UNITED STATES DISTRICT COURT
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, Defendant.	CIVIL ACTION NO. 1:09-CV-2880-CAP

O R D E R

This matter is now before the court on cross motions for summary judgment filed by the defendant [Doc. No. 20] and the plaintiff [Doc. No. 25].

I. Background

> Disturbed by the inhumane and despicable conditions discovered at New York's Willowbrook State School for persons with developmental disabilities, Congress enacted the Developmental Disabilities Assistance and Bill of Rights Act ("the Act") to protect the human and civil rights of this vulnerable population . . . . Pursuant to the Act, a state cannot receive federal funds for services to persons with developmental disabilities unless it has established a protection and advocacy ("P&A") system.

Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Center, 97 F.3d 492, 494 (11th Cir. 1996). Congress reauthorized this spending program in 2000, and the Developmental

Disabilities Assistance and Bill of Rights Act of 2000, as amended ("the DD Act"), is codified at 42 U.S.C. § 15001 et seq.

With similar concerns regarding the abuse and injury of individuals in psychiatric facilities, see ___ 42 U.S.C. 10801, Congress enacted the Protection and Advocacy for Individuals with Mental Illness Act ("the PAIMI Act"), which is codified at 42 U.S.C. § 10801 et seq. The PAIMI Act provides for additional federal funding for the same P&A systems established by the DD Act and expands their duties to encompass the protection of individuals with mental illness.

As shown below, at the core of the DD Act and the PAIMI Act (together, "the P&A Acts") is the requirement that each state accepting funding must establish and maintain an effective protection and advocacy system to serve the patients and clients of state-run facilities. While states electing to receive federal funds under the P&A Acts can establish a P&A system as an arm of the state or as a private entity, independence from the state-run facilities is key to satisfying the federal mandate. 42 U.S.C. 10805(a)(2).

The P&A system for the State of Georgia is the plaintiff in this case, the Georgia Advocacy Office, Inc., a private, non-profit corporation. The plaintiff's amended complaint in this case [Doc. No. 7] alleges that the defendant, in his official capacity as the

commissioner of the Georgia Department of Behavioral Health and Developmental Disabilities ("the Department"), has violated the plaintiff's right of access to patients, facilities, and records under the P&A Acts. The plaintiff requests that the court enter declaratory and injunctive relief pursuant to 42 U.S.C. § 1983.

Both parties have now moved for summary judgment. In the interest of economy, the facts and factual allegations are set out below in sections dedicated to the disposition of the motion to which they pertain. Further, the court notes that the parties' focus throughout briefing has been on the applicability of the PAIMI Act and its regulations. For this reason, the court has applied the relevant standards within the PAIMI Act framework to the factual situations raised by each side although the facts presented in support of each motion do not make clear whether the individual patients involved are covered by the PAIMI Act, the DD Act, or both.

II. Summary Judgment Standard

Rule 56(a) of the Federal Rules of Civil Procedure states, "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(c)(1) provides that a party must support its summary judgment position by "citing to particular parts of materials in the record, including

depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials" or by "showing that the materials cited to do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." The party seeking summary judgment bears the burden of demonstrating that no dispute exists as to any material fact. Adickes v. S. H. Kress & Co. , 398 U.S. 144, 157 (1970). This burden is discharged by "'showing'--that is, pointing out to the district court--that there is an absence of evidence to support [an essential element of] the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). In determining whether the moving party has met its burden, a district court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. Johnson v. Clifton, 74 F.3d 1087, 1090 (11th Cir. 1996).

Once the moving party has adequately supported its motion, the nonmovant has the burden of sh owing that summary judgment is improper by coming forward with specific facts showing a genuine dispute. Matsushita Electric Industrial Co. v. Zenith Radio Corp, 475 U.S. 574, 586 (1986). Ultimately, the court's function is not to resolve issues of material fact, but rather to determine whether there are any such issues to be tried. Anderson v. Liberty Lobby,

Inc., 477 U.S. 242, 251 (1986). Facts that are disputed, but which do not affect the outcome of the case, are not material and thus will not preclude the entry of summary judgment. Id. ___ at 248. Genuine disputes are those in which "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

III. 42 U.S.C. § 1983 and the Eleventh Amendment

The defendant's salient arguments in favor of his motion for summary judgment center not on the facts of this case but whether the plaintiff may properly bring suit in the first place. In support of this argument, the defendant asserts that the P&A Acts provide no federal rights that may be enforced by private suit pursuant to 42 U.S.C. § 1983. The defendant also briefly argues that the Eleventh Amendment to the United States Constitution protects the State of Georgia's sovereign immunity such that this action is barred. The court addresses these arguments in turn.

A. 42 U.S.C. § 1983

Quoting Blessing v. Freestone, 520 U.S. 329, 340 (1997), the defendant opens its argument on whether a § 1983 suit is appropriate by stating, "[I]n order to seek redress through § 1983, a plaintiff must assert the violation of a federal ***right***, not merely a violation of federal law" [Doc. No. 20-1, p.11][italics in original]. Then, citing several cases analyzing the existence of

federally-created rights under statutes passed pursuant to Congress' spending power, see U.S. Constitution Art. I, § 8, Cl. 1, the defendant concludes, "Where a statutory provision contains 'no rights-creating language,' has an 'aggregate, not individual, focus,' and serves primarily to direct the distribution of funds, it does not create a right enforceable under § 1983" [Doc. No. 20-1, p. 15].

