

## DALA seeing its first wave of abuser registry appeals

### Attorneys: forum gives care givers due process

By Kris Olson

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The Disabled Persons Protection Commission — the independent state agency charged with investigating and remediating instances of abuse committed against people with disabilities — has been around since 1987.



**DAMBROV**  
Lawyer weighs  
in on process

But thanks to Nicky's Law, signed by Gov. Charlie Baker on Feb. 13, 2020, DPPC received a new mandate: maintain an abuser registry, listing all care providers against whom a "substantiated finding of registrable abuse" of a person with intellectual or developmental disabilities has been made.

Nicky's Law is named for Cheryl Chan's son, who was beaten while attending a day program for people with intellectual disabilities in Millbury several years earlier.

At Chan's urging, the Legislature created a mechanism to prevent credibly accused abusers from being rehired elsewhere.

In recognition of the serious professional consequences that come with being placed on the registry, the Legislature provided accused care providers a way to challenge DPPC's determination, short of going to Superior Court. If their direct appeal to DPPC fails, they can file a petition with the Division of Administrative Law Appeals.

The first of those petitions on behalf of aggrieved care providers recently began popping up on DALA's docket. As of late last year, 18 appeals of DPPC actions had been filed, a few of which were resolved without a hearing, according to DALA's first administrative magistrate, James P. Rooney.

In addition, the first hearing decision — upholding DPPC's decision to place a care provider on the registry — has been issued. The attorney representing the care provider in that case said he has submitted the decision to the Middlesex Superior Court for further review.

Lawyers Weekly recently spoke

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with attorneys who have handled this first wave of cases in what is becoming a new niche practice area.

## Needed due process

Braintree attorney Edward J. O'Brien, who received his client through the Massachusetts Bar Association's Lawyer Referral Service, said first and foremost he is grateful that the Legislature recognized the need to give care providers the opportunity to seek recourse with DALA on due process grounds.

"It is really important that [the Disabled Persons Protection Commission] not be the judge, jury and executioner of people," he said.

If care providers' only recourse were a petition to Superior Court, that would be an imperfect solution, as by statute judges need to defer to the agency's determination, absent a showing that that determination is arbitrary or capricious, a nearly impossible standard to meet, O'Brien noted.

"The agency is like the 800-pound gorilla," he said.

In fact, O'Brien, who has handled several other types of administrative appeals, said the procedure that has been created for care providers is "much more independent" than that of the Board of Registration in Medicine or the Board of Bar Overseers, where "you have the prosecuting arm sharing office space with the determiners of fact and disposition."

"It's a little incestuous," he said.

O'Brien added that the right to subpoena witnesses is more readily available in abuser registry cases than it is with the BBO.

The DALA review is both de novo and two-fold, with the magistrate looking at not only whether the care provider did what DPPC concluded he did, but whether those actions warrant being placed on the registry, he said.

O'Brien noted that the regulations related to the abuser registry define "abuse" broadly and do not distinguish between those who commit the abuse directly and those who witness but fail to report it. His client fell into the latter category, he said.

O'Brien's client's case was resolved "to the satisfaction of both sides" through a consent agreement, he reported.

## Middle ground available

In the first written decision in an abuser registry case, *A.C. v. Disabled Persons Protection Commission*, Administrative Magistrate Kenneth Bresler affirmed that the care provider "committed abuse per se and caused serious emotional injury," warranting her placement on the registry.

"However, that is not the end of the inquiry," Bresler wrote.

Bresler then also reviewed DPPC's determination that A.C. did not qualify for

an exception that would apply if DPPC believed that "the incident was isolated and unlikely to reoccur," leaving the care provider still fit to provide services to people with intellectual or developmental disabilities.

In Bresler's estimation, A.C. had failed to present evidence or argue that she was eligible for the exception.

A finding that abuse occurred but that the incident did not warrant placement on the registry would still be helpful to a care provider, said Springfield attorney Robert L. Dambrov. The care provider then might be able to get work with state departments other than the Department of Developmental Services, whereas someone placed on the registry "probably could not get a job from anybody," he said.

Dambrov is less sanguine than O'Brien about the DALA process, given his client's experience.



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While he, too, was able to resolve his client's case on favorable terms, Dambrov said DPPC was unwilling to engage in settlement negotiations until a magistrate first denied its motions to dismiss and motion for summary judgment.

DPPC tried to argue that certain issues could not be presented to DALA because the accused had not followed its procedural rules.

