

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

ENDORSED
FILED IN MY OFFICE THIS

NOV 18 2011

Angie T. ...
CLERK DISTRICT COURT

CLERK CHAVEZ

No. D-0202-CV-2010-14328

The AMERICAN CIVIL LIBERTIES UNION OF NEW MEXICO,

Plaintiff,

v.

The NEW MEXICO CHILDREN, YOUTH AND
FAMILIES DEPARTMENT, BILL DUNBAR, Secretary,
New Mexico Children, Youth and Families Department,
and DEBRA PRITCHARD, Director, Juvenile Justice Services,
New Mexico Children, Youth and Families Department,

Defendants.

**THE COURT'S
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
REGARDING SEPTEMBER 8, 2011 HEARING**

The Court's decision, after an evidentiary hearing on September 8, 2011, is set forth below. Supporting the decision are the Court's Findings of Fact and Conclusions of Law. Any requested findings of fact or conclusions of law submitted by either party not included in this decision are deemed refused, immaterial to the Court's decision, or subsumed by these Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Factual Background

1. Prior to 2011, ACLU lawyers who wanted to visit a youth at CYFD, would provide a 24 hour notice.
2. The 24 hours notice was not required under the 2009 Agreement between ACLU and CYFD, but was provided to CYFD as a courtesy by the ACLU attorneys.

3. Prior to 2011, ACLU lawyers (and non-ACLU lawyers) met youth on their units.
4. Prior to 2011, if the ACLU were visiting with specific youth, they would inform CYFD of what specific youth they would be visiting.
5. Scott Cameron is Assistant General Counsel for CYFD.
6. Prior to working for CYFD, he worked for the ACLU of New Mexico, monitoring the 2006 Agreement between the ACLU and CYFD.
7. His position with CYFD involved negotiating the 2009 Agreement.
8. After the January 10, 2011 hearing, and after the 2009 Agreement ended by its terms, Mr. Cameron drafted a new policy regarding attorney visits from the ACLU.

The Controversy

9. On February 10, 2011, ACLU attorney John Hall sent an email to CYFD requesting to see two to three children at the Camino facility the same day.
10. He was informed by email from Mr. Cameron that the ACLU no longer had the same access as before and needed to comply with a new procedure.
11. The new protocol for ACLU attorney visits would be to give 24 hours notice to the Superintendent.
12. Instead of seeing youth on the unit, under the new policy the ACLU would have to visit the youth up in the front of the facility.
13. On another occasion, youth were questioned concerning their contacts with ACLU attorneys.
14. Youth requesting to speak with ACLU attorneys were also prevented from doing so for 26 hours during an on-site investigation by CYFD.
15. The new requirement that children were to be seen up front rather than on their unit was

- allegedly done so that attorney visits would not disrupt programming of the clients.
16. However, non-attorney visitors continue to be allowed to visit youth on their units, but are required to undergo and pass a background check.
 17. Furthermore, it appears that non-ACLU attorneys were until recently still allowed to visit youth on their units, without undergoing and passing a background check.
 18. The new policy regarding on-unit visits, as implemented, treated ACLU attorneys differently than non-ACLU attorneys.
 19. The new policy regarding on-unit visits also treated ACLU attorneys differently from non-attorney visitors.
 20. It appeared during the hearing that some “bad blood” exists between Mr. Cameron and his former colleagues, and that a significant motivation for implementing the new policy was retaliatory in nature, disrupted the ACLU’s relationship with its clients, and also designed simply to frustrate ACLU attorneys.
 21. Credible evidence at the hearing also demonstrated other retaliatory acts directed against youth who were reporting allegations of mistreatment to ACLU attorneys, and inappropriate questioning of youth about their contacts with ACLU attorneys.
 22. It was not clear (in other words, Plaintiff failed to meet its burden of proof if it intended to so prove) whether any acts of retaliation against youth were deliberately facilitated or encouraged by staff at the facility. It was clear, however, that staff were at times not taking seriously the potential for retaliation against youth who spoke with or sought to speak with ACLU attorneys.

23. However, in response to the ACLU's concerns about client confidentiality and retaliation, CYFD enacted a new policy on June 17, 2011, and took other steps to address the issues of client confidentiality and retaliation.

24. It was not clear whether any of the instances of retaliation on which evidence was presented were systemic or isolated instances, related or unrelated to the "bad blood" between Mr. Cameron and his former colleagues at the ACLU. It does appear, however, that CYFD currently appreciates the danger posed to the youth in its care of any retaliatory acts against them for talking with or seeking representation by ACLU attorneys.

25. It appeared that at least some of the disparate treatment by ACLU attorneys is the result of Mr. Cameron indulging his apparent ill feelings toward his former colleagues to unwarranted retributive or punitive effect.

CONCLUSIONS OF LAW

1. Incarcerated persons have a constitutional right to "adequate, effective and meaningful access to the Courts." *Bounds v. Smith*, 430 U.S. 817, 822 (1977).

2. When examining whether a restriction on access to counsel violates an incarcerated person's constitutional rights, "the standard of review is whether the infringement of the prisoner's right is reasonably related to legitimate penological interests." *Osborne v. Shillinger*, 932 F.2d 975 (10th Cir. 1991).

3. With respect to the 26-hour delay in access to youth who specifically requested to speak with ACLU attorneys, Plaintiff failed to demonstrate actual injury or that the constitutional rights of youth at the facility were otherwise implicated by their inability to speak immediately with the ACLU – *i.e.*, that the delay at issue, on the date and under the circumstances it occurred,

was unrelated to a legitimate penological interest.

4. While it is conceivable that a circumstance could arise in which strict adherence to the new 24-hour notice requirement creates an actual injury or constitutional infringement, Plaintiff further failed to demonstrate actual injury or that the constitutional rights of youth at the facility were otherwise implicated by the new 24-hour notice.

5. Plaintiff has demonstrated by its burden of proof that CYFD's non-universal approach to the location of visits by lawyers and others has no rational basis.

6. While permitting ACLU lawyers to visit on a unit would appear to undermine the confidentiality of the youth whose confidentiality ACLU seeks to protect, it is a determination to be made by ACLU and its clients.

7. The Court is concerned regarding Defendants' motives in their disparate treatment of the ACLU as compared to other attorneys, and non-attorney visitors, but at this time the ACLU has failed to meet its burden in establishing that it suffered or is threatened to suffer immediate and irreparable harm, regardless of whether its treatment was done intentionally, negligently, or unintentionally and inadvertently, other than as the disparate treatment relates to the location of ACLU on-unit visits. This conclusion relies to a significant degree on testimony from CYFD that is earnestly striving to require and achieve, universally, 24-hour notice for all attorney visits.

8. Regardless of Defendants' intent, having weighed all of the equities, the Court concludes that equity demands the ACLU be treated the same as other visitors, whether they are attorneys or non-attorneys, and be allowed to visit youth on units, provided ACLU attorneys are subject to and pass the same background checks required of other visitors to the units, and provided further that the requirement of background checks is actually required of all visitors,

attorneys and non-attorneys alike.

9. Defendants violated attorney-client confidentiality when enquiring into communications and contacts between ACLU attorneys and youth. While the evidence is closely balanced as to whether similar intrusions could reasonably be anticipated in the future, the overall balance of equities mandates that Defendants be ordered to respect fully and refrain from intruding upon the attorney-client relationship between ACLU attorneys and the youth they represent or have been asked to represent.

10. In light of the new policies recently enacted by CYFD and assurances made at the September 8, 2011, hearing regarding retaliation against youth seeking ACLU assistance, the Court declines to address at this time ACLU's request for the following injunctive relief because such an order does not appear to be necessary to ensure future compliance by Defendants: Ordering CYFD and its staff not to retaliate against youth for communicating with ACLU-NM, including that CYFD and that its staff not refer to youth as a "rat," a "baby" or a "snitch" if a youth communicates with ACLU-NM; and Ordering Defendants not to discourage any youth from communicating with ACLU-NM .

11. Other than as provided in Conclusions 8, 9 & 10 above, Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction Regarding Access to CYFD Youth is denied.

IT IS THEREFORE ORDERED & DECREED:

- A. Defendants shall allow ACLU attorneys who have passed the same background checks required of other visitors access to youth on their units.
- B. Defendants shall respect fully and refrain from intruding upon the attorney-client

relationship between ACLU attorneys and the youth they represent or have been asked to represent.

A handwritten signature in black ink, appearing to be 'CC', written over a horizontal line.

Clay Campbell
District Court Judge

I hereby certify that the foregoing Findings of Fact and Conclusions of Law were emailed and mailed to counsel of record on date of filing.

A handwritten signature in black ink, appearing to be 'Russell Garcia', written in a cursive style.

Trial Court Administrative Assistant