



STATE OF NEW YORK  
OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES

44 HOLLAND AVENUE  
ALBANY, NEW YORK 12224-0001  
518-473-1997 • TDD 518-473-3694

MEMORANDUM

April 9, 2002

RECEIVED

APR 10 2002

EMPLOYEE RELATIONS OFFICE

TO: All DDSO Directors  
All Directors of Institution Human  
Resources Management  
All Affirmative Action Administrators

FROM: Robert J. Foody 

SUBJECT: Duryea v. OMRDD, et al.

I am pleased to advise you that the Duryea case settlement has been approved by the United States District Court.

As you will recall, this case is a class-action filed on behalf of male Developmental Aides alleging discrimination in the designation of gender-specific staff assignments.

I have attached a copy of the "Stipulation and Order of Settlement and Discontinuance" which was approved and "So Ordered" by United States District Judge Colleen McMahon on March 22, 2002. Please review the Stipulation for the full requirements of the settlement.

Paragraph 1 recognizes that OMRDD may lawfully continue to make certain direct care assignments gender-specific when necessary to safeguard the legitimate and lawful privacy interests of consumers.

Paragraph 5 references the DDSO-specific policy adopted by each of your DDSOs.

Paragraph 6 contains the notice which must be included on all gender-specific assignment postings. It further contains the procedure to be utilized by Developmental Aides who wish to challenge the posting.

Paragraph 7 contains the DIHRM review procedure and the written notice which must be given to the challenging employee of the DIHRM's decision. If the DIHRM confirms the posting as appropriate, the employee may bring a grievance (see Paragraph 8).

Paragraph 9 provides that March 22, 2002 (the date the settlement was approved) is the starting date for the implementation of the procedure contained in Paragraphs 6 and 7.

Paragraph 10 provides that for a three year period from March 22, 2002 to March 22, 2005 a copy of all DIHRM letters which confirm the posting as appropriate (see Paragraph 7) must be sent to plaintiff's counsel, Sapir & Frumkin, LLP, 399 Knollwood Road, Suite 310, White Plains, New York 10603.

Paragraph 11 provides that as soon as possible, and continuously for a period of 60 days, each DDSO must post in a prominent place at all direct-care employee work sites, a copy of:

- a) Exhibit B of the Stipulation entitled "Policy Statement: Gender Specific Staffing";
- b) a copy of the DDSO Policy on gender-specific staffing (see Paragraph 5).

I am requesting that each DIHRM advise me of the date when the posting required by Paragraph 11 has been completed for your DDSO.

Paragraphs 12 through 20 deal with the procedure to be utilized for the distribution of the settlement money to class members.

Again, I refer you to the complete text of the attached Stipulation for the full requirements of the Settlement Agreement.

I want to thank each of you for the tremendous cooperation and assistance I have received during the arduous discovery and settlement process of this litigation. I also especially want to thank Louis Barrios in Central Office Personnel and Assistant Attorney General Leonard Cohen for their expertise and dedication in satisfactorily resolving this complex case.

Please contact me if you have any questions concerning the Settlement Agreement.

RJF/dld

Enclosures

cc: Commissioner Maul  
Helene DeSanto  
Peter Pezzolla  
Kathy Broderick  
Alden Kaplan  
James Moran  
James Shea  
Fred Zazycki  
Timothy McMullen  
Ellen Schusterson  
Louis Barrios  
Leonard Cohen, Esq.

**CHECK LIST AND DOCUMENTATION OF EFFORTS  
FOR  
AVOIDANCE OF GENDER BASED POSTINGS**

STRATEGY	APPLICABILITY		REMARKS
	N/A	YES	
<b>MIDLEVEL VOLUNTEER WHEN A SERVICE IS SCHEDULED OR PREDICTABLE</b>			
<b>TEMPORARY SCHEDULE ADJUSTMENT FOR CYCLICAL NEEDS WHEN A SERVICE IS SCHEDULED OR PREDICTABLE</b>			
<b>TEMPORARY REASSIGNMENT FROM WITHIN THE WORK LOCATION</b>			
<b>TEMPORARY REASSIGNMENT FROM WITHOUT WORK LOCATION</b>			
<b>TEMPORARY ASSIGNMENT OF EXTRA TIME</b>			
<b>TEMPORARY ASSIGNMENT OF SHARED STAFF BETWEEN TWO WORK LOCATIONS</b>			
<b>ASSIGNMENT OF NEW STAFF WHEN POSSIBLE</b>			

POLICY STATEMENT: GENDER SPECIFIC STAFFING

Every individual served will be afforded the privacy, dignity and respect which are the rights of all persons in our society. Staff on duty will assure that individual rights are maintained and that each consumer's potential is supported and developed.

