UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT OFFICE OF PROTECTION AND ADVOCACY FOR PERSONS WITH DISABILITIES; JAMES MCGAUGHEY, Executive Director, Office of Protection and Advocacy for Persons with Disabilities,

Plaintiffs,

v.

CASE NO. 3:03CV1352(RNC)

WAYNE CHOINISKI, Warden, Northern Correctional Institution, in his official capacity; GIOVANNY GOMEZ, Warden, Garner Correctional Institution, in his official capacity; and THERESA C. LANTZ, Commissioner, Connecticut Department of Correction, in her official capacity,

Defendants.

RULING ON PLAINTIFFS' MOTION

In August 2003, the State of Connecticut Office of Protection and Advocacy for Persons with Disabilities ("OPA") and its executive director, James McGaughey, commenced suit pursuant to 42 U.S.C. § 1983 against the Warden of the Northern Correctional Institution ("NCI"), Wayne Choinski; the Warden of the Garner Correctional Institution ("Garner"), Giovanny Gomez; and Commissioner of the Connecticut Department of Correction ("DOC") Commissioner, Theresa Lantz, in their official capacities. The parties entered into a settlement agreement. Pending before the court is the plaintiffs'

"renewed motion for an order allowing access to prisoner health records." (Doc. #86.) The plaintiffs seek an order permitting the plaintiffs, their counsel and their consultant access to the health records of prisoners housed at NCI and Garner in order to monitor the defendants' compliance with the settlement agreement. For the reasons that follow, the motion is granted in part and denied in part.

I. Background

The following background is necessary in order to place the plaintiffs' request in context.

Parties

OPA was created by the Connecticut legislature to further the State of Connecticut's "special responsibility for the care, treatment, education, rehabilitation of and advocacy for its disabled citizens." Conn. Gen. Stat. § 46a-7. It is authorized to investigate suspected abuse or neglect and to pursue administrative, legal and other remedies on behalf of individuals with mental illness. Conn. Gen. Stat. § 46a-11; 42 U.S.C. § 10805. It serves as Connecticut's protection and advocacy system for purposes of the Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C. § 10801(b)(2).

NCI is Connecticut's only level 5 maximum-security facility for adult male inmates. It has a highly structured three phase administrative segregation program. Phase I is the most restrictive

of the three phases and lasts a minimum of six months. During this time, inmates spend virtually all their time in their cell. Garner, also a state prison, is the designated mental health facility for offenders with significant mental health needs.

Claims

The plaintiffs allege in their complaint that the conditions of confinement for prisoners with mental illness at NCI and Garner cause the prisoners to suffer and exacerbate their mental illness in violation of the Eighth and Fourteenth Amendments. The plaintiffs claim that mentally ill prisoners in NCI receive disciplinary charges for behavior that is symptomatic of their mental illness. Such conduct, in turn, causes these prisoners to remain in Phase I, the conditions of which likely exacerbate their mental illness. (Compl. ¶20.) As a result of NCI's oppressive conditions and inadequate mental health services, prisoners become mentally ill or their mental illness worsens. (Compl. ¶25.)

The allegations regarding Garner are similar to those aimed at NCI. Like prisoners in NCI's Phase I, the plaintiffs say, inmates in certain mental health units at Garner are subject to nearly constant cell confinement and enforced idleness, conditions that exacerbate their mental illness. (Compl. ¶28.) The plaintiffs further allege that at Garner and at NCI (1) there are frequent uses of force by staff against mentally ill prisoners, including cell extractions and use of restraints and (2) mentally ill prisoners

often receive disciplinary charges for behavior that is caused by their mental illness. (Compl. ¶29.)

Settlement Agreement

After the lawsuit was commenced, the parties engaged in settlement negotiations. On March 8, 2004, the parties entered into a comprehensive settlement agreement resolving all claims. The settlement was subject to approval by the district court and entry of a final order and judgment. According to its terms, the settlement agreement, which lasts three years, became effective when the court entered an order of dismissal incorporating the agreement. (Settlement Agreement ¶¶A.6, A.7, B.17.)