The defendant relies heavily on the Supreme Court's opinion in Gonzaga Univeristy v. Doe, 536 U.S. 273 (2002). In Gonzaga, the Supreme Court analyzed the Family Education Rights and Privacy Act ("FERPA"), which provides funding to educational institutions but prohibits such funding to institutions that have a policy or practice of releasing education records to unauthorized persons. Id. at 276. The Supreme Court ultimately decided that FERPA did not provide for a private cause of action under § 1983 for the plaintiff, a student at Gonzaga University, whose records had allegedly been improperly released. Id.

In so holding, the Supreme Court utilized a set of inquiries based on the phrasing and content of FERPA. First, the Supreme Court looked into whether Congress intended to create a federal right. Id. at 286-87. To do so, it examined the text of the statute:

To begin with, the provisions entirely lack the sort of

> "rights-creating" language critical to showing the requisite congressional intent to create new rights. Unlike the individually focused terminology of Titles VI and IX ("No person . . . shall . . . be subjected to discrimination"), FERPA's provisions speak only to the Secretary of Education, directing that "[n]o funds shall be made available" to any "educational agency or institution" which has a prohibited "policy or practice." 20 U.S.C. § 1232g(b)(1). This focus is two steps removed from the interests of individual students and parents and clearly does not confer the sort of "*individual* entitlement" that is enforceable under § 1983.

Id. at 287 (italics in original)(internal citations omitted).

The Supreme Court next observed that FERPA's nondisclosure provisions "speak only in terms of institutional policy and practice, not individual instances of disclosure." Id. at 288 (citing a FERPA provision "prohibiting the funding of 'any educational agency or institution which has a *policy or practice* of permitting the release of education records' (emphasis added)"). "Therefore," the Supreme Court concluded, "they have an 'aggregate focus,' [and] they are not concerned with whether the needs of any particular person have been satisfied." Id.

Finally, the Supreme Court observed that its conclusion that FERPA's nondisclosure provision conferred no enforceable rights "is buttressed by the mechanism that Congress chose to provide for enforcing those provisions. Congress expressly authorized the Secretary of Education to ' *deal with violations*' of the act, § 1232g(f) (emphasis added), and required the Secretary to 'establish

or designate a review board" for investigating and adjudicating such violations." Id. at 289. The Supreme Court also observed that other administrative language regarding the location where "the functions of the Secretary" were supposed to take place under the nondisclosure provision were, when read together with the other administrative provisions empowering the Secretary of Education to "deal with" violations, incompatible with a private right of action. Id. at 290.

With these guiding principles in mind, the court turns to the text of the P&A Acts.

The DD Act provides for budgetary allotments to states that "have in effect a system to protect and advocate the rights of individuals with developmental disabilities." 42 U.S.C. § 15043; see also 42 U.S.C. § 15022. A system required by the DD Act (referred to generically throughout this order as a P&A system) is required by the DD Act to have the authority to, *inter alia*, pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for the rights of individuals with developmental disabilities, provide information on and referral to programs and services addressing the needs of such individuals, and investigate incidents of abuse and neglect of such individuals if the incidents are reported to the system or there is probable cause to believe that the incidents occurred. 42 U.S.C. §

15043.

The PAIMI act provides further funding to P&A systems established under the DD Act with the express purposes of "ensur[ing] that the rights of individuals with mental illness are protected" and

> assist[ing] States to establish and operate a protection and advocacy system for individuals with mental illness which will
>
> (A) protect and advocate the rights of such individuals through activities to ensure the enforcement of the Constitution and Federal and State statutes; and
>
> (B) 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.

42 U.S.C. § 10801(b). Consistent with these purposes, 42 U.S.C. § 10805(a)(1) confers upon P&A systems the authority to:

> (A) 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;
>
> (B) 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; and
>
> (C) pursue administrative, legal, and other remedies on behalf of an individual who--
>
> (i) was an individual with mental illness; and
>
> (ii) is a resident of the state,
>
> but only with respect to matters which occur within 90 days after the date of the discharge of such individuals from a facility providing care or treatment . . . .

Additionally, § 10805(a) provides that P&A systems shall:

(2) be independent of any agency in the State which provides treatment or services (other than advocacy services) to individuals with mental illness;
(3) have access to facilities in the State providing care or treatment;
(4) in accordance with section 10806 of this title, have access to all records of--

(A) any individual who is a client of the system if such individual, or the legal guardian, conservator, or other legal representative of such individual, has authorized the system to have such access;
(B) any individual (including an individual who has died or whose whereabouts are unknown)--

(i) who by reason of the mental or physical condition of such individual is unable to authorize the system to have such access;
(ii) who does not have a legal guardian, conservator, or other legal representative, or for whom the legal guardian is the State; and
(iii) with respect to whom a complaint has been received by the system or with respect to whom as a result of monitoring or other activities (either of which result from a complaint or other evidence) there is probable cause to believe that such individual has been subject to abuse or neglect; and

(C) any individual with a mental illness, who has a legal guardian, conservator, or other legal representative, with respect to whom a complaint has been received by the system or with respect to whom there is probable cause to believe the health or safety of the individual is in serious and immediate jeopardy, whenever--

(i) such representative has been contacted by such system upon receipt of the name and address of such representative;
(ii) such system has offered assistance to such representative to resolve the situation; and
(iii) such representative has failed or refused to act on behalf of the individual . . . .

