

STATE OF VERMONT

SUPERIOR COURT  
Washington Unit

CIVIL DIVISION

2015 OCT 13 A 13 54

VERMONT HUMAN RIGHTS  
COMMISSION,  
Plaintiff

v.

STATE OF VERMONT,  
AGENCY OF HUMAN SERVICES,  
SECRETARY OF THE AGENCY OF  
HUMAN SERVICES in his official capacity  
DEPARTMENT OF MENTAL HEALTH,  
COMMISSIONER OF DEPARTMENT  
OF MENTAL HEALTH, in his/her official  
capacity, DEPARTMENT OF  
CORRECTIONS, COMMISSIONER OF  
DEPARTMENT OF CORRECTIONS, in  
his/her official capacity,  
Defendants

Docket No. 629-10-1660n cv

COMPLAINT

INTRODUCTION

This action is brought by the Vermont Human Rights Commission (VHRC) on behalf of itself and D.C., as an aggrieved party, seeking declaratory and compensatory relief pursuant to the Vermont Fair Housing and Public Accommodations Act, (VFHPAA) 9 V.S.A. §4500, et seq. Despite knowledge on the part of all Defendants that D.C. was in need of a hospital level of care at the time of his by default confinement in a correctional facility, Defendants, by their actions and omissions, held D.C. in a medically inappropriate environment and caused D.C. to suffer significant harm in violation of his statutory rights to be placed in the most integrated setting appropriate to his needs while in State custody, and to have his disabilities reasonably accommodated. The VHRC seeks both compensatory damages on behalf of D.C. and declaratory relief in the public interest.

## PARTIES

1. The Vermont Human Rights Commission (hereinafter VHRC or “the Commission”) is a state agency authorized by 9 V.S.A. §4552(b) of the Vermont Human Rights Commission Act, (the VHRC Act) to investigate and enforce complaints of unlawful discrimination in places of public accommodation.
2. Defendant Agency of Human Services (“AHS”) has overall responsibility for providing appropriate placement and care for people in the State’s custody. The Departments of Corrections and Mental Health are major components of the Agency, designated by statute to care for those individuals. 3 V.S.A. §§ 3001-3002.
3. Defendant Secretary of the Agency of Human Services is the head of the Agency and is responsible for administration of the Agency. 3 V.S.A. § 3001.
4. Defendant Vermont Department of Mental Health (“DMH”) is a governmental entity mandated by State law to provide comprehensive services to all citizens of the state with mental health and related needs. 18 V.S.A. §7201.
5. Defendant Commissioner of DMH is charged with the overall administration of the Department and is responsible for coordinating services so as to most efficiently carry out the purposes of the Department including providing hospitalization for individuals with mental illness. 18 V.S.A. §7401.
6. Defendant Vermont Department of Corrections (“DOC”) is responsible for overseeing the care, treatment and for managing the incarceration of individuals in its custody. 28 V.S.A. §101.

7. Defendant Commissioner of DOC is charged with the overall responsibility of overseeing funding and services provided by the State to individuals in the custody of DOC including supervision of contracted medical providers. 28 V.S.A. §102. At all times relevant to this complaint, the contracted medical provider was Correct Care Solutions (CCS).

### JURISDICTION

8. The Superior Court, Civil Division has jurisdiction of the Vermont Fair Housing and Public Accommodations Act (VFHPAA) claims pursuant to its general authority under 4 V.S.A. §30(a)(1)(A) and §31 and specific authority over violations of the VFHPAA under 9 V.S.A. §4506.
9. This Court has personal jurisdiction over the State of Vermont Agency of Human Services, Department of Mental Health and Department of Corrections because they are entities of state government and all are state actors that transact business in the State of Vermont. The alleged violations also occurred within the State of Vermont.

### VENUE

10. Venue in Washington County Superior Court is proper pursuant to the VHRC Act, 9 V.S.A. §4553(a)(6)(B), which provides that actions brought by the Vermont Human Rights Commission under the VFHPAA may be brought in Superior Court in the county where the violation occurred or in Washington County.

## GENERAL FACTUAL ALLEGATIONS

11. The Vermont Human Rights Commission (VHRC) has authority pursuant to 9 V.S.A. §4553(a)(6)(A) to enforce conciliation agreements to prohibitions against discrimination by bringing an action in the name of the VHRC.
12. The VHRC may seek temporary and permanent injunctive relief in the public interest for an individual aggrieved by a discriminatory act and may also seek damages for such individuals. 9 V.S.A. §4553(a)(6)(A)(i) and (iii).
13. The VHRC presently has three other cases pending that raise substantial issues related to the discriminatory treatment of individuals with mental illness by the Defendant Departments of Corrections (DOC) and Mental Health (DMH).
14. Due to the duration of the stays in correctional facilities by individuals such as D.C. who are incarcerated while awaiting a forensic examination and/or acute, Level I bed, the public interest issues raised are often resolved before they can be fully investigated and/or litigated.
15. D.C., the aggrieved party, is presently in a temporary placement in Massachusetts but will return to Vermont as soon an appropriate living situation is obtained.
16. D.C.'s sister, and his legal guardian, reside in Vermont and are working together to facilitate his return to the State of Vermont.
17. D.C.'s mental illness has resulted in contact with the criminal justice system.
18. Between September 26, 2013 and January 17, 2014, D.C. was charged twice with disorderly conduct, and once with assault on a police officer. He had a total of

fourteen (14) encounters with Brattleboro Police Department during this short period of time.

19. On October 16, 2013, D.C. was given a citation for assault on a police officer after spitting at the officer who entered his hotel room in response to a call to 911. An arraignment date of January 21, 2014 was set.
20. On October 30, 2013, D.C. was involuntarily committed for an inpatient stay at the Brattleboro Retreat. He was released on January 17, 2014.
21. Two days after his release from Brattleboro Retreat, on January 19, 2014, D.C. was discovered in an ATM alcove without shoes and covered in feces.
22. D.C. was taken to Brattleboro Memorial Hospital where he was admitted and evaluated for an emergency in-patient placement. He remained at Brattleboro Memorial Hospital until January 22, 2014, missing his scheduled arraignment date.
23. As a result of missing his arraignment, a warrant for failure to appear was issued and bail in the amount of \$500 was set. D.C. was arrested on the failure to appear warrant when he was discharged from the hospital on January 22, 2014.
24. On January 23, 2014, the Superior Court Criminal Division, Windham Unit, committed D.C. to the custody of the Department of Mental Health for the purpose of evaluating his criminal responsibility and his competency to stand trial.
25. Because there were no available "acute" Level I beds available for D.C. as he awaited his *inpatient* evaluation, the court committed him to the custody of the Commissioner of Corrections and ordered that he be held at Southern State Correctional Facility ("SSCF") in Springfield, Vermont. (emphasis added).

26. On February 2, 2014, D.C. was evaluated at SSCF and found to be not criminally responsible for his actions and incompetent to stand trial.
27. At this point, his commitment to the custody of the DMH ended, but due to the continued lack of an available Level I bed, and his inability to post the \$500 bail, D.C. remained at SSCF in the custody of the Commissioner of the DOC.
28. On information and belief, if D.C. had been able to post the \$500 bond, he would have been released from SSCF on or about February 2, 2014.
29. On information and belief, D.C. is a 60-year-old individual with a long history of psychiatric hospitalizations. He was diagnosed in 1975 with bi-polar disorder but successfully managed his illness and substance abuse issues until he suffered a stroke in 2008. Since that time, he has been variously diagnosed with bi-polar-disorder type I (manic type), psychosis, schizophrenia, alcoholism, substance abuse and more recently, dementia. He also has concurrent and serious medical conditions including diabetes, high blood pressure, asthma and heart disease.
30. On information and belief, D.C.'s disabilities substantially limit one or more major life activities, including, but not limited to, an inability to comprehend and rationalize current circumstances or acquire new information and apply it to day-to-day activities.
31. Upon arrival at SSCF on January 23, 2014, after an initial visit from the Chief of Mental Health Services for Correct Care Solutions (CCS), the DOC contracted medical provider, D.C. was designated as Significantly Functionally Impaired (SFI), pursuant to 28 V.S.A. §906. Upon admission, he was placed in a "safety smock" and orders were given for 15-minute safety checks.

