

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

MARY TROUPE, et al.

PLAINTIFFS

VS.

CIVIL ACTION NO. 3:10-cv-153-HTW-MTP

HALEY BARBOUR, et al.

DEFENDANTS

MOTION FOR PROTECTIVE ORDER

Defendants David J. Dzielak, Director of the Mississippi Division of Medicaid, and Diana S. Mikula, Executive Director of the Mississippi Department of Mental Health, sued solely in their official capacities (“defendants” or “the State”), hereby move this Court, unopposed by plaintiffs, for a protective order and state:

1. The plaintiffs, defendants, and the United States Department of Justice (“DOJ”)¹ are currently voluntarily engaged in complex, structured, confidential settlement negotiations encompassing this five-year old lawsuit involving alleged deficiencies in the State’s system of providing children’s mental health services asserted by plaintiffs and DOJ, and other broad-based federal law claims separately asserted by DOJ relating to the State’s mental healthcare system.

2. The intensive confidential settlement negotiations have proceeded for approximately the past year under agreements between the parties. The negotiations have involved numerous settlement communications, conference calls,

¹ DOJ has appeared as an “interested party” in support of plaintiffs’ claims in this lawsuit pursuant to 28 U.S.C. § 517 [see Docket Nos. 41 & 57], and separately asserted various putative claims it intends to pursue against the State which encompass plaintiffs’ claims regarding children’s mental health services [see Docket No. 48].

in-person meetings, draft proposed agreements, and countless hours of time and effort expended by government officials and attorneys. The negotiations have been undertaken with the expectation that plaintiffs would participate when appropriate given the overlapping claims regarding children's mental health services asserted by plaintiffs and DOJ. The express purpose of the negotiations between plaintiffs, defendants, and DOJ has been to reach one global settlement resolving plaintiffs' claims in this lawsuit, DOJ's positions asserted in support of plaintiffs' claims in this lawsuit, and DOJ's threatened claims against the State. Future conference calls and in-person meetings for further negotiations are scheduled.

3. Significantly, the confidential settlement negotiations have been facilitated through the assistance of Technical Assistance Collaborative ("TAC"), a well-recognized expert in the field of state mental health services and compliance with federal law.

4. The State and DOJ have proceeded with the negotiations facilitated by TAC with the express understanding that the negotiations, including their communications and information exchanged by and between themselves and TAC, would remain confidential pursuant to agreements and this Court's rules.

5. Recently, in March 2015, TAC produced a comprehensive "Mississippi Children's Behavioral Needs Assessment" (the "March 2015 TAC Report") providing its findings and recommendations regarding the State's children's mental health services for the parties' use in evaluating their respective claims and to further the ongoing negotiations.

6. In February 2015, counsel for plaintiffs were provided with a draft of TAC's report regarding the State's children's mental health services by DOJ, however, plaintiffs have not yet been provided a copy of the final March 2015 TAC Report. However, plaintiffs have expressed a desire to receive a copy of the final March 2015 TAC Report.

7. Plaintiffs and the State agree the plaintiffs' counsel should be provided a copy of the final March 2015 TAC Report upon issuance of a protective order and further settlement negotiations, including any documents created or exchanged during the course of the negotiations, will remain confidential as governed by this Court's rules, including Local Rule 83.7.² The protective order should further provide the March 2015 TAC Report and any other confidential settlement communications, information and documents will not be provided to anyone who is not a party to the negotiations, counsel, or an expert participating in the confidential settlement negotiations unless all parties agree otherwise in writing.

8. The requested protective order will protect the confidentiality of the

² Rule 83.7, enacted pursuant to the Alternative Dispute Resolution Act of 1998, "is designed to provide access to effective ADR techniques and to encourage mutually satisfactory resolutions of disputes in all stages of civil litigation." L.U.R.Civ. 83.7(a). The Rule applies to "any activity in which the parties mutually engage by consent" to resolve putative claims without the necessity of trial, including mediation activities "in which impartial persons assist parties in reaching settlements . . . facilitate communications between the parties and assist them in their negotiations[, and] [w]hen appropriate . . . may also offer objective evaluations of cases and may make settlement recommendations." L.U.R.Civ. 83.7(d)(1)-(2). And, importantly, to further alternative dispute resolution activities' purposes under the Rule, settlement related communications are confidential, not evidence in any proceeding, and not subject to compelled disclosure absent extremely limited overriding circumstances. L.U.R.Civ. 83.7(j).

settlement negotiations which have taken place to date, and the further negotiations contemplated by the parties, and allow the parties to fully and frankly pursue an amicable resolution of the complex claims involved without further involvement by the Court.

