

FILED IN CLERK'S OFFICE
U.S.D.C. - Atlanta

OCT 16 2009

JAMES N. HATTEN, Clerk
BY: [Signature]

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

GEORGIA ADVOCACY OFFICE,)
INC.)

Plaintiff,)

v.)

FRANK SHELP, M.D., in his official)
capacity as Commissioner, Georgia)
Department of Behavioral Health and)
Developmental Disabilities, and)
HILARY HOO-YOU, in her official)
capacity as Regional Hospital)
Administrator, Southwestern State)
Hospital,)

Defendants.)

CAP

CIVIL ACTION FILE

NO 1 09-CV-2880

COMPLAINT

COMES NOW Plaintiff Georgia Advocacy Office, Inc. ("GAO"), by and
through counsel, and respectfully alleges as follows:

INTRODUCTION

1.

Plaintiff brings this action for injunctive and declaratory relief to redress the
Defendants' refusal to permit Plaintiff, the designated Protection and Advocacy

System for the State of Georgia, access to Defendants' facilities at Southwestern State Hospital ("SWSH") for the purposes of conducting an investigation of possible abuse of a person with mental illness and monitoring conditions pursuant to the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §§ 10801, et seq. (hereinafter "PAIMI Act").

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, 42 U.S.C. §10801 et seq.

3.

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

PARTIES

4.

Plaintiff 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 to the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. § 10801 et seq., the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. § 15041 et seq., and the Protection and Advocacy for Individual Rights Program of the Rehabilitation Act, 29 U.S.C. § 794e (“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, the P&A has 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).

7.

To fulfill this federal mandate, the P&A must have access to individuals with disabilities at reasonable times in locations in which services, supports, and other assistance are provided and to have access to their records 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).

8.

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”). Defendant Hilary Hoo-you is being sued in her official capacity as the Regional Hospital Administrator at Southwestern State Hospital.

9.

At all relevant times, Defendants 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

10.

The DBHDD operates seven (7) facilities that provide services to people with mental illness and developmental disabilities, including Southwestern State Hospital, West Central State Hospital, Central State Hospital, Georgia Regional Hospital at Atlanta, Georgia Regional Hospital at Savannah, East Central Regional Hospital and Northwest Regional Hospital.

11.

GAO routinely conducts investigations of abuse and neglect at DBHDD's seven facilities and regularly monitors conditions at these facilities.

12.

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

13.

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

14.

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.

15.

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.

16.

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.

17.

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.

18.

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

COUNT I

VIOLATION OF PROTECTION & ADVOCACY FOR INDIVIDUALS

WITH MENTAL ILLNESS ACT

19.

The allegations set forth in the numbered paragraphs hereinabove are incorporated herein as fully as if set forth verbatim.

20.

GAO is a "system" as such term is used in the P&A Acts.

21.

Pursuant to 42 U.S.C. §10805(a)(1)(B), a P&A system shall “have the authority to pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State.”

22.

Pursuant to 42 U.S.C. §10805(a)(1)(A), a P&A system shall “have the authority to investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred.”

23.

Pursuant to 42 U.S.C. §10805(a)(3), a P&A system shall “have access to facilities in the State providing care or treatment.”

24.

Pursuant to 42 C.F.R. §51.42(b), a P&A system “shall have reasonable unaccompanied access to public and private facilities and programs in the State which render care or treatment for individuals with mental illness, and to all areas of the facility which are used by residents or are accessible to residents.”

25.

Further pursuant to 42 C.F.R. §51.42(b), a P&A system “shall have reasonable unaccompanied access to residents at all times necessary to conduct a full investigation of abuse or neglect. This authority shall include the opportunity to interview any facility service recipient, employee, or other persons, including the person thought to be the victim of such abuse, who might be reasonably believed by the system to have knowledge of the incident under investigation.”

26.

As defined by 42 C.F.R. §51.2, “abuse” means “any act or failure to act by an employee of a facility rendering care or treatment which was performed, or which was failed to be performed, knowingly, recklessly, or intentionally, and which caused, or may have caused, injury or death to an individual with mental illness, and includes but is not limited to acts such as: rape or sexual assault; striking; the use of excessive force when placing such an individual with mental illness in bodily restraints; the use of bodily or chemical restraints which is not in compliance with Federal and State laws and regulations; verbal, nonverbal, mental and emotional harassment; and any other practice which is likely to cause immediate physical or psychological harm or result in long-term harm if such practices continue.”

27.

As defined by 42 C.F.R. §51.2, “neglect” means “a negligent act or omission by an individual responsible for providing services in a facility rendering care or treatment which caused or may have caused injury or death to an individual with mental illness or which placed an individual with mental illness at risk of injury or death, and includes, but is not limited to, acts or omissions such as failure to: establish or carry out an appropriate individual program or treatment plan (including a discharge plan); provide adequate nutrition, clothing, or health care; and the failure to provide a safe environment which also includes failure to maintain adequate numbers of appropriately trained staff.”

28.

In addition, 42 C.F.R. §51.2 defines “probable cause” as “reasonable grounds for belief that an individual with mental illness has been, or may be at significant risk of being subject to abuse or neglect. The individual making such determination may base the decision on reasonable inferences drawn from his or her experience or training regarding similar incidents, conditions or problems that are usually associated with abuse or neglect.”

29.

As described above, the GAO asserted probable cause to believe that D. had been subject to abuse and requested access to D. at SWSH pursuant to PAIMI, 42 U.S.C. §10801 et seq.

30.

Defendants refused to allow GAO to have access to D. or the SWSH facility.

31.

As a result of Defendants' violations of the P&A Acts, GAO is prohibited from fulfilling its mandate under PAIMI, 42 U.S.C. §10801 et seq., and is suffering irreparable injury.

COUNT II

VIOLATION OF 42 U.S.C. § 1983

32.

The allegations set forth in the numbered paragraphs above are incorporated herein as fully as if set forth verbatim.

33.

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.

34.

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

35.

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

36.

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

1. Declare that Defendants have violated the rights of Plaintiff under P&A Acts by unreasonably restricting Plaintiff's access to D., an individual with mental illness, at Southwestern State Hospital;
2. Preliminarily and permanently enjoin Defendants and their successors from denying Plaintiff any and all future access to individuals with disabilities in the locations where Defendants provide services to them as required by the P & A Acts;
3. Award Plaintiff a reasonable attorney's fee pursuant to 42 U.S.C. § 1988(b); and
4. Provide such other and further relief as the Court may deem just and proper.

This 16th day of October, 2009.



Joshua H. Norris
Georgia Bar No. 545854

Attorney for Plaintiff
Georgia Advocacy Office, Inc.

Georgia Advocacy Office, Inc.
150 E. Ponce de Leon Avenue
Suite 430
Decatur, GA 30030
Phone: (404) 885-1234
Fax: (404) 378-0031
Email: jnorris@thegao.org