32. On January 24, 2016, D.C. received a second visit from a CCS mental health provider who continued use of the safety smock and the 15-minute safety checks. A psychiatrist prescribed 14 days of trazadone, a drug D.C. had been prescribed for over 20 years, to assist him in the management of his mental health issues and to help him to sleep. He was assigned to the Mental Health Stabilization Unit, also known as the Alpha unit.
33. The Alpha unit consists of small, individual, single-occupancy cells. Contact with staff and other inmates is either severely limited or non-existent. Food trays and medicines are passed through a slot in the door. In addition, interactions with staff, including mental health staff, are often conducted through the slot, meaning there is no meaningful contact or interaction with the occupant of the cell.
34. On information and belief, D.C. was placed in a single cell and kept there for 23 of the 24 hours of each day for the first 10 days of his confinement at SSCF.
35. Alpha unit meets the statutory definition of segregation in that its single cell structure constitutes "a separation from the general population which may or may not include placement in a single occupancy cell and which is used for administrative, disciplinary or other reasons." 28 V.S.A. §701a(b).
36. On January 26, 2014, the use of the safety smock on D.C. was discontinued.
37. On information and belief, its use was contraindicated by both DOC policy on usage and the assessments done by CCS mental health staff when he arrived.
38. During his time in Alpha unit, D.C. was only seen four (4) times by CCS mental health staff.
39. On information and belief, records reveal that the majority of these visits were non-therapeutic in nature and design.

40. On information and belief, on January 28, 2014, a psychiatric nurse practitioner, without consulting the psychiatrist who initially prescribed trazadone, ordered that the prescription not be renewed when it lapsed.
41. On information and belief, beginning on February 2, 2014, D.C. began complaining about his inability to sleep and repeatedly requested his medication, which he was able to identify by name (trazadone).
42. On information and belief, instead of reinstating his trazadone, on February 10, 2014, a "sleep study," which consisted of DOC staff monitoring whether or not D.C. was sleeping and marking it on a log, was ordered by a social worker who qualified as a QMHP (Qualified Mental Health Professional). 18 V.S.A. §7101(13); 28 V.S.A. §906(2).
43. On information and belief, the results of the sleep study were not interpreted and were essentially ignored.
44. D.C. continued to experience sleep deprivation despite his repeated requests for medication and multiple referrals by DOC staff who either relayed his requests to the CCS mental health worker or reported his behaviors, including being awake most of the night or into the early hours of the morning.
45. D.C.'s trazadone prescription was not reinstated until February 27, 2014, a week before he was released from DOC custody to an Acute Level I DMH bed. The lack of medication caused an exacerbation of his underlying mental illnesses.
46. On February 4, 2014, D.C. was moved from the Alpha unit to the Bravo unit. The Bravo unit is a "step-down" mental health unit in its own section of SSCF which allows



inmates more freedom of movement, traditional cells, access to T.V. and interaction with other inmates.

47. On information and belief, the DOC's failure to accommodate D.C.'s mental illness between the denial of his trazadone while in Alpha unit and its re-prescription while in Bravo unit, caused D.C. to be charged with numerous disciplinary rule (DR) violations for minor "offenses," including refusing to shower, going to the mess hall more than once and lying when confronted. These charges resulted in his being confined to his cell, loss of privileges such as television, attending activities, interacting with other inmates, and humiliation.
48. On information and belief, the underlying behaviors that caused D.C. to pick up "disciplinary reports" (DRs) were manifestations of his mental illness.
49. On information and belief, despite the relationship of the behaviors to his disabilities, the correctional officers failed to accommodate those disabilities through modifications to policy and procedure, in part, due to a fundamental lack of understanding of mental health issues generally, his mental health issues specifically, as well as a lack of support and direction from contracted mental health providers, and the lack of required mental health training for staff. 28 V.S.A. §907(6).
50. During the entire 40-day period of his incarceration, DOC failed to accommodate D.C.'s need for services and treatment despite the SFI designation that occurred on January 23, 2014, which required screening within 24 hours of arrival, a thorough trauma-informed evaluation as well as development of an individual treatment plan. 28 V.S.A. §907(1)-(4).

