

**UNITED STATES DISTRICT COURT  
THE EASTERN DISTRICT OF NEW YORK**

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**SIDNEY HIRSCHFELD**, Director, Mental Hygiene Legal Service, Second Judicial Department, on behalf of **L. D., J. P., R. M., W. F., A. S.**, and all other similarly situated constituents,

**Case No. 07 CV 1819 (ARR/KAM)**

*Plaintiff,*

**ECF Case**

- against -

**NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; CHARLYNN GOINS**, Chairperson, New York City Health and Hospitals Corporation, in her official capacity; **ALAN D. AVILES**, President and Chief Executive, New York City Health and Hospitals Corporation, in his official capacity; **JEAN G. LEON**, Executive Director, Kings County Hospital Center, in her official capacity; **KATHY T. RONES**, Medical Director, Kings County Hospital Center, in her official capacity; **DAVID DAILEY**, Chief of Service - Psychiatry, Kings County Hospital Center, in his official capacity; **JOSEPH CHARLOT**, Medical Director, Comprehensive Psychiatric Emergency Program, Kings County Hospital Center, in his official capacity; **ELLEN TABOR**, Medical Director, Adult Psychiatric Inpatient Services, Kings County Hospital Center, in her official capacity; **JACQUELINE PURSER**, Captain, New York City Health and Hospitals Corporation Hospital Police, Kings County Hospital Center, in her official capacity; **OSWALD DAVID**, Assistant Director of Nursing/Product Line Manager for Comprehensive Psychiatric Emergency Program, Kings County Hospital Center, in his official capacity; and **ELSA P. BUSH**, Associate Executive Director of Nursing, Kings County Hospital Center, in her official capacity,

**ORDER GRANTING  
PRELIMINARY INJUNCTIVE  
RELIEF**

*Defendants.*

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WHEREAS Plaintiff Sidney Hirschfeld, Director, Mental Hygiene Legal Service, Second Judicial Department (“MHLS”), commenced the above-captioned action (the “Action”) on May 2, 2007 against New York City Health and Hospitals Corporation (“HHC”), Charlynn

Goins, HHC Chairperson, Alan D. Aviles, HHC President and Chief Executive, Jean G. Leon, Executive Director, Kings County Hospital Center (“KCHC”), Kathy T. Rones, KCHC Medical Director, David Dailey, KCHC Chief Of Service - Psychiatry, Joseph Charlot, Medical Director, KCHC Comprehensive Psychiatric Emergency Program (“CPEP”), Ellen Tabor, Medical Director, KCHC Adult Psychiatric Inpatient Services, Jacqueline Purser, Captain, HHC Hospital Police at KCHC, Oswald David, CPEP Assistant Director Of Nursing/Product Line Manager, and Elsa P. Bush, KCHC Associate Executive Director Of Nursing (collectively, the “Defendants”); and

WHEREAS, Plaintiff Sidney Hirschfeld, brought the Action in his representational capacity on behalf of all patients who have received, are receiving, or will receive, psychiatric treatment at KCHC; and

WHEREAS, the Complaint in this Action alleges, *inter alia*, that the KCHC CPEP and adult inpatient facilities are overcrowded and often dangerously unsanitary and that patients are routinely ignored and abused. The Complaint further alleges that the patients are subjected to illegal use of restraints and chemical injections, neglect and lack of proper services; and

WHEREAS, the Complaint in this Action claims that the Defendants’ actions violate the Due Process Clause of the U.S. Constitution, the Americans with Disabilities Act, the Rehabilitation Act, and several provisions of New York State Mental Hygiene Law, Public Health Law and the New York State Constitution; and

WHEREAS Defendants have denied the allegations in the Complaint; and

WHEREAS settlement discussions between the parties and their experts have focused on the conditions of care for patients in the CPEP and the Extended Observation Unit (“EOU”) including the following topics:

- 1) Gathering and analyzing certain data in the CPEP;
- 2) KCHC utilization of crisis residential beds;
- 3) Diversion from the CPEP to control the census;
- 4) Timeframes for patients to receive evaluations and dispositions in the CPEP as well as related timeframes;
- 5) Adoption of a triage system in the CPEP;
- 6) Accountability of CPEP clinical staff;
- 7) Environment of Care: housekeeping, linens, toiletries, and maintenance;
- 8) Hospital Police;
- 9) Management of agitated patients; including the reduction of the use of restraints and emergency medications in the CPEP;
- 10) Protection and care of children in the CPEP; and
- 11) Discharge planning from the CPEP and EOU; and

WHEREAS, Defendants have also provided information to Plaintiff on the following topics:

- 1) Accessibility for patients with physical disabilities in the CPEP; and
- 2) Care of patients diagnosed with mental retardation or other developmental disabilities; and

WHEREAS, the parties anticipate that after completion of their discussion of the above-listed topics they will engage in discussions in regards to the conditions of care on the adult psychiatric inpatient units, including but not limited to the following topics:

- 1) Assessment, treatment planning, and active treatment;
- 2) Discharge planning;
- 3) Management of agitated patients, including the use of restraints and of emergency intramuscular medications;
- 4) Psychiatric care;
- 5) Gathering and analyzing data;
- 6) Staffing;
- 7) Care and treatment of patients with mental retardation and developmental disabilities; and
- 8) Accessibility to patients with disabilities; and

WHEREAS, on June 19, 2008, a patient, who had been detained for more than 24 hours, died on the floor of the CPEP waiting room; and

WHEREAS, digital surveillance recordings that captured the events surrounding the individual patient's death show that the patient fell from her chair in the waiting room to the floor where she remained unattended to by any KCHC staff for nearly an hour; and

WHEREAS, the patient's records appear to have been either intentionally altered or not to have been maintained with the integrity that the law requires; and

WHEREAS, on June 25, 2008, Plaintiff requested a pre-motion conference with the Court seeking permission to file, on an expedited basis, a motion for preliminary injunctive relief; and

WHEREAS, the Court established an expedited briefing and hearing schedule by order dated June 25, 2008; and

WHEREAS, the parties wish to protect the rights and ensure the quality of the treatment services of current and future patients who seek services at the CPEP; and

WHEREAS, in lieu of motion practice, the parties have agreed to the terms and provisions of a preliminary injunction which assures that patients will not remain unattended in the CPEP; and

WHEREAS, the preliminary injunctive order establishes practices, procedures, and benchmarks designed to reduce patient waiting time in the CPEP and EOU, and improve the quality of services that patients receive there necessary to ensure a physically and psychologically safe and therapeutic environment; and

WHEREAS, the parties recognize that any final settlement must address both the issues that are the subject of this preliminary injunction, as well as other aspects of the CPEP, EOU, and adult psychiatric inpatient units at KCHC; and

WHEREAS, Defendants' agreement to entry of this Order shall not be construed as Defendants' acknowledgement that the provisions herein are legally mandated, absent this Court Order;

NOW, THEREFORE, for these reasons, Plaintiff and Defendants herein, through their respective counsel, stipulate and agree to the following provisions of this preliminary injunction:

1. Fifteen Minute Individualized Immediate Assistance Assessments.

(a) Each individual patient shall be checked every 15 minutes while in the CPEP by a clinical staff member to determine if the individual is in need of immediate assistance.

(b) Verbal contact is required if the patient is not sleeping.

(c) A general assessment is required if the patient is sleeping.

(d) Each assessment is to be properly documented in a separate patient log (i) accessible at all times to all MHLS attorneys assigned to represent and protect the rights of individuals detained in or admitted to the CPEP; and (ii) available to Plaintiff's counsel upon request. On or before July 3, 2008, Defendants will designate, and file with the Court, the name of a person charged with maintaining and securing this log and the information contained therein.

(e) On or before July 3, 2008, Defendants will designate, and file with the Court, the name of a person responsible for taking all reasonable steps to ensure that the digital recording system in the CPEP is properly maintained and is operational 24 hours per day and 7 days per week. In addition, that person will be responsible for taking all reasonable steps to ensure the integrity of the digital recordings.

(f) Counsel for Plaintiff may make a written request to Defendants' counsel to view any identified portions of the CPEP digital recordings, and Defendants shall immediately arrange for such a viewing by Plaintiff's counsel. If Plaintiff has concerns about specific portions of the digital recordings, Plaintiff may make a written request to Defendants' counsel for those portions of the digital recordings, and Defendants shall provide copies of those portions of the digital recordings to Plaintiff's counsel as soon as technologically practicable.

2. Benchmarks for Reduction in Mean and Median Lengths of Stay in the CPEP, Excluding the Extend Observation Unit ("EOU").

(a) Notwithstanding any provisions of this Order, Defendants acknowledge their obligation to comply with all provisions of the Mental Hygiene Law, including but not limited to the length of stay provisions established in N.Y. M.H.L. § 9.40. The parties also acknowledge Defendants' obligations to discharge patients safely to an appropriate setting.

(b) Adult Patients. Upon the entry of this order granting the preliminary injunctive relief contained herein (the "Start Date"), it is Defendants' intention that at the end of each of the following time periods the mean and median lengths of stay in the CPEP, excluding the EOU, shall be:

(i) 45 days after the Start Date

- (A) mean -- 20 hrs
- (B) median -- 16 hours

(ii) 60 days after the Start Date

- (A) mean -- 18 hrs
- (B) median -- 15 hrs

(iii) 90 days after the Start Date

- (A) mean -- 15 hrs
- (B) median -- 12 hrs

- (iv) 120 days after the Start Date
  - (A) mean -- 13 hrs
  - (B) median -- 10 hrs

(c) Child/Adolescent Patients. It is Defendants' intention that at the end of each of the following time periods, the mean and median lengths of stay in the CPEP, excluding the EOU, shall be:

- (i) 45 days after the Start Date
  - (A) mean -- 19 hrs
  - (B) median -- 15 hours
- (ii) 60 days after the Start Date
  - (A) mean -- 17 hrs
  - (B) median -- 14 hrs
- (iii) 90 days after the Start Date
  - (A) mean -- 14 hrs
  - (B) median -- 11 hrs
- (iv) 120 days after the Start Date
  - (A) mean -- 12 hrs
  - (B) median -- 9 hrs

3. "Step-Up" - Accountability Procedures regarding Individual Patients' Lengths of Stay within the CPEP.

(a) When a patient's length of stay in the CPEP, excluding the EOU, has reached 18 hours, a phone call will be made (regardless of the time of day or night) to a senior member of the HHC or KCHC Behavioral Health Staff for the purpose of expediting the patient's discharge.

(b) By the Start Date, Defendants will have designated a panel of HHC or KCHC senior members who will have rotating responsibility for fielding the phone calls described in Section 3(a) and utilizing all reasonably available means to effectuate the patient's

appropriate disposition within 24 hours of the patient's arrival in the CPEP. All reasonably available means may, but will not necessarily, include the physical presence of the panel member in the CPEP. A copy of a list of persons charged with this responsibility between now and July 9, 2008 will be filed with the Court on or before July 3, 2008. This list will be supplemented on or before July 9, 2008 with additional persons charged with this responsibility. Each member of each list filed with the Court shall file an affidavit or declaration with the Court. The affidavit or declaration shall read as follows:

I have read the attached order for preliminary injunctive relief (the "Order"). The terms, conditions and obligations of the Order have been explained to me. I affirm, under penalty of perjury, that I understand and will fulfill my obligations under the Order including, but not limited to, Sections 3(c), 4(c) and 6(c).

(c) If the patient who is the subject of the procedures in Section 3(a) is not physically discharged from the CPEP within 24 hours of his/her arrival, an email or fax will be sent no later than 25 hours after that patient's arrival at the CPEP (regardless of the time of day or night) to Dr. Ramanathan Raju, Executive Vice President of Medical & Professional Affairs for HHC, or his designee when appropriate. Additionally, Dr. Raju or his designee will be advised within that 25 hour timeframe by telephone (regardless of the time of day or night). The email or fax will explain the reasons why the patient was not discharged within 24 hours of his/her arrival. A copy of the email or fax to Dr. Raju, or his designee when appropriate, or its contents, will be faxed within that 25 hour timeframe to Plaintiff's counsel.