The plaintiff here contends that it instituted this suit in

order to vindicate its own federally protected rights, as opposed to bringing this suit on behalf of an individual under subpart (C) of § 10805(a)(1) [see amended complaint, Doc. No. 7, praying for a declaration that the defendant violated the plaintiff's rights, not the rights of a particular patient]. The court therefore analyzes the language of the PAIMI Act to determine whether it confers rights on the plaintiff, as Georgia's designated P&A system.

Under the analytical steps utilized by the Supreme Court in Gonzaga, this court has little difficulty in determining that the PAIMI Act confers certain rights on the plaintiff in this case. First, the PAIMI Act is phrased in terms of authorizations for the P&A systems and the facilities and records to which the P&A system "shall . . . have access . . . ." 42 U.S.C. § 10805. That Congress chose to mandate access with such specific language indicates the unambiguous intent to create rights of access.

Next, and as opposed to the framework set up in FERPA as analyzed by the Supreme Court in Gonzaga, PAIMI's language is not addressed to the authority charged with dispensing federal funds. Instead, PAIMI addresses the rights of the P&A systems regarding facilities such as those overseen by the defendant here. In addition, that the P&A systems are authorized to "pursue legal, administrative, and other appropriate remedies" further contrasts it with the Supreme Court's analysis of FERPA in that the Secretary

of Education is authorized to deal with violations under that statutory framework. Under PAIMI, there can be no doubt but that the proper entities for enforcement are the P&A systems.

Other courts are in agreement. Last year, the Court of Appeals for the Seventh Circuit issued its opinion in Indiana Protection and Advocacy Services v. Indiana Family and Social Services Administration, 603 F.3d 365 (7th Cir. 2010)(en banc)(hereafter "IPAS"). The Seventh Circuit analyzed the availability of a private cause of action for Indiana's P&A system, called IPAS, and concluded that the PAIMI Act created rights of access and that they were enforceable under 42 U.S.C. § 1983. In contrast to the nondisclosure provisions of FERPA as analyzed in Gonzaga and the disparate impact regulations under Title VI of the Civil Rights Act of 1964 as analyzed in Alexander v. Sandoval, 532 U.S. 275 (2001), the Seventh Circuit concluded that the right-of-access provisions in the PAIMI Act "are not one or two steps removed from IPAS - they are granted directly to IPAS itself." 603 F.3d at 379. Accordingly, the Seventh Circuit concluded that the PAIMI Act itself provides a cause of action for equitable relief and declined to decide whether 42 U.S.C. § 1983 similarly provided relief. See also Missouri Protection and Advocacy Services v. Missouri Department of Mental Health, 447 F.3d 1021 (8th Cir. 2006)(recognizing a cause of action under § 1983 to vindicate rights conferred by the PAIMI Act).

This court concludes that the PAIMI Act confers rights of access to the plaintiff in unambiguous terms and that these rights are enforceable under § 1983. The defendant's motion for summary judgment on the ground that the plaintiff has not alleged a deprivation of a federal right is DENIED.

B. Immunity and the Eleventh Amendment

Citing Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985), the defendant next argues, "Unless a State has waived its Eleventh Amendment immunity or Congress has overridden it, a State cannot be sued directly in its own name regardless of the relief sought." The defendant continues, arguing that the rule from Graham extends to state agencies and officers and that the plaintiff has failed to show any waiver of sovereign immunity [Doc. No. 20-1, p. 16]. The plaintiff responds by arguing that the doctrine of Ex Parte Young, 209 U.S. 123 (1908), which permits suits against state officers where the relief sought is prospective and equitable and seeks to end continuing violations of federal law, is applicable in this case.

The defendant's reply relies on Virginia v. Reinhard, 568 F.3d 110 (4th Cir. 2009) for the following proposition: "[T]he doctrine of Ex Parte Young only applies to suits by private individuals" [Doc. No. 48, p. 4]. This conclusion and the corresponding case law cited by the defendant in support overlooks the fundamental basis

upon which Reinhard was decided. At issue in Reinhard was whether Virginia's P&A system (called VOPA) could rightfully bring a cause of action under PAIMI against Virginia's commissioner of the Department of Mental Health in his official capacity for refusing access to records. The Fourth Circuit ultimately decided that the Eleventh Amendment barred VOPA's cause of action against the commissioner, but this holding was very limited. After narrowing the question ("The limited question we face, therefore, is 'whether the Eleventh Amendment bar should be lifted, as it was in *Ex Parte Young*,' when the plaintiff is a state agency"), id. ___ at 119 (internal citation omitted), the Reinhard court concluded, "We hold only that, because VOPA is a state agency, *Ex Parte Young* is the improper vehicle for VOPA to gain access to a federal forum. This holding in no way limits the scope of *Ex Parte Young* for private plaintiffs." Id. at 124. The Reinhard court expressly made its decision based on the fact that the P&A system there was a state agency. Its holding is therefore inapplicable to the plaintiff here, a non-profit private corporation. See id. at 118 (stating "this case differs from *Ex Parte Young* in a critical respect: the plaintiff there was not a state agency"); id. at 119 (stating "The state officials concede that *Ex Parte Young* would permit this action if the plaintiff were a private person or even a private protection and advocacy system").

