact information on several different legal bases.

Defendants claim they cannot release the directory information to OPA because of IDEA and FERPA. Letter of Bird to OPA at 2. Attachment 8. However, case law holds that the P&A access authority prevails over FERPA's restrictions. The Court in Michigan Protection and Advocacy Service v. Miller, 849 F. Supp. 1202 (W.D. Mich. 1994), held that the defendant

[8] The DD Act allows access to records without consent of a private non-state agency guardian as long as an effort was made to obtain consent, assistance was offered to resolve the situation and the guardian has failed or refused to act on behalf of the individual when the P&A has received a complaint or has probable cause to suspect abuse or neglect. 42 U.S.C. §15043(a)(2)(I)(iii)(I)-(V). If OPA is able to obtain the guardian contact information, as noted above, it can still access the records even if a guardian refuses to authorize release of such records. 45 C.F.R. 1386.22(a)(3)(i)-(iii). As held in Disability Law Center v. Reil, 130 F. Supp. 2d 294 (D. Mass. 2001), OPA as the designated Protection and Advocacy agency for the State of Connecticut, has access rights to records mandated notwithstanding the "good faith" refusal of guardians to authorize the release of such records. At the current time, OPA is not seeking such access.

could not rely on FERPA or the IDEA to deny a P&A access to records it needed to conduct an investigation. The Court noted that, "[FERPA] does prohibit federal finding to educational institutions which permit the release of records without parental consent. The DD, PAIMI and PAIR Acts, however, clearly mandate that organizations like [Michigan Protection and Advocacy System] have the authority to access DSS facilities and records in specific cases where the developmentally disabled and mentally ill individuals are involved. Defendant's reliance on the IDEA is misplaced." Id. at 1208.

Similarly, in the instant matter, as in Miller, OPA, as the Protection and Advocacy agency for the State of Connecticut, is seeking access to the facilities so that OPA can pursue its investigation of allegations of abuse and neglect at HTLA. As the P&A, OPA has a duty of confidentiality under §42 U.S.C. § 10806(a) and (b), 45 C.F.R. 1386.22(e)(1)-(3), for any information obtained by a P&A about clients or potential clients, barring any disclosure of such information to third-parties. Armstrong, 266 F. Supp.2d at 310-311. See also Czaplewski, 131 F. Supp.2d at 1052 (Court ruled that the residents of a nursing home would suffer no privacy harm because of confidentiality restrictions on P & As.)[9] This facility access is part of the foundation of the P&A's authority, and has consistently been upheld. See Mississippi Prot. & Advocacy Sys. Inc. v. Cotton, 929 F.2d 1054 (5th Cir. 1991).

Thus, OPA is likely to win on the merits of this case because as part of its investigation, OPA has the authority to the contact information of parents and guardians and the authority to access the facility. Additionally, as OPA is bound by the confidentiality provisions of the DD

[9] Notably, there appears to be one case holding otherwise; however, both the lower court's decision and the one page order from the appellate court, affirming the trial court decision, were unpublished with no precedential effect under the court's rules. Washington Protection and Advocacy Svc v. Evergreen Sch. Dist, 71 Fed.Appx. 654, 2003 WL 21751827 (9th Cir. 2003) (P&A access authority did not trump FERPA's restrictions on releasing information). In addition, the Court's analysis was deficient because it did not address the fact that the regulations implementing the DD Act, 45 CFR

Act and PAIMI barring any third-party disclosure of such information there is no risk of any harm to the students' privacy. Armstrong, 266 F. Supp. 2d. at 320. See also Arizona Ctr. for Disability Law v. Allen, 197 F.R.D. 689, 692 (D. Ariz. 2000). Consequently, Defendants' reliance on state and federal statutes and regulations dealing with disclosure of student information is misplaced.

IV. Conclusion

For the foregoing reasons, Plaintiffs request that this Court issue a preliminary injunction and thereafter a permanent injunction enjoining Defendants from continuing to refuse Plaintiffs access to the HTLA facilities at times students are present and to the directory information of the parents and guardians of the students in pursuit of its statutory obligation to investigate suspected incidents of abuse and neglect. Furthermore, the Court should enjoin the Defendants from engaging in similar acts in the future and order the Defendants to immediately give Plaintiffs the access requested.

Respectfully submitted,

The Plaintiffs,
The State of Connecticut
Office of Protection and Advocacy
For Persons with Disabilities
James McGaughey

By: _____
NANCY B. ALISBERG
Office of Protection and Advocacy
For Persons with Disabilities
60B Weston Street
Hartford, CT 06120
Fed. Bar. No. CT 21321
(860) 297-4397
Fax: (860) 566-8714

1386.22(i) themselves require that service providers turn over identities of guardians to P&As without any showing of probable cause.

PAULETTE G. ANNON
Office of Protection and Advocacy
For Persons with Disabilities
60B Weston Street
Hartford, CT 06120
Fed. Bar No. CT21556
Fax: (860) 566-8714
(860) 297-4329
paulette.annon@po.state.ct.us

Exhibit

1

Robert Henry
Superintendent of Schools

Dr. Barbara D. Macauley
Principal

Beverly Coker and Dwight Fleming
Assistant Principals

Hartford Public Schools

Hartford Transitional Learning Academy

110 Washington Street
Hartford, CT 06106
Phone: (860) 695-6120 Fax: (860) 722-8285
e-mail: htla@hartfordschools.org
&
150 Tower Avenue
Hartford, CT 06120
Phone: (860) 695-6020 Fax: (860) 522-6219
e-mail: htla.annex@hartfordschools.org

USAGE OF THERAPEUTIC PHYSICAL RESTRAINT TO MAINTAIN SAFETY

Please note the following important information:

1. The use of physical force (corporal punishment) as a disciplinary measure is not permitted in the Hartford Public Schools.

2. In accordance with state statutes, a teacher, administrator, or other person entrusted with the care and supervision of a student may use reasonable physical force when he/she believes it is necessary to (a) protect himself/herself or others from immediate physical injury; (b) obtain possession of a dangerous instrument or controlled substance upon or within the control of such student; or (c) protect property from physical damage.

Legal Reference: CGS 53a-18 (P.A. 89-186)

Parent: _____

Student: _____

Date: _____

~~03cv968 Att 2~~

2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

THE STATE OF CONNECTICUT OFFICE OF PROTECTION AND ADVOCACY FOR PERSONS WITH DISABILITIES, and **JAMES MCGAUGHEY,** Executive Director of The State of Connecticut Office Of Protection and Advocacy for Persons with Disabilities	)	
Plaintiffs,	)	CIVIL ACTION NO.
v.	)	August 11, 2004
HARTFORD BOARD OF EDUCATION, HARTFORD PUBLIC SCHOOLS, and **ROBERT HENRY**, in his official capacity as the Superintendent of Schools	)	
Defendants.	)	

AFFIDAVIT OF JOSE CENTENO

Jose Centeno, being duly sworn deposes and says:

1. My name is Jose Centeno. I am over 18 years of age and I understand the obligations of an oath.

2. I have been employed as a Human Services Advocate at the State of Connecticut Office of Protection and Advocacy for Persons with Disabilities (OPA) at 60B Weston Street, Hartford, CT 06120 since 1990. My area of specialization is Special Education. I have provided advocacy services for over 300 families and their children receiving special education and related services throughout the state of Connecticut.