(d) If counsel for Plaintiff believes the procedures described in Sections 3(a)-(c) are inadequate, counsel will inform Defendants. The parties will then meet on or after August 4, 2008 in an attempt to agree upon new or revised procedures. If an agreement cannot be reached within two business days of that meeting, Plaintiff may seek an order from the Court establishing appropriate accountability procedures, consistent with standards of professional

clinical judgment, and designed to ensure that individual lengths of stay within the CPEP, excluding the EOU, do not exceed 24 hours.

(e) The procedures identified in Sections 3(a)-(c) will be properly documented for each patient subject to the procedures in a separate log: (i) accessible at all times to all MHLS attorneys assigned to represent and protect the rights of individuals detained in or admitted to the CPEP; and (ii) available to Plaintiff's counsel upon request. On or before July 3, 2008, Defendants will designate, and file with the Court, the name of a person who will be charged with maintaining and securing this log and the information contained therein.

4. "Step-Up" - Accountability Procedures regarding Individual Patients' Lengths of Stay within the EOU

(a) When a patient's length of stay within the EOU has reached 65 hours, a phone call will be made (regardless of the time of day or night) to a senior member of the HHC or KCHC Behavioral Health Staff for the purpose of expediting the patient's discharge.

(b) By the Start Date, Defendants will have designated a panel of HHC or KCHC senior members who will have rotating responsibility for fielding the phone calls described in Section 4(a) and utilizing all reasonably available means to effectuate the patient's appropriate disposition within 72 hours of the patient's arrival in the CPEP. All reasonably available means may, but will not necessarily, include the physical presence of the panel member in the CPEP. A copy of a list of persons charged with this responsibility between now and July 9, 2008 will be filed with the Court on or before July 3, 2008. This list will be supplemented on or before July 9, 2008 with additional persons charged with this responsibility. Each member of each list filed with Court shall file an affidavit or declaration with the Court. The affidavit or declaration shall read as follows:

I have read the attached order for preliminary injunctive relief (the "Order"). The

terms, conditions and obligations of the Order have been explained to me. I affirm, under penalty of perjury, that I understand and will fulfill my obligations under the Order including, but not limited to, Sections 3(c), 4(c) and 6(c).

(c) If the patient who is the subject of the procedures in Section 4(a) is not physically discharged from the EOU within 72 hours of his/her arrival, an email or fax will be sent no later than 73 hours after that patient's arrival at the CPEP (regardless of the time of day or night) to Dr. Ramanathan Raju, Executive Vice President of Medical & Professional Affairs for HHC, or his designee when appropriate. Additionally, Dr. Raju or his designee will be advised within that 73 hour timeframe by telephone (regardless of the time of day or night). The email or fax will explain the reasons why the patient was not discharged within 72 hours of his/her arrival. A copy of the email or fax to Dr. Raju, or his designee when appropriate, or its contents, will be faxed within that 73 hour timeframe to Plaintiff's counsel.

(d) If counsel for Plaintiff believes the procedures set forth in Sections 4(a)-(c) are inadequate, counsel will inform Defendants. The parties will then meet on or after August 4, 2008 in an attempt to agree upon new or revised procedures. If an agreement cannot be reached within two business days of that meeting, Plaintiff may seek an order from the Court establishing appropriate accountability procedures, consistent with standards of professional clinical judgment and designed to ensure that individual lengths of stay within the EOU do not exceed 72 hours.

(e) The procedures identified in Sections 4(a)-(c) will be properly documented for each patient subject to the procedures in a separate log (i) accessible at all times to all MHLS attorneys assigned to represent and protect the rights of individuals detained in or admitted to the CPEP; and (ii) available to Plaintiff's counsel upon request. On or before July 3, 2008, Defendants will designate, and file with the Court, the name of a person who will be charged with maintaining and securing this log and the information contained therein.

5. Maximum Census (Benchmark)

(a) Immediately after the Start Date, it is Defendants' intention for the census within the CPEP not to rise above 25 persons.

6. "Step-Up" - Accountability Procedures Regarding CPEP Census Levels.

(a) When the census count reaches 20 persons, Defendants shall call for diversion.

