

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CIVIL ACTION NO: _____

DISABILITY RIGHTS)
NORTH CAROLINA, and)
LAWRENCE ATTAWAY,)
CLIFFORD L. WHITE, JR., and)
RASHANDA COBB, on behalf of)
themselves and all others)
similarly situated,)
)
Plaintiffs,)
)
v.)
)
NORTH CAROLINA DEPARTMENT)
OF HEALTH AND HUMAN SERVICES,)
and)
DEMPSEY BENTON, Secretary of the)
North Carolina Department of Health)
And Human Services, in His Official)
Capacity,)
)
Defendants.)
_____)

CLASS ACTION
COMPLAINT

PRELIMINARY STATEMENT

1. Plaintiffs Disability Rights North Carolina (“DRNC”), Rashanda Cobb, Lawrence Attaway and Clifford L. White, Jr., bring this action for declaratory and injunctive relief. Plaintiffs complain that the planned closure of certain wards of Dorothea Dix Hospital (“DDH”) and the transfer of patients currently being treated in those wards to Central Regional Hospital (“CRH”) in Butner, North Carolina, would violate the rights of those patients and contravene the statutory requirements set by the General Assembly last July, 2008.

This is a class action on behalf of all patients at DDH who will be transferred to CRH before CRH provides safe and adequate treatment and before Defendants meet the requirements established by the North Carolina General Assembly and enacted into law by Governor Easley on July 16, 2008.

By this action, DRNC, entrusted, empowered and obligated to protect the civil rights of individuals with mental illness in the State of North Carolina, together with the plaintiffs seek an order from this Court prohibiting Defendants from moving the patients at DDH to CRH until such time as conditions at CRH meet minimum safety requirements and the conditions set by the General Assembly are satisfied.

PARTIES, JURISDICTION and VENUE

2. Plaintiff DRNC, the Protection and Advocacy program designated by the Governor of the State of North Carolina to provide protection and advocacy services to individuals with disabilities, is a “person” authorized to seek legal and equitable relief against state officials who deny such individuals federally protected rights. DRNC receives federal funds pursuant to the Protection and Advocacy for Individuals with Mental Illness Act of 1986 (“PAIMI”) 42 U.S.C. § 10801, *et seq.*, and is thereby obligated to provide protection and advocacy for persons with mental illness. Under this statute, DRNC is also authorized to monitor facilities providing services to persons with mental illness, investigate suspected incidents of abuse and neglect and to pursue administrative, legal and other remedies on their behalf. DRNC, a non-profit corporation independent of state government, is incorporated in North Carolina and maintains its primary place of business in Raleigh, North Carolina.

3. Plaintiff XXXXXXXXX is a patient at DDH, Raleigh, North Carolina, and is one of the patients scheduled to be transferred to CRH sometime between October 1, 2008, and October 8, 2008.

4. Plaintiff XXXXXXXXX is a patient at DDH, Raleigh, North Carolina, and is one of the patients scheduled to be transferred to CRH sometime between October 1, 2008, and October 8, 2008.

5. Plaintiff XXXXXXXXX, is a patient at DDH, Raleigh, North Carolina, and is one of the patients scheduled to be transferred to CRH sometime between October 1, 2008, and October 8, 2008.

6. Defendant North Carolina Department of Health and Human Services (“DHHS”) is established pursuant to N.C. Gen. Stat. § 143B-136.1. DHHS is a governmental agency to whom the State has delegated its duties to “provide the necessary management, development of policy, and establishment and enforcement of standards for the provision of services in the fields of public and mental health and rehabilitation with the intent to assist all citizens ... to achieve and maintain an adequate level of health, social and economic well-being, and dignity.” N.C. Gen Stat. § 143B-137.1.

7. Defendant Dempsey Benton, employed by DHHS, is the Secretary of the Department of Health and Human Services, a position created by N.C. Gen. Stat. § 143B-139. As Secretary, Defendant Benton is responsible for the management of the Department and general oversight of its operations. Secretary Benton is being sued in his official capacity as Secretary.