Instead, the court conducts a straightforward inquiry into whether the "complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635, 645 (2002); see also IPAS, 603 F.3d at 371. The amended complaint in this case satisfies these criteria: it alleges that the defendant is violating the P&A acts by delaying and denying access to facilities, individuals, and records, and it requests injunctive relief restraining the defendants from doing so [Doc. No. 7].

This case fits neatly within the Ex Parte Young line of cases. The defendant's motion for summary judgment is therefore DENIED insofar as it seeks dismissal on Eleventh Amendment grounds.

IV. The P&A Acts as applied to this case

The remaining portion of the defendant's motion for summary judgment [Doc. No. 20] and the plaintiff's motion for summary judgment [Doc. No. 25] are based on the P&A Acts and their implementing regulations as applied to the facts of this case. The plaintiff's claims can neatly be summarized and divided into categories as follows: the defendant and the Department, in violation of the P&A Acts and the regulations promulgated thereunder, unlawfully restricted the plaintiff's access to 1) the Department's facilities and patients and 2) patient records.

A. Introduction

The apparent impetus for the original filing of this case occurred on October 13, 2009. Though the parties characterize the events of that day differently, what is undisputed is that one of the plaintiff's agents visited Southwestern State Hospitals ("SWSH"), which is run by the Department, but left before she was given access to the facilities. The stated reason for the visit was to investigate the alleged sexual assault of one of the patients[1] that had happened in July 2009 at that facility, as well as to monitor the conditions at that facility more generally. As a result the plaintiff organization filed suit alleging that it had been denied access to the SWSH facilities.

Following the court's denial of preliminary injunctive relief on October 22, 2009, the plaintiff filed an amended complaint broadening its claims to encompass more general claims of denial of access to facilities, patients, and patient records.

Each party has now filed a motion for summary judgment. The defendant's motion [Doc. No. 20] is supported by a statement of material facts [Doc. No. 21] ("Def. SMF"), to which the plaintiff

[1] The defendant refers to this individual as "a long term forensic consumer" [Doc. No. 20-1, p. 2], while the plaintiff refers to the individual as a "resident" [Doc. No. 25-1, p. 2]. For the sake of clarity, the court will refer to those under the care of the Department as patients throughout this order.

has responded [Doc. No. 42] ("Pl. Resp."). Similarly, the plaintiff's motion [Doc. No. 25] is supported by a statement of material facts [Doc. No. 25-2] ("Pl. SMF"), to which the defendant has responded [Doc. No. 45] ("Def. Resp."). Neither party filed a statement of additional facts which the respondent contends are material and present a genuine issue for trial pursuant to Civil Local Rule 56.1B(2)(b).

"The court will not consider any fact (a) not supported by a citation to the evidence (including paragraph number); (b) supported by a citation to a pleading rather than to evidence; (c) stated as an issue or legal conclusion; or (d) set out only in the brief and not in the movant's statement of undisputed facts." Civil Local Rule 56.1B(1).[2]

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[2] As an initial matter, the court notes that the affidavits of Michael James or Hillary Hoo-Yoo filed by the defendant in support of his statement of material facts are problematic. These documents, first filed as an appendix [Doc. No. 22, Exhibits A and B, respectively], are obvious drafts of affidavits. They contain an editor's proofreading marks in red ink or pencil, [Doc. No. 22-1, p.2; 22-2, p. 5], and the Appendix cover page indicates that the intended filings are each dated May 5, 2010 [Doc. No. 22]. The documents actually filed are dated October 20, 2009, and October 21, 2009. Apparently recognizing that there was some mistake and that the wrong documents had been filed, counsel for the defendant promptly filed a "notice of original filing" but appended the exact same documents [Doc. No. 23]. Finally, counsel for the defendant filed what appear to be the correct documents with another "notice of original filing" [Doc. No. 36]. These filings, without explanation from the defendant, understandably caused confusion for the court and for the plaintiff, see [Doc. No. 45](objecting to Def. SMF ¶ 17 and stating that the paragraph in an affidavit cited

i. Reasonable access to facilities and patients

The amended complaint summarily claims that the defendant is violating the P&A Acts "by delaying, denying and partially denying GAO's full, complete and timely access to the Defendant's facilities and the individuals confined to those facilities . . . as required by the federal statutes and their accompanying regulations" [Doc. No. 7, ¶ 32].

The implementing regulations for the PAIMI Act provide as follows regarding instances when a P&A system such as the plaintiff here suspects abuse or neglect in a regulated facility:

> 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. The P&A system shall have reasonable unaccompanied access to residents at all times necessary to conduct a full investigation of an incident 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. Such access shall be afforded, upon request, by the P&A system when:
> (1) An incident is reported or a complaint is made to the P&A system;
> (2) The P&A system determines there is probable cause to

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to support ¶ 17 does not exist). Although the court has read and considered the evidence in the latest-filed versions of these affidavits, [Doc. Nos. 36-1 and 36-2], these documents were not integral to the court's determination of the defendant's motion for summary judgment.

> believe that an incident has or may have occurred; or (3) The P&A system determines that there is or may be imminent danger of serious abuse or neglect of an individual with mental illness.

42 C.F.R. § 51.42(b).

> The next section provides:
>
> If a P&A system's access to facilities, programs, residents or records covered by the Act or this part is delayed or denied, the P&A system shall be provided promptly with a written statement of reasons, including, in the case of a denial for alleged lack of authorization, the name, address and telephone number of the legal guardian, conservator, or other legal representative of an individual with mental illness. Access to facilities, records or residents shall not be delayed or denied without the prompt provision of written statements of the reasons for the denial.

42 C.F.R. § 51.43.

The plaintiff points to incidents on four separate dates that it argues demonstrate that the defendant and the Department have violated the P&A Acts, as follows:

First, the plaintiff alleges that, on February 19, 2010, Central State Hospital ("CSH") staff refused to allow the plaintiff's agent, Katie Chandler, to attend a meeting to which she had been invited to assist in the transition of a 17-year-old boy from CSH to the community [Pl. SMF., Doc. No. 25-2, ¶ 26]. In response, the defendant denies that Ms. Chandler was denied access to a meeting by CSH staff and refers the court to ¶ 8 of the affidavit of Yevonna Paggett-Johnson, which states that, although

Ms. Chandler had been invited to the meeting in question, she had not been invited by the guardian of the patient in question, J.W. [Doc. No. 42-3, p. 7]. According to the Paggett-Johnson affidavit, CSH staff informed Ms. Chandler and her intern that they could not attend the meeting as planned, but that she could meet with J.W. and his mother afterwards [id.].

The evidence presented by the plaintiff on this point is insufficient to determine that it is entitled to judgment as a matter of law. The court lacks the factual predicate to determine whether Ms. Chandler was legally entitled to attend the meeting, including whether the patient's legal guardian invited her, and there are disputed questions of fact regarding why Ms. Chandler was not allowed to attend.

On the same date, the plaintiff claims that CSH staff "refused to allow advocate Katie Chandler visit [sic] or monitor on the hospital campus," [Pl. SMF, Doc. No. 25-1, ¶ 27], and "refused to allow advocate Katie Chandler to meet privately with an existing client," [id., ¶ 28]. The defendant denies these claims, and points to the Paggett-Johnson affidavit. Ms. Paggett-Johnson testified that Ms. Chandler was allowed onto the campus and was not denied access to monitor at CSH, but rather was directed to speak with a risk management representative first [Doc. No. 42-3, pp. 7-8]. Ms. Paggett-Johnson also testified that Ms. Chandler was allowed to

meet privately with the patient in question, C.C., but that Ms. Paggett-Johnson "did sit in the room due to being the staff witness for the signatures [for a required form], but left as soon as [she] had witnessed the signatures" [id., p. 8].

Again, there is a disputed issue of material fact on whether Ms. Paggett-Johnson prevented Ms. Chandler from meeting privately with a patient. Accordingly, summary judgment for the plaintiff is inappropriate on this evidence.

The plaintiff next claims that its agent, Sarah Stanton, was denied access to Monitor at West Central Hospital ("WCH") on June 2, 2009 [Pl. SMF, ¶ 29]. The defendant denies this allegation and instead points to the affidavit of Felicia Hardaway, who testifies, "the staff on the unit were not attempting to deny access to Ms. Stanton, only to clarify that she had authorization to be on the unit. Unfortunately, due to office relocation, it may have been difficult for staff to reach me in a more timely manner for authorization" [Doc. No. 42-2, p. 12]. This testimony is consistent with the record evidence cited by the plaintiff: Ms. Stanton testifies, "After waiting twenty-five (25) minutes, I was advised that [the staff members] were waiting for Ms. Hardaway to give permission for me to enter the unit" [Doc. No. 33, p. 18].

The evidence before the court is insufficient to determine that the access afforded to Ms. Stanton was legally insufficient.

Summary judgment for the plaintiff is therefore inappropriate on this point as well.

The plaintiff also alleges that on March 12, 2010, Ms. Stanton "was not allowed to speak to S.W., although she was standing near her," [Pl. SMF, Doc. No. 25-2, ¶ 30], and that "Stanton was allowed to obtain a release from A.C., but then was immediately interrupted and not allowed to speak to her further" [id. ¶ 31]. The defendant points out that the record evidence cited by the plaintiff to support the proposition that Ms. Stanton was not allowed to speak to patient S.W. is contradictory: Ms. Stanton testifies as follows in reference to S.W.:

> As I made my way towards her, a GRHA Registered Nurse said to me that she needed to get permission for me to see S.W. and that the last time I saw S.W. she should not have let me in. I explained to the Registered Nurse that I had the right to see S.W. because of GAO's federal access authority. I offered to show her a copy of our access authority, which she accepted and **allowed me to see S.W.**

[Doc. No. 33, pp. 23-24][emphasis added]. Regarding A.C., the defendant objects to the plaintiff's statement because the record evidence does not support the proposition for which it is cited, [D. Resp., Doc. No. 42, ¶ 31], and the court agrees. Accordingly, summary judgment for the plaintiff is inappropriate on this point as well.

