UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

James and Lorie Jensen, as parents, guardians and next friends of Bradley J. Jensen; James Brinker and Darren Allen, as parents, guardians and next friends of Thomas M. Allbrink; Elizabeth Jacobs, as parent, guardian and next friend of Jason R. Jacobs; and others similarly situated,

Plaintiffs,

v.

Minnesota Department of Human Services, an agency of the State of Minnesota; Director, Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; Clinical Director, the Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; Douglas Bratvold, individually, and as Director of the Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; Scott TenNapel, individually and as Clinical Director of the Minnesota Extended Treatment Options, a program of the Minnesota Department of Human Services, an agency of the State of Minnesota; and State of Minnesota,

Defendants.

Civil No. 09-1775 (DWF/FLN)

ORDER

Margaret Ann Santos, Esq., Mark R. Azman, Esq., and Shamus P. O'Meara, Esq., O'Meara Leer Wagner & Kohl, PA, counsel for Plaintiffs.

Steven H. Alpert and Scott H. Ikeda, Assistant Attorneys General, Minnesota Attorney General's Office, counsel for State Defendants.

Samuel D. Orbovich, Esq., and Christopher A. Stafford, Esq., Fredrikson & Byron, PA, counsel for Defendant Scott TenNapel.

This order is in response to the Court Monitor's request for clarification of his access to patient/client records to records relating to substance abuse treatment. He is preparing for monitoring and compliance reviews; such clarification will facilitate necessary records access.[1] The issue arises when individuals with mental illness or developmental disabilities have a co-occurring chemical dependency diagnosis.

The Minnesota Department of Human Services ("DHS") questions the Court Monitor's access to records which include substance abuse treatment information.[2] The Court Monitor's records access has not previously been challenged and, aside from the substance abuse treatment issue, no objection to his access to individual client records otherwise is raised now.

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[1] The Court's "independent consultant and monitor" audits and evaluates compliance by DHS and programs which it licenses and funds under the Joint Settlement Agreement and the several plans being developed under the settlement. *See* Orders of July 17, 2012 (Doc. No. 159) and August 28, 2013 (Doc. No. 224) (appointing monitor). *E.g., Monitor's Rationale for Document Request – Restraint Chair and Seclusion Use at AMRTC and MSH: Phase 1 Review* (Oct. 17, 2013) (Doc. No. 236); the *Implementation Plan for the Settlement Agreement Evaluation Criteria and Cambridge Closure,* the *Implementation Plan for the Rule 40 Advisory Committee Recommendations;* and the *Olmstead Plan and its Implementation Plan.* On the latter three plans, *see* Order of August 2, 2013 (Doc. No. 219). DHS and Plaintiffs chose Mr. Ferleger as the "External Reviewer" to evaluate compliance. Order of April 23, 2013 (Doc. No. 211).

[2] The issue arose recently when the Court Monitor requested information restricted to patients in two hospitals. DHS objected that some of the information would associate some patients with substance abuse treatment.

Federal law restricts access to, and the use and disclosure of, substance abuse treatment records. *See generally* 42 U.S.C. § 290.dd-2; 42 C.F.R. § 2.1 to § 2.67. The statute is intended to encourage individuals to seek treatment by assurance against public disclosure; it is not intended to restrict federal courts from evaluating programs to protect patients/clients' rights and enforce court orders. In any event, no public disclosure is contemplated in this case and the statute is likely not applicable at all.[3]

There are two suggested approaches. The DHS suggests that, under 42 C.F.R. § 2.66, a complex protective order is necessary to access substance abuse treatment records. The Court Monitor notes that, if the statute applies, 42 C.F.R. § 2.53 permits access for evaluation and audit of programs to take place simply, without a court order, where the review is "authorized by law."[4] The two regulations are set forth in full in Appendix A attached to this order.

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[3] The Congressional Conference Report states, concerning the predecessor to *§ 290dd-2*, that

> the strictest adherence to the provisions of this section is absolutely essential to the success of all drug abuse prevention programs. Every patient and former patient must be assured that his right to privacy will be protected. Without that assurance, fear of public disclosure of drug abuse or of records that will attach for life will discourage thousands from seeking the treatment they must have if this tragic national problem is to be overcome.

H.R. Rep. No. 92-775, 92d Cong., 2d Sess., p. 33, reprinted in U.S.C.C.A.N., 1972, p. 2072.

[4] *United States v. Shinderman*, 2006 U.S. Dist. LEXIS 8254, *34 (D. Maine 2006) (in criminal case against Medicaid provider, court rejected challenge to government access to methadone treatment claim information).

