

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

THE DISABILITY LAW CENTER)
OF ALASKA, INC.,)

Plaintiff,)

Case No. 3AN-18-9814 CI

v.)

STATE OF ALASKA; DEPARTMENT)
OF HEALTH AND SOCIAL)
SERVICES; et al.)

Defendants.)

AUG 27 2020

#34 FINAL JUDGMENT [~~PROPOSED~~]

PREAMBLE

The parties¹ share the following goals: Alaskans with behavioral health issues should receive appropriate and least restrictive treatment; Alaskans who enter the Title 47 civil commitment system should not be detained in correctional facilities if other less restrictive and clinically appropriate options are accessible; if Alaskans have been detained in a correctional facility pursuant to the Title 47 system, such detention should be as brief as possible.

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¹ The parties are plaintiff Disability Law Center, the Public Defender Agency on behalf of "John Doe," and defendants State of Alaska, Department of Health and Social Services, and its Commissioner, the Director of the Division of Behavioral Health, and the CEO of API, all sued in their official capacities ("DHSS" or "State").

D

The parties recognize that there are practical problems with implementing these goals, including encouraging community participation and coordinating with other branches of government.

The parties agree that these goals are not limited to this particular case or the current circumstances, and reflect a long-range commitment to improving the crisis psychiatric response system; improving DHSS's administration of the civil commitment statutes; preserving and protecting the constitutional rights of Alaskans involved in the civil commitment system; and generally improving behavioral health in Alaska.

SETTLEMENT AGREEMENT AND FINAL JUDGMENT

Pursuant to the parties' agreement, the Court enters final judgment for plaintiff Disability Law Center ("DLC"):²

FACTUAL AND LEGAL BASES FOR RELIEF

In the fall of 2018, the civil commitment system in Alaska was approaching a crisis. The Alaska Psychiatric Institute ("API") had a capacity of close to eighty patients (seventy civil, ten forensic).³

Seventy-two-hour evaluations (*see* AS 47.30.725(b)), were being done at API, as well as at three Designated Evaluation and Stabilization ("DES") facilities: Fairbanks Memorial Hospital in Fairbanks, Alaska, Bartlett Regional Hospital in Juneau, Alaska, and Ketchikan PeaceHealth in Ketchikan, Alaska.

² The claims raised by Doe petitioners are satisfied by the entry of this judgment.

³ Before fall 2018, API had closed its 10-bed Denali unit.

Treatment for 30-day commitment periods was being provided at API as well as at two Designated Evaluation and Treatment (“DET”) facilities: Fairbanks Memorial Hospital and Bartlett Regional Hospital. As a general matter, respondents were being transported and admitted to API and other DES/DET facilities promptly. API had, however, come under significant regulatory scrutiny due to high rates of patient seclusion and restraint, high rates of patient and staff injury, and it was in serious jeopardy of being forced to close. In response, API implemented a capacity policy of only accepting as many patients as it could safely care for. This new policy affected respondents who had been picked up in the community pursuant to ex parte evaluation orders, as well as respondents who were due for release from correctional facilities but who had been held there pursuant to emergency detention (*see* AS 47.30.705) and a petition for evaluation (*see* AS 47.30.700). Both groups of respondents experienced longer wait times for admission to API for evaluation, and some respondents who had been picked up in the community were brought to correctional facilities because they could not be admitted directly to API for evaluation, and no hospital would admit them. In addition, respondents at health care facilities who were being held pursuant to emergency detention also began waiting longer before admission to API for evaluation.

For the reasons noted above, in the fall of 2018 the Alaska Department of Health and Social Services (“DHSS”) reduced API’s bed capacity causing respondents who normally would have been admitted to API for evaluation and treatment to wait in hospital emergency rooms, Department of Corrections (“DOC”) facilities, and other correctional facilities for

space to become available at API. That change prompted DLC to file this lawsuit.⁴

DLC and the Does petitioners raised constitutional and statutory claims, asserting (i) that failing to provide timely evaluation and treatment violates the civil commitment statutes as interpreted by the Alaska Supreme Court in *Gabriel C.*; and (ii) that holding people in the punitive setting of jails and correctional facilities awaiting evaluation is unconstitutional. DLC's complaint also alleged violation of AS 47.30.660; AS 47.30.760, which provides that "[t]reatment shall always be available at a state-operated hospital"; 42 C.F.R. 489.24(f); the Americans with Disabilities Act; the Rehabilitation Act; and the Alaska Human Rights Act.