9. Additionally, a protective order is appropriate and necessary because this Court is the proper authority to determine the applicability of the confidentiality provisions of its Local Rules to settlement negotiations involving a lawsuit pending before it. As of this writing, at least one outside party has sought access to the March 2015 TAC Report. In March 2015, a reporter from *The Clarion-Ledger* requested a copy of the March 2015 TAC Report from the Mississippi Department of Mental Health putatively pursuant to the Mississippi Public Records Act. The Department denied access to the March 2015 TAC Report. Thereafter, the newspaper filed a Complaint against the Department in the Chancery Court of Hinds County seeking a copy of the March 2015 TAC Report and citing the lack of this Court's entry of a protective order as grounds for the relief requested. [See Complaint in *Gannett River States Publishing Corporation d/b/a The Clarion-Ledger v. Mississippi Department of Mental Health*, Cause No. G2015-466 W/4, affixed hereto as Ex. "1"].³

10. Absent the requested protective order, the State will be unable to

³ As of this writing, the Department has been served with the newspaper's Complaint but no further proceedings have taken place or been set in the newspaper's lawsuit. The Department's responsive pleading is currently due May 6, 2015.

furnish plaintiffs' counsel with a copy of the March 2015 TAC Report. Further, the parties' ongoing confidential settlement negotiations – in which the State only agreed to proceed based upon their confidential nature – will likely come to an abrupt end.

11. Pursuant to Local Rule 7(b)(10), undersigned counsel has discussed defendants' motion with counsel for plaintiffs, understands plaintiffs have no objection to the relief requested, and intends to submit a proposed protective order to the Court to which plaintiffs have agreed. Further, given defendants' motion is unopposed by plaintiffs, and the facts and authorities supporting this motion are fully set forth above, defendants request the Court waive the requirement of submitting a separate memorandum of authorities as required by Local Rule 7(b)(4).

FOR THESE REASONS, defendants request the Court enter a protective order in connection with the parties' ongoing confidential settlement negotiations finding and providing:

(1) There are ongoing confidential settlement negotiations governed by this Court's rules;

(2) Statements made, and documents generated or exchanged by one of the parties to the negotiations or the Technical Assistance Collaborative ("TAC") in the course of the settlement negotiations, including, but not limited to, the March 2015 TAC Mississippi Children's Behavioral Health Needs Assessment, shall not be disclosed by any of the parties to the negotiations to anyone who is not a party,

counsel, or an expert participating in the confidential settlement negotiations, unless the parties to the negotiations expressly agree otherwise in writing;

(3) Counsel for defendants shall provide counsel for plaintiffs with a copy of the March 2015 TAC Mississippi Children's Behavioral Health Needs Assessment, and said document shall be subject to the foregoing terms of the Court's order; and

(4) Any further relief deemed appropriate.

THIS the 24th day of April, 2015.

Respectfully submitted,

DAVID J. DZIELAK in his official capacity as
Director of the Mississippi Division of Medicaid,
and DIANA S. MIKULA, in her official capacity as
Executive Director of the Mississippi Department
of Mental Health

/s Harold E. Pizzetta, III
Harold E. Pizzetta, III (Bar No. 99867)
Assistant Attorney General

Office of the Attorney General
P.O. Box 220
Jackson, MS 39205
Telephone No. (601) 359-3680
Facsimile No. (601) 359-2003
hpizz@ago.state.ms.us

CERTIFICATE OF SERVICE

I, Harold E. Pizzetta, III, Assistant Attorney General for the State of Mississippi, do hereby certify that on this date, I electronically filed the foregoing document with the Clerk of Court using the ECF system which sent notification of such filing to all counsel of record.

THIS the 24th day of April, 2015.

/s Harold E. Pizzetta, III
Harold E. Pizzetta, III

Case: 25CH1:15-cv-000466 Document #: 2 Filed: 04/06/2015 Page 1 of 6

F I L E D
APR 06 2015

**IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT**

EDDIE JEAN CARR, CHANCERY CLERK

**GANNETT RIVER STATES PUBLISHING CORPORATION
D/B/A THE CLARION-LEDGER**

Abolomon
COMPLAINANT D.C.

VS.