3. I have a Bachelor of Arts from Northwest College, Kirkland, Washington.

4. As part of my work as a Human Services Advocate, I have served children who attended the Hartford Transitional Learning Academy [HTLA] At least two of these children were restrained and secluded while at HTLA.

5. One of these children was restrained on numerous occasions. He complained that he was treated roughly, and he developed bruises as a result of the restraints. He also reported being held tightly enough to cause pain.

6. He also frequently placed in seclusion. On one occasion he complained that his armed was forced behind his back as he was escorted to the "time-out" room.

7. On information and belief, he developed panic attacks as a result of the stress of this situation.

8. Another client also reported being restrained frequently. This child also suffered from bruising as a result of the restraints.

9. I have also heard reports that children served by Padres Abriendo Puertas, an agency housed in OPA offices, also reported being restrained. One such client reported on one occasion receiving rug burns on the face due to a prone restraint. On information and belief there are photographs documenting this injury.

10. In 2002, on a professional visit to the HTLA facility at 110 Washington Street, I observed a child who was subject to a prone 4-point restraint in the middle of the school hallway. I have no reason to believe that the practices at HTLA regarding restraint have changed in 2002.

3

Report Cards

Grade Equivalents:

A+	=	97	C+	=	77	F	=	59 and below
A	=	92	C	=	72			
A-	=	90	C-	=	70			
B+	=	87	D+	=	67			
B	=	82	D	=	62			
B-	=	80	D-	=	60			

High school credits will be determined by the guidelines of the student's district school.

Standards of Student Behavior/Behavior Management Plans

HTLA is a therapeutic program for students with emotional and behavioral needs who have been referred, through the PPT process, to modify their behaviors so that they may experience success in their district school. As such, we have very high standards of behavior for our students. Simply put, there are rewards for good behavior and consequences for poor behavior.

All students will participate in a Points and Levels System which will enable them to earn an increasing number of rewards and privileges as they display appropriate behavior.

Immediate consequences for any display of negative behavior may be:

- Verbal correction
- Loss of Point(s) on a daily point sheet; lowering of placement on the levels system
- Loss of privileges
- After school make-up room for time and/or work missed
- Time-out (see Time-Out section)
- Physical restraint (for students losing self-control). (See Physical Restraint section).
- Parent conference

Use of Time-Out Room

Controlled, monitored time-outs may be necessary to safely address aggressive and assaultive (verbal and physical) behaviors demonstrated by students during the school day. Time-out will be used as a last resort to remediate student behavior.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

THE STATE OF CONNECTICUT OFFICE OF PROTECTION AND ADVOCACY FOR PERSONS WITH DISABILITIES, and **JAMES MCGAUGHEY,** Executive Director of The State of Connecticut Office Of Protection and Advocacy for Persons with Disabilities	)	
Plaintiffs,	)	CIVIL ACTION NO.
v.	)	
HARTFORD BOARD OF EDUCATION, HARTFORD PUBLIC SCHOOLS, and **ROBERT HENRY**, in his official capacity as the Superintendent of Schools	)	August 11, 2004
Defendants.	)	

AFFIDAVIT OF BRUCE GARRISON

Bruce Garrison, being duly sworn deposes and says:

1. My name is Bruce Garrison. I am over 18 years of age and I understand the obligations of an oath.

2. I have been employed as a Human Services Advocate at the State of Connecticut Office of Protection and Advocacy for Persons with Disabilities (OPA) at 60B Weston Street, Hartford, CT 06120 for 17 years. My area of specialization is Special Education. I have provided advocacy services for over 600 families and their children receiving special education and related services throughout the state of Connecticut.

3. I have a Master's Degree in Education/Special Education from the University of Connecticut and have my teacher certification in the areas of regular and special education.

4. During the fall and winter of 2003-2004 I was assigned to work as part of a team to investigate allegations of abuse and neglect at the Hartford Transitional Learning Academy. The team doing the investigation included staff from OPA as well as staff from the State of Connecticut, Office of Child Advocate (OCA).

5. On information and belief, Both OPA and OCA had received complaints alleging abuse and neglect concerning the misapplication of restraints and seclusion at the HTLA facility. OPA therefore had probable cause to conduct an investigation under our federal mandates.

6. On information and belief, OPA has authority under those federal mandates to visit the HTLA facility and observe the students in their environment.

7. On February 3, 2004 the Executive Director of OPA, James McGaughey and the Child Advocate, Jeanne Milstein, sent a letter to Robert Henry, Superintendent of the Hartford Public Schools informing him that the offices would be conducting an investigation of the HTLA programs. The letter further informed Superintendent Henry that investigators would be making their initial visit to the HTLA facility at 110 Washington Street, Hartford, CT on Tuesday, February 10 at 9:00 am.

8. On Tuesday, February 10, 2004 I met Faith Vos Winkel, an Assistant Child Advocate from OCA, and together we walked to HTLA where we arrived at approximately 8:30 am.

9. We entered the building and went directly to the school office where we signed in. We showed the clerk at the desk our ID's and Ms. Vos Winkel informed her that we were from the Office of the Child Advocate and from the Office of Protection and Advocacy. She requested that we meet with Barbara McCauley, the principal of HTLA.

10. We were informed that Ms. McCauley was not in her office, and we were asked to take a seat and wait until she could be contacted.

11. While we waited we observed students, parents and teachers coming and going into the office. Although the office was a public area, we heard students referred to by name. We also observed a large "transportation roster" in the main corridor of the school that contained student names and bus routes. Finally, when we signed into the building, next to the sign-in book on the counter in the school office was a schedule of PPT's that were to be held that day listed by student name. There was no apparent effort to maintain the privacy of students in this public waiting area.

12. We waited for approximately 20-25 minutes. At that time Ms. McCauley entered the school office, greeted us and invited us into her office. Once there, Ms. Vos Winkel informed her that we were there to initiate an investigation into HTLA.

13. Ms. McCauley expressed surprise, and said that she had not been informed that we would be there that day. Ms. Vos Winkel informed her that a letter had been sent to Superintendent Henry by OCA and OPA and Ms. McCauley told us that she had not seen the letter nor been told anything about it. She then asked us what kind of investigation we were there to conduct.

14. Ms. Vos Winkel told her that today we wanted to look at documents relating to policies, procedures and program descriptions of HTLA. She also stated that we would be setting up subsequent visits to observe the programs at HTLA and to talk to faculty. She further informed Ms. McCauley that we would not be looking at confidential records on that day.

15. Ms. McCauley continued to express puzzlement as to why we were there. She pointed to a large stack of documents and stated that representatives from the Center for Children's Advocacy had just been there to review documents and she asked if we were connected to her investigation. We informed her that we were not and that we were conducting a separate investigation. Ms. McCauley then asked who had made the "referrals" to us, and Ms. Vos Winkel told her that information was confidential, but that OCA had indeed received complaints.

