

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

T.R., P.R., K.W., and A.M. on behalf of)
 themselves and others similarly situated;)
 and Protection and Advocacy for People)
 with Disabilities, Inc.,)

Plaintiffs,)

v.)

South Carolina Department of)
 Corrections; and William R. Byars, Jr.,)
 as Agency Director of the South Carolina)
 Department of Corrections,)

Defendants.)

IN THE FIFTH JUDICIAL CIRCUIT
 CIVIL ACTION NO. 2005-CP-40-02925

2011 NOV 28 PM 4:05
 JEANNE FLETCHER
 C.C.R. 80
 RICHLAND COUNTY

ORDER GRANTING PLAINTIFFS' AMENDED MOTION TO COMPEL

This matter came before the Court upon an amended motion by the Plaintiffs to compel various discovery responses submitted to Defendant SCDC during the course of this litigation. With two exceptions, the Department does not contest the responsiveness of the additional discovery materials Plaintiffs seek, most of which were identified in recent depositions of SCDC staff as the November 7, 2011 discovery deadline approached. As a result of these disclosures, Plaintiffs request that the discovery deadline be lifted solely to permit Plaintiffs to pursue matters set forth below that are responsive to longstanding discovery requests. For the reasons set forth below, Plaintiffs' motion is granted.

A. Recently Identified Discovery Materials

Depositions of SCDC staff taken since late September have revealed certain documents not previously produced that are responsive to Plaintiffs' outstanding discovery requests. It is possible, however, due to the substantial amount of previous document production, that some of the documents referenced in Plaintiffs' Motion to Compel have in fact been produced, and this

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Order shall not be interpreted as requiring a second production of materials that were previously produced. Taking into consideration the responsive materials identified in the March 2011 deposition of current SCDC mental health services director Pamela Whitley that have still not been produced by the Department, these records include the following:

1. All caseload monitoring sheets and logs prepared by all clinical counselors at any institution since January 1, 2008 (referenced in Ransom and Gambrell depositions).
2. All weekly medication monitoring sheets prepared by all clinical counselors at any institution since January 1, 2008 (referenced in Ransom deposition). These monitoring sheets have been produced for Camille Graham Correctional Institution prior to January 2010, but have not been updated.
3. All treatment team logs since January 1, 2008 at every institution where treatment teams have met (referenced in Ransom and Gambrell depositions). These logs were also produced for Graham prior to January 2010 but have not been updated.
4. All regional monthly statistical reports prepared since January 1, 2008 (referenced in Ransom and Gambrell depositions).
5. State statistical maps that summarize the regional monthly statistical reports submitted by regional coordinators. For the period prior to November 2008, these records should be in files maintained by SCDC director of mental health services Josephine Mitchell or assistants who worked with her (referenced in Ransom deposition).
6. Electronic spreadsheet maintained since June 2010 by Delgado that compiles the regional monthly statistical reports. The Department shall produce an electronic disc of the spreadsheet containing all information available since it was established (referenced in Whitley deposition).
7. Log tracking sheets (referenced in Whitley deposition).
8. All mental health audits, including any mental health management reviews, of SCDC institutions conducted since the audit tool was revised in May 2009 (referenced in Whitley deposition).
9. Behavior reports designed by Dr. Watson and completed by counselors related to Self Injurious Behavior (SIB) training (referenced in Whitley deposition).
10. All records in the possession of the Department related to the 2009 study conducted by Dr. Frierson and Dr. Campbell (referenced in Frierson deposition).

11. Monthly statistical reports submitted to the SCDC Division of Operations since January 1, 2008 (referenced in Sligh deposition).
12. Monthly statistical reports since January 1, 2008 that reflect Gilliam Psychiatric Hospital admissions, discharges, census, and clinical information (referenced in Page deposition).
13. Monthly statistical reports since January 1, 2008 that reflect the Intermediate Care Services (ICS) program admissions, transfers, and other clinical information (referenced in Simpson deposition).
14. Training materials distributed since January 1, 2008 at counselor training programs sponsored by SCDC for its mental health staff at various institutions and at the SCDC training academy that have not been previously produced (referenced in Gambrell deposition).
15. Monthly reports from Kirkland R&E counselors and weekly reports related to inmate referrals and clinical assignments (referenced in Renee Williams deposition.)
16. Documents tracking referrals (referenced in Gambrell deposition.)
17. Binders of reports and other information maintained by counselors and/or regional coordinators (referenced in Gambrell and Ransom depositions.)