Finally, the plaintiff states, "Advocate Tomika Jackson was

not permitted to have unaccompanied access to monitor the mental health unit at Central State Hospital" on February 18, 2010 [Pl. SMF, ¶ 32]. The defendant objects on the ground that this statement is in the form of a conclusion such that no response is required pursuant to Local Civil Rule 56.1B(1)(c). The court agrees. The plaintiff's statement of material facts fails, in this paragraph, to set out enough facts for the court to consider whether the conclusion -- that Ms. Jackson was denied unaccompanied access -- is supported. Accordingly, summary judgment for the plaintiff is inappropriate on this point as well.

In sum, the plaintiff has failed to carry its burden at summary judgment regarding the defendant's alleged violation of the P&A Acts and their regulations as they apply to the plaintiff's access to facilities and patients.[3]

With regard to access to facilities and patients, the defendant, in his brief and statement of material facts, sets out arguments only regarding the incident at SWSH on October 13, 2009. While the material facts regarding what happened that day are disputed, the defendant's motion as a whole is also insufficient

[3] The paragraphs of the plaintiff's statement of material facts not specifically cited in this order do not warrant the court's consideration: they are largely conclusions of law or argumentative rather than statements of facts material to this case.

because it treats October 13, 2009, as the only incident at issue in this case. The plaintiff's claims encompass more than that date, and even if the defendant's evidence negated each of the plaintiff's claims regarding the events of that date, the defendant's motion for summary judgment would still be denied: the defendant's evidence would not in that hypothetical case -- and does not in the present case -- establish that the defendant is entitled to judgment as a matter of law on the broader claims.

ii. Access to records

The PAIMI Act's regulations provide as follows regarding access to patient records for P&A systems:

> (a) Access to records shall be extended promptly to all authorized agents of a P&A system.
> (b) A P&A system shall have access to the records of any of the following individuals with mental illness:
> (1) An individual who is a client of the P&A system if authorized by that individual or the legal guardian, conservator or other legal representative.
> (2) An individual, including an individual who has died or whose whereabouts is unknown to whom all of the following conditions apply:
> (i) The individual, due to his or her mental or physical condition, is unable to authorize the P&A system to have access.
> (ii) The individual does not have a legal guardian, conservator or other legal representative, or the individual's guardian is the State or one of its political subdivisions; and
> (iii) A complaint or report has been received and the P&A system has determined that there is probable cause to believe that the individual has been or may be subject to abuse

or neglect.

(3) An individual who has a legal guardian, conservator, or other legal representative, with respect to whom a complaint or report has been received by the P&A system and with respect to whom the P&A system has determined that there is probable cause to believe that the health or safety of the individual is in serious and immediate jeopardy, whenever all of the following conditions exists:

(i) The P&A system has made a good faith effort to contact the representative upon prompt receipt of the representative's name and address;

(ii) The P&A system has made a good faith effort to offer assistance to the representative to resolve the situation; and

(iii) The representative has failed or refused to act on behalf of the individual.

(c) 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 the P&A system under the Act shall include, but not be limited to:

(1) Information and individual records, obtained in the course of providing intake, assessment, evaluation, supportive and other services, including medical records, financial records, and reports prepared or received by a member of the staff of a facility or program rendering care or treatment. This includes records stored or maintained in locations other than the facility or program as long as the system has obtained appropriate consent consistent with section 105(a)(4) of the Act. The system shall request of facilities that in requesting records from service providers or other facilities on residents that they indicate in the release form the records may be subject to review by a system.

(2) Reports prepared by an agency charged with investigating abuse neglect, or injury occurring at a facility rendering care or treatment, or by or for the facility itself, that describe any or all of the following:

> (i) Abuse, neglect, or injury occurring at the facility;
> (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 or injury such as records which describe persons who were interviewed, physical and documentary evidence that was reviewed, and the related investigative findings.
>
> (3) Discharge planning records.
> (4) 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, except that nothing in this section is intended to preempt State law protecting records produced by medical care evaluation or peer review committees.
> (5) Professional, performance, building or other safety standards, demographic and statistical information relating to the facility.
>
> (d) A P&A system shall have reasonable access and authority to interview and examine all relevant records of any facility service recipient (consistent with the provisions of section 105(a)(4) of the Act) or employee.
> (e) A P&A system shall be permitted to inspect and copy records, subject to a reasonable charge to offset duplicating costs.

42 C.F.R. § 51.41. As with access to patients and facilities, and as noted above,

> If a P&A system's access to . . . records covered by the Act or this part is delayed or denied, the P&A system shall be provided promptly with a written statement of reasons, including, in the case of a denial for alleged

> lack of authorization, the name, address and telephone number of the legal guardian, conservator, or other legal representative of an individual with mental illness. Access to facilities, records or residents shall not be delayed or denied without the prompt provision of written statements of the reasons for the denial.