In *Matter of Gabriel C.*,⁵ the Alaska Supreme Court anticipated situations when API might be at capacity and closed to people needing 72-hour evaluations.⁶ The Court observed that two civil commitment statutes evidence a legislative intent that respondents who are subject to an emergency ex parte order be "transported immediately to the nearest evaluation facility so that the 72-hour evaluation period can begin without delay."⁷ It concluded that "it is clear to us that the legislature did not intend to authorize these evaluations to be delayed simply because the nearest designated evaluation facility is filled to capacity."⁸ The Court then authorized judicial officers "to expedite an evaluation if the respondent cannot be

⁴ The Public Defender Agency filed *habeas corpus* petitions on behalf of two respondents detained in DOC facilities and then filed a *habeas corpus* petition on behalf of a "John Doe", who was not a specific natural person. The Doe petition was consolidated with the DLC action.

⁵ 324 P.3d 825 (Alaska 2014).

⁶ *Id.* at 834.

⁷ *Id.*

⁸ *Id.*

transported to the initially designated facility without delay.”⁹

In an Order dated October 21, 2019, the Court found that defendant DHSS had failed to fulfill its obligations to provide timely evaluations and treatment to respondents subject to civil commitment orders as required by AS 47.30.700-.725, and to fulfill its obligation to transport respondents “immediately to the nearest evaluation facility so that the 72-hour evaluation period can begin without delay,” as required by *Gabriel C.* The Court also found that the result of this failure—respondents waiting in emergency rooms and correctional facilities—caused ongoing irreparable harm to respondents in need of statutorily required evaluations and treatment. Further, the Court found that DHSS’ actions and inactions violated the due process rights of respondents held in the punitive conditions of correctional facilities.

The parties recognize and agree that the Court’s factual findings and legal analysis contained in its October 21, 2019 order form the basis for this final judgment. They further agree that the Court should now enter final judgment resolving the claims raised by the plaintiffs. The parties further agree that Plaintiffs will not be barred by res judicata or other legal doctrine from bringing future litigation against DHSS based on the same legal theories as in this case, but based upon future conduct or omissions.

The parties agree that under Title 47 of the Alaska Statutes, DHSS is the government agency principally responsible for administering the civil commitment process. They recognize that the solutions to the problems identified by the Court in its October 21, 2019

⁹ *Id.*

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order require both greater capacity for inpatient evaluation and treatment as well as the creation of diversionary and less restrictive services, such as those outlined in a document entitled "Crisis Now Consultation Report." The Crisis Now report was released by the Mental Health Trust Authority in December, 2019 and provides the model for a significant portion of DHSS's ongoing and future efforts to address the infirmities identified by the Court in its October 21st order. Because these systemic solutions will take time to implement, the parties agree, and the Court orders, DHSS to take the following additional actions, subject to the stipulations and agreements set forth in this Final Judgment.

I. ACTIONS TO BE CONTINUED OR COMPLETED BY DHSS ON OR BEFORE AUGUST 14, 2020.

A. DHSS shall continue its efforts to help establish the services described in the Mental Health Trust's Crisis Now report through cooperation and coordination with the Mental Health Trust and by making funding available for the full array of services described in the Crisis Now report (including a Mobile Crisis Team, a 23-hour stabilization center, and a short term stabilization center) via the Medicaid Section 1115 Demonstration Project waiver ("1115 Waiver").¹⁰ In addition, DHSS will work with the Trust to secure funding on a crisis hotline that would leverage existing systems or establish an entirely new crisis hotline.

¹⁰ This system is dependent on medical professionals enrolling in programs funded by the 1115 Waiver, and the parties recognize that DHSS cannot force any provider to enroll. However, DHSS is committed to making its best efforts, including offering competitive reimbursement rates, to recruit and retain providers.

B. DHSS shall continue to identify each person subject to an evaluation order through a daily status report produced by the DES/DET Coordinator (or the official or officials carrying out the Coordinator's duties if the Coordinator has not yet been hired) on State of Alaska business days. Status reports will continue to be filed in those respondents' cases.

C. DHSS shall continue to manage its waitlist for admissions to API by prioritizing civil detainees waiting in correctional facilities and those in the community (the "community list") for evaluation over civil detainees waiting in hospitals and other locations (the "civil list"). However, all patients should be admitted within a reasonable amount of time and, on occasion, consideration of the following factors will mean that a person from the civil list is accepted before a person from the community list:

1. Clinical factors to consider include:
 - a. The patient's past medical and psychiatric history;
 - b. The patient's clinical course;
 - c. Available local resources at the patient's location;
 - d. Available resources at API.
2. Logistical factors to consider include:
 - e. What travel arrangements are needed to bring the patient to API;
 - f. How long travel will take;

g. If the patient requires physical or specialized medical resources that API will need to obtain (example: hospital bed).