SCDC does not contest the responsiveness of the foregoing documents, but has noted that SCDC counsel learned of the existence of such documents at the same time during depositions that Plaintiffs' counsel learned of them. Plaintiffs respond by observing the obligation SCDC counsel has to advise the Department of the need to undertake a reasonable search to identify and produce responsive documents. The documents identified in recent depositions by mental health division managers contain information directly relate to the operation of the Department's mental health program. SCDC and its attorneys have been aware of the existence of many of the materials on the list since at least the time of Pamela Whitley's deposition in March 2011 and have failed to produce them.

The Department therefore is ordered to copy and provide the responsive materials to Plaintiffs within fifteen (15) days of the date of this Order, excluding documents that have already been produced by SCDC following the November 1, 2011 hearing on this motion.

Plaintiffs have asked that if the responsive documents are not produced, then Plaintiffs be permitted to arrange to go onsite at various institutions or at SCDC headquarters to obtain the records. SCDC, while indicating it can copy and produce the documents, did not object to this request. As a result, the Court will permit the following:

- a. In the event the Department fails to produce the documents identified above in this section, Plaintiffs may request a meeting at particular area mental health center institutions or at SCDC headquarters within ten (10) days from the date on which the documents were due under the terms of this Order or were produced, whichever is earlier.
- b. When the Plaintiffs request the meeting(s), Plaintiffs shall identify the mental health staff personnel they have reason to believe, based on prior SCDC depositions, has or has had possession of the records identified.
- c. When a meeting request is made, Plaintiffs shall identify the particular documents from among those listed above that they believe are in the possession of mental health personnel ("Contested Documents").
- d. SCDC counsel shall use their best efforts to schedule the meetings on the days and times requested by Plaintiffs and to arrange for the personnel identified to be present. If that is not possible, SCDC counsel shall within two business days of the request, propose alternative meeting dates and times within the same ten (10) day period identified in subparagraph a.
- e. At such meetings, Plaintiffs' counsel shall explain the basis for their belief that the Contested Documents are incomplete and are in the possession of the mental health personnel identified by Plaintiffs. Plaintiffs' counsel shall bring and make available to SCDC a set of the Contested Documents.
- f. Plaintiffs' counsel shall be escorted to the office or other locations where the Contested Documents are maintained in the normal course of business.
- g. The mental health personnel shall provide Plaintiffs' counsel an opportunity to review the Contested Documents in the manner in which they are routinely kept.

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- h. If, based on the review of the Contested Documents, Plaintiffs' counsel identify additional responsive documents, they shall be permitted to copy such records on site before they leave as long as the copies are made using a machine brought to the site by Plaintiffs' counsel. Plaintiffs' counsel shall make a copy for SCDC counsel of any documents copied by Plaintiffs' counsel at the same rate Plaintiffs pay SCDC for copies.

B. Disciplinary Hearing Records

Plaintiffs also seek two additional sets of discovery materials that SCDC contends are not responsive or are raised too late in time. The first relates to a report that SCDC Operations Division Coordinator Dennis Patterson identified concerning inmates with mental illness who have been found by disciplinary hearing officers (DHO) to be Guilty But Not Accountable (GBNA). Mr. Patterson testified in his October 17, 2011 deposition that in 2009 or 2010 the agency's information technology division prepared a report to identify the extent to which inmates diagnosed with mental illness had been found GBNA after being charged with disciplinary offenses. Mr. Patterson testified that he had not maintained a copy of the report but stated that the information technology division could run a similar report. Mr. Patterson also testified that when the GBNA policy was first adopted, a GBNA finding would result in a waiver of the sentence that otherwise would have been imposed. He further testified, however, that this practice was subsequently suspended when Dr. John Solomon, as the then director of mental health services, directed that the sentence that otherwise would be imposed following an inmate's conviction of an SCDC offense should not be waived following a finding of GBNA. Instead, under Solomon's revised practice, the agency would not require the loss of "good time" for inmates who were found "Guilty But Not Accountable" due to their mental illness at the time of the offense. The balance of the sentence, however, would be imposed without regard to the GBNA finding, including solitary confinement and the loss of such privileges as visitation and

telephone contact. Mr. Patterson also noted that under the revised policy the warden could confer with mental health staff to determine whether the sentence should be reduced after being imposed by the DHO. He stated that he was not aware of whether such reductions in sentences were ever authorized. Defendants did not contest the account of this report, except to volunteer at the motion hearing that the practice has been discontinued after Mr. Patterson's testimony.