CAUSE NO. G2015-466 W/4

MISSISSIPPI DEPARTMENT OF MENTAL HEALTH

RESPONDENT

COMPLAINT TO COMPEL PUBLIC ACCESS TO RECORDS

Complainant Gannett River States Publishing Corporation d/b/a The Clarion-Ledger (the "Clarion Ledger"), pursuant to Miss. Code Ann. § 25-61-13, hereby files this Complaint to Compel Public Access to Records against Respondent Mississippi Department of Mental Health (the "Department of Mental Health"), and in support thereof, would state as follows:

PARTIES

1. The Clarion Ledger is a corporation organized and existing under the laws of Arkansas, with its principal place of business in McLean, Virginia, and is qualified to do business in Mississippi.

2. The Department of Mental Health is a Mississippi state entity that may be served with process through the Office of the Attorney General of the State of Mississippi at his offices at the Walter Sillers Building at 550 High Street, Suite 1200, Jackson, Mississippi.

JURISDICTION AND VENUE

3. The Court has jurisdiction over this matter pursuant to Article VI, Section 156 of the Mississippi Constitution and Miss. Code Ann. § 25-61-13.

4. Venue is proper in this Court pursuant to Miss. Code Ann. § 25-61-13 because this Court is the "chancery court of the county in which the public body is located."



FACTS

5. On December 22 2011, the United States Department of Justice (“DOJ”) sent a letter (“Findings Letter”) to the State of Mississippi regarding the DOJ’s findings resulting from its investigation of the State’s services for and support of persons with mental illness and/or developmental disabilities (“DD”). See DOJ Findings Letter, attached as Exhibit A. As explained in the Findings Letter, the DOJ found that the State had violated the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12134, and its implementing regulations, 28 C.F.R. pt. 35, “by unnecessarily institutionalizing persons with mental illness or DD in public and private facilities and failing to ensure that they are offered a meaningful opportunity to live in integrated community settings consistent with their needs.” *Id.*

6. The State, through Attorney General Jim Hood, agreed with the DOJ that it would provide expanded services for adults with mental illness and people with developmental and intellectual disabilities and engage national experts to provide technical assistance regarding implementation of the expanded services. See August 29, 2014 Letter from Attorney General Jim Hood, attached as Exhibit B.

7. In May 2014, the State contracted with Technical Assistance Collaborative (“TAC”) to (1) assess and make recommendations for a statewide housing strategy to assist with locating and funding integrated supported housing options for individuals with mental illness and people with developmental and intellectual disabilities, and (2) evaluate the State’s current services and programs and provide recommendations and technical assistance where needed. See *id.* (“We have retained TAC to study permanent housing (study to be completed in August), and we are about to retain TAC to review *Troupe* issues”).¹

¹ “*Troupe*” as it is used in the AG’s August 2014 letter refers to *Troupe, et al v. Barbour, et al*, In the United States District Court for the Southern District of Mississippi, Civil Action No.: 3:10-cv-00153-HTW-MTP, wherein

8. TAC performed both assessments. TAC's report on integrated supportive housing was completed in October 2014 and published to the Department of Health's website. See <http://www.dmh.ms.gov/wp-content/uploads/2014/10/A-Statewide-Approach-for-Integrated-Supportive-Housing-in-Mississippi3.pdf>.

9. TAC's report (the "TAC Report") on the State's current services and programs, i.e., the *Troupe* issues, was completed in March 2015. However, the Department of Health has withheld it from publication.

10. Upon information and belief, the TAC Report was paid for with taxpayer money. Furthermore, upon information and belief, it was understood by the organizations and families who participated in the assessment for the TAC Report that the Department of Mental Health would make the TAC Report public. Again, the Department of Health has withheld it from publication.

11. On March 23, 2015, the Clarion Ledger submitted a public records request through its reporter Emily Le Coz, pursuant to Miss. Code Ann. § 25-61-5 to the Department of Mental Health requesting access to and a copy of the TAC Report. See Public Records Request, attached as Exhibit C.

12. In a March 26, 2015 letter, the Department of Mental Health refused to provide the Clarion Ledger access to the TAC Report, alleging that the TAC Report included "confidential mediation documents." See Response Letter, attached as Exhibit D.

13. However, the "exemptions" and/or "privileges" asserted by the Department of Mental Health are inapplicable, and the Department of Mental Health's refusal to provide access

plaintiffs have alleged that the State has failed to meet the needs of children with behavioral or emotional disorders and has discriminated against children with mental health issues.

to the TAC Report on the basis of these alleged “exemptions” and/or “privileges” is in direct contradiction to its publication of TAC’s first report.

