

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT OFFICE OF	:	Civil Action No. 3:03CV1352 (RNC)
PROTECTION AND ADVOCACY	:	
FOR PERSONS WITH DISABILITIES;	:	
JAMES MCGAUGHEY, Executive	:	
Director, Office of Protection and	:	
Advocacy for Persons with Disabilities,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
WAYNE CHOINSKI, 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.	:	May 17, 2006

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT  
OF THEIR RENEWED MOTION FOR AN ORDER  
ALLOWING ACCESS TO PRISONER HEALTH RECORDS**

**I. INTRODUCTION**

Plaintiffs seek an order allowing limited access to prisoner health records, so that their consultants can monitor defendants' compliance with the Settlement Agreement in this case. As set forth in plaintiffs' June 9, 2004 initial brief and July 27, 2004 reply brief, such an order is authorized by the Health Insurance Portability and Accountability Act ("HIPAA") and controlling federal law. Plaintiffs incorporate by reference the arguments made in their earlier briefs and continue to rely on them. Plaintiffs now make the following additional points in further support of their renewed motion.

## II. ARGUMENT

### A. Plaintiff Office of Protection and Advocacy Is a Health Oversight Agency to which the Records can be Released Without Implicating Any Privilege Concerns

During the April 28, 2005 telephonic discussion of plaintiffs' original motion, the Court asked defense counsel to explain the basis for the state's disclosure of prisoner health records to its outside mental health consultant: "How is it under the law that these individuals acting as consultants for the defendants are able to have access to this information. What authority do they rely on in order to have access themselves?" 4/28/05 Tr. at 9.<sup>1</sup>

The following colloquy then took place:

"MR. O'NEILL: Is Your Honor asking me did we believe that we did not – that we, the Department of Corrections, did not need to obtain consent from the inmates to disclose information to our consultant?

THE COURT: Right.

MR. O'NEILL: Okay. That was our position, yes.

THE COURT: And again just for the sake of clarification, that is because why?

MR. O'NEILL: That is because under HIPAA, the consultant is a business associate. There's an exception in there that allows for business associates to observe – to review records.

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<sup>1</sup> A copy of cited portions of the transcript of discussion of plaintiffs' original motion is attached to this brief as Exhibit 1.

And so because our consultant has been retained to assure compliance with this agreement and provide consultation services as to the quality of care provided, mental healthcare provided, she meets the definition.”

4/28/05 Tr. at 11-12.

There is similarly an exception in HIPAA that allows disclosure of medical records without prior consent to a health oversight agency.

45 C.F.R. §164.512(d)(1) provides:

A covered entity may disclose protected health information to a health oversight agency for oversight activities authorized by law, including audits... or other activities necessary for appropriate oversight of:...(iv) Entities subject to civil rights laws for which health information is necessary for determining compliance...

HIPAA defines a health oversight agency as meaning, inter alia,

an agency or authority of...a State... or a person ...acting under a grant of authority from or contract with such public agency... that is authorized by law to oversee... government programs in which health information is necessary to determine ...compliance, or to enforce civil rights laws for which health information is relevant.

45 C.F.R. §164.501.

Plaintiff Connecticut Office of Protection and Advocacy for Persons With Disabilities (“OPA”) is a State agency. See Conn. Gen. Stat. §46a-10. As the federally designated protection and advocacy agency for Connecticut, OPA is authorized by both federal and state law to enforce civil rights for which health information is relevant. See 42 U.S.C. §10801(b)(2)(A); Conn. Gen. Stat. §46a-11. OPA is thus a health oversight agency within the meaning of HIPAA. See Ohio Legal Rights Services v. The Buckeye Ranch, Inc., 365 F.Supp. 2d 877,

891-92 (S.D. Ohio 2005) (holding that Ohio Protection and Advocacy Agency is a “health oversight agency” under HIPAA).

