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DISTRICT COURT
SOUTHERN DISTRICT OF IA

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.

Pleading # 1

("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:

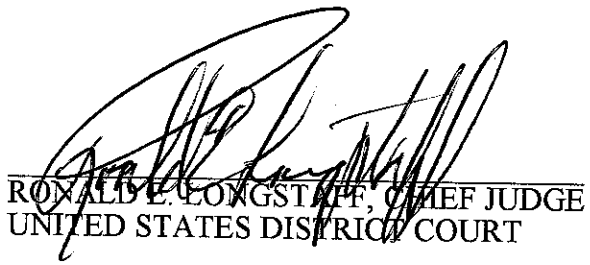
1. Defendant is immediately and temporarily enjoined from preventing or interfering with access by appropriately identified Iowa P & A representatives to defendant's records concerning resident T.

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 22nd day of March, 2002.



RONALD E. LONGSTAFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT