

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIA ADVOCACY OFFICE,)	
INC.)	
)	
)	Plaintiff,
)	
)	CIVIL ACTION FILE
v.)	
)	
)	NO. 1:09-CV-2880-CAP
FRANK SHELP, M.D., in his official)	
capacity as Commissioner, Georgia)	
Department of Behavioral Health and)	
Developmental Disabilities,)	
)	
)	Defendant.
)	
)	
)	
)	
)	
)	

FIRST AMENDED COMPLAINT

COMES NOW the Georgia Advocacy Office, Inc. (“GAO”), by and through counsel, and respectfully files its First Amended Complaint and shows as follows:

INTRODUCTION

1.

GAO brings this action under 42 U.S.C. §1983 for injunctive and declaratory relief to redress Defendant’s denial, partial denial, and delay of access

by GAO, the designated Protection and Advocacy System for the State of Georgia, to the state hospital facilities operated by Defendant, to the people confined to the state hospital facilities and to records maintained by Defendant and these facilities.

JURISDICTION AND VENUE

2.

The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 as this case arises under the laws of the United States, including, without limitation, the Protection and Advocacy for Individuals with Mental Illness Act (the “PAIMI Act”), 42 U.S.C. §§10801 *et seq.*, and the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (the “DD Act”), 42 U.S.C. §§15001 *et seq.* (hereinafter the PAIMI Act and DD Act shall be referred to collectively as the “P&A Acts”)

3.

Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(1), as the Defendant is deemed to reside in the Northern District of Georgia.

PARTIES

4.

GAO is a private, non-profit Georgia corporation which provides protection and advocacy services to individuals with disabilities. GAO has been designated by

the State of Georgia since 1977 as its protection and advocacy system ("P&A") to protect the legal and human rights of individuals with disabilities in the State of Georgia pursuant the federal legislation collectively referred to as the P&A Acts.

5.

GAO receives federal funding to provide protection and advocacy services to people with disabilities in Georgia pursuant to the P&A Acts.

6.

Under its federal mandate as the designated P&A, GAO is required to have authority to investigate specific incidents of abuse and neglect and to conduct monitoring activities to protect the rights and safety of individuals with disabilities. 42 U.S.C. §10805(a); 42 U.S.C. §15043(a)(2)(B).

7.

Further, the P&A shall have the authority to pursue administrative, legal and other appropriate remedies to ensure the protection of individuals with disabilities and mental illness in the State. 42 U.S.C. §10805(a)(1)(B); 42 U.S.C. §15043(a)(2)(A)(i).

8.

To fulfill this federal mandate to protect and advocate for individuals with disabilities in Georgia, GAO must have access to individuals with disabilities in

the locations in which services, supports, and other assistance are provided and to have access to their records, all of which are necessary in order to protect the legal and human rights of such individuals. 42 U.S.C. §10805(a); 42 U.S.C. §15043(a)(2).

9.

Defendant Frank Shelp, M.D., is being sued in his official capacity as the Commissioner of the Georgia Department of Behavioral Health and Developmental Disabilities (“DBHDD”). In his official capacity, Dr. Shelp directs and is responsible for the services provided by DBHDD to people with disabilities including Georgia’s seven (7) state regional hospitals for the treatment of individuals with mental illness and developmental disabilities.

10.

At all relevant times, Defendant Shelp and his employees and agents were operating under the color of state law as representatives of a public entity and within the scope of their public employment.

FACTUAL ALLEGATIONS COMMON TO ALL COUNTS

11.

The DBHDD operates seven (7) state regional hospital facilities that provide services to people with mental illness and developmental disabilities,

including Southwestern State Hospital, West Central Georgia Regional Hospital, Central State Hospital, Georgia Regional Hospital at Atlanta, Georgia Regional Hospital at Savannah, East Central Regional Hospital and Northwest Georgia Regional Hospital.

12.

As Georgia's P&A, GAO receives, among other information, complaints and information specific to incidents of abuse and neglect at the state hospital facilities operated by DBHDD.

13.

GAO investigates deaths and incidents where it has probable cause to believe that abuse or neglect has occurred at the state hospitals. In the course of its investigations, GAO will request records, interview people who may have information about the death or other incidents, and conduct on-site visits to the site of the alleged abuse or neglect pursuant to the P&A Acts.

14.

GAO investigators engage in a variety of activities to detect and remedy abuse and neglect in Defendant's hospitals where individuals with mental illness and with developmental disabilities are confined.

15.

GAO's investigators' methods include but are not limited to, conducting full investigations at the facilities themselves; reviewing the investigations conducted by the facilities and oversight agencies and intervening when the process or outcome raises questions; reviewing corrective action plans and their implementation, if any; analyzing trends in reported incidents in facilities, regions or across the state and making recommendations for changes in policies and practices.

16.

GAO regularly requests records from Defendant's agents and employees pursuant to its investigatory authority. Defendant's agents and employees routinely fail to provide complete records in a timely manner as required by the P&A Acts. It is not uncommon for GAO to have to send second and third requests for the same documents before any are provided.

17.

In order for GAO to perform effective investigations in accordance with its mandates, GAO must have access to what are generally referred to as "peer review records." Peer review refers to the process whereby by a medical staff member or committee of medical staff examines the care provided by a peer medical staff

member to determine whether the medical staff member under review has met accepted standards of care in providing healthcare services. Peer review records disclose, among other things, the process and outcome of reviews by state hospital medical staff and any recommended corrective or remedial actions regarding incidents of patient abuse and neglect, injury, and death within these facilities. Peer review records are required by various accreditation programs and bodies and participation in Medicaid and Medicare, and must be created by the facilities.

18.