51. No evaluation was conducted, nor was an individual treatment plan developed. D.C.'s medication was discontinued for three weeks and there are records of only two "therapy sessions."
52. Forty (40) days after D.C.'s confinement at SSCF, on March 3, 2014, an acute Level I bed finally became available at the Green Mountain Psychiatric Care Center.
53. On the date of his release from SSCF to the Green Mountain Psychiatric Care Center, the DOC mental health unit finally made a referral for an SFI protocol, despite the fact that the SFI designation (which is a DOC-specific designation) ended upon his release from DOC custody.
54. On information and belief, the Defendant Commissioner(s) of the DOC<sup>1</sup>, were aware that their Department was and is inadequately resourced to care appropriately for people like D.C. whose mental health diagnoses and concurrent disabilities require additional capacity within DOC to provide appropriate physical environment, staffing and therapeutic milieu.
55. On information and belief, the Defendant Commissioner(s) were aware that specific individuals who were pending placement in psychiatric beds were being held in their correctional facilities, often in segregated circumstances, despite either a court order or a physician's recommendation that the prisoner be evaluated and/or treated in a psychiatric hospital unit.
56. Employees of Defendant DMH on or before January 23, 2014 identified D.C. as requiring inpatient hospital level of care due to the decompensation of his mental health

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<sup>1</sup> Andrew Pallito was the Commissioner of the DOC at all times relevant to the allegations in this complaint. He was replaced by Lisa Menard in October 2015, who at all times relevant to this complaint was the Deputy Commissioner of the DOC.

and the fact that he was found in the ATM vestibule not long after being released from the Brattleboro Retreat.

57. Defendant DMH's determination of D.C.'s need for mental health treatment takes into account the criteria used to determine whether someone is eligible for involuntary treatment pursuant to 18 V.S.A. §7101(17).
58. Once Defendants DOC and DMH were on notice of D.C.'s need for involuntary treatment, Defendants AHS, DMH and the Commissioner(s)<sup>2</sup> of DMH became responsible for D.C.'s appropriate treatment and hospitalization. 18 V.S.A. §7401(6).
59. On information and belief, at all times relevant to this complaint, D.C. was in the State's custody under the supervision of Defendant AHS and its component parts, DOC and DMH.
60. Defendants AHS, DOC and DMH are required by statute to "meet the needs of individuals with mental health conditions, including the needs of individuals in the custody of the commissioner of corrections, and adhere to principles that reflect excellence, best practices, and the highest standards of care." 18 V.S.A. §7251(1).
61. Similarly, Defendants AHS, DMH and DOC are required to "provide a coordinated continuum of care by the departments of mental health and of corrections, designated hospitals, designated agencies, and community and peer partners to ensure that individuals with mental health conditions receive care in the most integrated and least restrictive settings available." 18 V.S.A. §7251(3).

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<sup>2</sup> Paul Dupre was the Commissioner of the DMH at all times relevant to the allegations in the complaint. He was replaced in June of 2015 by Frank Reed, who at all times relevant to the complaint was the Deputy Commissioner of the DMH.