14. Furthermore, as of the date of the filing of this Complaint, the DOJ has not filed a lawsuit against the State or the Department of Health related to its December 2011 Findings Letter, and a protective or confidentiality order covering the TAC Report has not been entered in the *Troupe* case. See Docket Report, attached as Exhibit E.

15. Accordingly, the Clarion Ledger now files this Complaint to Compel Public Access to Records pursuant to Miss. Code Ann. § 25-61-13, seeking a determination that the documents requested in its March 23, 2015 request were wrongfully withheld by the Department of Mental Health and should be produced, along with damages and expenses for the County’s willful and knowing denial of such documents.

COUNT I – VIOLATION OF MISS. CODE ANN. § 25-61-5

16. The allegations of paragraphs 1-15 are incorporated by reference.

17. The Department of Mental Health wrongfully, willfully, knowingly and without justification withheld records requested by the Clarion Ledger in its March 23, 2015 request, in violation of Miss. Code Ann. § 25-61-5.

COUNT II – PENALTY

18. The allegations of paragraph 1-17 are incorporated by reference.

19. The Department of Mental Health wrongfully, willfully, knowingly and without justification withheld records requested by the Clarion Ledger in its March 23, 2015 request, in violation of Miss. Code Ann. § 25-61-5.

20. Pursuant to Miss. Code Ann. § 25-61-15, the Department of Mental Health is liable in the amount of \$100.00, plus reasonable expenses, costs and attorneys' fees incurred by the Clarion Ledger in bringing this proceeding.

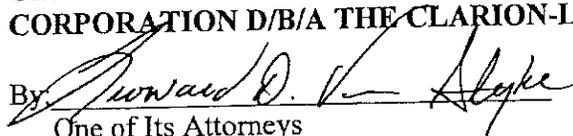
WHEREFORE, based on the foregoing, the Clarion Ledger respectfully requests that the Court grant the following relief:

- 1) Set this matter for hearing at the earliest practicable date, and expedite this matter in every possible way.
- 2) Enter a judgment declaring that the Department of Mental Health wrongfully, willfully, knowingly and without justification withheld records requested by the Clarion Ledger in its March 23, 2015 request, in violation Miss. Code Ann. § 25-61-5 and ordering the Department of Mental Health to produce the TAC Report;
- 3) Enter a judgment finding the Department of Mental Health liable pursuant to Miss. Code Ann. § 25-61-15 in the amount of \$100.00, plus reasonable expenses, costs, and attorneys' fees incurred by the Clarion Ledger in bringing this proceeding, plus prejudgment interest; and
- 4) All further relief as the Court may deem appropriate.

Dated: April 6, 2015.

Respectfully submitted,

**GANNETT RIVER STATES PUBLISHING
CORPORATION D/B/A THE CLARION-LEDGER**

By 
One of Its Attorneys

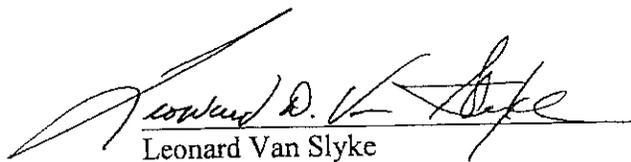
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Telephone: 601-948.3101
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lvanslyke@brunini.com

CERTIFICATE OF SERVICE

Pursuant to Miss. Code Ann. § 25-61-13, I hereby certify that I served a true and correct copy of the foregoing upon the Mississippi Ethics Commission by hand delivery to 660 North Street, Suite 100-C, Jackson, Mississippi 39202, and by U.S. Mail to P.O. Box 22746, Jackson, Mississippi 39225-2746.

Dated: April 6, 2015.


Leonard Van Slyke

COVER SHEET
Civil Case Filing Form
(To be completed by Attorney/Party
Prior to Filing of Pleading)

Court Identification
Docket Number
Case Year
Docket Number
County # Judicial Court ID
District (CH, CI, CO)
Month Date Year
Local Docket ID
Case Number if filed prior to 1/1/94

Mississippi Supreme Court
Administrative Office of Courts
Form AOC001
(Revised 1/1/2001)

This area to be completed by clerk

IN THE CHANCERY COURT OF HINDS COUNTY
Short Style of Case: Gannett River States Publishing Corp. d/b/a the Clarion-Ledger v. Mississippi Department of Mental Health
Party Filing Initial Pleading: Type/Print Name Leonard Van Slyke
Check (✓) if Not an Attorney
Compensatory Damages Sought: \$
Punitive Damages Sought: \$
Signature
MS Bar No. 6589
Is Child Support contemplated as an issue in this suit? Yes No