8. This Court has jurisdiction over this action pursuant to N.C. Gen. Stat §§ 1-75.4 and 1-253, *et seq.* Venue is appropriate in this district pursuant to N.C. Gen. Stat. § 1-79.

FACTUAL ALLEGATIONS

9. On July 16, 2008, the following provision of the 2008 Session of the North Carolina General Assembly (Session Law 2008-107) was passed into law:

SECTION 10.15.(g) Notwithstanding any other provision of law to the contrary, the Secretary of Health and Human Services shall not transfer patients from John Umstead Hospital or Dorothea Dix Hospital to Central Regional Hospital unless and until the Secretary provides a written report to the Governor, based on the Secretary's findings, that on the day of its opening and thereafter, Central Regional Hospital will be operated in a manner that provides a safe and secure environment for its patients and staff. On or after the date the Secretary has provided the written report to the Governor, the Secretary may transfer patients from John Umstead Hospital to Central Regional Hospital. On and after the date of the transfer of John Umstead patients, the Secretary may commence the transfer of patients from Dorothea Dix Hospital but only if the following conditions are met:

(1) At the time of commencing transfer of Dorothea Dix patients the Secretary has determined that an inspection of Central Regional Hospital indicates no findings of noncompliance with conditions of participation from the Centers for Medicare and Medicaid Services (CMS), and

(2) The Secretary finds that Central Regional Hospital is in compliance with Joint Commission on the Accreditation of Healthcare Organizations (JCAHO) standards for accreditation.

10. By Session Law 2008-107, the Legislature established two standards that Defendants must meet before patients could be transferred into CRH. Patients from John Umstead Hospital could move after “the Secretary provides a written report to the Governor, based on the Secretary’s findings, that on the day of its opening and thereafter, Central Regional Hospital will be operated in a manner that provides a safe and secure environment for its patients and staff.” The requirements set out by the legislature before

patients from DDH can be transferred to CRH were more demanding: the Secretary must determine that an inspection of CRH “indicates no findings of noncompliance with conditions of participation from the Centers for Medicare and Medicaid Services” and the Secretary must further find that CRH is in “compliance with Joint Commission on the Accreditation of Healthcare Organizations (JACHO) standards for accreditation.”

11. On July 15, 2008, Defendant Benton wrote Governor Easley that the “Health Service Regulation, Construction Inspections group” determined CRH to be safe for use by patients, staff, and visitors. Adult patients and staff moved from John Umstead Hospital (JUH) to CRH during the week of July 21, 2008.

12. DRNC hired Dr. Joel Dvoskin, Ph.D., ABPP, a nationally recognized expert to evaluate CRH for safety and suicide hazards pre-occupancy. Dr. Dvoskin toured CRH on July 18, 2008. He cautioned that his report “not be viewed as a systematic and comprehensive review of every aspect of the facility” and concluded that “based on the aspects of the hospital [he] was able to review, the physical plant did not pose undue safety or suicide risks.”

13. Having complied with the requirements of Session Law 2008-107, Defendants transferred adult patients from JUH to CRH starting July 21, 2008. Upon occupancy, however, patients and staff at CRH have experienced technological and operational breakdowns that result in the denial of a safe and therapeutic environment for the patients. After two months of effort by the Defendants to render CRH safe and operational, the following breakdowns persist and will not be corrected or “fixed” by the introduction of the patients and staff from DDH:

a. The Wireless System: All communications at CRH are designed to operate using a wireless system. As noted in Dr. Dvoskin’s report, “whenever the

system is ‘down,’ it must be treated as an emergency. . . .” Defendants’ acknowledge the system does not work as designed. Defendants and their agents have identified a malfunction in the network software requiring repair and installation of new software. (See Attachment 1, email string provided to DRNC by Defendants.) As an “interim solution” Defendants installed a “mitigation code” that they said would “enable the network to be ready and functional 100% of the time.” On information and belief, as recently as Friday, September 19, 2008, neither the phones nor the pagers worked at all for over an hour, negatively affecting the treatment of an acutely ill patient.