62. The Defendant Commissioner of the DMH is responsible for the administration of the Department of Mental Health, and is not relieved of accountability despite designation of any of his duties to other officers or agencies of Vermont. 18 V.S.A. §7401(13).
63. On information and belief, at all times relevant to this Complaint, the Commissioner of the DMH was aware that the department was not providing care in accordance with Vermont law to individuals such as D.C. who were in need of treatment, specifically that individuals in need of treatment were not being placed in appropriate treatment settings in a timely manner but instead at times were being held in segregated correctional cells for long periods of time.
64. On information and belief, the Defendant Commissioner of the DMH had actual knowledge as early as January 22, 2014 that D.C. was being held in segregation in a correctional facility and was in need of and eligible for hospital level of care.
65. At all times relevant to this Complaint, employees of Defendant DMH, under the direct supervision of the Defendant Commissioner, engaged in weekly discussions with Defendant DOC, and others, about a list of prisoners identified by physicians or by court order as requiring a hospital level of psychiatric care but instead being held in segregated circumstances in correctional cells.
66. On information and belief, while incarcerated in 2014, the DOC's contracted medical provider, CCS failed to provide D.C. with equal access to medically appropriate treatment and/or supports for his disabilities.
67. On information and belief, the lack of adequate and appropriate treatment and supports by CCS for D.C.'s disabilities directly resulted in his being segregated, suffering physical and emotional harm through lack of services, denial of medications and loss of

privileges due to DOC staff who were not properly trained on how to manage individuals with severe mental illnesses.

68. On information and belief, during all times relevant to this Complaint, Defendants DOC and its medical contractor CCS were aware of D.C.'s disabilities and failed to identify and implement necessary accommodations to prevent those disabilities from resulting in punitive actions or other harm to D.C. while in DOC custody.
69. On information and belief, had D.C. been placed appropriately and in accordance with the court's original order for an inpatient evaluation, D.C.'s treatment would have been guided by the Center for Medicaid Services regulations, 42 C.F.R. §482.13, and would have substantially safeguarded against the prolonged segregation and denial of treatment that D.C. experienced in DOC custody.
70. On November 24, 2015, D.C. filed a complaint with the Vermont Human Rights Commission (VHRC) alleging disability discrimination based on the failure of the AHS and its components, DOC and DMH, to provide treatment in the most integrated setting appropriate to his needs and on the failure of the DOC, and its contractor Correct Care Solutions (CCS), to provide him with accommodations that would have avoided the punitive treatment he received during his incarceration at SSCF.
71. After investigation, on March 24, 2016, the Commission determined that there were reasonable grounds to believe that DOC and DMH discriminated against D.C. based on his disability.
72. The VHRC attempted to conciliate this matter as required by 9 V.S.A. §4554(e) but was unable to do so.

73. The VFHPAA requires that the State provide services to allow individuals in custody to be placed in the most integrated setting appropriate to their needs. 9 V.S.A. §4502(c)(2).
74. During the period of time D.C. was at SSCF, Defendants were aware of D.C.'s mental health needs, his need for inpatient treatment. By the time D.C. was placed, he had suffered significant physical and psychological harm including but not limited to deterioration of his physical and mental health and severe sleep deprivation.
75. Defendants AHS, DOC, and DMH are places of public accommodation as defined under 9 V.S.A. §4501(8) in that they offer goods and services to the public.
76. On information and belief, while D.C. was in segregation and confined to his cell for approximately 23 hours a day, he did not have interactions with other people or access to the activities and programming available in the most integrated environment appropriate to his needs.
77. On information and belief, the harassment and discriminatory treatment D.C. suffered at the hands of DOC and contracted medical staff while incarcerated, but after he was identified as needing hospital level psychiatric treatment, traumatized him and resulted in unnecessary DRs and further punishment.
78. On information and belief, other than the record that D.C. was on a list of people needing a hospital level psychiatric bed for several weeks, there is no known documentation in Defendants' possession demonstrating additional planning, communications, meetings, or delegation of responsibility relating to D.C.'s placement in an appropriate setting.

79. All Defendants failed to substantively respond to D.C.'s needs while held in a DOC facility rather than being placed in the required hospital level of care setting, resulting in his extended confinement in segregation without adequate care and causing significant violations D.C.'s rights resulting in harm to D.C.

### CAUSE OF ACTION

Plaintiff incorporates by reference paragraphs one (1) through seventy-nine (79), above as if fully set forth herein.