Based on the information provided by Mr. Patterson, Plaintiffs have asked the Court to require SCDC to produce the following:

1. A report identifying all of the findings of GBNA since SCDC's establishment of the policy through September 1, 2011.
2. The DHO report for each offense in which a GBNA determination was made, including the mental health evaluation on which the GBNA finding was based.
3. In each instance where a GBNA determination was made, the report shall identify the following:
 - a. Whether a sentence was imposed.
 - b. If a sentence was imposed, the length of the sentence and the length and kind of any privileges suspended.
 - c. If the sentence was subsequently reduced by the warden as a result of conferring with mental health staff, identify the reduction to the sentence and produce the documents that verify each such reduction.

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The Court finds that the information Plaintiffs seek goes to the heart of Plaintiffs' claims. The Department is ordered to produce at their own cost the report and responsive materials identified above within fifteen (15) days of the date of this Order.

C. Mental Health Classification Records

Finally, Plaintiffs have asked the Court to require SCDC to produce certain information concerning changes in the Department's mental health classifications that have been implemented since January 2007. In the electronic database SCDC produced on September 9,

2011, mental health classifications reflect the current classification system (the "L" designations) rather than the former classification system (the "M" designations) for periods of time prior to the implementation of the current classification system. The relevance of this issue is that Plaintiffs report a substantial change in the number of inmates at two area mental health institutions. The following table demonstrates the changes in the Department's designations of "area" and "outpatient" classifications at the two facilities between a February 5, 2008 report and the September 1, 2011 report contained in the Department's electronic database.

February 5, 2008		
	<i>Area (M2, L3)</i>	<i>Outpatient (M3, L4)</i>
Lieber	126	119
Lee	86	92
TOTAL	212	211

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September 1, 2011		
	<i>Area (M2, L3)</i>	<i>Outpatient (M3, L4)</i>
Lieber	37	232
Lee	46	246
TOTAL	83	478

The Department stated at the hearing that while the mental health classification designations have been informally changed to reflect more precisely which area mental health inmates are in the Kirkland ICS program and which ones are located elsewhere, no substantive change in classification definitions have been placed into effect between 2007 and the present.

Plaintiffs have requested documents related to any changes in policy or in practice in the assignment of mental health classifications since January 1, 2007, including the final revisions to the mental health classification system. They assert that the classification changes raise serious questions about the application of the mental health classification system that Plaintiffs should be given an opportunity to pursue in discovery. The Department's response is that there have been

no "final revisions" or changes to policy regarding the mental health classification system and that as a result, there are no such documents.

Whether the changes in policy or practice have been adopted informally or have been finalized is immaterial for purposes of determining the appropriate scope of discovery related to this matter. Plaintiffs seek materials related to changes in the Department's practices, not only to its policies, related to the assignment of mental health classifications. They are entitled to that information without regard to whether changes in the mental health classification system have been finalized.

The Court therefore orders the Department to produce the following within fifteen (15) days of this Order:

1. A report that shows the number of inmates by the mental health classification then in effect as of the first day of each month beginning January 1, 2007 to September 1, 2011 at all SCDC institutions.
2. All memoranda, reports, and other communications, including internal emails, related to any changes in practice or in policy, in the assignment of mental health classifications since January 1, 2007. If SCDC claims privilege for any of these documents, it shall provide a relevant privilege log.

D. Extension of Discovery Period for Plaintiffs

Under the Third Amended Scheduling Order, discovery in this matter was scheduled to end on November 7, 2011. Plaintiffs have moved to keep the period open for them solely, not for Defendants. Plaintiffs assert that this unilateral authorization would be a fair and reasonable remedy to address the prejudice they have suffered by SCDC's persistent failure over the course of this six-year litigation to produce responsive documents in a timely manner. For the reasons set forth below, the Court agrees.

Under the Second Amended Scheduling Order, the initial deadline by which the parties were required to supplement the discovery responses was February 1, 2011. SCDC failed to

meet that mark, and Plaintiffs filed a motion to compel. At a hearing on February 4, 2011, the Court took the motion under advisement before the case was soon thereafter stayed by order of the South Carolina Supreme Court.

After remand, no action was taken on the pending motion. The Department then waited until September 1, 2011 to produce its supplemental responses, the date by which the parties were required to update and finalize their discovery responses under the Third Amended Scheduling Order. SCDC responded to nearly 300 requests by proposing to make responsive materials available for review and copying. On September 8, Plaintiffs' counsel advised Defendants' counsel that Plaintiffs did not need to inspect most documents but requested instead that the Department copy and produce them as soon as possible, a communication to which Defendants' counsel never replied. On September 9, Defendants produced to Plaintiffs an electronic database that reportedly contained responses to over 160 discovery requests containing over 50,000 pages that Plaintiffs had difficulty accessing.

