

FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

2005 DEC 30 PM 2:42

CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS, FLORIDA

ROGER G. CANUPP, JACOB MYERS,
LAWRENCE MCGEE, HUBERT DAVIDSON,
TYWAUN JACKSON, CHARLES DURDEN,

Plaintiffs,

vs.

Case No. 2:04-cv-260-FtM-33DNF

LIBERTY BEHAVIORAL HEALTHCARE
CORP., LUCY HADY, Secretary of the
Department of Children and Families,

Defendants.

_____ /

ORDER

This matter comes before the Court after a Preliminary Pretrial Conference was held before the undersigned on Friday, December 16, 2005. The following motions, which are currently pending, were addressed by the parties and the Court: (1) Plaintiff's Motion to Compel (Doc. #83); (2) Defendant's Motion for Protective Order (Doc. #89); (3) Plaintiff's Motion to Compel Second Request for Production (Doc. #103) and (4) Plaintiff's Motion to Compel Third Request for Production (Doc. #104). In particular, the parties agreed that Plaintiffs' experts will conduct a visit and inspection of the Florida Civil Commitment Center ("FCCC" or "Facility") over a four day period in March 2006, and that Plaintiffs shall be permitted to have a total of three experts and five attorneys (three attorneys to accompany the experts and two attorney to review records) at the Facility inspection.

With respect to the remaining issues, it is hereby

ORDERED:

1. Plaintiff's Motion to Compel (Doc. #83) is **GRANTED to the extent** that:

(a) Plaintiffs' Counsel or their Experts shall be permitted to hand out business cards or other documents directly to residents at the FCCC during the inspection; however, Defendants shall be permitted an opportunity to first inspect all such documents and business cards Plaintiff intends to present to any resident prior to the inspection;

(b) Plaintiffs' Experts shall be permitted to inspect and view typical resident areas including: sample living quarters for residents, including consenting residents, non-consenting residents, and residents who are restricted to living quarters due to their mental illness; therapy session rooms, recreations areas, medical treatment areas, educational rooms, dining areas, and those areas in which residents are confined due to disciplinary or other reasons.

(c) Plaintiffs' Experts shall be permitted to ask informal questions of current FCCC staff during the Facility inspection, provided that:

I. Any employee designated by Plaintiff as "managerial" shall not be questioned by Plaintiffs without the permission of and in the presence of Defense counsel.

ii. The questions shall be limited in nature and scope and shall be posed contemporaneous with the inspection and for purposes of clarification or explanation only. In no case shall the questioning of a FCCC staff member delay the normal course of the inspection or result in a detailed interview of an individual staff member.

iii. To the extent that Plaintiffs' Experts makes notes of any comments made by FCCC staff, such notes shall be preserved and made available to Defendants upon request.

iv. In no case shall any remarks or comments made by FCCC staff in response to a question by Plaintiffs' Expert during the FCCC inspection constitute an admission for purposes of Rule 801(d)(2)(d) of the Federal Rules of Evidence.

In all respects Plaintiffs' Motion is **DENIED**.

2. Defendants Motion for a Protective Order is (Doc. #89) is **GRANTED to the extent** that:

(a) Plaintiffs' Counsel and Experts are required to sign liability waivers prior to being permitted access beyond resident restricted areas.

(b) Plaintiffs shall not be permitted to attend or observe residents' therapy sessions; however Plaintiffs are permitted access to residents' treatment and medical records provided said resident executes a release pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), unless the

Court enters a qualified protective order as discussed *infra* at ¶6.

(c) Plaintiffs shall not be permitted to attend or observe treatment staff meetings.

(d) Plaintiffs shall not be permitted to interview residents in their living quarters, but instead shall conduct interviews of residents in a designated interview room.

In all other respects Defendants Motion is **DENIED**.

3. Plaintiff's Motion to Compel Second Request for Production (Doc. #103) and Plaintiff's Motion to Compel Third Request for Production (Doc. #104) are **DENIED as moot**.

4. The parties shall meet **no later than January 10, 2006** for the purpose of identifying which residents are members of the class as defined by the Court in its March 29, 2005 Order (Doc. #66).

5. Plaintiffs shall notify the Court five (5) days prior to the Facility inspection so that the Court may make itself available to resolve any areas of dispute between the parties that may arise during the inspection.

6. To the extent that Plaintiffs maintain that the Court can enter a Protective Order pursuant to 45 C.F.R. §164.512(e) so as not to require each resident to execute an individual HIPAA release, Plaintiffs shall submit for the Court's review and approval a draft protective order **within thirty (30) days** of this Order.

7. The **Deputy Clerk** is directed to enter a revised Case Management and Scheduling Order extending all current deadlines by ninety (90) days.

DONE AND ORDERED in Fort Myers, Florida, on this 30th day of December, 2005.



DOUGLAS N. FRAZIER
UNITED STATES MAGISTRATE JUDGE

SA: hmk
Copies: All Parties of Record