

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

GEORGIA ADVOCACY OFFICE, INC.,*

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Plaintiff,

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CIVIL ACTION

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1:09-CV-2880-CAP

v.

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FRANK SHELP, M.D., in his
Official capacity as
Commissioner of the DEPARTMENT
OF BEHAVIORAL HEALTH AND
DEVELOPMENTAL DISABILITIES,

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Defendant.

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STIPULATED AGREEMENT

These stipulations (“Stipulated Agreement”) are made and entered into by and between the Georgia Department of Behavioral Health and Developmental Disabilities (the “Department”), and the Georgia Advocacy Office, Inc. (“GAO”) as follows:

1. GAO is the designated protection and advocacy system for the State of Georgia pursuant to the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §§ 10801 *et seq.* (“PAIMI”), the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. §§ 15041 *et seq.* (“DD Act”), and the Protection and Advocacy for Individual Rights Program of the

Rehabilitation Act, 29 U.S.C. §§ 794e (PAIR, collectively, with the regulations issued under PAIMI, DD Act and PAIR, the “P&A Acts”). The term GAO refers to GAO, its employees and its agents authorized under the P&A Acts.

2. GAO has filed a civil action against the Department in the United States District Court for the Northern District of Georgia, Civil Action File No. 1:09-CV-2880-CAP, *Georgia Advocacy Office, Inc. v. Frank Shelp, M.D., in his official capacity as Commissioner of the Department of Behavioral Health and Developmental Disabilities* regarding GAO’s authority under the P&A Acts and regulations to have access to individuals, facilities, and records.

3. It is the desire of the parties hereto to avoid the time and expense associated with litigation of all issues except peer review.

4. The parties desire to enter into an agreement that facilitates and expedites GAO’s access to individuals, facilities, and records in a manner consistent with the P&A Acts and their implementing regulations.

5. The parties agreed to mediate this matter and this Court ordered said mediation, which occurred on June 22, 23, and 29, 2011, and July 14, 2011 and August 4, 2011.

6. The parties have made diligent efforts and have reached agreement as to all of GAO's claims except with respect to access to peer review records under the P&A Acts and regulations.

7. The parties request a scheduling order on the only remaining issue of access to peer review records under the P&A Acts and regulations.

ACCESS TO FACILITIES AND INDIVIDUALS

8. For purposes of this Agreement, Facility shall mean any setting operated by the Department that provides care or treatment services.

9. GAO shall have reasonable unaccompanied access to the Department's Facilities, and the individuals served by those Facilities during reasonable times, which shall include at a minimum, the normal working hours (operational hours) of the Facility. GAO shall have reasonable unaccompanied access to all areas of a Facility where services, supports, and other assistance are provided to individuals who are admitted or served by the Department.

(a) This access is for the purposes of providing information and training on, and referral to programs addressing the needs of individuals receiving services, and information and training about individual rights and the protection and advocacy services available from GAO, including GAO's

name, address, and telephone number; monitoring compliance with respect to the rights and safety of individuals receiving services; and inspecting, viewing and photographing all areas of the Facility used by, or accessible, to individuals receiving services.

10. GAO shall have reasonable unaccompanied access to Facilities and individuals at all times necessary to conduct a full investigation of any incident of suspected abuse or neglect. GAO shall be afforded such access to Facilities when GAO informs an employee of the Facility that it has received a complaint or has probable cause to believe abuse or neglect has or may have occurred.

(a) GAO shall not be required to reveal the source of the complaint or certify, attest or otherwise specify the factual bases upon which a determination of probable cause is made.

(b) This authority includes the opportunity: to interview any Facility service recipient, employee or other individual, including the individual thought to be the victim of such abuse, who might be reasonably believed by the system to have knowledge of the incident under investigation; to inspect, view and photograph all areas of the Facility's premises that might be reasonably believed by GAO to have been connected with the incident under investigation.

11. GAO shall not be required to alert Facility Administration of its presence at any Facility upon arrival or otherwise inform the Department of its presence at a Facility, except GAO shall notify staff, if available, upon arrival at the unit or building, and if asked, GAO will disclose the purpose of the visit.

12. All authorized GAO employees and agents shall have a GAO-issued picture identification card on their person and wear a GAO-issued identification nametag while at any of the Department's Facilities.

13. GAO has the right to reasonable unaccompanied access to all individuals receiving services, which includes the opportunity to meet and communicate privately with individuals receiving services regularly, formally and informally, by telephone, mail and in person. Reasonable times shall include, at a minimum, the normal working hours (operational hours) of the Facility.

14. GAO shall conduct its activities so as to minimize interference with the Facility programs, respect the privacy rights of individuals and honor an individual's request to terminate an interview in accordance with 42 C.F.R. 51.42(c).