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On September 16, Plaintiffs filed a motion to compel SCDC's Final Supplemental Responses. At a hearing on September 27, the Court heard the motion. In an Order filed October 11, 2011, the Court ordered, among other things, SCDC to copy and produce to Plaintiffs documents it identified in the several hundred supplemental responses. In addition, the Court ordered SCDC to make arrangements for representatives of its information technology (IT) division to meet with Plaintiffs' IT consultants, without lawyers, to attempt to resolve the technological impasse Plaintiffs reported.

The Court's scheduling framework was designed to allow sufficient time for each party to review the other's supplemental responses before the final round of depositions were to be taken, including senior SCDC officials and the parties' experts, in the fall of 2011. The final

supplemental response deadline was intended to allow the parties the opportunity to update their prior responses over the six-year course of this litigation with the most recent records on which they intend to rely at trial and to otherwise update responsive materials. Instead of producing discovery materials in February or even in September, however, as of the November 1st hearing on this motion, less than one week before the close of discovery, SCDC had yet to produce 20 of the 23 sets of documents identified in the September 1 Final Supplemental Responses that Plaintiffs requested on September 8. In addition, Plaintiffs are still attempting to determine whether the Department's electronic database is capable of producing meaningful discovery responses.

As a result of SCDC's failure to respond to Plaintiffs' discovery requests in a complete or timely manner and its failure to comply with discovery deadlines set forth in the Court's scheduling order, the Court finds that Plaintiffs have been prejudiced. This prejudice has, among other things, limited Plaintiffs' ability to obtain and review relevant discovery materials prior to the taking of depositions of SCDC witnesses. For that reason, the Court grants the Plaintiffs' motion to take depositions after the close of discovery on November 7, 2011 and to retake depositions of SCDC staff as necessary to pursue matters of which Plaintiffs are made aware through the Department's dilatory discovery responses.

If the depositions taken outside of the discovery period create the need for further discovery, the parties are ordered to apply their best efforts to cooperate to provide relevant records or information and to address promptly the need for further discovery. If further discovery motions are required to resolve such disputes that the parties cannot reasonably reconcile, the Court will not hesitate to impose sanctions as appropriate.

Plaintiffs have moved for an award of attorneys' fees and costs for the taking and retaking of such depositions. The Court will hold that part of the motion in abeyance until after such depositions are taken. At that time, Plaintiffs may bring this matter before the Court with a request for specific fees and costs that they have incurred.

Therefore, for the reasons set forth above, Plaintiffs are authorized to notice and take depositions beyond the close of discovery set forth in the Third Amended Scheduling Order and SCDC shall produce certain discovery materials and information consistent with this Order.

E. Hearing on James Wilson

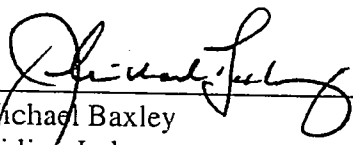
James Wilson, a member of the plaintiff class, has alleged that following an interview by Plaintiffs' attorneys, a correctional officer (CO) forcibly took away an envelope and business card they gave him, saying he would not be allowed to write his attorneys. Wilson further alleges that as a result of this incident he was falsely accused and convicted of hoarding medications, for which he was sentenced to an additional two years in lockup. SCDC has denied Wilson's allegations, and submitted a copy of relevant documents to the Court at the hearing.

Plaintiffs contend that, in addition to questions about the violation of Mr. Wilson's constitutional rights, these allegations raise broader concerns of the potential chilling effect that intimidation and retaliation by COs could have on inmates named as trial witnesses. Plaintiffs moved the Court to order SCDC to distribute a memorandum to all COs discouraging such behavior. SCDC objected, arguing that if any relief were to be granted it should come after an evidentiary hearing is held on Wilson's allegations. Plaintiffs do not object to such a hearing.

The Court agrees that an evidentiary hearing on these allegations should be held by this Court at Perry Correctional Institution following an appropriate amount of discovery. The

parties are directed to apply their best efforts to cooperate on document production and depositions and agree on a proposed date for the hearing.

IT IS SO ORDERED.



J. Michael Baxley
Presiding Judge
Complex Jurisdiction

Hartsville, South Carolina

November 22, 2011