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BARBARA A. SCOTT  
C.C.C. & G.S.

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF RICHLAND )  
 )  
 T.R., P.R., and K.W., on behalf of )  
 themselves and others similarly situated; )  
 and Protection and Advocacy for People )  
 with Disabilities, Inc., )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 SOUTH CAROLINA GENERAL )  
 ASSEMBLY and SOUTH CAROLINA )  
 DEPARTMENT OF CORRECTIONS, )  
 )  
 Defendants. )  
 )

IN THE FIFTH JUDICIAL CIRCUIT  
 C.A # 2005-CP-40-02925

ORDER GRANTING  
RULE 34 INSPECTION

*JMB*  
*1*

This case has been designated complex and assigned to this Court. Plaintiffs served a request for inspection pursuant to Rule 34 of the South Carolina Rules of Civil Procedure on Defendant South Carolina Department of Corrections (Department). The Department objected to several aspects of the inspection. In response, Plaintiffs filed a motion to compel inspection. The Court conducted an initial hearing on November 17, 2005, and both parties submitted briefs on the inspection issues and other matters. At that hearing, the requested inspection for facilities at Kirkland Correctional Institution was scheduled for January 9 through January 12, 2006. In follow up to the initial hearing, a telephone conference was held between counsel for all parties and the Court on December 29, 2005, beginning at 2:30 p.m. The purpose of this telephone conference was to further discuss the inspection issue; however, at the commencement of the conference, attorney Davidson for the Department objected that no record was being made of this proceeding. As a result, the Court undertook no substantive discussion of the issues in the telephone conference, and instead scheduled an immediate

hearing in Darlington for Tuesday, January 3, 2006, at which time all parties were present. Based upon the record in the two hearings, the pleadings, the affidavits, the evidence, and arguments of counsel, this Court issues its ruling as follows:

1. This case involves allegations regarding the violation of constitutional rights of inmates in the custody of the Department of Corrections who have been diagnosed with a serious mental illness.

2. Pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, Plaintiffs have asked for the right to inspect several institutions maintained by the Department.<sup>1</sup> As part of the inspection, Plaintiffs' counsel has asked that their experts be allowed to interview Department staff, interview inmates, review records, and walk through the institutions.

3. Plaintiffs have presented this Court with evidence showing that the type of inspection requested would be the most efficient, effective way to proceed with the fact-gathering process in a case with the scope and complexity of the present matter.

4. To that end, this Court is ordering an inspection of Kirkland Correctional Institution along the following parameters.

#### Dates of Inspection and Document Production

The inspection of Kirkland Correctional Institution will take place from January 9 through January 12, 2006 from approximately 8:30 a.m. to approximately 6:30 p.m. each day. The Court intends to be present on Tuesday, January 10, to participate to some degree in the viewing of the premises and to resolve any disputes that may arise. To allow Plaintiffs' experts time to prepare for the inspection and to minimize the time spent by the Department

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<sup>1</sup> While Plaintiffs have asked to inspect several institutions, the only issue before the Court presently is the inspection of Kirkland Correctional Institution.

locating records and answering questions during the inspection, this Court orders that the Department shall provide Plaintiffs with full, complete, and immediate responses to certain specific items within Plaintiffs' Fourth Interrogatories and Fifth Requests for Production. Those certain items are not detailed in this Order; however, they are discussed with particularity and noted on the record in the January 3, 2006 hearing transcript. The Department's intent to comply with this discovery directive has already been confirmed by letter dated January 4, 2006.