The settlement agreement resulted in an overhaul in the treatment of inmates with mental illness housed at NCI and Garner. For NCI inmates, the parties agreed that, inter alia, the Connecticut Department of Mental Health and Addiction Services ("DMHAS") would provide a diagnostic assessment. (Settlement Agreement Appendix B.) Inmates identified by DMHAS's evaluation as seriously mentally ill were to be removed from NCI within ten days of DMHAS's report, absent exigent circumstances. (Settlement Agreement ¶B.3.) A prisoner being considered for transfer to NCI for placement in administrative segregation must be evaluated before transfer to determine whether the inmate is seriously mentally ill. (Settlement Agreement ¶B.4.) In the event that a pre-transfer evaluation is not conducted, an evaluation by a licensed doctor-

level clinician must be completed by the end of the third business day after the inmate's transfer to segregation. (Id.) If the prisoner is found to be seriously mentally ill, he will not be kept at NCI's administrative segregation program unless the inmate falls into a "dangerousness exception." (Settlement Agreement ¶B.4.) Prisoners confined in segregation at NCI must be evaluated not less than every 90 days to determine whether their mental health is being adversely affected by confinement. (Settlement Agreement ¶4.a.) Prisoners who remain in Phase 1 for more than 120 days must be evaluated by a doctor-level clinician to determine whether the inmate's progress through the phased system is being impaired by mental illness. (Settlement Agreement ¶12.)

At Garner, the parties agreed to institute certain procedures for prisoners housed in units designated for the mentally ill. The settlement agreement provides that prior to a planned use of force, a clinical intervention must be attempted by a qualified mental health provider to persuade the inmate to cease the behavior that led to the planned use of force. (Settlement Agreement ¶7.) Before a Class A disciplinary report is issued to a prisoner, a qualified mental health professional must be consulted. (Settlement Agreement ¶8.) The consultant will be asked to express an opinion (1) whether the behavior for which the disciplinary report is given is a result of the prisoner's mental illness and (2) whether disciplining the prisoner would aggravate his mental illness. If the practitioner

answers in the affirmative to either question, the disciplinary report will not be delivered to the prisoner and must be dismissed, unless the Warden directs otherwise in writing. (Settlement Agreement ¶8.)

The settlement agreement also provides for changes at both facilities on mental health staffing, employee training, the administration of psychoactive medication, and confidentiality of mental health services.

The parties put into place a monitoring procedure to assess the defendants' compliance. The settlement agreement provides that the plaintiffs and defendants each appoint a mental health consultant. (Settlement Agreement ¶B.17.) The two consultants were to develop an audit instrument to evaluate the defendants' compliance with the mental health sections of the settlement agreement. The consultants' sole function is to review compliance with the settlement agreement. (Settlement Agreement ¶B.17.) To discharge this function, the parties agreed to give the consultants continued access to NCI and Garner to allow them to conduct private confidential interviews with inmates and staff, and review certain documents. (Settlement Agreement ¶B.17.)

The parties could not agree on how the plaintiffs' mental health consultant would be given access to the prisoners' health

records.[1] They included a provision in the settlement agreement that they would submit the issue to the court. (Settlement Agreement ¶B.17.)

In June 2004, after the Connecticut state legislature approved the settlement agreement, the plaintiffs sought a court order to give their consultants and attorneys access to the health records of NCI and Garner prisoners. (Doc. #37.) The defendants opposed the motion, arguing that the request violated the inmates' privacy rights and plaintiffs had to produce releases signed by inmates to obtain the medical records. (Doc. #39.) In an on-the-record conference, the court (Chatigny, C.J.) suggested that the plaintiffs begin by attempting to secure releases from inmates and conducting the audit using health records of those inmates who executed releases. (Doc. #60, tr. 4/28/05.)

Subsequently, the parties amended the settlement agreement to permit them to dismiss the case and the court to retain jurisdiction to rule, inter alia, on the issue of disclosure of inmate health records. Specifically, the parties agreed that

> [w]ith respect to the one time ruling on the issue of the disclosure of inmate health records to the consultants, the plaintiffs may file such a motion only on one occasion and shall file it with the court no later than 30 days after the receipt of the mental health auditors' report issued upon the completion of the first audit. Any such motion shall be limited to requesting court-

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[1]The issue only concerned the plaintiffs' consultant because the defendants' consultant had access to the health records. See footnote 3 infra.

ordered disclosure of health records.