ACCESS TO INFORMATION AND RECORDS

15. GAO has a right to access all of the records of individuals who are admitted or served by the Department pursuant to the P&A Acts and regulations. The Department is not required to create any records in order to respond to a GAO request. This provision does not require the Department to obtain records from other providers providing care or treatment or community service boards. Information and individual records, whether written or in another medium, draft or final, including handwritten notes, electronic files, photographs or video or audio tape records, which shall be available to GAO under this agreement if in the Department's possession or control, shall include, but not be limited to:

(a) individual records obtained or prepared in the course of providing intake, assessment, evaluation, education, training and other supportive services, including clinical records, financial records, and monitoring and other reports prepared or received by a member of the staff of the Facility that is providing care or treatment;

(b) reports prepared by an agency charged with investigating incidents of abuse or neglect, injury or death occurring at the Facility, or while the individual is under the care of a member of the Department staff, or by or for the Facility itself, that describes any or all of the following:

(i) abuse, neglect, injury, death;

(ii) the steps taken to investigate the incidents;

(iii) reports and records, including personnel records, prepared or maintained by the Facility in connection with such reports of incidents; or,

(iv) supporting information that was relied upon in creating a report, including all information and records used or reviewed in preparing reports of abuse, neglect, injury or death such as records which describe individuals who were interviewed, physical and documentary evidence that was reviewed, and the related investigative findings;

(c) discharge planning records;

(d) reports prepared by individuals and entities performing certification or licensure reviews, or by professional accreditation organizations, as well as related assessments prepared for the Facility by its staff, contractors or related entities; and,

(e) professional, performance, building or other safety standards, demographic and statistical information relating to the Facility.

16. GAO shall be afforded access to records promptly (1) upon the

presentation of an authorization of an individual or the individual's legal guardian, or (2) upon GAO's assertion of probable cause to suspect abuse or neglect where the individual is unable to authorize access to their records, the State (Adult Protective Services ("APS") or Division of Family and Children Services ("DFCS")) is the guardian, or the individual has a legal guardian and the legal guardian has failed to act after a good faith effort to contact the guardian by GAO to inform them of possible abuse or neglect of the individual.

(a) If GAO is present at the Facility when the request is made, the records shall be produced for inspection and review promptly, if readily available and such review does not interfere with the Facility's current use of the same records; provided, however, if the records are readily available at a different part of the Facility, GAO may access them there.

(b) Facility staff may be present during the inspection and review of records, provided however that the lack of Facility staffing shall not be used as a reason to deny prompt access to records to GAO requesting access to them while present at the Facility.

(c) After GAO has made a written request for records for the purposes of investigation or pursuant to an authorization by an individual (or their legal guardian), the Department shall either copy and produce the

records or make them available for inspection and copying by GAO. If the Department chooses to make the records available for inspection and copying by GAO, it shall inform GAO promptly. If the Department instead chooses to copy and produce them, it shall do so within three (3) business days.

(d) Where the Department is unable to meet the due date of a record copy request, it shall contact GAO prior to the time for compliance and request an extension of time for a specific period of time, which extension shall not be unreasonably withheld.

17. GAO shall be afforded immediate access to records, but not later than twenty-four (24) hours, after GAO has made a written request, in any case of death of an individual who is admitted or served by the Department, or if GAO determines there is probable cause to believe that the health or safety of an individual is in serious and immediate jeopardy. Where the Department is unable to meet the due date of a record request, it shall immediately contact GAO to request an extension of time, which extension shall not be unreasonably withheld.

18. All requests for copies of records, except for minimal requests made by GAO in person at the Facility, shall be in writing and addressed to the director of medical records at each Facility. GAO's access to records shall include inspecting

and obtaining copies of information and records. Copies of records shall be subject to the current rate specified in the Open Records Act, O.C.G.A. § 50-18-70 *et seq.* Payment in advance shall not be required but payment shall be made promptly. A written request includes an email, a legible hand-written request, a facsimile or letter. The time deadlines in paragraphs 16(c) and 17 shall apply to the mailing of the records.

19. The Department staff may speak with GAO and provide information where the individual or the individual's legal guardian has executed an authorization, or upon GAO's assertion of probable cause to suspect abuse or neglect where the individual is unable to authorize access to their records, the State (APS or DFCS) is the legal guardian, or the individual has a legal guardian and the legal guardian has failed to act after a good faith effort to contact the legal guardian by GAO to inform them of possible abuse or neglect of the individual. The Department's staff are not required to speak with GAO by this provision.