D. DHSS shall engage a DES/DET Coordinator to facilitate transportation of respondents to the closest clinically appropriate available location where a 72-hour evaluation can begin.¹¹

E. DHSS shall provide respondents who are detained by DHSS pursuant to a civil commitment evaluation order, notice of their rights pursuant to AS 47.30.725(a). DHSS shall continue to work with the Court System, and with agencies and community providers who are likely to file petitions seeking orders for hospitalization, in proposing standard notices that can be distributed to those agencies and community providers so they can provide them to respondents. An example of this work is the notice of rights document DHSS proposed to the Court System on April 30, 2020.

F. DHSS shall maintain a working list of state agencies, community providers and partners who are likely to file petitions seeking orders for hospitalization. At least two times each year DHSS shall notify these entities that training regarding the civil commitment process is available. The training will include the requirements and forms providing for notification of patient rights.

¹¹ There are instances where an individual's specific clinical needs, such as cardiac equipment or maternity services, will require that he or she be taken to a DET with specialized medical capabilities, in addition to mental health services.

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G. DHSS shall offer Title 47 training upon request to a state agency or community provider/partner. The training will include the requirements and forms providing for notification of patient right

H. DHSS has committed to the funding described in the attached spreadsheet labelled Exhibit 1, which shall be incorporated into this Agreement and the Judgment.

II. ACTIONS TO BE COMPLETED BY DHSS ON OR BEFORE OCTOBER 1, 2020 (UNLESS SUBJECT TO LEGISLATIVE APPROPRIATION)

A. DHSS shall reinstate the dashboard operated by DHSS, so that it conveys to the public and to law enforcement officers: API's daily census/capacity, for civil (non-forensic) patients, and the number of people on API's wait list.

B. DHSS shall establish a policy that sets forth appropriate inclusionary and exclusionary criteria for admission to API.

C. DHSS shall improve capacity for treatment of those people who receive evaluations and are subject to 30-day civil commitment petitions by:

1. providing disproportionate share funding, to the extent available, for non-tribally-operated hospitals¹² that serve people with mental illness to increase hospital-based mental health care;
2. providing current DES/DET administrative grants to offset costs and provide incentive grants for new hospitals to become DES/DET providers; and

¹² Tribal hospitals are not eligible to receive DHSS funding. However, they do receive Indian Health Services funding.

3. providing funding through crisis placement provider agreements and short-term placement options other than DOC or jail settings for people with complex placement needs while appropriate long term placements are established through working with other programs;
4. actively seeking through its Adult Protective Services III (“APS III”) and DES/DET coordinator long-term placement options for those who frequently cycle between API and DOC or jail.

D. DHSS shall work to establish a Memorandum of Agreement (“MOA”) with DOC so that DHSS personnel will provide initial ex parte evaluations when DOC personnel file an MC-105 with respect to an individual who is no longer held on a criminal case.

E. DHSS shall hire an APS III worker who will focus on discharge planning for those in DOC, other correctional settings, and emergency rooms.

F. DHSS shall contract with, or employ, or use provider agreements for Mental Health Professionals (“MHPs”) to perform statutorily required evaluations pursuant to AS 47.30 at the locations where individuals are held, including but not limited to emergency rooms, state operated correctional facilities, and local jails.

1. The MHP will conduct, every 24-hours, but at a minimum every 48 hours, a limited evaluation in order to determine whether individuals continue to meet civil commitment criteria.
2. If necessary and clinically appropriate, the MHP will conduct a full scale 72-hour evaluation to determine if a 30-day petition should be filed.

3. If at any time the MHP is unable to meet the 24-hour to 48-hour evaluation protocol, or after evaluation concludes that the respondent no longer meets commitment criteria, one of the following will be filed with the court:
 - a. If DHSS is not the petitioner, a MC-505, or any successor form adopted by the court, as soon as possible to request that the court release the person;
 - b. if DHSS is the petitioner, release the person and file a MC-412, or any successor form adopted by the court.