In the vast majority of cases, services will be provided by staff of either gender. However, in certain cases, and when consistent with Title VII of the Federal Civil Rights Act of 1964, the NYS Human Rights Act, and NYS State Mental Hygiene Law, along with pertinent articles of negotiated labor agreements, staff of one gender may be requested for consumer care as outlined below. It is expected that these situations will be fully justified after all other reasonable options have been reviewed and found not practicable in a specific case.

There are three categories of need for which a DDSO may require the assignment of staff of a designated gender, as follows:

- o a consumer's requirement for intimate care (i.e., that personal care which is typically assisted by a care giver of the same gender);
- o a consumer's documented forensic or behavioral history which indicates that staff of a specific gender are required for the health, safety and protection of the consumer and those around him or her;
- o transportation of a female consumer.

This policy will be implemented when requested by an individual consumer, family member, or advocate or as the result of appropriate clinical rationale provided by a professional level clinician. \*

Each DDSO must establish specific procedures to implement this policy. DDSO procedures must include the following elements:

- o a review of the environment, equipment, home practices and circumstances surrounding the delivery of intimate care services;
- o a review of pertinent consumer history leading to the request for gender-specific services;
- o substantiation of the need for gender-specific services within each consumer's Individual Program Plan, Residential Habilitation Plan, Plan for Protective Oversight, and/or Risk Management Plan.
- o documentation of efforts made to avoid gender-based staff assignments (including completion of the attached Check List);
- o written approval of gender-specific services by a senior manager, as designated by the DDSO Director.

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
HOWARD C. DURYEYEA, for himself, and  
all others similarly situated,

Plaintiff,

- against -

U.S. DISTRICT COURT  
FILED 950 CP 8789 (CM)(MDF)  
MAR 20 2002  
S. D. N. Y.

NEW YORK STATE OFFICE OF MENTAL  
RETARDATION AND DEVELOPMENT  
DISABILITIES, LETCHWORTH DEVELOPMENT  
DISABILITY SERVICES OFFICE  
a/k/a WESTCHESTER DEVELOPMENT  
DISABILITY SERVICES ORGANIZATION,  
THOMAS A. MAUL, Individually,  
FREDERICK ZAZYCKI, Individually,  
BARBARA A. HAWES, Individually,  
JAMES WHITEHEAD, Individually, and  
JAMES SHEA, Individually,

Defendants.

STIPULATION AND  
ORDER OF SETTLEMENT  
AND DISCONTINUANCE

----- X  
WHEREAS plaintiff Howard C. Duryea, a former developmental aide for defendant New  
York State Office of Mental Retardation and Developmental Disabilities ("OMRDD"), commenced  
this action on behalf of himself and all others similarly situated (collectively, "Plaintiffs") against  
Defendants, OMRDD, Letchworth Developmental Disabilities services Office ("Letchworth  
DDSO"), OMRDD Commissioner Thomas A. Maul, former Director of Letchworth DDSO  
Frederick Zazycki, former Deputy Commissioner of OMRDD Barbara A. Hawes, current Director  
of Letchworth DDSO James Whitehead, and former Director of Westchester Developmental  
Disabilities Services Office James Shea (collectively, the "Defendants"), challenging aspects of  
OMRDD's policy of designating certain work assignments on a gender specific basis; and

WHEREAS OMRDD has maintained a policy of requiring that where consumers of its

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services require assistance with their intimate care needs, staff assignments be made in such a way so as to ensure sufficient coverage by developmental aides of the same gender; and

WHEREAS the Plaintiffs have challenged the manner in which such gender-specific staff assignment policy has been implemented as violative of their rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq, and the New York State Human Rights Law, N.Y. Exec. Law § 296; and