16. Ms. McCauley told her that she didn't have a problem with our being there, but that she would have to check with the "administration." She left her office and returned some 10 minutes later. She informed us that she had spoken with Ann Bird, the Assistant Corporation Counsel, she advised her not to let

us into the facility until they could find the letter. Ms. McCauley then asked us to leave, and we did so without beginning our investigation.

17. To this date we have still not received permission to return to HTLA, and other than receiving certain documents we have unable to conduct our investigation of the facility.

18. As part of my work as a Human Services Advocate at OPA, I learned that students are placed at Students are also placed at HTLA without having received a functional behavioral assessment or without having a behavioral intervention plan in their record.

19. The only "plan" these students have is that contained in the "Hartford Transitional Learning Academy, Student and Parent Handbook" at 12. This handbook sets forth "Standards of Student Behavior/Behavior Management Plans." This general plan fails to provide a individualized plan for each particular child.

20. Based on my experience as a Human Services Advocate and based upon my educational experience, the failure to have an individualized behavioral intervention plan places students at risk of inappropriate restraint and seclusion, and thus at risk of abuse and neglect.

BRUCE GARRISON
Human Services Advocate

Signed and sworn to before me this 29th day of July, 2004

Commissioner of the Superior Court

5

Jeanne Milstein
Child Advocate

STATE OF CONNECTICUT

OFFICE OF THE CHILD ADVOCATE
18-20 TRINITY STREET, HARTFORD, CONNECTICUT 06106

OCA copy

February 3, 2004

Robert Henry, Superintendent
Hartford Public Schools
960 Main Street, 8th floor
Hartford, CT 06103

Re: Hartford Transitional Learning Academy

Dear Superintendent Henry:

We are writing to notify you that both the Office of the Child Advocate (OCA) and the Office of Protection and Advocacy for Persons with Disabilities (OPA) have received complaints regarding the provision of educational and related services to Hartford students being served in the Hartford Transitional Learning Academy (HTLA) programs. We will be investigating jointly alleged programmatic deficiencies and violations of student rights pursuant to authority established in sections 46a-13q and sections 46a-11 through 46a-13a of the Connecticut General Statutes, and 42 U.S.C. § 15001 *et. seq.*; 42 U.S.C. § 15043; and 29 U.S.C. § 794(e) *et. seq.*

Investigators from OCA and OPA will be making their initial visit to the 110 Washington Street site of HTLA on Tuesday, February 10, 2004 at 9 a.m. We anticipate the investigation to include policy review, record review, interviews and direct observation of practices. We will make every effort to not disrupt the educational environment.

Thank you in advance for your anticipated cooperation. If you have any questions, please do not hesitate to call.

Sincerely,

Jeanne Milstein
Child Advocate

Jim McGaughey
Executive Director, OPA

Phone: (860) 566-2106, (800) 994-0939 Fax: (860) 566-2251
www.oca.state.ct.us • jeanne.milstein@po.state.ct.us

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

THE STATE OF CONNECTICUT OFFICE OF PROTECTION AND ADVOCACY FOR PERSONS WITH DISABILITIES, and **JAMES MCGAUGHEY,** Executive Director of The State of Connecticut Office Of Protection and Advocacy for Persons with Disabilities	)	
Plaintiffs,	)	CIVIL ACTION NO.
v.	)	August 11, 2004
HARTFORD BOARD OF EDUCATION, HARTFORD PUBLIC SCHOOLS, and **ROBERT HENRY,** in his official capacity as the Superintendent of Schools	)	
Defendants.	)	

AFFIDAVIT OF FAITH VOSWINKEL

Faith VosWinkel, being duly sworn deposes and says:

1. My name is Faith VosWinkel. I am over 18 years of age and I understand the obligations of an oath.

2. I have been employed at the State of Connecticut Office of the Child Advocate ("OCA") at 18-20 Trinity Street, Hartford, CT 06106 since August 10, 2001. I currently am acting as an Assistant Child Advocate. In this position, my responsibilities include conducting fatality reviews/investigations regarding all unexplained unexpected child deaths and manage most of the casework related to special education issues and children with disabilities.

Previously, for approximately fifteen years, I worked at the State of Connecticut Office of Protection and Advocacy for Persons with Disabilities (OPA) at 60B Weston Street, Hartford, CT 06120 as an Assistant Program Director, supervising Human Service Advocates. For approximately four of those years, I was the Acting Program Director overseeing the investigatory and advocacy divisions.

3. I have a Bachelor's Degree from the University of Connecticut and currently am pursuing a master's degree in social work from the University of Connecticut.

4. During the fall and winter of 2003-2004, OCA and OPA began discussions concerning allegations of program deficiencies, improper restraint and seclusion techniques and safety concerns at Hartford Transition Learning Academy (HTLA). Numerous high level inter-agency meetings took place to discuss the manner in which these allegations might be investigated, culminating in OCA and OPA entering into a joint investigatory agreement.

5. I was assigned as lead investigator for OCA. Mr. Bruce Garrison, a Human Services Advocate at OPA, was named lead investigator for OPA.

6. On February 3, 2004 the Executive Director of OPA, James McGaughey and the Child Advocate, Jeanne Milstein, sent a letter to Robert Henry, Superintendent of the Hartford Public Schools informing him that their offices would be conducting a joint investigation of the HTLA programs. The letter further informed Superintendent Henry that investigators would be making

their initial visit to the HTLA facility at 110 Washington Street, Hartford, CT on Tuesday, February 10, 2004 at 9:00 a.m.

7. In order to conduct a proper investigation of the allegations at HTLA, it is imperative that we be allowed to observe students in their school environment.

8. On Tuesday, February 10, 2004 I met Mr. Garrison, and together we walked to HTLA, arriving at approximately 9:00 a.m.

9. We entered the building and went directly to the school's office where we signed in. We showed the clerk at the desk our ID's and I informed her that we were from the Office of the Child Advocate and from the Office of Protection and Advocacy and requested that we meet with Barbara McCauley, the principal of HTLA.

10. We were informed that Ms. McCauley was not presently available, and we were asked to take a seat and wait until she could see us.

11. While we waited we observed students, teachers and other adults coming and going into the office. When we signed into the building, next to the sign-in book on the counter in the school office was a schedule of PPT's that were to be held that day listed by student name. This schedule was in plain view. We also observed, in the main corridor of the school, a large "transportation roster" posted on one of the hallway's walls, that contained students' first and last names, home addresses and bus routes. I pointed this roster out to Mr. Garrison.

12. We waited for approximately 20-25 minutes. At that time Ms. McCauley greeted us and invited us into her office. Once there, I informed her that we were there to initiate an investigation into HTLA.

13. Ms. McCauley expressed surprise, and said that she had not been informed that we would be there that day. I informed her that a courtesy letter had been sent to Superintendent Henry by OCA and OPA notifying him of our intention to investigate HTLA. I further stressed that this letter was a mere formality. Ms. McCauley told us that she had not seen the letter nor been told anything about it. She then asked us what kind of investigation we were there to conduct.

14. I told Ms. McCauley that today we wanted to look at documents relating to policies, procedures and program descriptions of HTLA. I also stated that we would be setting up subsequent visits to observe the programs at HTLA and to talk to faculty. I further informed Ms. McCauley that we would not be going into confidential student records on that day, although we would like a tour of the school building.