20. GAO shall maintain the confidentiality of any information and records as required under federal or state law.

AUTHORIZATIONS

21. The Department shall honor any valid authorization for release of records executed by an individual receiving services from the Department or the individual's legal guardian. With respect to authorizations from the individual or the individual's legal guardian seeking GAO's attendance at treatment team meetings, service planning meetings and discharge planning meetings at Facilities, the Department shall grant all reasonable requests that are consistent with the individual's best interests; provided, however, GAO shall only make such request consistent with the individual's wishes.

ENFORCEMENT OF ACCESS

22. If the Department denies or limits GAO access to any Facility or individual for any reason, including GAO record reviews at a Facility, GAO attendance at meetings or the validity of an authorization, the responsible Department employee and GAO shall attempt to resolve the issue. In the event it cannot be resolved, the responsible Department employee shall immediately notify the Facility administrator (or her or his designee) who shall attempt to address the access issue with GAO. If the matter cannot be resolved immediately, the Facility administrator will contact the Department's Chief of Staff (or her or his designee) and GAO shall contact the GAO Executive Director (or her or his designee). The

two executives shall confer telephonically immediately to attempt to resolve the matter in dispute.

23. In the event the Department denies or limits GAO's written request for access to records, the Department shall provide promptly to GAO, but not later than twenty-four (24) hours after a denial of access, a written statement of the reasons for the denial of access. GAO will attempt to resolve the Department's objection. If no resolution is reached prior thereto, the Chief of Staff to the Commissioner of the Department and the Executive Director of GAO agree to meet or confer telephonically as soon as practicable.

24. In the event the process in Paragraph 22 or Paragraph 23 does not resolve the issue and the Department denies GAO access to records, Facilities and individuals admitted or served by the Department, the Department shall provide promptly to GAO after a denial of access, a written statement of the reasons for the denial of access.

25. Prior to filing pleadings with this Court, both parties agree to follow Paragraphs 22 through 24 of this Agreement and make reasonable and diligent efforts to resolve disputes.

26. The court shall retain jurisdiction for the purposes of enforcing this Stipulated Agreement until August 31, 2014.

TRAINING

27. As soon as practicable after the Effective Date of this Agreement, the Chief of Staff to the Commissioner of the Department and the Executive Director of GAO agree to coordinate the content and process of the training under this Agreement to the Department and GAO. To that end, the Chief of Staff to the Commissioner of the Department (or his or her designee) and the Executive Director of GAO (or his or her designee) agree to conduct joint trainings on the Agreement to both the Department and GAO.

28. Within six months of the Effective Date of this Agreement, the Department shall communicate with its Facilities' officials, employees, agents and independent contractors involved in providing care to the individuals in its Facilities, the provisions in this Agreement that are applicable to their respective job duties.

29. Within six months of the Effective Date of this Agreement, GAO shall communicate with its officials, employees and agents, the provisions in this Agreement that are applicable to their respective job duties.

COOPERATION AND CIVILITY

30. The parties agree to conduct themselves in a cooperative and civil manner in carrying forth the terms of this Agreement.

SCOPE OF AGREEMENT

31. The Effective Date of this Stipulated Agreement shall be the date on which this agreement is jointly filed in Civil Action File No. 1:09-CV-2880-CAP, *Georgia Advocacy Office, Inc. v. Frank Shelp, M.D., in his official capacity as Commissioner of the Department of Behavioral Health and Developmental Disabilities.*

32. GAO and the Department agree that this Stipulated Agreement resolves all claims except as to the claim of access to peer review records, set forth in the Complaint filed in *Georgia Advocacy Office, Inc. v. Frank Shelp, M.D., in his official capacity as Commissioner of the Department*, United States District Court for the Northern District of Georgia, Civil Action File No. 1:09-CV-2880-CAP.

33. This resolution of claims releases the Department from any and all claims under the P&A Acts and regulations, except as to the claim of access to peer review records under the P&A Acts and regulations, which GAO could have or should have raised in the above-referenced litigation between the parties. The

Stipulated Agreement does not apply to legal claims or actions GAO may bring against the Department specifically on behalf of and in the name of third parties.

34. This Stipulated Agreement is enforceable only by the parties and is binding upon the parties, by and through their officials, agents, employees, assigns and successors. No individual or entity is intended to be a third party beneficiary of the provisions of this Stipulated Agreement for purposes of any civil, criminal or administrative action, and accordingly, no individual or entity may assert any claim or right as a beneficiary or protected class under this Stipulated Agreement in any civil, criminal or administrative action.

35. Nothing in this Stipulated Agreement shall be construed as an acknowledgment, an admission or evidence of liability of the Department under the Constitution of the United States, federal or state law, and this Stipulated Agreement may not be used as evidence of liability in any other civil or criminal proceeding.