(Amendment to ¶A.13, dated September 21, 2005.)

On September 26, 2005, Chief Judge Robert N. Chatigny granted the parties' motion for conditional dismissal and approval of settlement and incorporated into the court's order the terms and conditions of the parties' settlement agreement.[2] (Doc. #75.) According to the terms of the settlement agreement, this marked the effective date of the settlement agreement. (Settlement Agreement ¶A.6.)

Monitoring Compliance with the Settlement Agreement

Thereafter, the plaintiffs' mental health consultant, Carl Fulwiler, M.D., Ph.D. and the defendants' mental health consultant, Cassandra Newkirk, M.D., performed the first audit. The plaintiffs' consultant, Dr. Fulwiler, was not permitted to review health records for inmates who had not executed a release authorizing disclosure of the inmate's medical records. The defendants' consultant had access to these records, although it does not appear that Dr. Newkirk reviewed them for purposes of the audit.[3] The consultants' report, dated April 17, 2006, set forth their findings for the time

[2]The dismissal of the case terminated the plaintiffs' pending motion (doc. #37) regarding disclosure of the inmates' health records.

[3]The defendants maintain that their consultant, Dr. Newkirk, does not need a release to examine inmate health records because she is a "business associate" under the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d *et seq.* The plaintiffs do not dispute this contention.

frame of September 16, 2005 through December 2005. Of the thirty-three areas reviewed in the audit, the consultants found nine areas of noncompliance and eleven areas of partial compliance.

The consultants agreed that the requirement of obtaining releases for mental health records posed significant obstacles. Not only is the plaintiffs' consultant unable to review medical records for individuals who do not sign a release but the names and other identifying information of these individuals are redacted on monthly reports and/or logs the consultants use in conducting the audit. Both consultants expressed concern that some of the most severely disturbed inmates, particularly those with paranoid symptoms, are the most likely to refuse to sign a release. Both consultants said that paranoid inmates are more likely to incur disciplinary infractions and accumulate extended sentences in segregated housing as a result of their mental illness. Initially, eleven seriously mentally ill inmates were transferred to NCI's administrative segregation program under the dangerousness exception. Of those, four refused to sign consent forms. By June 2006 (after the consultants' initial report), the number of mentally ill inmates transferred to NCI's administrative segregation program had increased to twenty. Of those, nine refused to sign releases authorizing disclosure of their medical records. (Doc. #95, Gallagher Aff. ¶3; Doc. #99, Fulwiler Decl. ¶3.)

The consultants also are charged with auditing the DOC's

compliance with the settlement agreement provision that inmates who remain in Phase 1 of the administrative segregation program at NCI for more than 120 days undergo a thorough mental health evaluation to determine if their progress through the phase system is impaired by mental illness. (Settlement Agreement ¶12.) For the months of April and May 2006, the latest data in the record, nine prisoners were in Phase 1 for more than 120 days. Six of the nine declined to sign releases. (Doc. #99, Fulwiler Decl. ¶4.)

II. Discussion

The plaintiffs seek a court order granting the plaintiffs, their counsel and their expert consultants access to the health records of prisoners housed at NCI and Garner.[4] (Doc. #86 at 3.) They contend that disclosure is necessary to effectuate the goals of the settlement agreement because without disclosure they are unable to evaluate the defendants' compliance with the settlement agreement. In support of their request, they submit declarations of plaintiffs' consultant, Dr. Fulwiler, who avers that because he cannot review the inmates' medical records, he is "unable to ascertain with a reasonable degree of medical certainty whether the audit [he] performed completely evaluated defendants' compliance with the Settlement Agreement." (Doc. #87, Fulwiler Decl. ¶10.)