15. Ms. McCauley continued to express puzzlement as to why we were there. She pointed to a large stack of documents and stated that representatives of the Center for Children's Advocacy had just been there to review documents and she asked if we were connected to that investigation. I informed her that we were not and that we were conducting a separate investigation. Ms. McCauley then asked who had made the "referrals" to us, and I told her that information was confidential, but that OCA had indeed received complaints.

16. Ms. McCauley told us that she didn't have a problem with our being there, but that she would have to check with the "administration." She left her office and returned some 10 minutes later. She informed us that she had spoken with Ann Bird, the Assistant Corporation Counsel, who advised her not to let us into the facility until they could find the letter. Ms. McCauley then asked us to leave, and we did so without beginning our investigation.

17. Prior to departing HTLA, I again tried to impress upon Ms. McCauley the parameters of the Child Advocate's statutory authority and that we did not intend to review confidential material that day.

18. To this date we still have not gained access into HTLA in order to properly conduct our investigation.

Faith VosWinkel

Faith VosWinkel
Assistant Child Advocate

Signed and sworn to before me this 20th day of July, 2004

Maureen Regula

Commissioner of the Superior Court
Maureen Regula

7

STATE OF CONNECTICUT

OFFICE OF PROTECTION AND ADVOCACY FOR
PERSONS WITH DISABILITIES
60B WESTON STREET, HARTFORD, CT 06120-1551

April 12, 2004

Ann F. Bird
Assistant Corporation Counsel
City of Hartford
550 Main Street – Room 210
Hartford, CT 06103

Dear Ms. Bird:

It was a pleasure meeting you on Wednesday, April 7 at the offices of the Child Advocate. I am pleased to provide you with information regarding the federal statutes that govern the work of the Office of Protection and Advocacy. I am certain that after you review these statutes that you will understand that we have the authority to have access to the facilities that comprise HTLA while the students are present. Furthermore, you will come to understand that we have the authority to obtain the names of the parents and guardians of these students so that we may seek authorization to obtain their records. Put more simply, our federal authority supercedes the privacy provisions of the Family Educational Rights and Privacy Act [FERPA].

As I mentioned during our meeting, there are three statutes that are relevant to the investigation being undertaken by OCA and OPA. They are the Protection and Advocacy for Individuals with Mental Illness Act [PAIMI], 42 U.S.C. §§ 10801 – 10807, the Developmental Disabilities Assistance and Bill of Rights Act [DD Act], 42 U.S.C. §§ 15041 – 15045, and the Protection and Advocacy of Individual Rights Act [PAIR], 29 U.S.C. 794e. PAIMI is implemented by regulations at 42 CFR Part 51, and the DD Act at 45 CFR 1386.20-25. PAIR provides that it shall have the same access as the DD Act. 29 U.S.C. 794e (f)(2).

As a review of the case law will show you, courts have uniformly held that the P&A access authorities require facilities to permit the P&A to operate with broad discretion and independence in gaining access to facilities and records for investigative purposes. One case that I would particularly suggest that you read is Michigan Protection and Advocacy Service, Inc. v. Miller, 849 F. Supp. 1202 (W.D. Mich. 1994). Miller addresses the right of the Michigan P&A to obtain access to a juvenile facility and to records of individuals in that facility notwithstanding objections from the facility. I would also suggest you read Office of Protection and Advocacy for Persons with Disabilities v. Armstrong, 266 F. Supp. 2d 202 (D. Conn. 2003). This case will

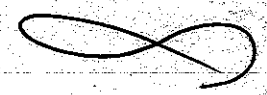
give you a good idea of how broadly P&A access has been construed by the one Connecticut Court that has had the opportunity to do so as yet.

Again, I am confident that after a review of the statutes and the case law, we will be permitted to conduct our investigation utilizing the full extent of our authority. Please be assured that this office will act with complete discretion and will comply with our requirements to maintain confidential all student information. I look forward to hearing from you.

Very truly yours,

Nancy B. Alisberg
Managing Attorney

Cc: James McGaughey
Jeanne Millstein
M.J. McCarthy
Amador Mojica



CITY OF HARTFORD

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MAY - 5

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ANN F. BIRD
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May 3, 2004

Nancy B. Alisberg
Managing Attorney
Office of Protection and Advocacy
For Persons With Disabilities
60B Weston Street
Hartford, CT 06120-1551

Re: HTLA

Dear Attorney Alisberg:

Thank you for your letter of April 12, 2004. Now that I have reviewed the authorities provided in your letter and conducted additional research, I remain firmly convinced that neither these nor other legal authorities allow or require the Hartford Public Schools to provide your office with access to confidential student records or to the HTLA facility while students are attending.

Of the statutes you cited, The Protection and Advocacy for Individuals with Mental Illness Act (PAIMI) would seem closest to applying to HTLA's students. That statute, however, addresses protection and advocacy for persons with significant mental illness who are inpatient or resident in a facility, or in the process of being admitted to a facility, or incarcerated. 42 CRF Section 51.2. The HTLA students generally do not meet this definition, as they are neither inpatient nor incarcerated, at least while attending HTLA.

Even if PAIMI did apply to the HTLA students, however, PAIMI provides that P&A may have access to records only under circumstances that do not apply here. P&A may have access to records of (a) persons who are clients of P&A and who have authorized such access; (b) persons whose mental condition prevents self authorization and who have no guardian or other representative who can give authorization and where P&A has a specific complaint or probable cause as to

neglect or abuse; or (c) persons who have guardians or conservators who have not responded to requests for authorization and where P&A has a complaint or probable cause to believe there is a serious or immediate threat to health or safety. 42 U.S.C. Section 10805(a)(1)(4). These conditions do not apply to HTLA students.

PAIMI also clearly does not require or permit Hartford Public Schools to provide P&A with access to the HTLA facility. Although PAIMI indicates that a P&A may "have access to facilities in the State providing care or treatment", the regulations clearly define "facility" to include only residential facilities. 42 CFR Section 51.2. HTLA is not a residential program and does not provide residential services. Students return to their parents or guardians each day after school.

Similarly, the Developmental Disabilities Assistance and Bill of Rights Act (DD Act) does not apply to HTLA students because they do not meet the definition of persons with a "developmental disability" under the Act. 42 U.S.C. Section 15002(8) defines developmental disability to mean "a severe, chronic disability of an individual that . . . results in substantial functional limitations in 3 or more . . . [defined] areas of major life activity." Although some HTLA students may have developmental deficits, these tend to be slight. Even if some HTLA students did had developmental disabilities, however, the DD Act's provision for access to records is very similar to PAIMI's provision, and does not apply here, in the absence of individualized authorization by a parent or adult student. See 42 U.S.C. Section 15043(a)(2)(I).

Finally, the Protection and Advocacy of Individual Rights Act (PAIR), provides funding for organizations such as yours, but does not vest your agency with additional powers or authority.

In addition, the judicial decisions that you cited, while interesting, all deal with situations very unlike HTLA's because they involve residential facilities, deceased disabled individuals, or severely disabled people who have no guardians and are incapable of seeking assistance or authorizing access to their own records by virtue of their disabilities.