G. For respondents who are not in DOC custody when an evaluation order is entered, DHSS shall:

1. After consultation with the Department of Public Safety, draft written guidelines¹³ to assist local law enforcement agencies in understanding how to evaluate and direct or transport individuals to the most therapeutic environment possible.
2. Offer training to police officers on those guidelines that identifies where individuals are best served based on clinical presentation that would include, but not be limited to, options such a DES/DET, crisis stabilization centers, supportive housing, and substance use disorder treatment centers.

¹³ These guidelines shall include at a minimum the following information: (i) correctional facility environments are not therapeutic and should be seen as an option of last resort; (ii) other available options for placement; (iii) access and training on how to use the dashboard operated by DHSS.

3. Offer twice-yearly training (as well as training opportunities as needed or upon request) with details on how to directly access:

- a. the DES/DET Coordinator on State of Alaska business days;
- b. the API Admissions and Screening Office directly on weekends or State of Alaska holidays;
- c. assistance with transportation to (to the extent feasible) a 23-hour crisis stabilization center, short term crisis stabilization center, or DES/DET as an alternative to a jail or Department of Corrections facility. This will primarily apply to peace officers outside Anchorage, Fairbanks, Juneau, and the Mat-Su Valley area.

H. DHSS will use its best efforts to ensure that civil detainees who are in DOC or correctional custody when the order for hospitalization is issued should wait in DOC custody for no more than 24 hours that are attributable to DHSS, and that civil detainees who are subject to an order authorizing hospitalization but not in DOC or other correctional custody should go into DOC custody only under the rarest circumstances.

1. The 24-hour time limit will begin when DHSS receives notice of a civil detainee in DOC custody or in a jail and time caused by the following should not be attributed to DHSS:

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- a. API being at capacity, as explained in API P&P PC 01-01.01, Capacity and Notification or the successor to that P&P, but only if DHSS has sought admission of the civil detainee to alternative DETs and only if a MHP is sent to re-evaluate the civil detainee ideally every 24 hours and no more than 48 hours;
- b. If the respondent has not been medically cleared for admission, including clearance for Covid-19, as explained in API P&P ASSESS 050-07.03, Medical Screening & Admission or the successor to that P&P;
- c. If the patient requires physical or specialized medical resources that API will need to obtain, but only if API makes reasonable efforts to obtain those resources and reports by the next business day the situation to this court in a way that does not implicate Protected Health Information under the Health Insurance Portability and Accountability Act;
- d. Time a civil detainee who has tested positive for Covid-19 spends in isolation, but only if DHSS makes reasonable efforts to arrange for the civil detainee to be isolated in a non-correctional facility location and reports by the next business day the situation to this court in a way that does not implicate Protected

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Health Information under the Health Insurance Portability and Accountability Act.;

- e. A civil detainee with an open criminal case where the detainee has not made bail or otherwise been released on his or her own recognizance;
- f. For orders issued on Fridays, Saturdays, and Sundays, but only if weekend staffing at API is actually insufficient to safely admit a particular respondent and DHSS has sought admission to alternative DETs, the time until the first minute of the following Monday or as soon as staffing reaches sufficient levels to allow for safe admission of the respondent, whichever occurs earlier;
- g. Time needed to schedule travel for areas outside of the Municipality of Anchorage, the Matanuska-Susitna Borough, and the Kenai Peninsula. (Time for travel in those areas is included in the 24 hours.);
- h. Time following DHSS' filing of an objection to a magistrate judge's recommendation for hospitalization for evaluation, or the filing of a motion for reconsideration of a superior court judge's order for hospitalization for evaluation, but only if DHSS files the objection or motion within one business day of receipt of the order for 72-hour evaluation; and only if DHSS

works to find a place other than jail for a respondent to wait while the motion is being resolved.

III. ACTIONS TO BE COMPLETED BY DHSS ON OR BEFORE JUNE 30, 2021.

DHSS shall advocate for statutory changes in the next legislative session that would permit involuntary holds and 72-hour evaluations at less restrictive community-based settings.

IV. ACTIONS TO BE COMPLETED BY DHSS TO IMPROVE DES/DET CAPACITY IN SOUTHCENTRAL ALASKA

A. DHSS will actively recruit providers to become designated by the department to provide DES/DET services under AS 47.30. These efforts will include but not be limited to the following:

1. Providing financial incentives such as FY 21 administrative grants to DES/DET providers.
2. Expediting any needed Certificate of Need (CON) applications if required.
3. Providing training and resources including advocating for increased telehealth opportunities in Alaska including needed approvals by professional licensing boards.