36. Each party shall bear the cost of its fees and expenses incurred in connection with this case, including attorneys' fees; provided, however, this stipulation does not waive GAO's right to seek fees and costs that arise from the litigation of the claim of access to peer review records under the P&A Acts and

regulations or from the enforcement of this agreement, nor shall the Department be prohibited from opposing such request.

37. Notice under this Agreement shall occur by sending written documentation by overnight courier to the following:

Commissioner
Georgia Department of Behavioral Health and Developmental Disabilities
2 Peachtree Street, N.W.
Atlanta, Georgia 30303

Chief Executive Officer
Georgia Advocacy Office
150 East Ponce De Leon Avenue
Suite 430
Decatur, Georgia 30030

PEER REVIEW

38. The parties are unable to resolve the GAO's claim of access to peer review records under the P& A Acts and regulations.

39. For purposes of this Agreement, the Department's definition of peer review includes but is not limited to those processes described and authorized in O.C.G.A. §§ 31-7-15, 31-7-131, and 31-7-140, which produce confidential information that includes but is not limited to the proceedings, records, actions, activities, evidence, findings, recommendations, evaluations, opinions, data or other information created by the peer review or shared between individual

clinicians and/or groups which are performing peer review. *See* O.C.G.A. § 31-7-133. The aforementioned definition encompasses mortality review records.

40. Nothing in this agreement shall be construed as an acknowledgement or admission regarding GAO's right to access peer review records under the P&A Acts and regulations. All peer review records are excluded from this Agreement.

41. The parties additionally stipulate to the facts set forth in Exhibit A.

42. The parties request that this Court enter a scheduling order whereby GAO shall have thirty (30) days after entry of this Agreement to brief the issue of access to peer review records under the P&A Acts and regulations. The Department shall have thirty (30) days after the filing of GAO's brief to respond. GAO shall have fourteen (14) days to file a reply to the Department's brief. Thereafter, the Department requests the Court schedule a hearing on the issue of access to peer review records under the P&A Acts and regulations. GAO does not oppose the request.

Respectfully submitted on this 29th day of September, 2011.

SAMUEL S. OLENS 551540
Attorney General

DENNIS R. DUNN 234098
Deputy Attorney General

/s/Shalen S. Nelson
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/s/ Joshua H. Norris (w/ express permission)
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Georgia Bar No. 545854
Attorney for Plaintiff

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

CERTIFICATION OF COMPLIANCE WITH RULE AND ORDER

I hereby certify that the forgoing Stipulated Agreement was prepared in 14-point Times New Roman font in compliance with Local Rule 5.1(C).

/s/ Jason S. Naunas
JASON S. NAUNAS
Assistant Attorney General
Georgia Bar No. 142051

State Law Department
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
PH: (404) 656-3357
FAX: (404) 463-1062
E-mail: jnaunas@law.ga.gov

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing **STIPULATED AGREEMENT** with the Clerk of the Court using the CM/ECF system which will automatically send email notification of such filing to the following attorney of record:

Joshua H. Norris, Esq.
Georgia Advocacy Office
150 E. Ponce De Leon Ave.
Suite 430
Decatur, Georgia 30030

This 29th day of September, 2011.

/s/ Jason S. Naunas
JASON S. NAUNAS
Assistant Attorney General
Georgia Bar No. 142051
jnaunas@law.ga.gov

Exhibit A – Stipulated Facts

1. The Department’s protocol is to allow GAO to physically inspect peer/mortality review records at the hospital where the records are located. However, GAO is not permitted to make copies of the peer/mortality review records in question.

2. GAO makes requests for access to peer/mortality review records related to deaths and injuries that are connected to care and treatment at the Department’s state hospitals. The following is an example of GAO’s requests and the Department’s response.

Facts Related To L.P.

3. On November 2, 2010, GAO made a written request pursuant to the P&A Acts to the Department for records, including peer/mortality review records, related to L.P.’s death at East Central Regional Hospital (“ECRH”) based upon information that L.P. was a person with a developmental disability who had died.

4. On November 5, 2010, the Department mailed the requested records except for the peer/mortality review records, which were available at ECRH for GAO to review at their convenience.

5. On November 23, 2010, GAO inspected, but was not permitted to copy, the peer/mortality review records related to L.P.

Facts Related To C.C.

6. GAO determined it had probable cause to believe that C.C., an individual with mental illness, may have been subject to neglect prior to her death at Central State Hospital based upon information GAO had received.

7. On May 27, 2009, GAO made a written request asserting probable cause pursuant to the P&A Acts and regulations to the Department for records related to C.C.'s death.

8. On May 29, 2009, GAO made a supplemental request for peer/mortality review records related to C.C.'s death.

9. On June 2, 2009, the Department sent the requested records except for the peer/mortality review records.

10. On June 17, 2009, GAO inspected, but was not permitted to copy, the peer/mortality review records related to C.C.