In the event of a patient's death at a facility, GAO is entitled access to all records within twenty-four hours after the request is made. In the past, Defendant's agents and employees have inconsistently provided all or some or none of the peer review records from the various hospitals, and when any have been provided it has been only after repeated requests and delays of a year or more.

19.

Currently, Defendant will not permit GAO to copy or take into its possession peer review records created and maintained by Defendant. Defendant will allow GAO to view peer review records by appointment at the facility where the records are located, making necessary multiple trips to facilities located hundreds of miles from GAO's offices, and creating barriers to GAO's use of the peer review records

in fulfilling GAO's Congressional mandate to investigate incidents of abuse, neglect and death. Peer review records are necessary to analyze trends, to assess the quality of the peer reviews and the physicians who conduct them, and to determine whether the corrective and remedial actions recommended have been completed and whether they have been effective.

20.

GAO investigators and advocates monitor Defendant's facilities in order to observe directly such matters as health and safety conditions, the use of restraints and seclusion, ratios of staff to patients, the attitudes and demeanor of interactions among staff and patients, and conducting on site interviews of patients and staff.

21.

Although the P&A Acts clearly provide that GAO have unaccompanied access to facilities and individual patients, GAO is frequently prevented from doing so by Defendant's agents and employees. Thus, when conducting monitoring activities, including speaking to individual patients confined to the hospitals, GAO advocates are often accompanied by hospital staff. Even when such staff remains at a short distance and probably cannot overhear the precise content of the advocate and patient conversation, there is no confidentiality afforded to the fact of the patient's communication with the advocate.

22.

In some instances, GAO has been prevented from conducting private interviews with patients outside the direct presence of Defendant's facility staff.

23.

D. is a person with mental illness confined to SWSH.

24.

D. is eligible for protection and advocacy services from GAO pursuant to the PAIMI Act.

25.

GAO received information that D. had been subject to abuse while confined at SWSH. Specifically, GAO received information that D. had been sexually assaulted at SWSH.

26.

GAO considered the information it had received in light of its knowledge and experience and made a finding that probable cause exists to believe that D. may have been subject to abuse at SWSH and opened an investigation into the matter.

27.

GAO informed Defendant Hoo-you by faxed letter on October 13, 2009, that a representative of GAO would be visiting SWSH on that day for the purposes of

investigating the sexual assault of D. and to conduct monitoring of the facility.

GAO informed Defendant of GAO's role as Georgia's P&A and explained in detail its federally mandated access authority for purposes of investigation and monitoring.

28.

On October 13, 2009, a GAO investigator traveled to SWSH hospital to meet with D. and investigate the sexual assault and to monitor conditions at the hospital.

29.

On October 13, 2009, Defendant Hoo-you denied GAO's investigator access to D. and to the SWSH facility.

30.

Defendant's stated reason for refusing to allow GAO's investigator access to D. was the absence of a member of the hospital staff to accompany the GAO investigator.

COUNT I

31.

GAO restates and incorporates by reference each numbered paragraph, above.

32.

Defendant is violating the P&A Acts, 42 U.S.C. §§ 10801 et seq. and 15041 et seq., by delaying, denying and partially denying GAO's full, complete and timely access to the Defendant's facilities and the individuals confined to those facilities and their records as required by the federal statutes and their accompanying regulations.

33.

Defendant has engaged in a course of conduct prior to the filing of this complaint through which Defendant has violated the P&A Acts by delaying, denying and partially denying GAO's full, complete and timely access to the records, facilities and individuals as required by the statutes and their accompanying regulations.

34.

By delaying, denying, and partially denying GAO's full, complete, and timely access to the records, facilities and individuals, Defendant has, and is,

interfering with GAO's ability to effectively perform its obligations under the P&A Acts in accordance with its Congressional mandate, and is therefore causing GAO to suffer irreparable harm for which there is no adequate remedy at law.

35.

By the nature of Defendant's violations of the P&A Acts, these violations are capable of repetition and yet resist judicial review in order to provide complete relief to GAO.

36.

GAO's right to access individuals with disabilities in the locations in which they receive services and to access records of such individuals are rights secured by the laws of the United States, including, but not limited to, the P&A Acts.

37.

In violation of 42 U.S.C. § 1983, Defendant has subjected GAO to a deprivation of GAO's rights under color of a statute, ordinance, regulation, custom, or usage of the State of Georgia.

38.

As a result of Defendant's deprivation of GAO's rights, the GAO is suffering irreparable injury.

39.

Pursuant to 42 U.S.C. § 1988, GAO should recover a reasonable attorney's fee as part of its costs for taking action to enforce Section 1983.

WHEREFORE, GAO prays that the Court will grant the following relief:

1. Declare that Defendant has violated the rights of GAO under the P&A Acts by unreasonably restricting GAO's access to D., an individual with mental illness, at Southwestern State Hospital;

2. Declare that Defendant has violated the rights of GAO under the P&A Acts by unreasonably denying GAO access to DBHDD's seven (7) state regional hospital facilities that serve people with mental illness and developmental disabilities.

3. Declare that Defendant has violated the rights of GAO under the P&A Acts by unreasonably delaying GAO's access to records; specifically, that Defendant has unreasonably denied GAO's access to peer review records.

4. Preliminarily and permanently enjoin Defendant and his successors from denying GAO any and all future access to individuals with disabilities in the locations where Defendant provides services to them as required by the P & A Acts;

5. Award GAO a reasonable attorney's fee pursuant to 42 U.S.C. § 1988(b); and
6. Provide such other and further relief as the Court may deem just and proper.

This 2nd day of November, 2009.

/s/ Joshua H. Norris

Joshua H. Norris
Georgia Bar No. 545854

Attorney for Plaintiff

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