B. DHSS will continue to promote the 1115 waiver program to increase the number of entities who will provide for 23-hour and short term crisis stabilization centers in order to provide a clinical alternative to the DES system of care, and to encourage

these entities to apply to become designated to do evaluations under AS 47.30.715.

- C. The parties agree that a statutory amendment is needed to hold a person at a 23-hour or short term stabilization center; the state agrees to pursue this statutory amendment so long as the 1115 Demonstration Project exists or if the services are made a permanent part of the Medicaid state plan services.

COMPLIANCE

DHSS shall demonstrate compliance by:

- A. Providing DLC, the Public Defender Agency, and the Court with monthly ex parte reports showing where people are held and for how long, and providing DLC with the quarterly reports of the 1115 waiver by an evaluator external to DHSS (and meet with DLC as needed to answer questions about the reports).
- B. Providing DLC and the Court with updates every 90 days until all actions required by this judgment are complete detailing:
1. Which actions required by this Judgment have been completed;
 2. The date of completion of each action required by this Judgment;
 3. Progress toward completing unfinished actions required by this Judgment;
 4. Anticipated completion date of unfinished actions required by this Judgment.

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JURISDICTION

This Court will retain jurisdiction to adjudicate any claim relating to the State's inability or failure to comply with the terms of the Agreement, including any failure of the Alaska legislature to fund any or all of the fiscal components of this Agreement.

The data and reporting requirement of this Agreement shall remain in effect until the end of the 2021 legislative session, including any special sessions, or the end of May 2021, whichever is later. The DLC shall have thirty (30) days after each reporting period to notify the State of any questions or issues it has with the State's reporting. If the parties are unable to resolve their differences, the DLC may file a motion to enforce with this Court.

Nothing in this Agreement precludes the Department from taking additional action to amend or change state statute or regulations so long as those changes are made by the Legislature or pursuant to the Administrative Procedure Act. Nothing in this Agreement precludes counsel for plaintiffs from challenging any statutory, regulatory or programmatic changes made in the future.

The parties agree that upon court approval, this Settlement Agreement will be accepted as the Department Plan in response to the Court Order dated October 21, 2019. Further, this Settlement Agreement will be entered as a Final Judgment which resolves and dismisses all claims in this case with prejudice. This will become the final order in this matter, subject to the retention of jurisdiction by this Court as described under the provisions of this "Jurisdiction" section of this Agreement and to resolve any motions for attorney's fees.

PREVAILING PARTIES AND ATTORNEY FEES

The State agrees plaintiff DLC is a prevailing party.

DATED and ENTERED this 3rd day of Sept., 2020, at Anchorage, Alaska.

WILLIAM F. MORSE
SUPERIOR COURT JUDGE

Certificate of Service

The undersigned certifies that the foregoing Proposed Final Judgment was served by U.S. MAIL and ELECTRONIC MAIL on this 27th day of August 2020. The e-mail attaching the document requested that the document be kept confidential until the hearing.

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Mark Regan

I certify that on 9.3.20 a copy of the following was mailed/mailed to each of the following at their addresses of record.

[Signature]
Administrative Assistant

Regan
Bookman
Pickett
Beecher
Brennan
Cicotte

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Fiscal Summary for Settlement of 3AN-18-09814Cl; Does v. State of Alaska; Disability Law Center v. State of Alaska*

Requested Appropriations:	Component	Funded in FY2021
DES/DET Coordinator Position housed in Commissioner's Office	DSS/Commissioner's Office	\$50.0 Fed
Adult Protective Services III position housed in Division of Senior & Disabilities Services (SDS)	SDS/Admin	\$75.0 MHTAAR
Provider agreements for Mental Health Professionals (MHP)	DSS/Commissioner's Office	\$75.0 Fed
Crisis Placement Provider Agreements for placement of civil psychiatric patients	Service Provided by API with some reimbursement through Medicaid for those covered by Medicaid	\$75.0 MHTAAR
Provide DES/DET administrative grants to assist in offsetting the cost of operating these programs on behalf of DHSS	DBH/DET	\$300.0 MHTAAR
Additional appropriation for FY2021 to only be accessed if new providers sign up to be DES or DET providers	DBH/DET	
Disproportionate Share Hospital (DSH) for Hospital-based Mental Health Care (not IMD DSH) funding	DBH/DET	
Disproportionate Share Hospital (DSH) for Hospital-based Mental Health Care (not IMD DSH) funding	Medicaid	
DET Secure Transport	DBH/DET	
Total		\$125.0 Fed \$450.0 MHTAAR

*Preliminary estimate subject to change based on settlement or judgement.