The defendants agree that the requirement that individual

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[4]The plaintiffs' request does not contemplate releases or notice to the inmates.

inmates sign releases authorizing disclosure of their health records is a time consuming process and, even when done, ultimately excludes certain materials from review by the plaintiffs' consultant. However, they maintain that the releases are necessary because inmates have a constitutional right to confidentiality of their medical information. The defendants contend that the disclosure of medical information would violate this right. They further assert that to the extent that disclosure includes inmates' communications with mental health treaters, such disclosure is precluded by the psychotherapist-patient privilege set forth in Jaffee v. Redmond, 518 U.S. 1 (1996).

A. Constitutional Right to Privacy

The plaintiffs acknowledge that their request implicates a constitutional right to privacy but contend that the right is not absolute and under the facts and circumstances of this case, is outweighed by a countervailing need for limited disclosure. The plaintiffs emphasize that they are attempting to vindicate important federal constitutional rights of the inmates. They suggest a protective order to provide that the records would be used only for the audit and subsequently destroyed.

"Although the right to privacy is one of the less easily delineated constitutional guarantees," Statharos v. New York City Taxi and Limousine Com'n, 198 F.3d 317, 322 (2d Cir. 1999), the Supreme Court held in Whalen v. Roe, 429 U.S. 589 (1977) that it

encompasses "the individual interest in avoiding disclosure of personal matters." Id. at 599. Pursuant to Whalen, the Second Circuit recognized a "constitutional right to privacy in personal information" and held that "the right to confidentiality includes the right to protection regarding information about the state of one's health." Doe v. City of New York, 15 F.3d 264, 267 (2d Cir. 1994) (Plaintiff "has a right to privacy (or confidentiality) in his HIV status, because his personal medical condition is a matter that he is normally entitled to keep private."). See, e.g., O'Connor v. Pierson, 426 F.3d 187, 201 (2d Cir. 2005) (holding that plaintiff had a protected privacy right in his medical records); Powell v. Schriver, 175 F.3d 107, 112 (2d Cir. 1999) ("We now hold, as the logic of Doe requires, that individuals who are transsexuals are among those who possess a constitutional right to maintain medical confidentiality.").

"Yet this confidentiality interest is not absolute, and can be overcome by a substantial government interest that outweighs the right to privacy." Nassau County Employee "L" v. County of Nassau, 345 F. Supp. 2d 293, 302 (E.D.N.Y. 2004). See O'Connor, 426 F.3d at 201 ("That [plaintiff] has a constitutionally protected privacy interest in his records does not, however, mean that he need never disclose them; it means that he need not disclose them unless the [defendant] has a sufficient interest to justify its request."); Statharos v. New York City Taxi & Limousine Commission, 198 F.3d

317, 323 (2d Cir. 1999) ("This confidentiality interest is not absolute, however, and can be overcome by a sufficiently weighty government purpose."); Doe v. City of New York, 15 F.3d 264, 269-70 (2d Cir. 1994) ("[T]he city's interest in disseminating information . . . must be 'substantial' and must be balanced against [plaintiff's] right to confidentiality."); Grosso v. Town of Clarkstown, No. 94 Civ. 7722, 1998 WL 566814, at *10 (S.D.N.Y. Sept. 3, 1998) ("The right to privacy in medical records or personal information is a conditional right that requires a determination of whether the state's interest in disclosing the records is sufficiently substantial to overcome the individual's interest in confidentiality."); Doe v. Marsh, 918 F. Supp. 580, 585 (N.D.N.Y. 1996) ("The government may use information covered by the right of privacy if it can show that its use would advance a substantial state interest and that the use is narrowly tailored to meet the legitimate interest.")