WHEREAS, by Memorandum Decision and Order dated October 8, 1999, the Court granted class certification to the Plaintiffs herein, certifying a plaintiff class consisting of:

All present and former male direct care staff employees of the New York State Office of Mental Retardation and Developmental Disabilities ("OMRDD") who, at any time from January 1, 1992 to the present, were denied a full time position due to OMRDD's policy and practice of designating some direct care positions female-only;

All qualified male applicants, who seek or sought assignment to a direct care staff position and were refused a direct care position at any time from January 1, 1992 to the present, because OMRDD designated the position female-only; and

All males, who were deterred from applying for any direct care position that was designated by OMRDD as female-only, from January 1, 1992 to the present; and

WHEREAS the parties desire to resolve amicably issues raised in the Fourth Amended Complaint herein;

IT IS HEREBY STIPULATED AND AGREED that:

**I. EQUITABLE RELIEF FOR ALL CLASS MEMBERS**

1. The parties agree that gender may be a bona fide occupational qualification for developmental aides employed by OMRDD when necessary to safeguard the legitimate and lawful privacy interests of the consumers of OMRDD services, and when gender-specific assignments are made in accordance with the terms set forth herein, the policies annexed hereto and the procedures

promulgated by a DDSO in compliance with and adherence to this Stipulation and Order;

2. OMRDD shall retain the ability to make staff assignments on a gender-specific basis where deemed necessary and when based upon (i) one or more consumer's requirement for assistance with intimate care, or (ii) one or more consumer's documented forensic or behavioral history which indicates that staff of a specific gender are required for the health, safety and protection of the consumer and those around him or her. In addition, it is recognized that OMRDD continues to be subject to the requirements of New York State Mental Hygiene Law (SECTION) 33.17; however nothing herein shall prohibit a class member from bringing any action or proceeding to contest the validity of Section 33.17 or the legality of any gender-specific assignment having Section 33.17 as a basis;

3. The designation of a particular work assignment as gender-specific may be ordered when requested by an individual consumer, family member or consumer guardian or advocate, or as the result of a clinical assessment made by a professional level clinician, subject to the limitations set forth below;

4. After such a request or clinician's recommendation has been made, the treatment team assigned to the individual consumer shall assess the advisability of requiring same-sex intimate care assistance for such consumer. In the event that the treatment team determines that a consumer requires same-sex intimate care assistance, it shall communicate such determination to the supervisor(s) responsible for setting staff work assignments in the particular residence;

5. Each of OMRDD's constituent developmental disabilities service offices ("DDSOs") shall promulgate DDSO-specific procedures that must be followed prior to the implementation of a gender-specific assignment. Although individualized to meet the needs of the various DDSO, each

such set of procedures must incorporate, at a minimum, the following elements;

- a. A review of the environment, equipment, home practices and circumstances surrounding the delivery of intimate care services;
- b. A review of the consumer's history leading to the making of the request or recommendation for gender-specific intimate care assistance;
- c. Substantiation of the need for gender-specific services within the consumer's Individual Program Plan, Residential Habilitation Plan, Plan for Protective Oversight, Risk Management Plan or any other similar document;
- d. Documentation of efforts made to avoid the gender-specific assignment, including completion of the checklist attached hereto as Exhibit "A;"
- e. Written approval of the gender-specific assignment indicating review by an appropriate senior manager (an individual with the title of Deputy Director or Developmental Disabilities Program Specialist IV), as designated by the DDSO Director;

6. If, following adherence to the procedures referenced above, it is determined that a particular staff work assignment is to be designated as gender-specific, the posting advertising the availability of such position shall include a statement to the effect that any interested employee may, upon request, view the documentation supporting such gender-specific positing at the DDSO personnel office at a time of his or her convenience outside of his or her working hours. If the interested employee works more than five (5) miles from the DDSO personnel office, the relevant documents shall, upon such employee's request, be made available at his or her worksite within five (5) days to be reviewed outside of normal working hours. Such posting shall also include a statement to the effect that any employee wishing to challenge the designation of such assignment as gender-specific must do so by writing to the DDSO Director of Human Resource Management within three (3) weeks of the date of the initial posting;