(b) When the census is greater than 25 persons, a phone call will be made (regardless of the time of day or night) to a senior member of the HHC or KCHC Behavioral Health Staff for the purpose of reducing the census to 25 persons or less.

(c) By the Start Date, Defendants will have designated a panel of HHC or KCHC senior members who will have rotating responsibility for fielding the phone calls described in Section 3(a) and utilizing all reasonably available means to effectuate the patient's appropriate disposition to reduce the census in the CPEP to no more than 25 persons. All reasonably available means may, but will not necessarily include, the physical presence of the panel member in the CPEP. A copy of a list of persons charged with this responsibility between now and July 9, 2008 will be filed with the Court on or before July 3, 2008. This list will be supplemented on or before July 9, 2008 with additional persons charged with this responsibility. Each member of each list filed with the Court shall file an affidavit or declaration with the Court. The affidavit or declaration shall read as follows:

I have read the attached order for preliminary injunctive relief (the "Order"). The terms, conditions and obligations of the Order have been explained to me. I affirm, under penalty of perjury, that I understand and will fulfill my obligations under the Order including, but not limited to, Sections 3(c), 4(c) and 6(c).

(d) The procedures identified in Sections 6(a)-(c) will be properly documented in a separate log (i) accessible at all times to all attorneys with MHLS assigned to represent and protect the rights of individuals detained in or admitted to the CPEP; and (ii) available to Plaintiff's counsel upon request. On or before July 3, 2008, Defendants will designate, and file with the Court, the name of a person who will be charged with maintaining and securing this log and the information contained therein.

7. Peer Advocacy Program

(a) Defendants will establish a peer advocacy program in the CPEP as soon as possible. Defendants will make their best efforts to have peer advocates in the CPEP 24 hours a day, seven days a week, beginning no later than 30 days after the Start Date.

(b) Defendants will utilize an organization or organizations to train peer advocates for the peer advocacy program that have been or will be mutually agreed upon by the parties.

8. Data Collection and Reporting

(a) Data Collection

(i) Defendants shall collect data to demonstrate compliance with Sections 2-6.

(ii) Defendants shall collect the CPEP-specific data previously agreed by the parties' experts utilizing the data collection forms previously agreed upon by the parties' experts (the "CPEP Grids"). Copies of the CPEP Grids are attached hereto as Exhibit A.

(b) Reporting

(i) All data referred to in Section 8(a) shall be provided to counsel for Plaintiff on a weekly basis.

(ii) All reports of data to counsel for Plaintiff shall be accompanied by a certification attesting to the data's accuracy. The certification will read as follows:

I \_\_\_\_\_ certify that the information contained in the accompanying CPEP Grids is true, accurate and complete based upon representations as to accuracy and completeness made to me either orally or through submission of documentation by appropriate personnel with responsibility for the matters contained herein.

On or before July 3, 2008, Defendants will designate, and will file with the Court, the name of a person who will be responsible for taking all reasonable steps to ensure the accuracy of the CPEP Grids and the data contained therein.

9. Participation In Search Committee

(a) Plaintiff and Defendants shall jointly select the search committee for replacement of the following positions:

- (1) Deputy Executive Director, KCHC Behavioral Health, and
- (2) KCHC CPEP Director.

(b) The ultimate decision as to who will fill these positions will be made by HHC after careful consideration of the candidates recommended by the search committee.

(c) No party shall unreasonably withhold approval of a member of the search committee proposed by the other party.

(d) The Search Committee shall be formed by July 10, 2008.

(e) Plaintiff and Defendants shall consult to determine whether a search committee will be utilized to identify candidates for other key KCHC Behavioral Health management positions that may become available.

10. Dispute Resolution / Relief From Court

(a) Sections 2 and 5

(i) During the first 45 days after the Start Date, Plaintiff will not seek Court intervention for non-compliance with Sections 2 and 5.