80. D.C. is a qualified individual with disabilities as defined in the VFHPAA in that he has a physical or mental condition, as well as a history of such a condition, that limits one or more major life activities. 9 V.S.A. §4501(2)(A)-(B).
81. Defendants are public accommodations in that they are governmental entities that offer services, privileges, advantages, and/or benefits to the general public. 9 V.S.A. §4501(1) and (8).
82. As public accommodations, the Defendants are required by law to afford their services, privileges, advantages, and/or benefits to and individual with a disability in the most integrated setting appropriate for the needs of the individual. 9 V.S.A. §4502(c)(2).
83. As public accommodations, the Defendants are required to provide an individual with disabilities equal opportunity to participate in its services, privileges, advantages, and/or benefits offered by the entity. 9 V.S.A. §4502(c)(1) and (3).
84. As public accommodations, the Defendants are required to make reasonable modifications to policies, practices or procedures when those modifications are necessary to offer their services, privileges, advantages, and/or benefits to an individual with a disability.

85. The Defendants failed to provide meaningful access to services, privileges, advantages, and/or benefits, failed to provide reasonable modifications and/or violated the integration mandate in the following ways while D.C. was in Defendants' custody:
- a) By Defendants AHS and DMH failing to place D.C. in an in-patient psychiatric bed for 40 days, despite knowledge that he required a hospital level of care;
  - b) By Defendants AHS and DMH failing to ensure that adequate mental health treatment was being provided to D.C. while he awaited such placement;
  - c) By Defendant DOC placing D.C. in a safety smock for three (3) days when it was contraindicated by DOC's policy on usage, and the assessments done by intake staff and the mental health unit;
  - d) By Defendant DOC placing D.C. in segregation (Alpha Unit) for ten (10) days where he was confined to his cell for at least twenty-three (23) hours a day with minimal human contact;
  - e) By Defendant DOC failing to provide meaningful access to mental health services and psychiatric referrals during the forty (40) days he was incarcerated;
  - f) By Defendant DOC depriving D.C. of a necessary medication for approximately three weeks resulting in severe sleep deprivation;
  - g) By Defendant DOC failing to train its correctional officers about persons with severe mental health issues and concurrent disorders as required by statute and rule;
  - h) By the failure of the Defendant DOC's mental health unit staff to monitor and ensure that correctional officers were making reasonable modifications to disciplinary rules while in the Bravo Unit to take into account D.C.'s disabilities and the limitations they imposed;



- i) By the failure of the Defendant DOC's contracted medical provider to provide meaningful access to therapeutic services while D.C. was in DOC custody;
  - j) By Defendant DOC subjecting D.C. to punitive measures including locking him in his cell, taking away television access and access to common areas, and issuing him DRs for minor issues that were manifestations of his mental illness and concurrent physical disabilities.
86. As a direct result of the discriminatory actions of the Defendants AHS, DMH and DOC, D.C. suffered significant pain and suffering.
87. As a result, Defendants AHS, DOC and DMH have caused D.C. serious irreparable harm, and there exists a cognizable danger that this harm will be repeated if D.C. is returned to DOC facilities in the future.

#### **CLAIMS FOR RELIEF**

Wherefore, the Vermont Human Rights Commission respectfully requests that this Court:

88. Issue a judgment that the actions of Defendants described herein are unlawful and violate D.C.'s rights under the Vermont Fair Housing and Public Accommodations Act as well as the VHRC's public interest in a society that is free from discrimination.
89. Award D.C. damages adequate to compensate him for the pain and suffering, including emotional distress and loss of dignity stemming from the violations of his rights as stated in this Complaint as permitted by 9 V.S.A. §4553(6)(A)(iii);
90. Grant the VHRC reasonable attorney fees and costs pursuant to 9 V.S.A. §4506(b);
91. Grant such other relief as the Court deems just and proper under the circumstances of this case.

Plaintiff demands a jury on all matters so triable.

Dated at Montpelier, Vermont, this 18<sup>th</sup> day of October 2016.

Vermont Human Rights Commission

By Karen L. Richards

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