

UPDATE: Tribute to Louise Underwood, 1936-2008

VOR Weekly E-Mail Update

October 10, 2008

Contents

FOCUS ON MASSACHUSETTS

1. Ricci case update: Appellate Court reverses decision regarding Fernald

2. Related MA News: Denial of visits to elderly woman appears to violate DMR regulations

3. Related MA News: Fernald League considers future discrimination lawsuit

=====

1. Ricci case update: Appellate Court reverses decision regarding Fernald

Summary: The U.S. Court of Appeals for the First Circuit found last week that the District Court did not have jurisdiction to reopen the case because conditions for doing so, as outlined in a 1993 Disengagement Order were not properly met. The appeal related to a 2006 decision by the U.S. District Court which called on the Massachusetts to stop transferring residents from Fernald in furtherance of the state's plan to close Fernald, except in situations where a resident asks to be moved. The District Court had held that Massachusetts' administration of the Individual Service Plan (ISP) process under its global closure policy "amount[ed] to a 'systemic failure' to provide a compliant ISP process" within the meaning of the 1993 Disengagement Order. The Appellate Court disagreed finding that the District Court itself, in issueing the 1993 Disengagement Order, recognized that the Order did not prohibit the closing of any facility. The real consideration to determine a valid ISP is whether individualized supports and services which are, in the case of the Ricci Order, "equal or better" are provided; where they are provided is not relevant to a consideration of whether the Order has been violated.

Ricci case update: Appellate Court reverses decision regarding Fernald

By Richard Conn

Daily News Tribune

October 2, 2008

WALTHAM - A federal appeals court ruling yesterday appears to clear the way for the state to close Walter E. Fernald Developmental Center over the opposition of family members of some residents who say their care will suffer.

The U.S. First Circuit Court of Appeals ruled that federal Judge Joseph Tauro exceeded his authority in a Aug. 14, 2007, decision that said the state must allow Fernald's residents the opportunity to stay there if they want.

In its pleadings to the appeals court, the state Department of Developmental Services said Tauro's ruling "constituted an unlawful command" that Fernald remain open.

"We do not decide the issue of what path best serves the interests of the residents of Fernald and the other parties who have a stake in this matter," Chief Judge Sandra Lynch wrote in the appeals court decision.

"People of good faith can and do passionately differ about the Commonwealth's intention to close the Fernald Center."

Lynch said that the appeals court ruled that Tauro did not have the right to reopen a 1993 consent decree, which guaranteed Fernald residents individualized care that must be equal or better treatment if they were moved to another facility.

"We hold only that the district court lacked authority to reopen the consent decree in this case and that it lacked jurisdiction on that or any other basis to reopen and enter the orders it did," Lynch wrote in the order.

Jean McGuire, assistant secretary for the state Office of Health and Human Services, said the appeals court decision does not mean the department is immediately closing Fernald, but would continue to examine the needs for each of its residents.

"I think you can assume it's going to be a very orderly and thoughtful process," McGuire said.

Marilyn Meagher, president of the Fernald League, said that over the last several weeks members have discussed filing an appeal to the U.S. Supreme Court if Tauro's decision were overturned. The suggestion was made by Beryl Cohen, the Fernald League's longtime attorney at the group's annual meeting on Sept. 21.

"That's probably the route we'll go," Meagher said late last night.

The state has said closing Fernald would be in line with a shift away from institutional care to more community-based living options for the developmentally disabled. Fernald League members said their family members would not receive the same level of care if they were moved to other facilities.

Last month, Robert Quinan, an attorney for the state, argued before the appeals court that Tauro's order also interfered with the Department of Developmental Services process for deciding what living options are truly best for Fernald's residents.

In overturning Tauro's decision, Lynch said it was not up to the appeals court to determine whether Fernald should be closed or whether they its residents should be moved to other facilities.

McGuire said the appeals court's ruling would allow the state to continue its goal of adequately assessing the needs of each of Fernald's roughly 163 residents and sit down with them and their families or guardians to decide what are the best living options for them.

"We will be doing things on a very individual basis," McGuire said. "This will not be cookie cutter."

2. Related MA News: Denial of visits to elderly woman appears to violate DMR regulations

Dave from Hvad

Wed. Oct 1, 2008

On five separate occasions, Dorothy Rouleau has knocked on the door of a group home in Bedford, hoping to visit A.T., a 91-year-old woman with mental retardation, who was transferred there in February from the Fernald Developmental Center.

Each time, Rouleau, whose sister still lives at Fernald, has been turned away at the door of the group home and told that no visitors would be allowed to see A.T.

Rouleau said she is disturbed by the situation "because I feel that A.T. is being kept a prisoner. No one is allowed in to see her. We have no idea what condition she's in."

The group home's closed-door policy appears to be a direct violation of state regulations governing care of persons with mental retardation. Those regulations state that clients of the Department of Mental Retardation "have the right to be visited and to visit others under circumstances that are conducive to friendships and relationships."

Other regulations state that DMR services must be provided in a manner that promotes "the least restrictive care" and the "opportunity to engage in activities and styles of living which encourage and maintain the integration of the person in the community..."

On September 27, the last time Rouleau attempted to visit A.T., she was told she would have to contact the woman's corporate guardian, the Arc of Greater Boston (GBARC), for permission. She contacted GBARC on Monday and received a message on her answering machine on Tuesday afternoon from A.T.'s case manager at the agency stating that no visits would be allowed "until the court has had an opportunity to make a ruling."