On the existing record, the court finds that the state interest in disclosure is substantial and outweighs the burdened privacy right. OPA, as it is statutorily authorized to do, is seeking to protect the civil rights of persons who are mentally ill in an environment in which they are particularly vulnerable. There is a strong public interest in ensuring that prisoners are receiving appropriate mental health treatment, that they are not subject to punishment as a result of their illness and that they are not living

under conditions - such as prolonged isolated confinement - that can cause and/or worsen mental illness without appropriate monitoring. The plaintiffs have demonstrated that the requirement of obtaining releases imposes too great an impediment upon their implementing these objectives. The consultants, who are working together as a team, need equal access to information to make the monitoring process work. Because of the inability to obtain releases, OPA cannot audit effectively the areas of fundamental concern that led to the lawsuit and settlement agreement.[5] See, e.g., doc. #87, Fulwiler Decl. ¶7 (stating that the refusal rate for seriously mentally ill inmates who are transferred to NCI's administrative segregation program "preclude[d] any meaningful audit").

Disclosure of the requested information is sought by professionals whose purpose is to monitor compliance with protocols and procedures designed to provide adequate treatment for mentally ill persons. Importantly, these professional are obligated to keep the information confidential.[6] See Barry v. City of New York, 712

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[5]The court explored with the parties the alternative of using pseudonyms. According to the defendants, the burden of implementing such a system would be enormous and simply not feasible. (Tr. 2/16/07 at 56-57.)

[6]The settlement agreement provides that "any health records ordered to be disclosed by the court shall be used solely to evaluate compliance with th[e] agreement and all copies of health records would be destroyed upon termination of th[e] agreement." (Settlement Agreement ¶B.17.) The agreement also provides that all the consultants' reports shall remain confidential and shall not be disclosed publicly. (Id.)

F.2d 1554, 1561 (2d Cir. 1983) ("'[T]he degree of intrusion stemming from public exposure of the details of a person's life is exponentially greater than disclosure to government officials.'")

B. Jaffee v. Redmond

The court turns to the defendants' claim that the plaintiffs' motion implicates the federal common-law privilege established by the Supreme Court in Jaffee v. Redmond, 518 U.S. 1 (1996). The defendants argue that the inmates whose records the plaintiffs seek have a privilege prohibiting the disclosure of their communications with mental health treaters. (Doc. #39 at 16.)

In Jaffee v. Redmond, 518 U.S. 1 (1996), the Supreme Court considered whether statements that the defendant police officer made to a licensed social worker in course of psychotherapy, and notes taken during their counseling sessions, should be protected from compelled disclosure in a federal civil action brought by the family of the suspect whom the defendant officer shot. The court concluded that they should and recognized a privilege protecting confidential communications between psychotherapist and patient. Although declining to "delineate [the] full contours" of the psychotherapist privilege, id. at 18, the court described the privilege as protecting "the confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment . . . from compelled disclosure under Rule 501 of the Federal Rules of Evidence." Id. at 15. The court stated that

> the psychotherapist-patient privilege is rooted in the imperative need for confidence and trust. . . . Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

Id. at 10 (internal quotation marks and citation omitted). The court held "that the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy." Id. at 15. Lastly, the court determined that the privilege is absolute. The court, in rejecting a balancing approach, stated

> Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. . . . [I]f the purpose of the privilege is to be served, the participants in the confidential conversation must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

Id. at 17-18 (internal quotation marks and citation omitted). The Supreme Court noted, however, that the psychotherapist-patient privilege, like other testimonial privileges, may be waived. Id.

at 15 n.14.

The plaintiffs argue, and the defendants do not disagree, that records subject to the privilege do not encompass the entirety of the inmates' health records but rather, such documents comprise a discrete subsection of those records that can be segregated out from disclosure. As noted, the privilege is not subject to balancing and there has been no waiver. The defendants assert that to the extent the inmates' health records contain material that is privileged under Jaffee, such communications should not be disclosed. The court agrees. The plaintiffs' request for medical records other than Jaffee privileged material is granted. Records that fall within the Jaffee privilege shall not be disclosed.

III. Conclusion

For these reasons, the plaintiffs' "renewed motion for an order allowing access to prisoner health records" (doc. #86) is granted in part and denied in part. Any disclosure shall be governed by a protective order that the records shall be kept confidential, used solely to evaluate compliance with the settlement agreement and destroyed upon termination of the settlement agreement. See footnote 6.

SO ORDERED at Hartford, Connecticut this 30th day of March, 2007.

_________/s/__________________
Donna F. Martinez
United States Magistrate Judge