42 C.F.R. § 51.43.

The plaintiff's statement of material facts contains five numbered paragraphs that fairly relate to what it perceives as problems receiving records. First, the plaintiff points to the affidavit testimony of Sarah Stanton in alleging, "[O]ver a 6 month period, investigator/Advocate Stanton sent 69 formal requests [for records], 18 of which were second requests, and that does not count follow up efforts through email" [Pl. SMF, Doc. No. 25-2, p. 20]. While the defendant does admit that Ms. Stanton has made formal requests for records, including some second requests [Def. Resp., Doc. No. 42, ¶ 20], he also points to record affidavit testimony that explains the potential source of some of the alleged delays in the plaintiff's receipt of copies of records and notes that the plaintiff may always access patient records at the facility where the patient is housed [id.]. Viewing the facts in the light most favorable to the defendant, the court cannot conclude that the Department's provision of records was not "prompt" under 42 C.F.R. § 51.41(a) in these circumstances.

Next, the plaintiff complains that one of the hospitals, CSH,

requires that all releases must be submitted on the hospital's form and insists on the signature of a witness [Pl. SMF, Doc. No. 25-2, ¶ 21]. A review of the record evidence cited for this proposition (and the plaintiff's argument that this requirement is an unreasonable barrier to access to records because the plaintiff is virtually unable to effectively request records through the mail from CSH) shows that CSH requires a signature on its forms while the plaintiff is not required to provide a signature for records requests for other facilities [Doc. No. 33, ¶ 25]. The defendant denies that CSH requires that its own form be used but does not contradict the allegation that CSH requires a witness for all signatures [Doc. No. 42, ¶ 21; Doc. No. 42-1, p. 53].

Though the essential fact -- that a signature is required for all signatures -- is undisputed, the plaintiff is not entitled to judgment as a matter of law on this basis. The plaintiff lacks factual support for its apparent assertion that it has been denied access to the records in question under the PAIMI Act and its regulations.

The plaintiff's next paragraph states "Once a release is signed, the hospital will determine whether the individual has capacity to authorize GAO to have the records even in the absence of a guardianship" [Pl. SMF, Doc. No. 25-2, ¶ 22]. The defendant objects, stating that the record evidence cited, [Doc. No. 33, ¶

46], does not stand for this proposition [Def. Resp., Doc. No. 42, ¶ 22]. The court agrees, and the court will not consider this statement pursuant to Civil Local Rule 56.1B(1)(a).

Next, the plaintiff makes various allegations regarding access to so-called peer review records. The plaintiff complains that the peer review records are only available at the facilities (as opposed to through the mail), that the records being provided are less than what is available, and that the Advocate Stanton has received mixed messages regarding whether any peer review records are available [Pl. SMF, Doc. No. 25-2, ¶ 24]. [4] Though the record evidence cited by the plaintiff is the affidavit testimony of Ms. Stanton, and it tends to substantiate these generalities, the defendant disputes the factuality of many Ms. Stanton's statements or objects to the vagueness of the references found in the plaintiff's statement [Def. Resp., Doc. No. 42, ¶ 24]. The record evidence cited by the defendant supports his position [see , e.g.

[4] Paragraph 24 of the plaintiff's statement of material facts is representative of many of the paragraphs in that document in that it combines many factual statements that are more accurately described as variations on a theme into a single "statement." Though this practice violates Civil Local Rule 56.1B(1) ("A movant for summary judgment shall include with the motion . . . a separate, concise, numbered statement of the material facts to which the movant contends there is no genuine issue to be tried. Each material fact must be numbered separately . . . ."), the court has attempted to address the separate allegations contained within those paragraphs.

Doc. No. 42-2, p. 12]. There are disputes of material fact creating genuine issues for trial with regard to the access to peer review records provided to the plaintiff.

Finally, the plaintiff sets out several allegations regarding the a delay in time between when the plaintiff requested guardianship information and when records were sent [Pl. SMF, Doc. No. 25-2, ¶ 25]. The record evidence is again Ms. Stanton's affidavit testimony wherein she relays alleged time lines for two separate record requests. [Doc. No. 33, ¶¶ 48, 56].[5] Regarding the request for S.W.'s guardianship information, a review of the record evidence cited, incl uding exhibits, shows that the requested information was sent the same day it was requested [Doc. No. 33-2, p. 62]. Regarding the request for the records of Z.R., the defendant offers contrary evidence [Doc. No. 42-3, p.3], and the court cannot say as a matter of law whether, based on the facts, the Department had a duty to provide the requested information or whether the provision of such was other than prompt. Summary judgment is therefore inappropriate.

The defendant, in support of his motion for summary judgment, devotes approximately one page of his brief [Doc. No. 20-1, pp. 16-17] and no paragraphs of his statement of material facts to the

[5] See note 2, supra, regarding issues of form.

issue of access to records. The defendant's only argument on the issue of the whether the Department has denied the plaintiff access to patient records can be articulated as follows: the plaintiff complains that it is denied access to full peer review records but admits that peer review records can be viewed by appointment at the facility where those records are kept; therefore the plaintiff should not be heard to complain about having to travel to each facility to view the records. The defendant's argument on this issue, however, is insufficient to warrant summary judgment in his favor.