Accordingly, just as the state allows its outside consultant access to prisoner health records under the business associate exception, OPA’s outside consultant should be given access to these same records under the health oversight agency exception. As the state conceded, no privilege concerns are implicated by disclosure to someone who falls within an exception created by HIPAA. Plaintiffs’ motion can and should be granted on this basis alone.

**B. Requiring Releases Prevents A Meaningful Audit**

In urging the parties to perform the first audit cycle using records obtained by individual releases, the Court noted the lack of a record that would counter the privacy rights being asserted by defendants. See 4/28/05 Tr. at 31. The Court went on to say however:

It seems to me that in undertaking to enter into this agreement, the defendants risked a court order that would give the plaintiffs’ consultants some considerable access to this health information of the inmates, and even if that’s not so, by entering into an agreement that contemplated some monitoring, I think the defendants committed themselves to permitting somebody access to some information in some way at some time in some form that would make monitoring meaningful. In other words, I don’t think the defendants could say that in entering into the agreement both sides contemplated that the plaintiff would have to trust the defendants when it came to monitoring performance of the agreement. There had to be something more than that going on there, I would think.

4/28/05 Tr. at 33.

The Court told plaintiffs “to make a better record by exhausting alternatives such as the one the State has extended, and that is having your people visit with those individuals and ask for their consent.” Id. at 32.

Finally, the Court also noted:

If I had a record of non-compliance with the agreement, if there were articulable facts substantiated by evidence showing that there was a pattern of non-compliance and this was something that required the plaintiffs' consultant to be able to take a closer look, that would be a different record.

Id. at 31.

Plaintiffs did try the alternative suggested by the state of performing an audit using health records of only those prisoners who signed an individual release. As detailed in the attached declaration of Carl Fulwiler, M.D., Ph.D (Exhibit 2 hereto), plaintiffs' mental health consultant, that proved to be extremely problematic. While Dr. Fulwiler was able to document many areas of noncompliance,<sup>2</sup> he could not perform a complete audit.

Dr. Fulwiler was concerned at the outset that the most severely mentally ill prisoners would be likely to refuse to provide a release, especially those with paranoia. See Fulwiler Declaration, ¶5. This concern was well founded: four of the first eleven seriously mentally ill prisoners who were sent to NCI under the dangerousness exception refused to sign releases. Id. Dr. Fulwiler thus could not review their medical records, which in turn prevented any meaningful audit of their return to NCI. Id.

All mental health clinicians agree that insulated confinement is damaging to people with serious mental illness. Id., ¶6. Paragraph 4 of the Settlement Agreement provides for the exclusion of seriously mentally ill prisoners from NCI's administrative

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<sup>2</sup> A copy of the mental health audit report is being filed, together with a motion to file under seal, as an exhibit to the transmittal declaration of Ben A. Solnit.

segregation program unless the prisoner is too dangerous to be placed anywhere else.<sup>3</sup> Pursuant to this exception, defendants had, by the time of Dr. Fulwiler's audit visit in late January, 2006, transferred to the administrative segregation program at NCI eleven seriously mentally ill prisoners. That number has now grown to 15. Id.

Prisoners who have paranoia are more likely to incur disciplinary infractions and accumulate extended sentences in segregated housing as a result of their serious mental illness. That the refusal rate for this group of eleven transferred prisoners was nearly half is therefore not surprising but it precluded any meaningful audit of their transfer to NCI despite being seriously mentally ill. Id., ¶7. This same pattern of refusal to sign releases by prisoners whom Dr. Fulwiler particularly wanted to include in his audit extended to other areas as well. Id.

Indeed, Dr. Newkirk and Dr. Fulwiler were unable to audit an entire area, item 23 of the mental health audit instrument, programming made available to prisoners at NCI, because of the lack of releases. See id. at ¶8.

When the auditors attempted to work around such problems by requesting redacted records, this led to long delays and unusable documents. Id. at ¶9.