General Considerations Concerning Interviews and Inspections

13 Plaintiffs' request to allow Plaintiffs' experts to meet with Department employees, as well as inmates not presently involved in this litigation, presents this Court with a hotly contested and novel issue. Plaintiffs contend this is necessary for investigation, discovery, and formulation of the expert opinions necessary to ultimately determine the issues in this case. The Department generally objects to the inspections, and strenuously opposes on multiple grounds the allowance of individual interviews with Department employees and the inmate population. The Court in this Order is attempting to strike a balance between allowing the investigation and discovery of this case to go forward, but at the same time protect the interests of the Department. The Court concludes that the inspection and interview protocols outlined herein are necessary, proper, and will best serve the interests of justice given the allegations and defenses set forth and the issues to be resolved in this case. Clearly, the inmates in question are under the custody and physical control of the Department, and the employees in question are charged with the responsibility to provide mental health services thereto. The Court rejects as unduly burdensome, costly, chilling, administratively inefficient, and practically impossible (particularly with regard to a walk through inspection) the Department's

position that all discussions with Department employees should be in an individual deposition setting, but imposes the following safeguards on all interviews with Department personnel:

- (1) Believing it to be unenforceable, violative of civil process, and against the tenets of effective client representation, the Court has denied Plaintiffs' request that Department counsel be prohibited from discussing in advance with Department personnel the upcoming interviews and inspections, even though such discussions may have the potential to occur in a way that creates a chilling effect on such personnel's decision to cooperate;
- (2) All Department personnel interviews should be set for Tuesday, January 10, 2006, while the Court will be nearby and available to resolve any disputes that arise (the Court will not participate or be present during the interviews, but may participate in some walk through inspections);
- (3) One attorney for the Department may attend any interview, and if such option is exercised, one attorney from each of the other parties will be given the same opportunity. To prevent the interviews becoming legal battles, counsel will not be allowed to speak;
- (4) Immediately prior to the interviews taking place, the Court will meet with all counsel, and at that time Plaintiffs will be required to divulge the topics to be discussed and questions that will be asked by the experts during the interview. Objections will then be considered to the proposed questions;
- (5) Defense counsel will be given the opportunity to stop the interview if the topics covered go beyond those divulged by the experts, and will be allowed to take this matter up with the Court on the record outside of the presence of the interviewee(s);
- (6) The interviews will be allowed for a limited time duration, the exact amount to be decided by the Court during the pre-interview conference; and,
- (7) Plaintiffs will be required to record the proceeding with an innocuous but reliable recording device. The tapes will be available for use in the event there is a dispute as to what actually occurred in a particular interview, but will be sealed and unused by any party except by further Order of the Court, and will ultimately be destroyed when no longer needed for purposes of this litigation.

The above protocols do not apply to interviews with inmates, nor do they apply to the unit walk through by Plaintiffs' correctional experts as outlined below. Moreover, nothing

contained in this Order shall prejudice the rights of the parties to assert any appropriate objections at a later date to the evidence or opinions that result from these or future interviews and inspections, nor does this written Order prevent the Court from adjusting the protocols if such is determined to be necessary.

Psychiatric Interviews and Inspection

Plaintiffs' designated expert psychiatrists Jeffrey Metzner, M.D. and Raymond Patterson, M.D. will be allowed to interview the administrator in charge of mental health services for Kirkland Correctional Institution. To the extent that there is not one person with administrative responsibility and knowledge of the different facilities, units, divisions, and services at Kirkland (i.e., Gilliam Psychiatric Hospital, Intermediate Care Services, Reception and Evaluation, Administrative Segregation Outpatient Services), Plaintiff's experts will be allowed to interview an administrator for each facility, unit, division, or service. At the Department's option, one lawyer for Plaintiffs, one lawyer for the Department, and one lawyer for the General Assembly can be present for the interviews, but these lawyers may not ask any questions, make any comments, nor attempt to communicate with Departmental staff during the interviews.

Plaintiffs' expert psychiatrists will be allowed to conduct a group interview of clinical line staff who provide mental health services to inmates. This would include psychiatrists, psychologists, nurses, counselors, social workers, and other clinical line staff. At the Department's option, one lawyer for Plaintiffs, one lawyer for the Department, and one lawyer for the General Assembly can be present for the group interview, but these lawyers may not ask any questions, make any comments, nor attempt to communicate with Departmental staff during the interview.