The Court finds that, if the statute applies (an issue not decided today), the Court Monitor's access is permitted under 42 C.F.R. § 2.53 ("Audit and evaluation activities").[5] The federal court is an entity "authorized by law" to regulate the programs under the orders in this case. Neither the DHS nor any individual or provider program regulated, licensed or funded by DHS suffers any harm or prejudice when the Court Monitor (who is also the DHS's agreed External Reviewer) reviews such records to ascertain compliance with the court orders in this case. Of course, the confidentiality of patient-identifiable information, and of confidential communications, will continue to be maintained by the Court, the Court Monitor, his staff, and consultants.

For the above reasons,

IT IS HEREBY ORDERED:

The Court Monitor shall have access to, and shall be permitted access to, the patient/client records of individuals served by the Minnesota Department of Human Services and the programs and services which it operates, regulates, licenses or funds.[6] This access includes, but is not limited to, records of substance abuse treatment.

Dated: October 23, 2013

s/Donovan W. Frank
DONOVAN W. FRANK
United States District Judge

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[5] Therefore, the Court need not address the effect of 42 C.F.R. § 2.66. Access to records not including substance abuse treatment information is already permitted under the Court's equitable powers to manage this litigation and under the prior orders in this case.

[6] Access includes both inspection and copying.

APPENDIX A

42 C.F.R. § 2.66 - Procedures and criteria for orders authorizing disclosure and use of records to investigate or prosecute a program or the person holding the records.

(a) Application.

> (1) An order authorizing the disclosure or use of patient records to criminally or administratively investigate or prosecute a program or the person holding the records (or employees or agents of that program or person) may be applied for by any administrative, regulatory, supervisory, investigative, law enforcement, or prosecutorial agency having jurisdiction over the program's or person's activities.
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> (2) The application may be filed separately or as part of a pending civil or criminal action against a program or the person holding the records (or agents or employees of the program or person) in which it appears that the patient records are needed to provide material evidence. The application must use a fictitious name, such as John Doe, to refer to any patient and may not contain or otherwise disclose any patient identifying information unless the court has ordered the record of the proceeding sealed from public scrutiny or the patient has given a written consent (meeting the requirements of § 2.31 of these regulations) to that disclosure.

(b) Notice not required. An application under this section may, in the discretion of the court, be granted without notice. Although no express notice is required to the program, to the person holding the records, or to any patient whose records are to be disclosed, upon implementation of an order so granted any of the above persons must be afforded an opportunity to seek revocation or amendment of that order, limited to the presentation of evidence on the statutory and regulatory criteria for the issuance of the court order.

(c) Requirements for order. An order under this section must be entered in accordance with, and comply with the requirements of, paragraphs (d) and (e) of § 2.64 of these regulations.

(d) Limitations on disclosure and use of patient identifying information:

> (1) An order entered under this section must require the deletion of patient identifying information from any documents made available to the public.
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> (2) No information obtained under this section may be used to conduct any investigation or prosecution of a patient, or be used as the basis for an application for an order under § 2.65 of these regulations.

42 C.F.R. § 2.53 - Audit and evaluation activities.

(a) Records not copied or removed. If patient records are not copied or removed, patient identifying information may be disclosed in the course of a review of records on program premises to any person who agrees in writing to comply with the limitations on redisclosure and use in paragraph (d) of this section and who:

(1) Performs the audit or evaluation activity on behalf of:

(i) Any Federal, State, or local governmental agency which provides financial assistance to the program or is authorized by law to regulate its activities; or

(ii) Any private person which provides financial assistance to the program, which is a third party payer covering patients in the program, or which is a quality improvement organization performing a utilization or quality control review; or

(2) Is determined by the program director to be qualified to conduct the audit or evaluation activities.

(b) Copying or removal of records. Records containing patient identifying information may be copied or removed from program premises by any person who:

(1) Agrees in writing to:

(i) Maintain the patient identifying information in accordance with the security requirements provided in § 2.16 of these regulations (or more stringent requirements);

(ii) Destroy all the patient identifying information upon completion of the audit or evaluation; and

(iii) Comply with the limitations on disclosure and use in paragraph (d) of this section; and

(2) Performs the audit or evaluation activity on behalf of:

(i) Any Federal, State, or local governmental agency which provides financial assistance to the program or is authorized by law to regulate its activities; or

(ii) Any private person which provides financial assistance to the program, which is a third part payer covering patients in the program, or which is a quality improvement organization performing a utilization or quality control review.