Dr. Fulwiler concluded that while Dr. Newkirk and he had found many areas of noncompliance, id. at ¶3., (see Ex.1 to Solnit Declaration, noting 9 areas of noncompliance and 11 areas of only partial compliance), the obstacles created by the release requirement prevented him from performing a complete, meaningful audit. Id. at ¶10. Dr. Fulwiler was unable to check on the well being of the sickest prisoners, one of

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<sup>3</sup> A copy of the Settlement Agreement is attached as Ex.1 to plaintiffs' June 9, 2004 brief in support of their original motion for an order allowing access to prisoner health records. A copy of amended paragraph A.13 of the Settlement Agreement, under which this renewed motion is brought, is attached hereto as Exhibit 3.

plaintiffs' central concerns. Id. Accordingly, the record requested by the Court has been created. There are clearly serious issues with defendants' compliance. Equally clearly, Dr. Fulwiler has been prevented by the release requirement from taking a closer look at important areas of concern to him.

**C. Releases Are Largely Unnecessary Because Most of the Records at Issue Are Not Protected Under Jaffee**

Further, releases are not even relevant to most of the records in question. The privilege created in Jaffee v. Redmond, 518 U.S. 1 (1996) covers only "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment..." 518 U.S. at 15 (emphasis added). There is a clear distinction drawn in the mental health field between therapy, which includes diagnosis and treatment, and evaluation. Fulwiler Declaration, ¶11. Further, there is a clear legal distinction between confidential communications and either forms of information.

Courts applying Jaffee have consistently held that the privilege does not apply if the information at issue is not "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment." See e.g., U.S. v. Schwensow, 942 F.Supp. 403-04 (E.D. Wis. 1996), aff'd, 151 F.3d 650 (7<sup>th</sup> Cir. 1998), cert. denied, 525 U.S. 1059 (1998). ("In recognizing the psychotherapist privilege and extending it to licensed social workers, the Supreme Court specifically held that the confidential communications were to be made in the course of psychotherapy"; defendant's discussion with AA volunteers did not qualify for protection under that test); Barrett v. Vojtas, 182 F.R.D. 177, 180-81 (W.D. Pa. 1998) (Jaffee did not protect



information created by examination ordered by officers employer; “we find that the psychotherapist-patient relationship which existed in the instant case was not the type of relationship contemplated when the privilege was recognized by the Supreme Court”); Phelps v. Coy, 194 F.R.D. 606, 607 (S.D. Ohio 2000), aff’d, 286 F.3d 295 (6<sup>th</sup> Cir. 2002), cert. denied, 537 U.S. 1104 (2003) (“records regarding psychiatric evaluations, reports, notes, documents and test scores” which were reported to officer’s employer are not “confidential communications” under Jaffee) (emphasis in original); Merrill v. Waffle House, Inc., 227 F.R.D. 467, 471 (N.D. Tx. 2005) (Jaffee “protects only communications between the therapist and patient”) (emphasis in original).

Here, only a tiny fraction of the records Dr. Fulwiler received through a release reflected confidential patient-psychotherapist communication in the course of diagnosis and treatment and those few records were easily segregable. Fulwiler Declaration, ¶11. Thus, most of the records at issue are not protected under Jaffee. Even if access to all prisoner health records is not ordered for the reasons argued above, at a minimum, access to all but these few records should be given.

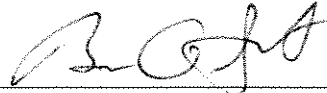


### III. CONCLUSION

Limited access to prisoner health records is necessary to a complete, meaningful audit and is allowed under the law. Plaintiffs' motion should therefore be granted.

THE PLAINTIFFS  
STATE OF CONNECTICUT  
OFFICE OF PROTECTION & ADVOCACY, et al.