It was not immediately clear what court ruling the GBARC case manager was referring to. The sudden and possible involuntary move of A.T. from Fernald has been under investigation by the U.S. Attorney Michael Sullivan's Office since February, at the request of U.S. District Court Judge Joseph Tauro.

Tauro requested the U.S. Attorney probe following a day-long hearing on the matter in his courtroom on February 27. Sullivan's office was reportedly set to release a report on the matter in September, but has not yet done so.

Rouleau, who has a sister currently living at Fernald, said she had repeatedly sought to visit A.T. on her own volition because she was concerned about her. In February, Rouleau and other members of the Fernald League first raised concerns with Judge Tauro after A.T. was suddenly removed from Fernald and taken to the then newly constructed group home.

The elderly woman who is blind and has congestive heart failure, had told several people that she did not want to leave Fernald. However, she is one of six former Fernald residents, whose corporate guardian, GBARC, approved their moves to the Bedford group home in cooperation with the DMR.

Rouleau said she first tried to visit A.T. on February 17, four days after she had been transferred to the group home. She said she was told at that time that A.T. was not there and was out shopping. On February 24, she tried again and said she was told no visitors were being allowed to visit her at that time.

Rouleau tried for the third time to visit in March, and was told by staff that her guardian was not allowing visitors "so (A.T.) can make the transition." During a fourth visit, Rouleau said she was told she would have to contact GBARC for permission. On September 27, during her fifth try, she was told again to contact GBARC.

Meanwhile, Meagher said she is concerned that the U.S. Attorney's investigation has taken more than seven months on the probe and has yet to release a report. She said that a number of people close to A.T., whom A.T. had told of her desire to stay at Fernald, have apparently not been interviewed by the U.S. Attorney.

3. Related News: Fernald League considers future discrimination lawsuit

By Richard Conn/Daily News Staff

Daily News Tribune

Posted Sep 26, 2008

WALTHAM - Guardians of residents at Walter E. Fernald Developmental Center are considering filing a new lawsuit against the state due to a large number of layoffs and buyouts recently for staff at the facility.

If another suit is filed, it would be the latest step in a protracted legal battle between the state, which for more than five years has sought to close Fernald, and the Fernald League, a group of guardians and family members who are fighting to keep it open.

Employees at five Department of Developmental Services facilities last month were told last month they were eligible for \$5,000 layoff packages if they agreed to be laid off or retire by Sept. 2. Along with Fernald, staff at Wrentham Developmental Center, the Glavin Regional Center in Shrewsbury, the Templeton Center in Baldwinville and Monson Center in Palmer are eligible for the buyouts.

Beryl Cohen, attorney for the Fernald League, recommended during the group's annual meeting, that the league file an anti-discrimination lawsuit because the number of layoffs and buyouts at Fernald are much larger than the other four state-run facilities.

Juan Martinez, a spokesman for the state Department of Mental Retardation, said yesterday in an e-mail that since the layoff-incentive plan there were 13 voluntary layoffs and 53

involuntary ones, including a manager at Fernald. He said all of the five facilities have seen decreases in the number of residents.

"This was a fiscally responsible way for us to address the decrease in census, while still ensuring the best quality of care to the residents at our facilities and while meeting our budgetary obligations," Martinez said in the e-mail.

Martinez said Fernald has seen the largest decrease in residents of any of the five state-run facilities.

Marilyn Meagher, president for the Fernald League, said the number of staff which have left Fernald because various buyouts or layoffs is closer to 80 - including 44 direct-care workers. She said cutting the staff could leave residents at risk.

"We do feel discriminated against," Meagher said.

In August 2007, U.S. District Judge Joseph Tauro ruled that the state must give residents at Fernald the opportunity to stay there if they so choose.

The state appealed that decision. A three-judge panel from the First U.S District Court of Appeals has yet to make a decision on whether to overturn Tauro's ruling. Meagher said once that ruling comes down, the Fernald League will decide whether to forge ahead with an anti-discrimination lawsuit.

"Once (the appeals court decision) comes out, we'll gather again and make a decision," Meagher said.

At the league's meeting on Sunday, Cohen also recommended that the group file appeals with the U.S Supreme Court if the appeals court overturns Tauro's decision.

Tamie Hopp

**REFERRAL/MEMBERSHIP/CONTRIBUTION
FORM**

THREE EASY WAYS TO SUPPORT VOR

REFER, CONTRIBUTE OR JOIN

THANK YOU FOR YOUR SUPPORT!

TO JOIN OR CONTRIBUTE: \$25 per individual, \$150 per family organization, or \$200 per provider/professional organization. Extra donations are welcome!

You may pay by credit card or check.

TO REFER SOMEONE TO VOR: Use the form below, including the additional sections for referrals.

Mail the completed form (if joining or contributing) with payment to:

Voice of the Retarded

836 S. Arlington Heights Rd., #351

Elk Grove Village, IL 60007

847-253-0675 fax (for referrals or credit card payments)

Tamie327@hotmail.com (for referrals or credit card payments)

FOR REFERRALS: _____ The contact information provided is for someone I think would consider membership with VOR.

FOR REFERRALS: _____ You may use my name in any correspondence with this individual. My name is _____.

Name

Address (if paying by credit card, use billing address). All forms must include complete address including zip code)

City St Zip

Phone Fax

E-Mail

Family/Professional Organization Affiliation (if applicable)

VOR accepts Master Card and Visa. If paying by credit card, please provide the following information:

Amount to charge to card:

___\$1,000 ___\$500 ___\$250 ___\$150 ___\$50 ___\$25 \$_____ Other
amount

_____ Mastercard

_____ Visa

Card Number: _____

Expiration Date: _____

Cardholder's Signature: _____

=====