First, the defendant's argument is limited to the issue of peer review records, a subset of the plaintiff's broader claims regarding records generally. Additionally, and within that subset, the plaintiff points out specific alleged instances supported by record evidence indicating that its agents were denied access to peer review records [Doc. No. 46, p. 21]. Though this information should properly have been set out in a statement of additional material facts under Civil Local Rule 56.1B(2)(b), it is clear, even without such evidence, that there are disputed issues of material fact creating issues for trial on the whether the plaintiff's access to records has been unduly abridged. Summary judgment is therefore inappropriate for the defendant on these grounds.

iii. Mootness

Finally, the defendant claims that this action is moot. He states, "Plaintiff originally sought a 'temporary restraining order to ensure that it is able to access the SWSH facility in a timely manner to investigate an incident of abuse and to moniter conditions at the facility' [. . . .] Now it seeks to 'enjoin Defendant and his successors from denying Plaintiff any and all future access'" [Doc. No. 20-1, p. 18]. Despite apparently recognizing that the plaintiff broadened its claims from the original complaint to the amended complaint to encompass not only the alleged denial of access to Southwestern State Hospi tal but also alleged delays and denials of access to records and patients on a larger scale, the defendant focuses only on the incident at SWSH in October 2009 for the following proposition: "This entire action is moot as the Department never denied Plaintiff access to SWSH" [Doc. No. 20-1, p. 17].

The defendant's arguments fail for various reasons. First, it ignores the breadth of the scope of issues before the court in this case as noted above regarding the plaintiff's access - other than access to SWSH - afforded under the P&A Acts versus that allowed by the defendant and the Department. Next, there are genuine issues of material fact regarding the level of access given to facilities, individuals, and records and even what happened on October 13,

2009, such that this court cannot state with any certainty whether the plaintiff was denied access under the P&A Acts and their implementing regulations at SWSH that day. Finally, if the plaintiff's allegations bear out, this case fits into the category of exceptions to the doctrine of mootness for actions that are "capable of repetition, yet evading review." See Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 514 (U.S. 1911). "[T]he exception can be invoked only when (1) there is a reasonable expectation or a demonstrated probability that the ***same*** controversy will recur involving the ***same*** complaining party, and (2) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration." Soliman v. U.S. ex rel. INS, 296 F. 3d 1237, 1243 (11th Cir. 2002)(italics in original)(internal citation omitted).

In the current case, with regard to the first prong of the above test, there is a reasonable expectation that the Department will continue to operate in the same manner as it did leading up to this suit in its dealings with the plaintiff. The defendant's positions that his department "did not violate any federal law" and that "the Plaintiff has always had access to the Department's mental health hospitals" serves to underscore this point [Doc. No. 20-1, pp. 6-7]. And if the department's practices in dealing with the plaintiff are ultimately found to be violative of federal law,

they are by their very nature too short in duration to be fully litigated prior to the occurrence of the harm that Congress was seeking to prevent in enacting the P&A Acts. That is, if the plaintiff's access is denied or delayed unduly, the harm occurs in the denial or delay. Whether any foul play in the form of cover-ups, inappropriate coaching of patients before interviews, or the like is actually happening during these delays is immaterial. Denial and delay in and of themselves inhibit the investigations that the plaintiff and other P&A systems are charged to undertake in addition to breeding mistrust between entities (the plaintiff and the Department) that should and must work together to achieve a common goal: to raise the level of care for those protected by the P&A Acts. Therefore, summary judgment for the defendant is inappropriate on mootness grounds.

V. Conclusion

The plaintiff has filed this suit in apparent frustration over the defendant's policies and practices. Far from focusing on a single event or circumstance, the plaintiff has cited numerous examples of what it contends are roadblocks set up by the Department either with the intention or the effect of slowing or denying the plaintiff's ability to do what the P&A Acts mandate: protect the interests of patients. The defendant largely argues that many of the delays or denials of which the plaintiff complains

can be explained or excused by the surrounding circumstances. It is clear that the relevant inquiries in this case are based on facts upon which the parties disagree.

The court is also mindful that the PAIMI Act's regulations are explicit regarding how parties affected by the PAIMI Act, such as the parties here, should conduct themselves in the face of a dispute. 42 C.F.R. § 51.32(b) provides, "Disputes should be resolved whenever possible through nonadversarial process involving negotiation, mediation, and conciliation." The court doubts that it would have been -- or is now -- impossible to resolve the disputes at issue in this case nonadersarially.

The defendant's motion for summary judgment [Doc. No. 20] and the plaintiff's motion for summary judgment [Doc. No. 25] are each DENIED. The court will set a schedule for the parties to submit their joint proposed pretrial order at a later date.

SO ORDERED, this 9th day of March, 2011.

/s/ Charles A. Pannell, Jr.
CHARLES A. PANNELL JR.
United States District Judge