b. Pagers: On information and belief the pagers do not work. Hospitals depend on reliable paging to successfully provide critical, life-saving care. CRH’s interim alternative is to use the overhead system for all Code Blue and Med Stats such as falls, injuries, responsive or not, etc. On information and belief, the overhead is also used as a last resort when all other methods of communication fail resulting in many interruptive announcements. Using the overhead is an inadequate solution in a psychiatric institution where there already exists a high degree of anxiety. Defendants acknowledge they are operating CRH “with very low pager reliability” potentially resulting in loss of life for patients and or staff members. (See Attachment 2, email string provided to DRNC by Defendants.) Four days ago, on Friday, September 19, 2008, Defendants signed a contract for construction and installation of a transmitter. (See Attachment 3, Affidavit of Cynthia Shearin.) On information and belief Defendants do not know if the transmitter will solve the problem. On information and belief timelines for installation of the transmitter have ranged from one week to 30 – 45 days.

c. Phones: On information and belief the wireless phones have never worked consistently, including after installation of the interim solution of the “mitigation code.” On information and belief a CRH doctor reported the phone was “dead” with no dial tone for hours the week of September 15, 2008.

d. Duress alarms: The duress response system at CRH is not functional. An average of 10 false alarms are reported a day, adding up to 300 a month. This has resulted in a staff habit not to respond to duress alarms. For example, Human Rights Committee reviewed an incident when a nurse failed to respond to a duress call because there had been so many false alarms in the past. At the same time, on information and belief, last Friday night five staff pushed their duress alarms during two separate behavioral events and none of the alarms worked. In one of the events the staff person used the medical code call system to get help.

e. Staffing: On information and belief at times CRH has been operating under minimally adequate staffing patterns for which staff performing 1:1 function or management functions are not included according to standards.

f. Supplies: On information and belief there is inadequate space in the medical department for supplies resulting in compromise to patient care. On information and belief one acutely ill patient on close supervision was able to rip open an eight inch long wound that was three inches deep on her abdomen when the health care technicians assigned to protect her against self-harm were unable to locate gloves.

g. Staff training and orientation: On information and belief current staff have not received adequate training and orientation resulting in a compromise to patient care. On information and belief approximately three weeks ago staff learned a patient had an oral temperature of 92.5 degrees but failed to request medical assistance. A Physician's Assistant entered the ward and identified the situation as an emergency. However, on information and belief, it took an hour to locate a rectal thermometer so the patient could be properly diagnosed and appropriately treated. Staff are unfamiliar with policies and procedure including where supplies are, who to contact for medical emergencies, the procedure for getting blood to the lab and how to react to a fire alarm. On information and belief medical department staff are not adequately trained to provide the increased level of care required by the merger of DDH and CRH.

h. Interview and work space: On information and belief the rooms designed for interviews had to be re-purposed because they lacked safety features including vision panels and non-locking doors resulting in insufficient interview space to insure patient confidentiality. On information and belief psychiatrist are using showers and the laundry rooms to interview patients. On information and belief there is insufficient space for charting on the wards. These difficulties negatively impact patient care and create staff frustration. On information and belief many solutions have been suggested to CRH administration, some requiring building alteration, but to date CRH has not adopted a plan with timelines for implementation.

i. Patient access to sharp instruments: Over two months ago Dr. Dvoskin identified patient access to sharp instruments in the treatment rooms as a hazard unless the cabinets were locked. On information and belief, as of Friday, September 19, 2008, there were sharp instruments in unlocked cabinets in the treatment rooms on the patient wards.

j. Fire Safety: On information and belief there has not been a fire alarm/defend in place drill nor have staff been trained on evacuation procedures for all parts of the building.

k. Building condition: On information and belief, when it rains heavily the building leaks badly. In addition, condensation forms from machinery located above the ceiling. These leaks create falls hazards. On information and belief, last week staff discovered water under floor tile when they entered a room for the first time to ready it for medication administration. Staff identified this as

a patient safety hazard. It is reasonable to conclude that the planned rapid occupancy of 170 additional patients at CRH will likely reveal additional hazards.

