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 before the court on the plaintiff's motion for permanent injunction pursuant to Federal Rule of Civil Procedure 65 [Doc. No. 65].

I. Procedural posture

The order on the parties' cross motions for summary judgment sets out the factual background of this case in detail; it does not need to be reiterated here except as follows: the cross motions for summary judgment were deined, and, following private mediation, the parties settled almost all of the plaintiff's claims and entered a stipulated agreement [Doc. No. 63]. The sole legal issue left for the court to decide is whether the plaintiff is entitled to inspect and copy peer review records pursuant to the P&A Acts[1] and their

[1] The Protection and Advocacy Acts: the Protection and Advocacy Act for Individuals with Mental Illness Act of 1986, 42

regulations.

The parties have stipulated to all facts material to the disposition of this issue. See [Doc. No. 63-1]. Although the defendant currently allows the plaintiff to physically inspect peer-review records, the defendant does not allow copying of any peer-review records. Moreover, the defendant has now taken the position that it should be able to restrict the plaintiff's access to all peer-review records.

The court held a hearing on February 28, 2012, in which Ruby Moore, the plaintiff's Executive Director, and the defendant testified. The plaintiff's motion is now ripe for adjudication.

II. Legal Standard

> A plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Monsanto Co. v. Geertson Seed Farms, --- U.S. ---, 130 S. Ct. 2743, 2756 (2010).

U.S.C. § 10801 et seq., the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. § 15001 et seq., and the Protection and Advocacy of Individual Rights Program of the Rehabilitation Act of 1973, 29 U.S.C. § 794e.

III. Analysis

The plaintiff argues it is entitled to access -- and specifically to inspect and copy –- peer review records under the plain language of the several congressional acts, referred to herein as the P&A Acts. In support, the plaintiff first cites the access provision of the Protection and Advocacy Act for Individuals with Mental Illness Act of 1986 ("PAIMI Act"), 42 U.S.C. § 10801 et seq. Under that access provision, P&A systems are entitled to "access of all records" of individuals in several categories. 42 U.S.C. § 10805(a)(4). In the PAIMI Act, the term "records"

> includes reports prepared by any staff of a facility rendering care and treatment or reports prepared by an agency charged with investigating reports of incidents of abuse, neglect, and injury occurring at such facility that describe incidents of abuse, neglect, and injury occurring at such facility and the steps taken to investigate such incidents, and discharge planning records.

42 U.S.C. § 10806(b)(3)(A).

The plaintiff next cites the access provision of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 ("DD Act"), 42 U.S.C. § 15001 et seq. That provision also entitles P&A systems to "access to all records of" individuals in several categories. 42 U.S.C. § 15043(a)(2)(I). The definition of "record" under the DD Act includes

> (1) a report prepared or received by any staff at any location at which services, supports, or other assistance

> is provided to individuals with developmental disabilities;
> (2) a report prepared by an agency or staff person charged with investigating reports of incidents of abuse or neglect, injury, or death occurring at such location, that describes such incidents and the steps taken to investigate such incidents; and
> (3) a discharge planning record.

15 U.S.C. § 15043(c). Third, the plaintiff cites the access provision of the Protection and Advocacy of Individual Rights Program of the Rehabilitation Act of 1973 ("PAIR Act"), 29 U.S.C. § 794e. That provision requires the P&A system to "have the same general authorities, including access to records . . . as are set forth in subtitle C of the [DD Act]." 29 U.S.C. § 194e(f)(2).

Because all of the P&A Acts, by their explicit terms, allow P&A systems such as the plaintiff here broad access to records, including the right to inspect and copy those records,[2] the sole question for the court is whether peer review records fall within the definition of the term "records" as set out in the P&A Acts. In support of his argument that peer review records are not records under the P&A Acts, the defendant cites a regulation promulgated by the United States Department of Health and Human Services in 1997 pursuant to a 1991 reauthorization of the PAIMI Act. See 42 U.S.C. § 10826(b) ("[T]he Secretary shall promulgate final regulations to carry out [PAIMI]."). That regulation states, in a non-exclusive

[2] See infra, pp. 7-8.

list of records P&A systems are entitled to access, "[N]othing in this section is intended to preempt State law protecting records produced by medical care evaluation or peer review committees." 42 C.F.R. § 51.41(c)(4).