HTLA's students are either capable of advocating for themselves or providing authorization for access or have parents or other guardians who are capable of advocating and consenting to access. Nor are HTLA students and their parents so disabled or isolated that they are unable to either seek assistance or to consent to access by P&A. Obviously, if any HTLA students are clients of P&A and P&A has received authorization for release of records, we will honor those authorizations. Otherwise, Hartford may not disclose records or identify parents or guardians or

provide access to students at HTLA because to do so would violate FERPA and is not mandated by PAIMI, the DD Act or (PAIR).

Thank you for your courtesy and consideration in this regard.

Sincerely,

Ann F. Bird
Assistant Corporation Counsel

cc: Robert Henry
Amador Mojica
Jody S. Lefkowitz
Barbara Macauley
James McGaughey
Jeanne Millstein
M.J. McCarthy

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STATE OF CONNECTICUT

OFFICE OF PROTECTION AND ADVOCACY FOR
PERSONS WITH DISABILITIES
60B WESTON STREET, HARTFORD, CT 06120-1551

July 20, 2004

Ann F. Bird
Assistant Corporation Counsel
City of Hartford
550 Main Street – Room 210
Hartford, CT 06103

Re: Access to HTLA Facilities and Directory Information

Dear Ms. Bird:

This letter will serve as a demand letter regarding the refusal of the Hartford Public Schools to allow the Office of Protection and Advocacy to have access to the HTLA facilities and to directory information for the parents and guardians of HTLA students.

As we informed you in our meeting on April 7, 2004 and again on April 8 by letter, OPA has state and federal authority to conduct an investigation of HTLA. That investigatory authority includes the right to have access to the facilities and to the requested directory information. Your failure to comply with this authority constitutes a violation of OPA's rights. We hope to be able to settle this matter without resorting to litigation. We are prepared to file suit in Federal District Court by July 30, 2004. If the issues are not completely resolved by that date we shall proceed to litigate the matter.

I look forward to prompt reply to this letter, and I look forward to resolving the issues.

Very truly yours,

Nancy B. Alisberg
Managing Attorney

Cc: James McGaughey
Robert Henry
Amador Mojica

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CITY OF HARTFORD

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July 22, 2004

Nancy B. Alisberg
Managing Attorney
State Office of Protection And Advocacy
For Persons With Disabilities
60B Weston Street
Hartford, CT 06120-1551

Re: Access to HTLA Facilities and Directory Information

Dear Attorney Alisberg:

Thank you for your letter of July 20, 2004. Your letter's claim that the Hartford Public Schools has refused the Office of Protection and Advocacy access to the HTLA facilities is inaccurate. As you know, during our meeting on April 7, 2004, Superintendent Henry made clear that access to the HTLA facility and administration (but not students) will be provided at a mutually convenient time upon request. Superintendent Henry asked that communications to arrange such access be made through Acting Superintendent Amador Mojica. In fact, I also confirmed this officer in a letter of April 30, 2004 to Faith Voswinkel, Protection and Advocacy's "co-investigator" from the Office of the Child Advocate.

I do not believe Protection and Advocacy has contacted Mr. Mojica to arrange such a meeting or access to the facility.

As I also indicated during the April 7, 2004 meeting and in my letter to you of May 3, 2004, however, the Hartford Public Schools cannot allow access to the students themselves, absent individualized authorization, because to do so would violate its obligations under FERPA. I also provided a detailed explanation as to why the federal authorizing statutes for the Office of Protection and Advocacy do not authorize such access in my letter of May 3, 2004. You have not responded to my letter or otherwise indicated disagreement with its conclusions.

Your claim that the Hartford Public Schools has denied the Office of Protection and Advocacy Directory information for the parents and guardians of HTLA students is also puzzling because that information has never actually been requested. The only documents that have been requested were requested by the Office of the Child Advocate, and those documents were provided. Even if a request had been made for a list of parents and guardians, however, FERPA also prohibits the Hartford Public Schools from providing that data. The Hartford Public Schools has not followed a practice of notifying HTLA parents and guardians that their names and addresses would be disclosed upon request, and has not afforded them the opportunity to prevent that disclosure. Under those circumstances, FERPA prohibits disclosure of the names and addresses of parents and guardians.

Sincerely,

Ann F. Bird
Assistant Corporation Counsel

cc: Robert Henry, Superintendent of Schools
Amador Mojica, Acting Assistant Superintendent
Dr. Barbara Macauley, HTLA

STATE OF CONNECTICUT

OFFICE OF PROTECTION AND ADVOCACY FOR
PERSONS WITH DISABILITIES
60B WESTON STREET, HARTFORD, CT 06120-1551

July 27, 2004

Ann F. Bird
Assistant Corporation Counsel
City of Hartford
550 Main Street – Room 210
Hartford, CT 06103

Re: Letter of July 22, 2004

Dear Ms. Bird:

Thank you for your response to my July 20, 2004 letter. Unfortunately, it seems that we will not be able to resolve this matter short of litigation. Our access authority to facilities expressly permits us to have access to the individuals who are in the facilities. Access to an empty school is simply far short of the access granted to us under our federal statutes. See 42 C.F.R. § 51.42(b) and 45 C.F.R. § 1386.22(g).

Secondly, if you reread my April 12, 2004 letter, you will note that we did indeed request directory information at that time. Nevertheless, since you have stated that you will not provide that information, further discussion seems fruitless.

I therefore interpret your letter as refusing to allow us to have the access rights to which we are entitled.

Very truly yours,

Nancy B. Alisberg
Managing Attorney

Cc: James McGaughey
Robert Henry
Amador Mojica
Peter Tyrrell

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

IOWA PROTECTION AND ADVOCACY SERVICES, INC. Plaintiff, vs. RES-CARE PREMIER, INC., d/b/a VICTORIAN ACRES REHABILITATION, Defendant.	CIVIL NO. 4-02-CV-10112 ORDER

The Court has before it plaintiff Iowa Protection and Advocacy Services, Inc.'s ("Iowa P & A") motion for temporary restraining order and preliminary injunction, filed contemporaneously with its complaint on February 26, 2002.[1] The Court held a hearing on March 11, 2002, and defendant filed a resistance memorandum on March 13, 2002. The motion is fully submitted.

I. BACKGROUND

Iowa P & A is a private, non-profit corporation operating under three separate federal statutes: the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. §§ 15041 *et seq.* ("PADD"); the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §§ 10801 *et seq.* ("PAIMI"); and the Protection and Advocacy of Individual Rights Act, 29 U.S.C. §§ 794e *et seq.* ("PAIR"). Iowa P & A's mission is to protect the rights of persons with developmental disabilities, mental illness disabilities and certain other disabilities. The State of Iowa has designated Iowa P & A as an appropriate agency for investigating allegations of abuse and neglect of persons covered under these statutes.

Defendant Res-Care Premier, Inc. ("Res-Care") operates Victorian Acres Rehabilitation

[1] Although the motion is styled as a temporary restraining order, the Court notes defendant participated in the hearing and was represented by counsel.

("Victorian Acres"). Victorian Acres is a residential facility in Altoona, Iowa that cares for persons with traumatic brain injuries.