l. Forensic unit: On information and belief the Forensic unit at CRH contains design features that may be dangerous to patients and staff without careful pre-occupancy planning and implementation of procedures and staff training not allowed by the current timetable for movement of patients. On information and belief new staff will be assigned to work in the Forensic unit that do not have experience with this population, while the planned ratio of Social Worker to patient will decline at CRH presenting safety and treatment concerns.

m. Building temperature: On information and belief, due to the HVAC system the temperature in CRH cannot be adequately controlled and is between 62 degrees and 64 degrees in the patient care units.

n. Electronic doors: On information and belief electronic doors continue to malfunction creating safety hazards and elopement risks. (See Attachment 4, Affidavit of Karen Murphy.)

o. Dental Clinic: On information and belief the dental clinic at CRH is not operational and lacks dental chairs.

14. On September 19, 2008, the deficiencies identified above and others caused the entire DDH Medical-Psychological Staff to endorse writing a letter DHHS officials raising “serious questions about safety and treatment program” at CHR and urging “postponement of the move.” (See Attachment 5, September 19, 2008, letter.)

15. As of September 20, 2008, there were 166 patients at CRH. They occupy five Admission wards, four Community Transition wards, two Geriatric wards and one patient is in the Medical ward. The Defendants plan to double the census of CRH by transferring approximately 170 patients from DDH to CRH between October 1, 2008, and October 8, 2008. The incoming patients will include 78 people in the Forensic service, a group that present new issues to CRH regarding safety and treatment.

16. Defendant Benton has not caused there to be “an inspection” of CRH as required by Session Law 2008-107 prior to the transfer of patients from DDH. In

announcing his intent to commence the move of patients from DDH to CRH on October 1, 2008, the Secretary made the following statement concerning the two conditions contained in Session Law 2008-107: “Our attempt to have the hospital accredited by the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO) depends on the two hospitals functioning together as one unit. It is our conclusion, as well as that of an independent outside reviewer, that the merger is not only safe, but poses fewer risks than leaving the facilities as separate entities. The Legislature’s special provisions have been met to the maximum extent feasible.” DHHS Press Release dated September 18, 2008 (emphasis added).

17 . On information and belief, the “independent outside reviewer” referred to in the Press Release is a report issued by a workgroup established by Defendant Benton that reviewed only the unoccupied building and completed their work prior to the introduction of patients to CRH. On information and belief, one member of the workgroup, Dr. Anthony Lindsay, has not entered CRH since June 16, 2008.

18 . On information and belief Defendant Benton could order the Division of Health Service Regulation, a division of DHHS, to conduct a mock survey of CRH to determine compliance with CMS conditions of participation, and could employ Joint Commission Resources, a not-for-profit affiliate of the Joint Commission, to conduct a consultative review of CRH and assess compliance with Joint Commission standards. (See Attachment 6, Affidavit of Harold Carmel, MD.)

19. On information and belief, the addition of 170 patients to CRH would result in constitutionally deficient conditions in that the environment would be both unsafe and non-therapeutic.

CLASS ALLEGATIONS

20. Plaintiffs seek to bring this case as a class action pursuant to Rule 23 of the North Carolina Rules of Civil Procedure. The proposed class is identifiable, consisting of all patients at DDH who will be transferred to CRH before CRH provides safe and adequate treatment and before Defendants meet the requirements of Session Law 2008-107.

21. Upon information and belief, there are approximately 170 proposed class members. The class members are patients receiving treatment in the wards of DDH that Defendants intend to transfer to CRH, such transfer scheduled to commence on October 1, 2008. The proposed class is so numerous that joinder is impracticable.

22. Common questions of law and fact predominate over any individual issues that may be present. Common questions include whether the Defendants have complied with Session law 2008-107 and whether the conditions and operations of CRH provide a safe and therapeutic environment.

23. The claims of the named plaintiffs against the Defendants are typical of the claims of the proposed class. The Defendants have acted or failed to act toward the named plaintiffs in the same manner they have acted or failed to act toward all members of the proposed plaintiff class.