Based on this language and legislative history that facially supports it, as well as Georgia statutes requiring peer review records to be "held in confidence," O.C.G.A. § 31-7-133, and disallowing their discovery or introduction into evidence in suits against health services providers, O.C.G.A. § 31-7-143, the defendant argues that peer review "records" were meant to be exempted from the definition of the term records under the P&A Acts. Moreover, he argues 42 C.F.R. § 51.41(c)(4) is entitled to deference from this court under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

Pretermitting whether there is any conflict in Georgia law and the access provisions of the P&A Acts,[3] the court declines to defer to the interpretation of the Department of Health and Human Services regarding peer review records, as expressed in 42 C.F.R.

[3] It is not at all clear that the mandates of the P&A Acts conflict with Georgia law. The court does not decide whether such a conflict exists because the plaintiff here is entitled to access peer review records regardless of state law under the plain language of the P&A Acts and the relevant access provisions. The analysis offered in this order is to demonstrate that, even if a conflict exists, the P&A Acts preempt state law.

§ 51.41(c)(4). The court is persuaded by the analysis of this issue by the Third Circuit Court of Appeals in Pennsylvania Protection & Advocacy, Inc. v. Houstoun, 228 F.3d 423 (3d Cir. 2000). It explained its rejection of the regulation cited by the defendant as follows:

> The interpretation of PAMII[4] set out in 42 C.F.R. § 51.41(c)(4) does not represent a reasonable interpretation of the statute, and we must therefore reject it. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). As noted, PAMII requires that groups such as [the plaintff] be given access to a defined category of records. Peer review reports either fall within that definition or they do not. The statutory language cannot reasonably be construed to encompass identical peer review reports in some states but not others. If Congress wished to achieve that result, it needed to enact different statutory language. It could not achieve that result, in the face of the statutory language it enacted, simply by inserting a passage in a committee report. Nor could that result be achieved by means of a regulation.

Id. at 427-28. The Houston court held that PAIMI "requires that an organization such [as the plaintiff] be given access to peer review reports such as those at issue here irrespective of state law." Id. Since then, the Second, Eighth, Tenth, and Seventh circuits have agreed with the Houston court's analysis and its conclusion that P&A systems are entitled to access peer review records. See

[4] PAMII, which is cited by Houston, is the same act as the PAIMI Act. It was reworded to refer to "individuals with mental illness" instead of "mentally ill individuals" and was renamed accordingly.

Protection & Advocacy for Persons with Disabilities v. Mental Health & Addiction & Advocacy Services, 448 F.3d 119 (2d Cir. 2006); Missouri Protection & Advocacy Services v. Missouri Department of Mental Health, 447 F.3d 1021 (8th Cir. 2006); Center for Legal Advocacy v. Hammons, 323 F.3d 1262 (10th Cir. 2003); Indiana Protection and Advocacy Services v. Indiana Family and Social Services Administration, 603 F.3d 365 (7th Cir. 2010) (cert. denied, 131 S. Ct. 2149). This court agrees. There is simply no textual basis for finding an implied exception to the requirements that all records be available to the plaintiff in this case.

The court is sensitive to the concerns Dr. Shelp expressed during the February 28, 2012, hearing. There, he reiterated that the goals of the peer review process, such as candid evaluation of one's own actions and those of peers after an unfavorable medical outcome as well as the policy changes that result therefrom, are intrinsically dependent on keeping the peer review process shielded from outsiders. While these goals undoubtedly aim to serve the higher purpose of improving patient care, so do the P&A Acts. The balance the P&A Acts strike between secrecy and oversight dictates that the plaintiff in this case be given the same access to peer review records as it is any other records. Policy arguments to the contrary are better made to Congress.

Moreover, the plaintiff is entitled to inspect and copy the

peer review records. Under 42 C.F.R. § 51.41(e), a PAIMI Act regulation, "A P&A system shall be permitted to inspect and copy records, subject to a reasonable charge to offset duplicating costs."[5] The DD Act regulations contain an almost identical provision, 45 C.F.R. § 1386.22(d), and the PAIR Act allows the same access to records as provided for in the DD Act, 29 U.S.C. § 194e(f)(2). The defendants do not cite any contrary authority.