On December 30, 2001, a Victorian Acres resident, to whom the Court shall refer as "T," was involved in an incident with a Victorian Acres staff member. According to Res-Care, T had an outburst which required redirection from the staff member. While attempting to move T into a wheelchair, the staff member stumbled and both resident and staff member fell to the ground. Res-Care states that T sustained a "scratch on his buttock area." Victorian Acres did not immediately report the incident to the Iowa Department of Inspections and Appeals, ("DIA"), the licensing body for the State of Iowa, because it did not believe that any abuse had occurred.

In mid-January 2002, Res-Care made the decision to terminate an employee by the name of "Irene" for alleged verbal abuse of residents. During her exit interview, Irene made a vague reference to an incident of abuse of resident T. Although Irene did not give a date on which the incident allegedly occurred, Victorian Acres administrators reviewed the records and determined Irene likely was referring to the December 30, 2001 incident. Both Res-Care, and DIA, whom Res-Care had contacted, then conducted independent investigations of the incident. The Veterans Administration, the agency responsible for payment of T's care in the facility, also conducted an investigation. Res-Care claims that none of the three groups could confirm that abuse had occurred.

On or about January 29, 2002, Iowa P & A received a complaint from a concerned individual that resident "T" had been physically assaulted.[2] The version of events provided to Iowa P & A differs from those presented by Res-Care. According to Iowa P & A, a staff member dragged T outside of the building without his pants, which resulted in a five-inch wound to T's backside and buttocks. On January 31, 2002, David Parr, disability rights advocate and educator for Iowa P & A, contacted Victorian Acres, and spoke with Eric Cantu, then acting administrator.

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[2] Although the individual is known to plaintiff, the individual prefers to remain anonymous to defendant and/or the public to ensure no retaliatory action is taken against resident T.

Mr. Parr informed Mr. Cantu that Iowa P & A was authorized to investigate the alleged assault, and requested information regarding the incident. Mr. Cantu asked Mr. Parr to provide him with a formal written request. He then told Mr. Parr that he did not have the authority to release confidential patient records, but would get back to him. Mr. Cantu stated during the hearing that after speaking with Res-Care management, he called Mr. Parr later in the day and told him Res-Care was unable to release the information requested.

The following day, Mr. Parr, along with Marsha Gelina and Bonnie Kerns of the Iowa P & A, went to Victorian Acres to investigate the alleged assault. Mr. Cantu met the three individuals in the parking lot. The individuals told Mr. Cantu they were investigators from the Iowa P & A, and that they had probable cause to believe that a physical assault had taken place at the facility, and planned to investigate. It appears only one of the Iowa P & A representatives produced a business card. Mr. Cantu asked the three to leave.

Shortly thereafter, a woman named Melissa Gonzalez came out of the facility to speak with the individuals.[3] Mr. Parr produced two form letters outlining the statutory authority on which Iowa P & A bases its right to access a facility, and purporting to announce the reason for this particular investigation. One of these letters, attached to the complaint as "Exhibit B," indicated that Iowa P & A intended to conduct a "routine monitoring" of the facility. The second letter, introduced during the hearing as Exhibit 1, indicated that Iowa P & A was investigating an alleged sexual assault at a Dallas County care facility. Ms. Gonzalez stated that she would need to confer with the facility administrator and legal counsel regarding the letters. Meanwhile, Mr. Parr proceeded to take photographs of the facility grounds.

A woman identified only as "Julie" then came out of the facility and stated the three were on private property and must leave. Ms. Gelina asked if Julie understood the basis for Iowa P &A's authority, and Julie again stated the individuals were on private property and should leave.

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[3] It appears that Ms. Gonzalez works in an unidentified capacity at Res-Care's corporate headquarters.

The three individuals left the property shortly thereafter.

Plaintiff filed its present complaint seeking declaratory and injunctive relief on February 26, 2002. In its complaint, Iowa P & A urges this Court to declare that Res-Care's "policies, regulations, practices and conduct of interfering with and denying Iowa P &A proper and immediate access violates 29 U.S.C. section 794e and 42 U.S.C. section 105041, *et seq*," and to both preliminarily and permanently enjoin Res-Care from denying Iowa P & A its requested access. Complaint ¶¶ 35- 37.

In resisting Iowa P & A's request for preliminary injunctive relief, Res-Care states it does not contest the agency's general authority to investigate allegations of abuse and neglect, but disputes that probable cause exists to initiate an investigation in the present case. It also seeks to clarify the parameters of any lawful investigation that may result.

II. APPLICABLE LAW AND DISCUSSION

A. Law Governing Preliminary Injunctive Relief

In determining whether to grant preliminary injunctive relief, this Court must consider the following factors:1) plaintiffs' probability of success on the merits; 2) the threat of irreparable harm to plaintiffs; 3) the balance between this harm and potential harm to others if relief is granted; and 4) whether an injunction serves the public interest. *Sanborn Mfg. Co., Inc. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 485 (8th Cir. 1993) (citing *Dataphase Sys., Inc. v. C L Sys., Inc*, 640 F.2d 109, 114 (8th Cir. 1981)). The same factors are used to evaluate a request for a temporary restraining order. *See S.B. McLaughlin & Co. v. Tudor Oaks Condominium Project*, 877 F.2d 707, 708 (8th Cir. 1989); *Sports Design & Development, Inc. v. Schoneboom*, 871 F. Supp. 1158, 1162-65 (N.D. Iowa 1995).

B. Probability of Success on the Merits

1. Whether Residents Covered by Iowa P & A Directives

The Eighth Circuit has held that although no one *Dataphase* factor is dispositive, *see, e.g.*,

Calvin Klein Cosmetics Corp. v. Lenox Lab., 815 F.2d 500, 503 (8th Cir. 1987), a plaintiff's probability of success should generally be given considerable weight. *S & M Constructors, Inc. v. Foley Co.*, 959 F.2d 97, 98 (8th Cir. 1992); *Tullos v. Parks*, 915 F.2d 1192, 1196 (8th Cir. 1990). Accordingly, the Court will begin by addressing the merits of plaintiff's complaint.

As set forth above, based on a complaint received in January 2002, Iowa P & A currently seeks access to the records of resident T, whom it believes has been subject to neglect or abuse, as well as those of all individuals residing in the Victorian Acres facility. Res-Care rejects Iowa P & A's request on several grounds. First, Res-Care argues that no showing has been made that the federal authority under which Iowa P & A operates apply to the brain-injured individuals currently residing in defendant's facility. Admittedly, the PADD and PAIMI programs are directed toward individuals with developmental and mental illness disabilities, respectively. *See* PADD, 42 U.S.C. § 15041 (PADD program created to protect the legal and human rights of individuals with developmental disabilities); PAIMI, 42 U.S.C. § 10803 (PAIMI Act designed to "protect and advocate the rights of individuals with mental illness . . . ."). The PAIR program was created, however, to provide the same protection and advocacy services for individuals with disabilities who were otherwise ineligible for the services under either the PADD or PAIMI programs. 29 U.S.C. § 794e(a)(1)(A)-(B)(ii).[4]

The statute does not expressly state that individuals with traumatic brain injuries are

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[4] Specifically, PAIR was enacted:

> To protect the legal and human rights of individuals with disabilities who -
> (A) need services that are beyond the scope of services authorized to be provided by the client assistance program under section 732 of this title; and
> (B)(i) are ineligible for protection and advocacy programs under subtitle C of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 [42 U.S.C.A. § 15041 *et seq.*] because the individuals do not have a developmental disability, as defined in section 102 of such Act; (42 U.S.C. § 6002); and
> (ii) are ineligible for services under the Protection and Advocacy for Mentally Ill Individuals Act of 1986 (42 U.S.C. § 10801 *et seq.*) because the individuals are not individuals with mental illness as defined in section 102 of such Act.