Plaintiffs' expert psychiatrists will be allowed to conduct private cell-front interviews of any mentally ill and non-mentally ill inmate who is housed at Kirkland in any areas other than Gilliam Psychiatric Hospital ("Gilliam") and Intermediate Care Services ("ICS"). Prior to speaking with any inmate, Plaintiffs' experts must advise the inmate that he/she is not required to participate in any discussions. After conducting cell-front interviews, Plaintiff's expert psychiatrists will be allowed to privately review requested records, including medical records<sup>2</sup>, of selected inmates and conduct individual private interviews of inmates without the presence of Department staff or counsel for Plaintiffs or Defendants.

For inmates located in Gilliam or ICS, in lieu of conducting cell-front interviews, Plaintiffs' expert psychiatrists will be allowed to conduct private group interviews of these inmates without the presence of Department staff or counsel for Plaintiffs or Defendants. Prior to speaking with any inmate, Plaintiffs' experts must advise the inmates that they are not required to participate in any group or individual discussions. After these interviews, Plaintiff's expert psychiatrists will be allowed to review requested records, including medical records, and conduct individual private interviews with inmates, if requested.

Dr. Metzner and Dr. Patterson will be allowed to take their laptop computers into Kirkland to take notes during the interviews. Copies of any and all notes prepared by Plaintiffs' expert psychiatrists during their interviews with any inmates must be produced to defense counsel within twenty-four (24) hours. These notes are protected information, and may not be disseminated in any form beyond counsel and retained experts.

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<sup>2</sup> To alleviate the concerns of the Department regarding disclosure of medical information, this Court has entered an appropriate protective order which will direct production of medical records in compliance with the Health Insurance Portability and Accountability Act of 1996. See 42 C.F.R. § 164.512(e)(1) (allowing covered entity to disclose protected records pursuant to court order).

Correctional Interviews and Inspection

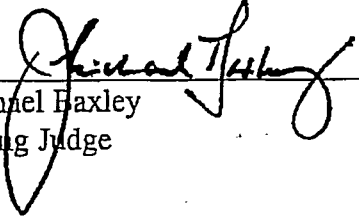
Plaintiffs' correctional experts, Mr. Steve J. Martin and Mr. William D. Leeke, will also conduct their inspection of Kirkland from January 9 through January 12, 2006 from approximately 8:30 a.m. to 6:30 p.m. each day. Plaintiffs' correctional experts will be allowed to interview an administrator with knowledge of Kirkland to obtain information regarding the overall layout and operation of the facilities at Kirkland. These interviews are subject to the same protocols outlined above. During the interview, Plaintiffs' correctional experts will be allowed to ask factual questions about the organization and contents of a representative institutional file. At the option of the Department, one lawyer for Plaintiffs, one lawyer for the Department, and one lawyer for the General Assembly can be present for the interview, but these lawyers may not ask any questions, make any comments, nor attempt to communicate with Departmental staff during the interview.

These experts will also be provided with a knowledgeable escort who will walk them through all the units, divisions, support areas, and facilities at Kirkland. The experts will be allowed to ask the escort factual questions during the walk-through. During the walk-through Plaintiffs' experts will be allowed to conduct private, cell-front interviews of inmates. Prior to speaking with any inmate, Plaintiffs' experts must advise the inmate that he/she is not required to participate in any discussions. Also, during this walk-through, Plaintiffs' experts can take photographs as long as the subject matter of the photographs does not present any security concern. No attorneys for any party may accompany Plaintiffs' experts during the walk-through.

After the walk-through, Plaintiffs' correctional experts can return to each housing unit and support area to interview in private selected individual inmates. These interviews may

include a review of requested records related to each selected inmate. Copies of any and all notes prepared by Plaintiffs' correctional experts during their interviews with any inmates must be produced to defense counsel within twenty-four (24) hours. These notes are protected information, and may not be disseminated in any form beyond counsel and retained experts.

**IT IS SO ORDERED.**

  
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J. Michael Baxley  
Presiding Judge

January 5, 2006