PLAINTIFF - PARTY(IES) INITIALLY BRINGING SUIT SHOULD BE ENTERED FIRST (FIRST NAME IN SHORT STYLE) - ENTER ADDITIONAL PLAINTIFFS ON SEPARATE FORM
Individual
Last Name First Name Maiden Name, if Applicable Middle Init. Jr/Sr/III/IV
Address of Plaintiff
Check (✓) if Individual Plaintiff is acting in capacity as Executor(trix) or Administrator(trix) of an Estate, and enter style:
Estate of
Check (✓) if Individual Plaintiff is acting in capacity as Business Owner/Operator (d/b/a) or State Agency, and enter entity:
D/B/A / Agency
Business Gannett River States Publishing Corporation
Enter legal name of business, corporation, partnership, agency - If Corporation, indicate state where incorporated
Check (✓) if Business Plaintiff is filing suit in the name of an entity other than the above, and enter below:
D/B/A: The Clarion Ledger

DEFENDANT - NAME OF DEFENDANT (FIRST NAME IN SHORT STYLE) - ENTER ADDITIONAL DEFENDANTS ON SEPARATE FORM
Individual
Last Name First Name Maiden Name, if Applicable Middle Init. Jr/Sr/III/IV
Check (✓) if Individual Defendant is acting in capacity as Executor(trix) or Administrator(trix) of an Estate, and enter style:
Estate of
Check (✓) if Individual Defendant is acting in capacity as Business Owner/Operator (d/b/a) or State Agency, and enter entity:
D/B/A / Agency
Business Mississippi Department of Mental Health
Enter legal name of business, corporation, partnership, agency - If Corporation, indicate state where incorporated
Check (✓) if Business Defendant is being sued in the name of an entity other than the above, and enter below:
D/B/A:
ATTORNEY FOR THIS DEFENDANT: Bar No. or Name: Pro Hac Vice (✓)

- In left hand column, check one (1) box that best describes the nature of this suit. In right hand column check all boxes which indicate secondary claims.
Business/Commercial
Accounting (Business)
Bankruptcy
Business Dissolution - Corporation
Business Dissolution - Partnership
Debt Collection
Employment
Examination of Debtor
Execution
Foreign Judgment
Garnishment
Pension
Receivership
Replevin
Stockholder Suit
Other
Domestic Relations
Child Custody/Visitation
Child Support
Contempt
Divorce: Fault
Divorce: Irreconcilable Differences
Domestic Abuse
Emancipation
Modification
Paternity
Property Division
Separate Maintenance
Termination of Parental Rights
UIFSA (formerly URESA)
Other
Contract
Breach of Contract
Installment Contract
Insurance
Product Liability under Contract
Specific Performance
Other

- Probate
Accounting (Probate)
Birth Certificate Correction
Commitment
Conservatorship
Guardianship
Heirship
Intestate Estate
Minor's Settlement
Muniment of Title
Name Change
Power of Attorney
Testate Estate
Will Contest
Other
Statutes/Rules
Bond Validation
Civil Forfeiture
Declaratory Judgment
ERISA
Eminent Domain
Extraordinary Writ
Federal Statutes
Injunction or Restraining Order
Municipal Annexation
Racketeering (RICO)
Railroad
Seaman
Other Mississippi Public Records Act
Appeals
Administrative Agency
County Court
Hardship Petition (Driver License)
Justice Court
MS Employment Security Comm'n
Municipal Court
Oil & Gas Board
Workers' Compensation
Other

- Children and Minors - Non-Domestic
Adoption - Noncontested
Consent to Abortion for Minor
Removal of Minority
Other
Torts-Personal Injury
Bed Failh
Fraud
Loss of Consortium
Malpractice - Legal
Malpractice - Medical
Negligence - General
Negligence - Motor Vehicle
Products Liability
Wrongful Death
Other
Mass Tort
Asbestos
Chemical Spill
Dioxin
Hand/Arm Vibration
Hearing Loss
Radioactive Materials
Other
Real Property
Adverse Possession
Ejectment
Eminent Domain
Judicial Foreclosure
Lien Assertion
Partition
Receiver Appointment
Tax Sale: Confirmation/Cancellation
Title, Boundary &/or Easement
Other
Civil Rights
Elections
Habeas Corpus
Post Conviction Relief
Prisoner
Other