29 U.S.C. § 794e(a)(1)(A)-(B)(ii).

covered under the PAIR program. Nevertheless, since this type of disability cannot appropriately be categorized as mental illness, under PAIMI, or developmental, under PADD, the Court finds that individuals with traumatic brain injuries fall within the scope of the PAIR program.

2. Whether Iowa P & A is Entitled to Access Resident T's Records

Res-Care also argues that Iowa P & A has failed to fulfill the statutory directives which would entitle it to access facility records. Specifically, Res-Care contends Iowa P & A failed to establish probable cause to believe neglect or abuse had occurred. Res-Care also contends Iowa P & A has failed to prove it contacted T's legal guardian before initiating its investigation.

Initially, the Court feels compelled to note that the Iowa P & A representatives' attempt to enter the Victorian Acres facility on January 31, 2002 was less than professional. The extensive, intrusive nature of the representatives' request to investigate certainly carried with it the responsibility to appropriately identify themselves, and to provide the facility with sufficient detail of their probable cause to access facility records.

That having been said, however, the Court finds defendant no longer has a legal basis on which to deny or delay access. Congress enacted the PAIR program to provide protection and advocacy services to certain individuals with disabilities not covered under the PADD or PAIMI Acts. *See* 29 U.S.C. § 794e(a). The PAIR statute further provides that an agency designated under the Act shall have "the same general authorities, including access to records and program income" as agencies designated under the PADD Act. *Id.* § 794e(f)(2). The PADD Act provides in turn that the designated state agency, in this case Iowa P & A, shall have access to the records of covered individuals in cases in which the individual, or the individual's legal guardian, conservator or other legal representative has authorized the system to have such access. 42 U.S.C. § 15043(a)(2)(I)(i)-(iii). In addition, Iowa P & A shall also have access to the individual's records if:

> (ii) (I) the individual, by reason of such individual's mental or physical condition, is unable to authorize the system to have such access;

(II) the individual does not have a legal guardian, conservator, or other legal representative, or the legal guardian of the individual is the State; and
(III) a complaint has been received by the system about the individual with regard to the status or treatment of the individual or, as a result of monitoring or other activities, there is probable cause to believe that such individual has been subject to abuse or neglect; and

(iii) any individual with a developmental disability in a situation in which
(I) the individual has a legal guardian, conservator, or other legal representative;
(II) a complaint has been received by the system about the individual with regard to the status or treatment of the individual or, as a result of monitoring or other activities, there is probable cause to believe that such individual has been subject to abuse and neglect;
(III) such representative has been contacted by such system, upon receipt of the name and address of such representative;
(IV) such system has offered assistance to such representative to resolve the situation; and
(V) such representative has failed or refused to act on behalf of the individual.

42 U.S.C. § 15043(a)(2)(I)(i)-(iii). Because resident T has a legal guardian empowered to make decisions regarding his care, the Court finds subsection (a)(2)(I)(iii) governs Iowa P & A's right of access to T's facility records.

With regard to the issue of probable cause, the evidence shows that Iowa P & A received a complaint that an individual entitled to protection under the PAIR Act was dragged outside in the middle of winter without his pants on by a Victorian Acres staff member, and suffered a five-inch wound during the process. Based on this complaint, Iowa P & A determined it had probable cause to believe the individual had been subjected to abuse or neglect. 29 U.S.C. § 794e(f)(2); 42 U.S.C. § 15043(a)(2)(I)(ii)(III).

In its resistance memorandum, Res-Care contends the fact that two other agencies, DIA and the Veterans' Administration, fully investigated the incident and failed to find abuse prevents plaintiff from establishing probable cause as a matter of law. This Court disagrees. First of all, DIA had declined to release its report of the incident to plaintiff until forced to do so by court order on March 12, 2002. *See Iowa Protection & Advocacy Services, Inc. v. Rasmussen*, No. 4-02-CV-90004 (S.D. Iowa March 12, 2002) (Pratt, J)[5]. Secondly, probable cause determinations

[5] Local Rule 3.1(e) requires that parties identify on the civil cover sheet "all related cases of which the plaintiff or the plaintiff's counsel is aware that either are pending in any Iowa state or

are made by Iowa P & A exclusive of other investigative authorities. As reasoned by Judge Pratt in *Rasmussen*: "[P]rotection and advocacy systems are established as independent checks on state care and regulation of care for dependent adults. That independent check would become meaningless if a state was allowed to simply legislate away a protection and advocacy system's power to investigate by enacting restrictions." *Rasmussen*, slip op. at 14-16; *see also Arizona Ctr. For Disability Law v. Allen*, 197 F.R.D. 689, 693 (D. Ariz. 2000) ("[A] P & A is the final arbiter of probable cause for the purpose of triggering its authority to access all records for an individual that may have been subject to abuse or neglect. To conclude otherwise would frustrate the purpose of the P & A laws . . . ."). Based on the seriousness of the allegations contained in the complaint received by Iowa P & A, the Court finds Iowa P & A likely has a sound basis for determining it has probable cause for investigating the incident.

Res-Care also questions whether Iowa P & A appropriately contacted T's guardian as required by the statute. Iowa P & A asserts it did contact the guardian, and received consent to proceed with its investigation, but that the individual desires to remain anonymous. On March 20, 2002, Iowa P & A submitted to this Court in camera a document entitled, "Iowa Protection and Advocacy Services, Inc. Investigative Agreement for Advocacy Services," which is signed by T's guardian. This form confirms that T's guardian was in fact the individual who initially contacted Iowa P & A in January 2002, and that the guardian therefore had appropriate notice of Iowa P & A's investigation. Absent a statutory or regulatory provision dictating the form of proof of notification, the Court is satisfied Iowa P & A has complied with section 15043(a)(2)(I)(iii) of the PADD statute.[6]

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federal court or were concluded in any Iowa state or federal court within the preceeding year." Recently, the Court has encountered many instances in which plaintiff's counsel have failed to list related cases. In the event of future litigation, plaintiff's counsel is urged to list this and prior court actions as related cases. After evaluating potential similarities in the legal and factual issues involved, the Court will make the appropriate judicial assignment.

[6] Iowa P & A argues alternatively that even if the Court finds it did not properly contact T's guardian, provisions contained in the PADD Act entitle it to have immediate access to facility records in situations in which it determines "there is probable cause to believe that the health or safety of the

3. Whether Iowa P & A is Entitled to Investigate Facility as a Whole

In addition to the care provided to T, Iowa P & A also seeks to investigate the care provided to Victorian Acres residents as a whole. In support of this request, Iowa P & A argues that Res-Care has admitted that some type of incident involving resident T did in fact occur in December 2001. Iowa P & A also notes that one staff member was found by Victorian Acres administrators to have verbally abused residents. That staff member has since been terminated, however, and there are no allegations of verbal abuse by other staff members.