24. The named plaintiffs are adequate representatives of the class in that the named plaintiffs do not have antagonistic or conflicting claims with other members of the class; the named plaintiffs has a sufficient interest in the outcome to ensure vigorous

advocacy; and counsel for the named plaintiffs have the requisite qualifications and experience to conduct the proposed litigation competently and vigorously.

25. The Defendants have acted and refused to act on grounds generally applicable to the proposed class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole. The declaratory and injunctive relief sought cannot, as a practical matter, be granted on behalf of fewer than all the class members, and prosecution of separate actions would risk inconsistent adjudications. Class action is superior to other available methods for fair and efficient adjudication of the controversy.

CLAIMS FOR RELIEF

First Claim for Relief – Violation of Session Law 2008-107

26. Session law 2008-107 requires that, prior to commencing the move of patients from DDH to CRH, the Secretary of DHHS must determine that an inspection of CRH indicates no findings of noncompliance with CMS conditions of participation and find that CRH is in compliance with the standards for accreditation set by JCAHO.

27. Defendant Benton has failed to make the findings and determinations that the General Assembly has set out as “conditions” for the commencement of the transfer of patients from DDH to CRH. Rather, Defendant Benton has stated that the statutory prerequisites have been satisfied only “to the maximum extent feasible.”

28. The Named Plaintiff’s, as persons whose rights and status are affected by the provisions of Session Law 2008-107, have standing to assert a claim for the Defendants’ violation of the Session Law. DRNC, as the designated Protection and

Advocacy agency for North Carolina, has independent standing by virtue of the statutory mandate contained in the PAIMI Act to protect the rights of persons with mental illness.

29. Defendants failure to comply with the statutory conditions contained in Session Law 2008-107 have harmed the Named Plaintiffs and members of the Plaintiff Class in that their safety will be adversely affected by moving them to a facility that does not meet the minimum standards set by CMS and JCAHO, as contemplated by the General Assembly.

30. Plaintiffs have no adequate remedy at law.

Second Claim for Relief – Violation of 42 U.S.C. § 1983

31. Plaintiff incorporates and re-alleges paragraphs 1 through 30.

32. The Civil Rights Act of 1871, 42 U.S.C. § 1983, states that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

33. Defendant DHHS, a government agency acting in its official capacity, and Defendant Dempsey Benton, acting in his official capacity as Secretary of DHHS, engaged in state action infringing § 1983 by violating clearly established federal rights.

34. Defendants’ actions, if permitted to proceed, would result in an official policy and/or custom of denying patients a safe and therapeutic environment to which Plaintiffs are entitled under federal law. Youngberg v. Romeo, 457 U.S. 307 (1982).

35. Plaintiff has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs DRNC, and XXXXXXXX, XXXXXXXX
and XXXXXXXX on behalf of themselves and on behalf of all others similarly situated,
having complained of the Defendants, respectfully request that this Court:

- A. Certify this case as a class action under Rule 23 of the North Carolina Rules of Civil Procedure;
- B. Enter a declaratory judgment, in accordance with N.C. Gen. Stat. § 1-253, declaring that the Defendants' actions violate Session Law 2008-107 and 42 U.S.C. § 1983 by:
 - i) Moving the Plaintiff Class from Dorothea Dix Hospital to Central Regional Hospital before the conditions set out by legislative act are satisfied; and
 - ii) Depriving the Plaintiff Class of safe treatment in a therapeutic environment in violation of 42 U.S.C. § 1983;
- C. Enter a temporary restraining order and thereafter preliminary injunctive relief, pursuant to N.C. Gen. Stat. § 2202, prohibiting the Defendants from moving any patients from Dorothea Dix Hospital to Central Regional Hospital until such time as conditions at Central Regional Hospital provide Constitutionally adequate safety to and an adequately therapeutic environment for its patients and satisfy the legislative mandates of session law 2008-107;
- D. Retain jurisdiction over this action to ensure Defendants' compliance with the mandates of the Court and Session Law 2008-107;
- E. Award reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988(b);
- F. Such other, further, or different relief as the Court deems equitable and just.

September 23, 2008
Date

DISABILITY RIGHTS NORTH CAROLINA

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