BY



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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing has been mailed this 17th day of May, 2006, to the following counsel of record:

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## **EXHIBIT 1**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

----- X  
: STATE OF CONNECTICUT : No. 3:03CV1352 (RNC)  
: OFFICE OF PROTECTION & ADVOCACY :  
: FOR PERSONS WITH DISABILITIES :  
: Plaintiff :  
: vs. :  
: NORTHERN CORRECTIONAL INSTITUTE, :  
: ET AL :  
: Defendants : HARTFORD, CONNECTICUT  
: APRIL 28, 2005  
: ----- X

COPY

TELEPHONE CONFERENCE

BEFORE:

HON. ROBERT N. CHATIGNY, CHIEF U.S.D.J.

Darlene A. Warner, RDR-CRR  
Official Court Reporter

1 parties will submit to the Court the issues of ordering  
2 the disclosure of prisoner health records to the  
3 consultants. It doesn't say the parties will argue  
4 whether plaintiff has the right to have the consultants  
5 see any documents without individual consents.

6 So the only thing that has been reserved by this  
7 settlement agreement is the conditions under which the  
8 parties' consultants, and really the plaintiffs'  
9 consultants, because the defendants are using in one case  
10 their own full-time employee and in another case a person  
11 they've done an employment contract with. So they have no  
12 problem getting access. But the plaintiffs in order to  
13 adequately audit the settlement agreement need to have  
14 access, and the only issue is under what terms that access  
15 will be issued.

16 I agree we're beyond the complaint.

17 THE COURT: Okay. Let me ask a couple of  
18 follow-up questions on this part of the problem.

19 How is it under the law that these individuals  
20 acting as consultants for the defendants are able to have  
21 access to this information? What authority do they rely  
22 on in order to have access themselves?

23 MR. O'NEILL: We cited in our brief, Your Honor,  
24 the Commissioner of Correction is the person responsible  
25 for providing mental and medical healthcare, obviously is

1           We've now retained an outside person to perform  
2           that function. She provides additional consultive  
3           services to the Department of Corrections. While she's  
4           not a direct employee, she's a contractor. So she is an  
5           advisor to the agency on mental health services.

6           THE COURT: So -- and I'm not meaning to imply  
7           by my questions that I have reason to disagree with what  
8           you're saying, I'm just looking for information.

9           Is it your view that HIPAA would permit this  
10          without any opportunity on the part of the inmate to  
11          object? In other words, under HIPAA, you were not obliged  
12          to tell the inmates that their individually identifiable  
13          mental health information would be given to people for  
14          this purpose unless they objected? You felt that HIPAA  
15          would not require you to give notice in the first  
16          instance, is that right?

17          MR. O'NEILL: Is Your Honor asking me did we  
18          believe that we did not -- that we, the Department of  
19          Corrections, did not need to obtain consent from the  
20          inmates to disclose information to our consultant?

21          THE COURT: Right.

22          MR. O'NEILL: Okay. That was our position, yes.

23          THE COURT: And again just for the sake of  
24          clarification, that is because why?

25          MR. O'NEILL: That is because under HIPAA, the

1 consultant is a business associate. There's an exception  
2 in there that allows for business associates to observe --  
3 to review records.

4 And so because our consultant has been retained  
5 to assure compliance with this agreement and provide  
6 consultation services as to the quality of care provided,  
7 mental healthcare provided, she meets the definition.

8 THE COURT: I see.

9 MR. SOLNIT: Your Honor, Ben Solnit.

10 There's also a provision under HIPAA that allows  
11 a covered entity such as DOC to disclose protected  
12 healthcare information to a health oversight agency for  
13 oversight activities including audits, and the definition  
14 of the health oversight agency includes an agency of a  
15 state acting under a grant of authority authorized by law  
16 to enforce civil rights law for which health information  
17 is relevant, and that's in the first part in allowing DOC  
18 to disclose to OPA is 45 CFR 164.512(d). And then the  
19 definition of a health oversight agency is 45 CFR 164.501.

20 So it's plaintiffs' position even before you get  
21 to qualified protective order in litigation, there is a  
22 provision in HIPAA to allow this information to be  
23 provided to our consultants. Just like Mr. O'Neill  
24 explained that there's a provision under HIPAA for the  
25 business associate for his consultant, there's this other



1 privacy interest of the individual in these unusually  
2 sensitive, delicate records.