While "DALA handled it very well," the whole process came at a cost to his client, Dambrov said.

"The unfortunate part is that most ... care providers do not have a lot of money," he said. "My client had to pay me to get to the point where we could resolve [the case]."

Once the motions were dismissed, DPPC was "very cooperative and good to work with," Dambrov added.

But perhaps because the category of cases is so new, DPPC seemed intent on getting the legal issues raised in its motions litigated, Dambrov said.

Asked whether he thought the magistrate's decisions in his case might spare future appellants a similar ordeal, Dambrov said he was unsure.

## Unique witnesses

The case that Andover attorney Adam P. Beck is handling on behalf of two people who were terminated by their employer

after being "wrongfully accused" of abuse is still pending.

Beck said he is mystified that the process has gotten as far as it has, given that the sole witness against his clients is a fellow employee who has since been terminated for using an illicit substance on the job.

Beck said he has other workers lined up to testify that the resident suffered his injuries when he simply tripped and fell on ice outside the group home. Beck said he provided affidavits from those witnesses to DPPC during its internal review, but they failed to hold sway in a process he described as a "free-for-all."

"DALA is more like Superior Court as we know it," he said. "There are more rules in place, and they are more flexible than in Superior Court."

The nature of the incidents that get a care provider placed on the abuser registry means that a person with intellectual dis-

abilities will often be a relevant witness. But attorneys who have handled these cases say that, to the extent it creates an issue, it is a manageable one.

Beck said that in his client's case, the alleged victim does have some ability to communicate, but his intellectual capacity is "definitely a challenge."

"The other witnesses become even more important," he said.

In A.C., the fact that a behavioral analyst testified that the victim did not have the cognitive ability to make up a story about the incident factored into Bresler's decision in the DPPC's favor.

O'Brien said in his client's case, too, it was important that other workers had witnessed the alleged incident.

In a typical case, the record may well also include footage from security cameras that tend to be installed at group residences, along with medical records that document the alleged victim's injuries, he added.

## Procedural refinements

As Bresler highlighted in a footnote in A.C., DALA late last year issued a second amended "Order Regarding Confidentiality," reinforcing the implication from the general requirements of G.L.c. 19C, §15, and 119 CMR 9.00 that the victim, witnesses and other people with disabilities should not be named in the decisions that magistrates issue in abuser registry cases.

Other procedural matters that need to be resolved are revealing themselves as the cases are litigated.

For example, Bresler had to grapple with how to treat DPPC's investigation report. He noted that administrative law tribunals generally do not need to observe the rule against hearsay.

DPPC had then argued in its post-hearing brief that "DALA must accept the Investigation Report for the truth of the matter," which Bresler said he assumed meant that he had to accept the report "into evidence" but not necessarily accept the report as unassailable truth.

Earlier in his decision, Bresler pointed to a regulation, 118 CMR 9.03(1), which "appears to bar me from directly quoting from the investigative report, but not from paraphrasing it."

The appellant in A.C. had also argued that she should not be placed on the abuser registry because DPPC's investigator had violated the agency's protocol. But Bresler said he did not believe that he had the power to decide the case on that basis.

"I am aware of no statute or regulation that authorizes the Division of Administrative Law Appeals to keep an abuser from being placed on the abuser registry because DPPC did not follow its investigation protocol," Bresler wrote, adding that the appellant had not called any such authority to his attention, either.

Andrew L. Levraut, deputy general counsel of the Disabled Persons Protection Commission, has been representing the agency in the DALA cases. In an emailed statement, Levraut expressed appreciation for the time and dedication of DALA staff "as it has addressed in a thorough and deliberate manner several matters of first impression presented by Nicky's Law."

Like his colleagues on the other side of the proceedings, Levraut believes the current law "strikes an appropriate balance between ensuring the due process rights of appellants and protecting an underserved population — many of whom have communication barriers."

Thus far, the abuser registry appeal process has not presented any substantial procedural or evidentiary issues, in Levraut's view.

"However, the DPPC has included in its proposed bill to modernize and streamline its enabling statute minor amendments to clarify the confidential nature of Abuser Registry proceedings," he said.

O'Brien noted that DALA itself had flagged a concern whether expanding its jurisdiction to include appeals of abuser registry determinations might impact the quality of due process that appellants get as it takes more time to schedule hearings and turn decisions around.

But that is not an issue yet, it seems. **WV**