7. Upon receipt of any timely written challenge to a gender-specific posting, the DDSO

Director of Human Resource Management shall verify that the decision to so designate the posting was undertaken appropriately and in adherence to this agreement, including but not limited to ascertaining whether the checklist attached hereto as Exhibit "A" has been completed and whether the necessary approval has been obtained. In the event that the DDSO Director of Human Resource Management confirms the appropriateness of the gender-specific posting, he or she shall so inform the inquiring employee in writing and refer such employee to the appropriate grievance procedure if any further action is desired;

8. The grievance procedure(s) established in the applicable collective bargaining agreement between the State of New York and the appropriate collective bargaining unit of the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, shall be the sole avenue of the legal challenge available to class members who wish to contest the decision of any DDSO in designating a particular job posting as "female only." Defendants, their employees, and agents, shall not object to the admissibility of the instant Stipulation and Order, and the exhibits annexed hereto, as evidence in any proceeding brought by or on behalf of a class member contesting any OMRDD or DDSO's decision designating a job posting or assignment as "female only;"

9. Nothing in this Stipulation and Order shall either require the Defendants to review and reconsider gender-specific postings made prior to the date of the Court's approval of this Stipulation and Order or permit the Plaintiffs to challenge any such posting on the basis of the terms of this agreement;

10. For a period of three (3) years following the date this Stipulation and Order is approved by the Court, copies of all letters from the DDSO Directors of Human Resource Management to inquiring employees, evidencing such unsuccessful appeals of gender-specific

postings shall be sent to the Plaintiffs' counsel, Sapir & Frumkin LLP, 399 Knollwood Road, Suite 310, White Plains, New York 10603. For the same period, when an appeal made pursuant to Paragraph 7 above is unsuccessful, all non-confidential documents supporting the underlying decision to post the position as gender specific with names of consumers redacted shall be sent to the Plaintiffs' counsel, Sapir & Frumkin LLP, upon request, or made available for inspection at a time and place of mutual convenience;

11. OMRDD shall, immediately upon approval of this Stipulation and Order by the Court, arrange for each DDSO to post for sixty (60) days the document entitled "Policy Statement: Gender Specific Staffing," a copy of which is attached hereto as Exhibit "B," in a prominent place at all worksites where direct care employees are employed together with a copy of the procedures adopted pursuant to the Policy Statement by the DDSO in which the employee is employed.

## **II. MONETARY RELIEF FOR ELIGIBLE CLASS MEMBERS**

### *Claims by the Named Plaintiff*

12. Defendants agree to settle the claims asserted by Duryea by payment of \$20,000.00 to him. Defendants agree to provide Plaintiff's counsel a settlement draft in the amount of \$20,000.00 payable to Howard Duryea, together with an attorney's fees check to Plaintiff's counsel in the amount of \$365,000.00, within one hundred twenty (120) days of approval by the Court of this Stipulation and Order. Upon payment of these amounts, Duryea releases the Defendant from any and all claims, actions, causes of action, rights, debts, obligations, damages or accounting of whatever nature, including claims for attorneys fees, which he may have by reason of or arising out of, any of the matters, acts or omissions described or referred to in his Fourth Amended Complaint, whether known or unknown, including any claims for retaliation occurring before the approval by

the Court of this Stipulation and Order.

***Claims for Monetary Relief by the Certified Class***

13. Upon approval by the Court of this Stipulation and Order and upon payment of the amounts described below, any claims for monetary relief by any member of the Certified Class based on all or any part of the transactions or occurrences out of which this action arose shall be extinguished.

***Qualifying Criteria - Those Who Applied***

14. It is stipulated and ordered that members of the Certified Class who allege that they were wrongfully denied assignment to direct care staff positions by OMRDD on the basis of gender, and who filed a timely claim with the Court in this action or did not receive notice of this Court's Order, dated December 10, 1999, shall be entitled to awards of compensatory damages, including back pay, upon making a successful application for such relief, subject to the limitations set forth below. An application shall be considered successful if the information contained therein establishes that during the period from January 1, 1992 through February 15, 2000:

- (a) the individual was a male; and,
- (b) the individual was employed by OMRDD as a developmental aide or developmental aide trainee; and,
- (c) the individual applied for a position or for re-assignment as a developmental aide trainee or a developmental aide; and,
- (d) the position for which the individual applied was designated by OMRDD as "female-only;" and,
- (e) the individual did not receive the position for which he applied.