(ii) Upon the 46th day after the Start Date, if, based on weekly data collection, the benchmarks set forth in Sections 2 and 5 have not been achieved, Defendants will, upon delivery of the weekly data, notify counsel for Plaintiff in writing. The notification shall also set forth the reasons why the benchmarks have not been achieved and proposed corrective measures. Defendants will provide the weekly data, notification, and proposed corrective measures as contemplated under this subparagraph to counsel for Plaintiff by the close of business each Wednesday. In the event that the Wednesday reporting demonstrates that the benchmarks set forth in Sections 2 and 5 have not been achieved, the parties will consult that Friday. After such consultation, if counsel for Plaintiff is unsatisfied with the proposed corrective measures, Plaintiff may then make an application to the Court for relief.

(b) Sections 1, 3, 4, 6-9, 11

(i) If counsel for Plaintiff believes that Defendants are not in compliance with any of Sections 1, 3, 4, 6-9, 11, counsel for Plaintiff shall notify Defendants and provide Defendants with the opportunity to propose corrective measures. Defendants shall propose corrective measures within two business days hours of receipt of notice from counsel for Plaintiff. The parties shall consult within two business days of the provision of the proposed corrective measures to counsel for Plaintiff. After such consultation, if counsel for Plaintiff is unsatisfied with the proposed corrective measures, Plaintiff may then make an application to the Court for relief. To the extent that Defendants are obligated under any of Sections 1, 3, 4, 6-9, 11 to provide weekly data to counsel for Plaintiff, Defendants will provide notification, and proposed corrective measures as contemplated under this subparagraph to counsel for Plaintiff by

the close of business each Wednesday. In the event that the Wednesday data reporting demonstrates that Defendants are not in compliance with any of Sections 1, 3, 4, 6-9, 11, the parties will consult about the proposed corrective measures that Friday. After such consultation, if counsel for Plaintiff is unsatisfied with the proposed corrective measures, Plaintiff may then make an application to the Court for relief.

(c) In Circumstances of Imminent Harm

(i) Notwithstanding any other provision of this order, if counsel for Plaintiff believes that imminent harm will result to patients in the CPEP due to Defendants' non-compliance with any of the provisions of Sections 1-11, counsel for Plaintiff shall not be required to consult with Defendants prior to seeking relief from the Court. Although Plaintiff need not consult with Defendants under such circumstances before proceeding to court, Plaintiff will provide Defendant with reasonable notice that he intends to seek relief from the Court.

11. Identification of HHC Personnel Responsible for Compliance with Sections 1 - 8.

(a) Defendants shall identify officials from HHC who will be responsible for ensuring that KCHC complies with Sections 1 through 8 of the Order.

12. Certification of Dissemination and Explanation of Order for Preliminary Injunctive Relief

(a) No later than one week after the Start Date, Defendants shall certify in writing to counsel for Plaintiff that all relevant KCHC and HHC employees have been shown the Order and have been given a complete explanation of its terms and the obligations of each individual employee pursuant to the Order.

13. Duration of Preliminary Injunctive Relief

(a) This Order will terminate upon entry of a full settlement agreement in the Action.

(b) In the absence of a full settlement agreement in the Action, the order will terminate at the later of:

- (i) June 1, 2009; or
- (ii) 3 months after the KCHC CPEP has been relocated to the new facility designated KCHC Building R.

(c) Notwithstanding the forgoing subparagraph 13(b), counsel for Plaintiff may make application to extend any or all of the provisions of this Order, or for such injunctive relief as is appropriate. Plaintiff shall advise Defendants 15 days prior to the expiration of this order whether he intends to apply for an extension of this Order (unless the application is based on circumstances that could not reasonably have been known to Plaintiff prior to that date).

14. Preservation of MHLS Rights

(a) Nothing in this Order is intended or shall be interpreted to abridge, curtail, diminish, or in any way adversely modify the rights of MHLS afforded by New York State statutory or case law, including but not limited to MHLS's right of access to persons, places, records, data, etc., as set forth in and consistent with New York Mental Hygiene Law Section 47.03(d), 22 NYCRR Part 694.

15. Defendants' Waiver of Security Required of Plaintiff

(a) Defendants hereby waive any requirement that Plaintiff give security pursuant to Fed. R. Civ. P. 65(c).

Dated: New York, New York  
July 2, 2008

s/ Dennis B. Feld

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SO ORDERED:

7/2/08

Kiyō A. Matsumoto, U.S. J.