The court holds that peer review records are subject to inspection and copying by the plaintiff in the same manner and subject to the same limitations as any other records. Addressing the elements of the test for a permanent injunction, the court concludes an injunction is appropriate. First, the defendant's failure to allow the required access constitutes an irreparable injury. The information contained in the disputed peer review records is not available in other records. Second, the plaintiff has no remedies available at law; no amount of damages could provide the plaintiff with the information it needs. Third, Congress has determined the hardship to the plaintiff outweighs that the defendant would experience in sharing the peer review records. Finally, the public interest is undoubtedly served when a

[5] Note that this is a different provision of the same regulation that the courts of appeal have largely rejected as inconsistent with the statutory language. There is no indication that the inspect and copy provision is not good law, however.

Congressional mandate is followed. Accordingly, the plaintiff's motion for permanent injunction [Doc. No. 65] is GRANTED.

The parties are hereby ORDERED as follows:[6]

PERMANENT INJUNCTION

ACCESS TO FACILITIES AND INDIVIDUALS

1. Facility shall mean any setting operated by the Department that provides care or treatment services.

2. 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

[6] With the exception of the Peer Review section, the language of this injunction order is taken from the parties' stipulated agreement [Doc. No. 63], which they agree should be confirmed as the permanent injunction of the court. Rule 65 mandates that injunctions must not refer to other documents in describing the acts enjoined. Rule 65(d)(1)(C). Accordingly, the court copies the relevant portions of the agreement, making minor changes such as paragraph numbering and confirming language of agreement into mandatory language. Additionally, the court adopts the plaintiff's proposed language in the Peer Review section with similar changes and decreased time deadlines in Paragraphs 21-22.

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.

3. 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 has been 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.

4. 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.

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

6. 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.

7. 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

8. 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.

9. 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 him or her 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 atthorization 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 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.

10. GAO shall be afforded immediate access to records, but not later than 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.

11. 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 9(c) and 10 shall apply to the mailing of the records.

12. 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.

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

AUTHORIZATIONS

14. 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

15. 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.

16. 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 than24 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 shall to meet or confer telephonically as soon as practicable.

17. In the event the process in Paragraph 15 and Paragraph 16 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.

18. Prior to filing pleadings with this Court, both parties shall follow Paragraphs 15 through 17 of this Agreement and injunction and make reasonable and diligent efforts to resolve disputes.

19. The court shall retain jurisdiction for the purposes of enforcing this Agreement and injunction until August 31, 2014.

TRAINING

20. As soon as practicable after the Effective Date of this Agreement and injunction, 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) shall to conduct joint training on the Agreement to both the Department and GAO.

21. Within 30 days 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 and injunction that are applicable to their respective job duties.

22. Within 30 days of the Effective Date of this Agreement and injunction, GAO shall communicate with its officials, employees, and agents, the provisions in this Agreement and injunction that are applicable to their respective job duties.

COOPERATION AND CIVILITY

23. The parties shall conduct themselves in a cooperative and civil manner in carrying forth the terms of this Agreement and injunction.

24. Notice under this Agreement and injunction shall occur by sending written documentation by overnight courier to the following: (1) Commissioner, Georgia Department of Behavioral Health and Developmental Disabilities, 2 Peachtree Street, N.W.,

Atlanta, Georgia 30303 and (2) Chief Executive Officer, Georgia Advocacy Office, 150 East Ponce De Leon Avenue, Suite 430, Decatur, Georgia 30030.

PEER REVIEW

25. The following provision supplements the preceding injunction provisions. The Department is enjoined and restrained from:

(a) Denying, preventing, and interfering with Plaintiff GAO's access to any records upon GAO's request, pursuant to 42 U.S.C. § 15001 et seq. and 42 U.S.C. § 10801 et seq., and specifically, peer review and mortality review records. The term "access" shall include both inspection and copying of any records included within the definition of "all records" under the P&A Acts and as set forth as follows:

(i) Peer review records;

(ii) Mortality review records;

(iii) 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 by or received by a member of the staff of the Facility that is providing care or treatment;

(iv) 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:

(A) abuse, neglect, injury, death;

(B) the steps taken to investigate the incidents;

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

(D) 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;

(v) discharge planning records;

(vi) 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;

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

(viii) records of any meeting of licensed medical professionals reviewing, critiquing, and/or discussing in any way the performance of another medical professional.

(ix) Records within the scope of O.C.G.A., §§ 31-7-15, 31-7-131, 31-7-133, 31-7-140, and 31-7-143.

Because this order and injunction adjudicates all remaining issues, the clerk is DIRECTED to close this civil action.

SO ORDERED, this 9th day of May, 2012.

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