3 Even assuming that a court has the authority to  
4 engage in such a balancing, the record I have at the  
5 moment doesn't give the plaintiffs' demand for  
6 across-the-board access, the weight that I think would be  
7 necessary to overcome the individual's privacy interest.

8 I grant you that if the OPA is a health  
9 oversight agency, then there's no need for balancing, I  
10 guess, and there's an exception there that can be  
11 respected. But even as to that, I'm not sure at the  
12 moment.

13 Point is, I think the defendants rightly  
14 emphasize that the individual does have a very strong  
15 interest in maintaining the privacy of his or her mental  
16 health records. And I don't see a countervailing interest  
17 at the moment.

18 If I had a record of non-compliance with the  
19 agreement, if there were articulable facts substantiated  
20 by evidence showing that there was a pattern of  
21 non-compliance and this was something that required the  
22 plaintiffs' consultant to be able to take a closer look,  
23 that would be a different record. But at the moment, it  
24 seems to me you're asking me to find that the State's  
25 willingness to enter into this settlement agreement

1 provides a sufficient basis for overriding the privacy  
2 interests of all these individuals. And for all I know,  
3 the State decided to enter into a settlement agreement not  
4 because the rights of these individuals have been or would  
5 be violated but because it was interested in improving the  
6 quality of mental healthcare and protecting people against  
7 violations of their rights. And for me to hold it against  
8 the State, so to speak, at the expense of these  
9 individuals who might well object to the blanket  
10 disclosure of their records, is something that I don't  
11 think I should do.

12 So I would urge you to see if there is a way to  
13 narrow your request for access to maybe put conditions on  
14 your access, to perhaps formulate a way of getting at  
15 information that would allow you and your consultants to  
16 get the substantive information without having access to  
17 the records themselves. Maybe you've done this to a fair  
18 thee well and there's simply no other alternative.

19 If that's so, then I think I would ask you to  
20 make a better record by exhausting alternatives such as  
21 the one the State has extended, and that is having your  
22 people visit with these individuals and ask for their  
23 consent. It may be that that's time consuming and  
24 expensive, but I'm afraid I need to ask you to do that  
25 before I can in effect nullify the privacy interests of

1 people who might well object.

2 So in light of all that we've discussed, in  
3 light of all you've said in your papers, recognizing that  
4 the plaintiff might well feel somewhat ill used, or  
5 insulted even, I think that the Jaffee case does require  
6 me to proceed this way.

7 If you can't come up with an alternative, if you  
8 find yourselves looking for consents and not getting them  
9 and you believe that in the absence of an order from me  
10 the monitoring that you consider an essential part of this  
11 agreement simply can't occur, then we can talk again.

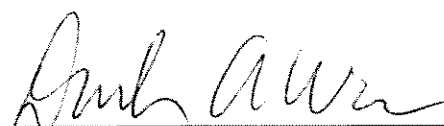
12 It seems to me that in undertaking to enter into  
13 this agreement, the defendants risked a court order that  
14 would give the plaintiffs' consultants some considerable  
15 access to this health information of the inmates, and even  
16 if that's not so, by entering into an agreement that  
17 contemplated some monitoring, I think the defendants  
18 committed themselves to permitting somebody access to some  
19 information in some way at some time in some form that  
20 would make monitoring meaningful. In other words, I don't  
21 think the defendants could say that in entering into the  
22 agreement both sides contemplated that the plaintiff would  
23 have to trust the defendants when it came to monitoring  
24 performance of the agreement. There had to be something  
25 more than that going on there, I would think. And I'm

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C E R T I F I C A T E

In Re: OPA v. NORTHERN

I, Darlene A. Warner, RDR-CRR, Official Court Reporter for the United States District Court for the District of Connecticut, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

  
\_\_\_\_\_

CO. 1

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