15. It is stipulated and ordered that defendants will pay this entire Certified Class of individuals who applied for positions \$125,000.00, except as may be modified hereinafter. All class members who successfully apply for compensatory damages including back wages, from the pool of money described in this paragraph shall divide the total of the pool among themselves, subject to the limitations set forth herein. In no event shall an individual class member be entitled to more than \$15,000.00. The pool of \$125,000.00 shall be divided as follows: each class member will be allocated one point for each year in which he proves that he lost wages resulting from the denial of the application. Each class member shall receive one point for each year in which he proves that he received treatment from a health care provider for physiological or emotional injury resulting from the denial of the application. Each class member will receive one point for proving that mental anguish was sustained by him as a result of being denied the position for which he applied. The points allocated for each class member applying for compensation will be added together. The total pool will be divided by the total number of points allocated among the class member applicants to determine the number of dollars per point to be allocated. For purposes of this formula, a year is defined as a calendar year. The total pool will be allocated among the class member applicants according to the points they each have subject to the cap of \$15,000.00 per class member. If the award allocated to any class member exceeds the \$15,000.00 cap, the excess shall be distributed among all other members of the applicant class based on each individual's total points. All damages awards or portions of damages awards that are based on claims for lost wages, including back wages, are fully subject to applicable federal, state and local income tax withholding laws. In the event there is money left undistributed to class member applicants, residual funds shall be distributed into the pool for deterred applicants.

16. In the event there are funds left undistributed to class members pursuant to the formula above, any funds leftover will be returned to the Defendants.

***Qualifying Criteria - Those Allegedly Deterred***

17. It is stipulated and ordered that members of the Certified Class who alleged that they were wrongfully deterred by OMRDD from applying for a direct care staff position as developmental aide trainee or developmental aide, and who filed a timely claim with the Court in this action, or did not receive notice of this Court's Order, dated December 10, 1999, shall be entitled to monetary relief upon making successful application for such relief, subject to the limitations set forth herein. An application shall be considered successful if the information contained therein establishes that:

- (a) the individual is a male; and,
- (b) the individual was on OMRDD's list of persons qualified to be assigned to a position as developmental aide trainee or developmental aide, or, alternatively, was employed by OMRDD as a developmental aide trainee or developmental aide; and,
- (c) the individual was deterred from applying for a position as a developmental aide trainee or developmental aide due to the position's designation by OMRDD as a "female-only" position; and,
- (d) the individual is not receiving any payment as a denied applicant from the pool of money described above for those who applied.

18. Each successful deterred applicant shall receive a maximum of \$1,000.00 and the Defendants shall be obligated to pay no more than \$40,000.00 to settle the class claims of those allegedly deterred from applying for a position. All class members who successfully apply for compensatory damages, including back wages, from the pool of money for those allegedly deterred

from applying shall divide the total pool of \$40,000.00 among themselves subject to the limitations set forth herein. In the event there are funds left undistributed to class member deterred applicants, residual funds shall be distributed into the pool of class members who applied for positions and will be allocated pursuant to the formula set forth above for those who applied.

In the event there are funds left undistributed to class members pursuant to the formula above, any funds leftover will be returned to the Defendants.

#### *Implementation*

19. It is stipulated and ordered that applications for payment under the terms of this Stipulation and Order shall be sent by first class mail to those who filed a Proof of Claim pursuant to this Court's Order, dated December 10, 1999, at the address set forth in the Proof of Claim. Applications shall also be made available at the offices of counsel for the Certified Class. Applications shall be in the form attached hereto as Exhibit "C." The application period shall remain open for 45 days after the initial mailing of the applications. All applications shall be processed by counsel for the Certified Class within 30 days after the close of the application period. Counsel for the Defendants shall then have thirty (30) days within which to contest any assessment of points made by counsel for the Certified Class to any member of the Certified Class as set forth above. Defendants agree that a claimant's sworn statement may be sufficient to prove a claim and that, due to the passage of time, information provided may not be exact or specific. The parties shall use their best efforts to resolve any disagreements regarding the eligibility of any applicant within this second 30-day period. If there is a disagreement as to eligibility which cannot be resolved, the parties shall request the assistance of the Magistrate Judge assigned to this action, whose decision regarding any application that is challenged shall be final and unappealable.

20. Within one hundred twenty (120) days after a final decision as to those who are entitled to payment, as denied applicants or deterred applicants, under the terms of this Stipulation and Order, the Defendants will send to each successful claimant at the address designated by him, a check in the agreed or ordered amount less required federal, state and local withholdings with a statement explaining the withholdings. Counsel for the Certified Class shall receive a copy of each check and statement of withholdings sent by Defendants. Defendants shall file with the Court, an accounting of the disbursement within 30 days after the funds have been disbursed. It is stipulated and ordered that Defendants will pay counsel for the Certified Class the sum of \$35,000.00 for attorney's fees and disbursements, as soon as possible after such accounting has been filed, but, in no event, later than one hundred twenty (120) days after such filing.

21. In consideration of the payment of the sums specified above, Plaintiffs, for themselves and for their heirs, executors, administrators and assigns, release Defendants, OMRDD, Letchworth DDSO, Thomas A. Maul, Frederick Zazycki, Barbara A. Hawes, James Whitehead and James Shea, their successors in interest and any and all current or former employees or agents of the Defendants, in their individual and/or official capacities, and their heirs, executors, administrators and assigns, from all rights of action, Claims and liability connected with, related to or arising from the claims, causes of actions, incidents and actions alleged in the complaint in this action, and any and all claims for attorneys fees, costs and disbursements, except as set forth herein. Plaintiffs shall not be entitled to pre-judgment or post-judgment interest;

22. Nothing in this Stipulation and Order shall be construed as an admission of liability or of the truth of any allegations contained in the complaint, or an admission that the defendants or any current or former agent or employee of the defendants have in any manner violated plaintiffs'

rights or the rights of any other person or entity, as established by any federal or state constitution, statute, ordinance, rule, regulation, policy, protocol or by-law of any department or subdivision of government;

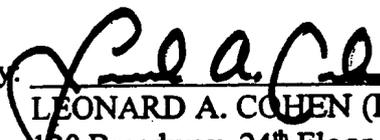
23. This Stipulation and order finally determines all claims of plaintiffs on the merits in this action against all defendants arising from the incidents and actions alleged in the complaint in this action, or which could have been alleged in the complaint in this action;

24. All claims brought by the Plaintiffs against the Defendants are hereby voluntarily discontinued, with prejudice, and without further costs, disbursements or attorneys fees to be paid to any party; and,

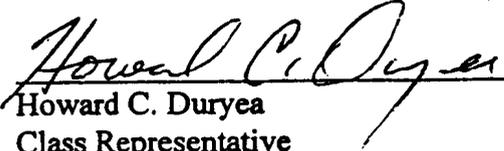
25. This action is hereby discontinued, with prejudice, and without further costs, disbursements or attorneys fees to be paid to any party, except that this Court shall retain jurisdiction of this action to enforce the terms of this Stipulation and Order.

Dated: New York, New York  
January 29, 2001

ELIOT SPITZER  
Attorney General of the State of New York  
Attorney for Defendants

By:   
LEONARD A. COHEN (LC 2468)  
120 Broadway, 24<sup>th</sup> Floor  
New York, New York 10271  
(212) 416-8597

Dated: White Plains, New York  
January \_\_\_\_\_, 2001

  
Howard C. Duryea  
Class Representative

Dated: White Plains, New York  
~~January~~ 5, 2001  
*February*

SAPIR & FRUMKIN LLP  
Attorneys for Plaintiffs

By: *Donald L. Sapir*  
Donald L. Sapir (DS 2724)  
399 Knollwood Road, Suite 310  
White Plains, New York 10603  
(914) 328-0366

SO ORDERED:

*Colleen McMahon*  
Colleen McMahon, U.S.D.J.

Dated: White Plains, New York  
~~January~~ 22, 2002  
*April 22, 2002*

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