In evaluating plaintiff's request for broad-based access, the Court acknowledges that Iowa P & A is the final arbiter of a finding of probable cause to initiate an investigation. *Rasmussen*, slip op. at 14-16; *Arizona Ctr. For Disability Law*, 197 F.R.D. at 693. Nevertheless, the Court does not believe that Congress intended to allow the designated PADD, PAIMI or PAIR agency(s) unbridled authority to access facility records. Rather, a review of the legislation reveals that the statutory focus of the mandated protection and advocacy services is on alleged neglect or abuse of specific *individuals*. *See* 42 U.S.C. § 15043(a)(2)(I)(i)-(iii) (outlining procedures a PADD agency may use to gain access to *individual* records); *see also* 29 U.S.C. § 794e (f)(2) (indicating agencies empowered under PAIR shall have "the same general authorities" as set forth under the PADD Act).

Unlike the situation in *Gerard*, there is no allegation that "other residents" of [Victorian Acres] may also be in jeopardy of being abused." *Iowa Protection and Advocacy Services v. Gerard Treatment Programs, L.L.C.*, 152 F. Supp.2d 1150, 1153 (N.D. Iowa 2001); *see also Pennsylvania Protection & Advocacy, Inc. v. Royer-Greaves School for Blind*, No. CIV. A. 98-3995, 1999 WL 179797 at *1 (E.D. Pa. Mar. 25, 1999) (protection and advocacy agency sought to investigate allegation of "systemic neglect" at school for mentally-challenged blind students).

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individual is in serious *and immediate* jeopardy." 42 U.S.C. § 15043(a)(2)(j)(ii)(I)-(II) (emphasis added). Although the Court does not want to diminish the seriousness of the allegations made against Victorian Acres, Iowa P & A's own delay in filing the present complaint and request for preliminary injunctive relief belie any claim that it believes T is in *immediate* jeopardy.

There is no evidence in the present case to suggest any abuse is ongoing, that other residents have been affected, or that the alleged mistreatment resulted from a Victorian Acres policy or procedure. Accordingly, absent evidence any resident is in immediate jeopardy, the Court declines to enable Iowa P & A to bypass the resident-specific procedures set forth under section 15043(a) of the PADD Act by initiating a broad-based investigation. If, after reviewing T's records, Iowa P & A representatives conclude they have probable cause to believe that other covered individuals residing in Victorian Acres have been subject to abuse or neglect, they may initiate the appropriate procedures to gain access to those records as well.

4. Conclusion Regarding Probable Success on the Merits

Based on the severity of the allegations made in the complaint received by Iowa P & A, the Court finds Iowa P & A is likely to succeed on the merits of its claim that it has probable cause to believe that resident T was subjected to abuse or neglect. Nevertheless, absent evidence that any particular resident is in immediate jeopardy, or that an abusive individual remains on staff at Victorian Acres, the Court does not believe Iowa P & A is likely to succeed on the merits of its request to obtain open access to all facility records.

C. Threat of Irreparable Harm to Plaintiffs

Although the Court's finding that plaintiffs are likely to succeed in part on the merits carries considerable weight, *S & M Constructors, Inc. v. Foley Co.*, 959 F.2d at 98, this finding does not eliminate the need to at least consider the remaining three *Dataphase* factors. *Calvin Klein Cosmetics Corp. v. Lenox Lab.*, 815 F.2d at 503. The first of the three remaining factors is whether a denial of preliminary injunctive relief will irreparably harm the plaintiff organization.

Plaintiff contends the continued denial of access will irreparably harm its ability to comply with its congressional mandate to investigate the report of abuse of T, an individual covered by plaintiff's enabling statutes. This Court agrees, finding that although T may not be in *immediate* danger, plaintiff's ability to protect him from future harm is further compromised with each additional day it is denied access to facility records. *See also Rasmussen*, slip op. at 9;

Gerard, 152 F. Supp. 2d at 1168-72. As noted by the Court in *Gerard*:

> [W]hether or not other investigations have already been conducted of alleged abuse and neglect . . . and whether or not any investigation already undertaken by [Iowa P & A] or likely to be undertaken by [Iowa P & A] has or will reveal that no abuse or neglect has occurred . . . [Iowa P & A] is still irreparably harmed by being prevented from pursuing fully its right to access records . . . in pursuit of its duty to investigate circumstances providing probable cause to believe abuse or neglect may be occurring.

Gerard, 152 F. Supp. 2d at 1173 (internal citation omitted). The Court therefore finds this factor weighs in favor of granting preliminary injunctive relief.

D. Balance of Harms

The Court must also consider the balance between this harm and potential harm to others if relief is granted. *Sanborn Mfg. Co.*, 997 F.2d at 485. In the present case, the only potential harm cited by Res-Care in the event injunctive relief is granted is a breach of client confidentiality. This argument is not persuasive, however, as the PAIR program requires Iowa P & A to conduct all investigations in a confidential manner. Pursuant to the applicable regulations:

> (a) all personal information about individuals served by any eligible system under this part, including lists of names, addresses, photographs, and records of evaluation, must be held confidential.
> (b) The eligible system's use of information and records concerning individuals must be limited only to purposes directly connected with the protection and advocacy program, including program evaluation activities . . . .

34 C.F.R. § 381.31 (2001). The Court therefore concludes this factor supports the issuance of preliminary injunctive relief.

E. Whether Injunction Serves the Public Interest

Finally, the Court must consider whether the issuance of a preliminary injunction and/or temporary restraining order serves the public interest. *Sanborn Mfg. Co.*, 997 F.2d at 485. This Court finds that it does. As noted in *Rasmussen*: "The PADD Act and the PAIMI Act set forth a clear federal legislative mandate for protection and advocacy systems to review independently care for dependent adults by state and privately run caregivers." *Rasmussen*, slip op. at 10. The PAIR Act echoes this mandate for certain individuals with disabilities otherwise ineligible for

services under the PADD or PAIMI Acts. *See* 29 U.S.C. § 794e. Because plaintiff's ability to protect T from future harm depends upon a timely investigation of the allegations at issue, the Court finds granting preliminary relief is warranted.

III. CONCLUSION

For the reasons outlined above, plaintiff's motion for a temporary restraining order/preliminary injunction is granted as follows:

1. Defendant is immediately and temporarily enjoined from preventing or interfering with access by appropriately identified Iowa P & A representatives to defendant's records concerning resident T.

2. As set forth above, if, after reviewing T's records, Iowa P & A representatives conclude they have probable cause to believe that other covered individuals residing in Victorian Acres have been subject to abuse or neglect, they may initiate the appropriate procedures to gain access to those records as well.

IT IS FURTHER ORDERED that within ten (10) days from the date of this Order, the parties should jointly contact the chambers of the Honorable Ross A. Walters, Chief Magistrate Judge for the Southern District of Iowa, to establish an expedited briefing and/or trial schedule to resolve plaintiff's complaint for declarative and permanent injunctive relief.

IT IS ORDERED.

Dated this 11th day of March, 2002.

RONALD E. LONGSTAFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT