

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of
ALBANY LAW SCHOOL, and DISABILITY
ADVOCATES, INC.,

Petitioners and Plaintiffs,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

Index No. 10371-08

Sackett, J.

-against-

THE NEW YORK STATE OFFICE OF MENTAL
RETARDATION AND DEVELOPMENTAL
DISABILITIES and DIANA JONES RITTER, in her
official Capacity as Commissioner of the New York State
Office of Mental Retardation and Developmental
Disabilities,

Respondents and Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS**

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Statement

This case is about the right of the petitioners to obtain the clinical records of individuals who are developmental disabled without regard to their ability to consent or without notifying or seeking the permission of their representative family members.

Facts

In order to understand the claim being made by the petitioners in this proceeding it will be helpful to identify the players and to review the relevant statutory history. The Office of Mental Retardation and Developmental Disabilities (OMRDD) provides services and in some cases residences to individuals with developmental disabilities. OMRDD is overseen by the New York State Commission on Quality of Care and Advocacy for Persons with Disabilities (CQC-APD). The Petitioners are parties to a contract with CQC-APD (Martinelli Exhibit C-4) funded by a federal grant to provide Protection and Advocacy services to individuals with developmental disabilities.

The history leading up to this contract began in 1975 the Developmentally Disabled Assistance and Bill of Rights Act, when Congress enacted a Developmental Disabilities Assistance and Bill of Rights Act P.L. 94-103 codified as 42 U.S.C.A. §§ 15001 et seq. This statute provided funding incentives to states that create community programs and services for persons with developmental disabilities. States receiving these federal funds were required to develop protection and advocacy (P & A) systems for individuals with developmental disabilities (PADD). PADD systems provide information and legal assistance to eligible individuals. PADD systems also have the

authority to investigate incidents of abuse and neglect of individuals if a complaint is received by them or if they have probable cause to believe that the incidents occurred (42 U.S.C.A. 15043).

(CQC-APD) is an oversight agency within the Executive Department of the State of New York. It has a broad mandate to review the organization and operations of the Department of Mental Hygiene, including OMRDD and to oversee the reporting procedures pertaining to allegations of child abuse among other responsibilities. (Lynch 4-5)¹ At all times since its establishment, CQC-APD has had broad and unrestricted access to mental hygiene facilities and to the books and records of those facilities, as necessary to perform its functions (see Chapter 655, Laws of 1977 and Mental Hygiene Law Article 45 and Lynch 5).

In order to qualify for the federal funds available under the Developmental Disabilities Assistance and Bill of Rights Act, the State of New York designated CQC-APD as the system for providing Protection and Advocacy services² required by the federal legislation. CQC-APD, in turn, entered into and administers a series of contracts with entities like the petitioners to perform P&A services in various regions of the State. (Lynch 5).

¹ Citations to affidavits appear as the name of the person making the affidavit and the paragraphs to which the citation is made. This citation is to the affidavit of Jane Lynch at paragraphs 4 and 5.

² "PADD" systems

Federal law did not address access to records by the PADD systems until the Developmental Disabilities Assistance and Bill of Rights Act (DD Act) of 1984, P.L. 98-527. The law provided that the PADD system be authorized to obtain access to the records of persons with developmental disabilities living in facilities if (a) a complaint has been received by the system from or on behalf of the person, and (b) such person does not have a legal guardian or the state is the person's legal guardian. This conditional access requirement is much more restrictive than the rights that CQC-APD already had. This requirement for records access did not immediately apply to states, such as New York, that had laws prohibiting such access to records, but instead gave states until 1986 to come into compliance.

With the new federal requirement that PADD systems be granted access to records as provided by the DD Act, the New York Mental Hygiene Law was amended by Chapter 184, Laws of 1986, to authorize the PADD systems to access records "as provided for by federal law" (see generally, Mental Hygiene Law sections 33.13 (c)(4) and 45.09 (b)).

CQC-APD entered into a contract with Albany Law School and Disability Advocates Inc. (DAI) as a subcontractor (Martinelli Exhibit C-4). That contract provides at Appendix A-1, Agency-Specific Clauses:

"WHEREAS the STATE has been designated as the agency for administration of a system to protect and advocate the rights of persons

with developmental disabilities pursuant to the provisions of Title I, Section 141 of Pub. L106-402 et seq., the Developmental Disabilities Assistance and Bill Of Rights Act of 2000, and any amendments thereto, hereinafter referred to as the 'ACT', and

WHEREAS the CONTRACTOR has submitted an application to the STATE, hereinafter referred to as Appendix D, Program Work Plan, for Federal funding under the aforesaid ACT,..."

The contract goes on to provide at paragraph 4:

"With the exception of information and referral services, all services to be provided under this AGREEMENT will be limited to services to, or for the benefit of, clients who possess a developmental disability which substantially comports with the term as defined by Pub. L106-402,..."

APPENDIX D-WORK PLAN is captioned:

"Civil Rights and Disabilities Law Clinic of Albany Law School
RFP 08/01
PADD Program Grant Application
July 1, 2008-June 30, 2013"

At page 6 of Appendix D the contract provides:

"CRDLC [Albany Law School] and DAI will continue to dedicate the necessary attorney, faculty, administrative, and law student resources to address problems related to the rights of persons with developmental disabilities **to fulfill the obligations under the PADD grant...**"
(emphasis added).

The contract does not contain any provision delegating to the petitioners the broad authority that CQC-APD has to obtain records of individuals residing with OMRDD, nor does it contain any provision authorizing the petitioners to obtain records other than as provided in the federal statute (42 USC §15043), and it certainly does not contain any provision authorizing the petitioners to obtain records simply by demanding them. (Lynch 8)

More than 125,000 individuals with developmental disabilities receive some level of supports and services through OMRDD's network of nonprofit providers and its State-operated programs. OMRDD operates at the regional level through its 13 Developmental Services Offices ("DDSOs"). OMRDD provides an array of services including residential services, although approximately 63,000 individuals with disabilities receive services through the OMRDD network of services while living at home with family, other caregivers or independently. (Martinelli 7)

A number of individuals with disabilities reside at several types of facilities operated by OMRDD. The "facilities" defined by Mental Hygiene Law § 1.03 include Individual Residential Alternatives, community residences known as "group homes" and Intermediate Care Facilities for persons with Mental Retardation (ICFs/MR), including campus based ICFs/MR (known as developmental centers) like the two at issue in this proceeding. (Martinelli 10) Beginning in the late 1970s and early 1980s the number of individuals living in developmental centers has decreased significantly from approximately 28,000 to 1,528 today (including those living in secure forensic units). At this point there are only approximately 458 individuals living in general population in developmental centers. (Martinelli 29) With the exception of individuals living in the forensic unit at Taconic, all of the individuals residing at the two facilities at issue in this proceeding reside there voluntarily. They cannot be retained against their will. If they wish, they can leave at any time. (Martinelli 9).

The significant reduction in the number of individuals living in institutions over the years is due to a policy of "de-institutionalization" and initiatives such as NY CARES which provides individuals with community-based residential support and services. In addition, beginning in June 2007 Diana Jones Ritter, the Commissioner of OMRDD, named as a respondent in this proceeding, has undertaken a program called "Community Placement Process" under which every individual remaining in developmental centers has been assessed for readiness to live in the community (including all individuals residing at the two facilities which are the subject of this proceeding). The "readiness standard" used in this process was proposed by the petitioners in this proceeding. Individuals who met the readiness standard have been placed in community residences where available (reducing the population from 524 in June 2007 to approximately 458 at the present). Where community residences were not available, planning has been undertaken to locate or develop community residences, and for those individuals who have not yet met the readiness standard, treatment with regular follow-up has been focused on acquiring skills needed in order to meet the standard. (Martinelli 29-37, 39)

Despite the severe fiscal crisis that New York State faces, the 2008-2009 budget supported the capital funding and the 2009-2010 Executive Budget Recommendations provide the operating funding to support the development, over three years, of a total of 141 State-operated and 225 voluntary-operated community residential opportunities for developmental center rundown, as well as the development of a total of 24 State-

operated community residential opportunities for individuals in special units each year, for a total of 72 over three years. (Martinelli 38).

At the O.D. Heck Developmental Center, the campus based ICF/MR operated by the Capital District DDSO, 6 individuals have been placed since the Community Placement Process was instituted, and placements have been identified for at least an additional 10 individuals. OMRDD has now closed the adolescent unit by the end of March 2009. (Martinelli 40)

At the Taconic Developmental Center, since the Community Placement Process began, 21 individuals are now in community placements, including six accomplished by converting a residence on the developmental center campus from a campus operation to a community-based home. OMRDD plans to close all of the units of the Taconic Developmental Center campus except the forensic unit in the next five years. The 2009-2010 Executive Budget Recommendation provides capital support for the development of 65 State-operated community residential opportunities needed to close the Multiply Disabled Unit (MDU) on the Taconic campus. (Martinelli 41) Throughout this process, OMRDD has kept the petitioners involved and informed. (Martinelli 42)

Pursuant to law and practice, clinical records must be retained on every individual who resides in a facility operated by OMRDD or a provider agency. These records span the individual's entire time with the OMRDD network and contain care and treatment plans; details concerning behavioral issues and familial relationships; medical diagnoses and treatment; information concerning sexual matters, criminal histories, details about eating, grooming and even records on bowel movements. They are personal and sensitive, and the law is highly protective of them. MHL § 33.13 requires

that clinical records be maintained in confidence, with limited exceptions for disclosure to enumerated individuals and entities. Likewise, the federal HIPAA privacy Rule limits the use of protected health information, including clinical information. Such information may not be disclosed unless, for example, disclosure is mandated by federal or State law. (Martinelli 11)

Individuals residing at the two facilities at issue in this proceeding have varying degrees of authority to consent to access of their clinical records. Some of them do not have the ability to consent and do not have a legal representative with the authority to consent. OMRDD has provided their records to the petitioners despite the absence of the statutorily required probable cause or complaint. (Martinelli 79) Some individuals do have the ability to consent to the disclosure of their records. Two of them are reside at the Capital District DDSO and 39 of them reside at Taconic. (Martinelli 13) OMRDD has identified them and instructed the petitioners to obtain their consent before their records will be released. A third group does not have the ability to consent; but does have either legal guardians or involved family members who make decisions on their behalf pursuant to OMRDD's rules and regulations. OMRDD has identified them to the petitioners as well, has provided their contact information and has instructed the petitioners to obtain their consent before their records will be released. (Martinelli 16-24)

This proceeding arose because the petitioners demanded the clinical records of all OMRDD's consumers without notice to them and without regard for their capacity to consent to the disclosure of their records. (Petition 49-50) In this proceeding the petitioners assert that "The clinical records must be produced upon request. No further

showing is required." (Petition 21) The petitioners claim that they are investigating OMRDD's discharge practices (Petition 48, Monthie 35). Noticeably absent from the petition are any factual allegations, even including dates. Counsel for OMRDD has inquired and found no record of any investigation. (Martinelli 45, 49-50, 55)

The petitioners also allege that they have "concluded, in their professional judgment, that there was probable cause to suspect abuse and/or neglect of individuals residing at these facilities. This abuse and neglect includes both the denial of rights to live in less restrictive settings and the failure to provide necessary treatment that would prepare and enable individuals with disabilities to live in such settings." (Petition 49, 76) The petition is completely devoid of any factual allegations that would support this conclusion and disregards the fact that these residents are voluntary. (Martinelli 9) The affidavits of Jennifer Monthie and Bridget Burke likewise make similar conclusory allegations. (Monthie 20, Burke 11-12) The reason for the absence of factual allegations in the petition is clear. The petitioners' claim is false. In fact, since June 2007, all of the residents in the developmental centers have been assessed for readiness to live in the community. (Martinelli 34) The readiness standard used by OMRDD was the one recommended by the petitioners. (Martinelli 35) The process of moving individuals into community residences can take several years as opportunities are developed or in some cases built. (Martinelli 36-41, 48) OMRDD has communicated all of this to the petitioners on an ongoing basis. (Martinelli 42) The staff at all DDSOs have been trained in the community placement process. (Martinelli 53) In fact, OMRDD is closing units at this very time. (Martinelli 56)

During discussions with the petitioners prior to the commencement of this proceeding and in preparation for responding to it once it was, counsel for OMRDD checked with counsel for CQC-APD and learned that that agency which entered contracts with the petitioners agreed with the position of the respondents in this proceeding. (Martinelli 70, Lynch 6-10) In addition, Parent to Parent, an organization of parents who have developmentally disabled children disagrees with the petitioners and opposes providing them access without authorizations to the clinical records of their children. (Affidavit of Janice Fitzgerald) Finally, the Self-Advocacy Association of New York State, a not-for-profit organization broadened by and for people with developmental disabilities, whose motto is "Nothing About Us Without Us" disagrees with the petitioners and opposes their attempt to obtain individuals' clinical records without their consent. (Affidavit of David Liscomb)

Statutes Involved

42 USC §1983

42 USC §15043

Mental Hygiene Law §§33.13, 33.16, 45.07 and 45.09

Point 1

State law does not give the petitioners any greater rights than they have under federal law.

Any analysis of the petitioner's authority must start with an analysis of its source. In this case that is the contract between the State of New York, represented by CQC-APD and Albany Law School with DAI as a subcontractor for the period July 1, 2008 to June 30, 2013 (Martinelli Exhibit C-4)⁴. In the absence of this contract the petitioners have no authority to oversee OMRDD or to advocate on behalf of individuals with developmental disabilities. Appendix A-1 makes specific reference to the designation of CQC-APD as the agency for administration of a system to protect and advocate the rights of persons with developmental disabilities pursuant to Pub. L106-402 et seq. and goes on to say that the contractor has submitted an application to the state for federal funding under that act.

Appendix D, the Program Work Plan, is the portion submitted by the petitioners stating what they intend to do for the money. While Appendix D. is not terribly specific, the petitioners do say that their services are "... to fulfill the obligations under the PADD grant..." (page 6). "One staff attorney is assigned primary responsibility for providing services under the PADD program. The executive director and other staff attorneys may provide consultation in support for PADD activities." (page 9) "Individuals or

⁴ This is the only contract that involves provision of Protection & Advocacy services to individuals with developmental disabilities. Because DAI would not agree that this is the only relevant contract, copies of its other contracts with CQC-APD under other federal programs for: Protection & Advocacy for Individuals with Mental Illness (both within the Hudson Valley and as a statewide back up), the Client Assistance Program, Protection & Advocacy of Individual Rights and Protection & Advocacy for Beneficiaries of Social Security are provided as exhibits. A review of each of them discloses that they are each for a different federal grant providing various services under different federal statutes. Not a word in any of them confers upon the petitioners the right to obtain clinical records of individuals with developmental disabilities.

agencies seeking assistance under the PADD program will initially contact DAI. The staff attorney assigned to the PADD grant will insure that all requests for assistance are handled in a prompt and professional manner." (page 10) "CRDLC [Albany Law School] will accept cases and develop community education and training programs based on PADD priorities..." (page 11)

The contract does not mention Mental Hygiene Law §§ 33.13 or 45.09. It does not contain any delegation by CQC-APD of its authority other than that contained in the federal PADD program. It does not contain any provisions with respect to obtaining clinical records, and it certainly does not provide that the petitioners should be given the clinical records of individuals simply on demand. Yet this is what the petitioners claim. They assert in this proceeding that because they have been engaged under this contract their authority to access records is equivalent to the authority held by the New York State Commission on Quality Care and Advocacy for Persons with Disabilities ("CQC-APD") and that, therefore, they can access records without any showing of probable cause and without any need to obtain consent.

The authority of P & A contractors to access records is set forth in Mental Hygiene Law §§ 45.09 (b) and 33.13 (c) (4). Section 45.09 (b) provides:

Pursuant to the authority of the commission to administer the protection and advocacy system *as provided for by federal law*, any agency or person within or under contract with the commission which provides protection and advocacy services must be granted access at any and all times to any facility, or part thereof, serving a person with a disability operated or licensed by any office or agency of the state, and to all books, records and data pertaining to any such facilities upon receipt of a complaint by or on behalf of a person with a disability...

(Emphasis added.)

Section 33.13 (c) (4) provides one of the exceptions to the general rule set forth in MHL § 33.13 that clinical records be kept confidential. The exception initially provided that only CQC-APD would have access to those records. Chapter 184 of the Laws of 1986 amended 33.13 (c) (4) to add “or any person or agency under contract with the commission which provides protection and advocacy services pursuant to the authorization of the commission to administer the protection and advocacy system as *provided by federal law.*” (Emphasis added.)

The rules of statutory construction are clear. Courts shall not look to extraneous sources to interpret a statute when its meaning is clear on its face. “[T]he court cannot, through construction, enact an intent the Legislature totally failed to express, and the courts may not read into a law any word or provision unless good grounds appear for thinking that the lawmakers intended to include something which they have failed to plainly express.” Statutes § 92; *Archer v. Equitable Life Assurance Soc.*, 218 N.Y. 18 (1916). These two sections are clear on their face that the authority provided to the protection and advocacy contractors would be only as broad as that provided by federal law. Rather than reiterate the detailed provisions of the Developmental Disabilities Assistance and Bill of Rights Act, the New York State Legislature instead referenced the federal law and indicated its intention that the P & A contractors would operate in accordance with those federal law provisions. Even the placement of the phrase “as provided for by federal law” supports this unambiguous reading, as, in both 45.09 (b) and 33.13 (c) (4), it is modifying the “authorization” of the P & A contractor.

The Legislative Intent Supports Interpreting State Law as Merely Mirroring Federal Law on P & A Contractors' Authority to Access Records.

If there is doubt as to the meaning of a statute, courts look to legislative intent.

"As a general rule, the legislative intent with which statutes are enacted is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and from the objects and remedy in view.... a statute directed against known and stated evils is not to be stretched to cover situations having no known or reasonable relation to those evils." Statutes § 95; *Metropolitan Life Ins. Co. v. Durkin*, 301 N.Y. 376 (1950). In this case the "evil" the Legislature sought to remedy was the possibility of losing a source of federal funds. An examination of the circumstances leading up to the enactment of Chapter 184 of the Laws of 1986, which enacted both of the relevant sections of State law, fully supports Respondents' interpretation of P & A's authority concerning records access.

In 1980, in accordance with 42 U.S.C.A. §15044, the Commission on Quality Care, (now CQC-APD) was designated by the State as its independent agency to oversee New York's PADD system and was authorized to contract with private, not for profit agencies for the provision of protection and advocacy services. Mental Hygiene Law § 45.07 (h) (i) CQC was already an oversight agency at that time charged with, among other things, ensuring the quality of care in mental hygiene facilities operated or certified by what was then the Department of Mental Hygiene and later became the Office of Mental Health and the Office of Mental Retardation and Developmental Disabilities. Mental Hygiene Law § 45.07. The creation of CQC was intended to bolster and centralize the oversight which had been provided historically by Boards of Visitors at the Department of Mental Hygiene's psychiatric and developmental centers. Since its

inception, which was separate and distinct from any responsibility it had assigned to it two years later to implement the PADD system, CQC-APD has had broad and unrestricted access to mental hygiene facilities, and to the books and records of such facilities, as necessary to perform its functions. This history is more fully set forth in the affidavit of Jane G. Lynch, Chief Operating Officer of CQC-APD.

In 1984, Congress amended the Developmental Disabilities Assistance and Bill of Rights Act (DD Act) P.L. 98-527. This is the first time that the DD Act addressed the issue of records access. At the time, the DD Act did not recognize that there were individuals who could provide consent to disclosure of their own records or that there were others besides guardians who could consent on behalf of an individual, but it did state that probable cause was a condition precedent to access records and that only the records of those without guardians could then be accessed. What is relevant to this history is that this particular amendment went on to state that:

Prior to October 1, 1986, the provisions of paragraph (2) (D) of subsection (a) shall not apply to any State in which the laws of the State prohibit the system required under such subsection from obtaining access to the records of a person with developmental disabilities under the conditions described in such paragraph.

Public Law 98-527, § 142 (b).

In March, 1985, Governor Cuomo signed and provided to the federal government an "Assurance by the State of New York for the Protection of Rights and Advocacy for Persons with Developmental Disabilities." In that Assurance, he made reference to the Developmental Disabilities Act of 1984 requirement that assurances be provided and indicated, in relevant part, that CQC has the powers it requires to access the records of persons with developmental disabilities residing in State-operated and licensed mental

hygiene programs. He then stated: "Further clarification, including legislative amendments, will be sought to ensure access by the Protection and Advocacy Program contract agencies *consistent with the requirements of Public Law 98-527*. (Emphasis added.)

Subsequently, legislation was proposed to add 45.09(b) and amend 33.13 (c) (4) to add P & A contractors. The sponsor's memorandum in support of the legislation stated that the purpose of the legislation was "ensure compliance by New York State with the Developmental Disabilities Act of 1984." The memo goes on to explain that existing law did not provide the Commission with authority to delegate to P & A contractors the authority they needed to access clinical records. It further explained that the 1984 amendment to the DD Act required each state to ensure that the program has access to records of developmentally disabled persons living in residential programs, and that the Governor had submitted an assurance to the US Department of Health and Human Services that New York State's law would be amended "to ensure access to the required records by the Protection and Advocacy agencies under contract with the Commission." The sponsor's memo provided that:

Without authorizing access to records by the Commission's contract agencies, New York would not be in full compliance with the federal law governing the operations of the Protection and Advocacy Program, and thus jeopardizing continued federal funding to the Commission estimated at \$871,000 for federal fiscal year 1986. In addition, the approximately \$3.5 million in federal funds to the Developmental Disabilities Planning Council for federal fiscal year 1986 may be jeopardized also since Public Law 98-527 makes funding to the Planning Council contingent upon the establishment and operation of the Protection and Advocacy Program.

The clear import of the legislative history leading up to the enactment of Chapter 184 of the Laws of 1986 was to bring New York State into compliance with federal law relating

to PADD contractors' access to clinical records and to thus continue to qualify for federal funds. Nothing in the sponsor's memo or the history leading up to the enactment of Chapter 184 suggest that there was any intention of giving P & A contractors broader rights than *provided by federal law*.

CQC-APD's Interpretation of P & A Contractors' Records Access Authority Should be Given Great Weight by this Court.

The Affidavit of Jane G. Lynch, which has been submitted in support of Respondents' Motion to Dismiss should be given great weight by this court in deciding this issue. McKinney's Statutes provides:

Judicial construction of an ambiguous statute is often aided by the way the statute is interpreted by those administering it, and a long continued course of action by executive or administrative officers may be entitled to great weight unless manifestly wrong. Courts will generally accept such interpretation if it is found to have a rational and reasonable basis. *It is otherwise stated that where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited; and the administrative determination as to construction of a statute is to be accepted by the court if it has warrant in the record and a reasonable basis in law, and judicial function is exhausted, where there is found to be a rational basis for the conclusions approved by the administrative body.*

Statutes 129; see e.g. *Mabb v. Toia*, 64 A.D.2d 831 (4th Dept. 1978), *aff'd* on op of App. Div. 48 N.Y.2d 928 (1979)

As set forth in the Lynch affidavit, CQC-APD is the agency charged with administering New York State's PADD system and interpreting State and federal law which establishes it. Her affidavit is clear that CQC-APD does not agree with Petitioners' interpretation, but rather supports Respondents'. Moreover, as noted in the

affirmation of Patricia Martinelli, OMRDD Counsel consulted with CQC-APD before rendering a determination on this issue, and was advised by CQC-APD's Counsel that its P & A contractors had only that authority to obtain records that the DD Act provided.

All the applicable sections of law must be harmonized and can be under Respondents' argument.

In addition to arguing that both 33.13 (c) (4) and 45.09 (b) eliminate the need for them to obtain permission to access records, Petitioners read 33.13 (c) (4) as saying they can access the clinical records of each and every individual in a facility regardless of whether a complaint has been filed or probable cause established. Section 45.09 (b) just talks in terms of the filing of a complaint, not probable cause. If Petitioners want to take the Mental Hygiene Law as being comprehensive in its scope, rather than intending to reference back to federal law, then they can only get access to records upon complaint, not upon any other basis. They then compare their reading of § 33.13 (c) (4) to § 45.09 (b) which they concede requires a complaint as a triggering event. However, Petitioners make no attempt to reconcile the apparent inconsistency of these two sections. In effect, Petitioners are rendering the language which requires a complaint in § 45.09 meaningless, by suggesting they can just use § 33.13 (c) (4) as an alternative, which despite the language "... as provided for by federal law", authorizes them to obtain clinical records with no reason whatsoever.

Statutes § 98 provides in part "... [I]f possible, all parts of an enactment shall be harmonized with each other as well as with the general intent of the whole enactment, and meaning and effect given to all provisions in the statute." The flaw in Petitioners' reliance on § 33.13 (c) (4) to circumvent the requirement that a complaint be filed is that

it fails to recognize the different purposes of the two sections and how they complement each other. They make no effort to harmonize the sections so that all provisions have meaning. These sections are not contradictory, but make sense when considered in broader context. Mental Hygiene Law section 33.13 applies to confidentiality of clinical records and then provides limited exceptions under which those records can be released. It is not the section that grants CQC-APD or its contractors its powers – it is the section that merely lists the exceptions to the general rule about confidentiality, making reference to the various instances in which disclosure can be made with enough specificity so the reader can know to which entity, with which authority, the exception applies.

In contrast, § 45.09 is the section that sets forth CQC-APD's powers and those of its contractors – subsection (a), the former, and (b) the latter. As such, it applies to all records of the facilities, while 33.13 (c) (4) applies only to clinical records since its concern is their confidentiality. In addition, § 45.09 (b), which governs P & A contractors, applies in settings other than OMRDD operated or provider operated facilities, extending, instead, for instance, to nursing homes where individuals with developmental disabilities reside. As the subsection which addresses the P & A contractors' powers, 45.09 (b) provides more of the detail concerning access and makes reference to the need for a complaint. At the same time, as mentioned above, it doesn't reiterate the entire DD Act, but instead says: "...as provided for by federal law...."

The Two Memoranda upon which Petitioners Rely were Part of the Bill Jacket of Chapter 184 of the Laws of 1986 and do not Justify Interpreting State law as Expanding upon P & A Contractors' Powers.

Despite the unambiguous language of MHL §§ 33.13 (c) (4) and 45.09 (b) and the legislative history which clearly supports that unambiguous interpretation, Petitioners maintain that the New York State Legislature intended to make P & A contractors the equivalents of CQC-APD rather than just bring New York law into compliance with the DD Act. Their entire legal argument is based upon two memoranda to the Governor when Chapter 184 was before him for consideration. The first is from Paul Stavis, then the Counsel to CQC-APD, and the second from Paul Kietzman, who was then Counsel to OMRDD. Petitioners are reading more significance into some general verbiage of the Stavis memorandum than was intended. First, Mr. Stavis provides the same explanation as was contained in sponsor's memorandum: that "this bill was submitted to the Legislature to ensure that the State of New York is in compliance with the Developmental Disabilities Act of 1984...." He makes reference to and attaches Governor Cuomo's letter of Assurance and also talks about the funding that was at stake.

Petitioners make much of the one sentence in the memo which states, "[S]ection one of the bill will enable the agencies under contract with the Commission as part of this protection and advocacy program, to obtain access to mental hygiene residential facilities and client records allowed to the Commission itself under current law." However, the sentence does not say, "to the *same* client records allowed *under the same circumstances* to the Commission itself under current law."

The second memorandum is from OMRDD's own Counsel at that time, Paul Kietzman, recommending disapproval of the bill. His argument was that CQC's oversight was ample and that P & A contractors did not need to be given records access. He does argue that the bill would allow access without the need for a complaint and without the need for permission from legal guardians, for instance. This memorandum was not before the members of the Legislature when they voted on this legislation and therefore cannot be considered evidence of what they intended. Statutes § 120 Case law is clear that a memorandum submitted to the Governor presenting a particular view on legislation does not express the intention of the legislators who passed the bill. Mr. Kietzman may not have fully understood what was being proposed or perhaps was merely presenting a worst case scenario in order to defeat legislation which OMRDD preferred not being passed. While the memorandum may have some embarrassment value at this point it has virtually no value when it comes to statutory interpretation. In *Majewski v. Broadalbin-Perth CSD* 91 N.Y.2D 577 (1998) the Court of Appeals discussed a number of things which were offered as aids to interpret the meaning of a statute amending the Worker's Compensation Law. The Court stated that statements of legislators during floor debates were not reliable guides to the meaning of a statute. They simply showed that different people held different views. The Court applied the same reasoning to post enactment memoranda by the Governor and with respect to memoranda submitted by agencies stated:

"Under the circumstances, little weight should be accorded to the postpassage opinions of the Department of Insurance and the Workers' Compensation Board concerning the reach of the legislation (see, Mem of Workers' Compensation Board, Susan Gravlich, Secretary, dated Aug. 8, 1996, Bill Jacket, L 1996, ch 635, at 2; Letter of Department of Insurance,

Edward Muhl, Superintendent, dated Aug. 9, 1996, Bill Jacket, L 1996, ch 635, at 8).” *Majewski v. Broadalbin-Perth CSD* 91 N.Y.2D 587 n.2 (1998)

In addition, OMRDD cannot be estopped from taking the legal position it has now taken because there is no estoppel against the state. *Schorr v. New York City Department of Housing Preservation and Development* 10 N.Y.3d 776 (2008); *Greene County Department of Social Services v Ward* 8 N.Y.3d 1007 (2007). In any event, the vast weight of the evidence supports Respondents’ interpretation of §§ 33.13 (c) (4) and 45.09 (b). In addition there is absolutely no case authority supporting the petitioner’s claim that they are entitled to obtain the clinical records of individuals on demand, or for that matter under any circumstances other than those contained in the federal statute, 42 U.S.C. § 15043.

Point 2

The petitioners have not met the standard for obtaining clinical records under federal law.

While there is no dispute that the petitioners have a right of access to OMRDD’s facilities and to the individuals who reside there, the situation is significantly different with respect to obtaining clinical records. The leading case on this issue, *Connecticut Office of Protection and Advocacy for Persons with Disabilities et. al. v. Hartford Board of Education, et. al.* 464 F.3d 229 (2nd Cir. 2006) compares and contrasts these two rights of Protection & Advocacy agencies. There the Second Circuit held that the P&A agency had a free right of access to the facility and the individuals with developmental

disabilities in it based upon the differences in statutory language between the access provision and the access to records provision. In speaking about statutory construction the court said:

“Contrary to the access provisions, PAIMI and the DD Act are very explicit about what type of authorization is required for a P&A system to view an individual's records: they detail from whom a P&A system must have authority to access records and when prior consent is necessary. See 42 U.S.C. §§ 15043(a)(2)(I), 10805(a)(4). That Congress provided explicit and detailed authorization provisions with respect to an individual's records but did not do so with respect to a P&A system's right to access a facility suggests that it did not intend to require a P&A system to obtain authorization prior to visiting a facility to observe conditions or interact with the individuals receiving services in that facility. See *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (quotation marks and citation omitted; alteration in original)); see also *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 2412, 165 L. Ed. 2d 345 (2006) (explaining that where Congress uses different words, it is presumed that Congress intended the different words to make a legal difference). *Connecticut Office of Protection and Advocacy for Persons with Disabilities et. al. v. Hartford Board of Education, et. al.* 464 F.3d 229, 243 (2nd Cir. 2006)

The provisions in federal law related to PADD access provide that the PADD systems shall:

42 USC 15043

- (I) have access to all records of –
 - (i) any individual with a developmental disability who is a client of the system if such individual, or the legal guardian, conservator, or other legal representative of such individual, has authorized the system to have such access;
 - (ii) any individual with a developmental disability, in a situation in which—
 - (I) the individual, by reason of such individual's mental or physical condition, is unable to authorize the system to have such access;
 - (II) the individual does not have a legal guardian, conservator, or other legal representative, or the legal guardian of the individual is the State; and

- (III) a complaint has been received by the system about the individual with regard to the status or treatment of the individual or, as a result of monitoring or other activities, there is probable cause to believe that such individual has been subject to abuse or neglect; and
- (iii) any individual with developmental disability, in a situation in which—
 - (I) the individual has a legal guardian, conservator, or other legal representative;
 - (II) a complaint has been received by the system about the individual with regard to the status or treatment of the individual, or as a result of monitoring or other activities, there is probable cause to believe that such individual has been subject to abuse or neglect;
 - (III) such representative has been contacted by such system, upon receipt of the name and address of such representative;
 - (IV) such system has offered assistance to such representative to resolve the situation; and
 - (V) such representative has failed or refused to act on behalf of the individual;
- (J) (i) have access to the records of individuals described in subparagraphs (B) and (I), and other records that are relevant to conducting an investigation, under the circumstances described in those subparagraphs, not later than 3 business days after the system makes a written request for the records involved; and
 - (ii) have immediate access, not later than 24 hours after the system makes such a request, to records without consent from any party, in a situation in which services, supports, and other assistance are provided to an individual with developmental disability—
 - (I) if the system determines there is probable cause to believe that the health or safety of an individual is in serious and immediate jeopardy; or
 - (II) in any case of death of an individual with a developmental disability.

In enacting the DD Act, Congress was very sensitive to the rights of individuals and their families to keep clinical records private and solicitous of the right of those who can advocate for themselves. In balancing those rights against the need for oversight of

the care and treatment of individuals with developmental disabilities, Congress concluded that PADD systems should only be allowed to trigger the records access provisions, in cases where the PADD had not obtained permission, if there is probable cause to believe there is abuse and neglect against an individual, and then only if the individual's whose records they seek to access lacks capacity to consent and has no representation. PADD systems can also access records of those with a representative who refuses to act when notified of the suspected abuse or neglect. Congress also provided an exception to the privacy safeguards when there is probable cause to believe that the health or safety of an individual is in serious and immediate jeopardy or in the case of death. Thus, the statute allows for the privacy concerns to be overridden, but only under certain extenuating circumstances. These records access provisions are in sharp contrast to the unfettered access which PADD systems have to the facilities themselves and to the individuals within them. This disparate treatment makes sense in light of the sensitive nature of the information contained in clinical records. (Martinelli 11) That same concern is reflected in the regulations promulgated under the act. In addition to the statute itself, the Office of Human Development Services within the United States Department of Health has promulgated regulations expounding upon and implementing the DD Act. 45 CFR 1386.⁵

In this case the petitioners have failed to meet the threshold requirements. Their petition does not allege that they received a complaint by or on behalf of an individual as required by the statute; rather it only sets forth conclusory allegations that they

⁵ These regulations were promulgated prior to the more recent amendment to the DD Act and are inconsistent with the Act in a number of ways, all of which appear to be irrelevant to this proceeding. There are some minor variations. For instance, the regulations expand somewhat on the types of activities conducted by a P & A system which might trigger a probable cause finding, § 1386.22 (a) (2) (iii), but that difference does not appear to be at play in this lawsuit.

received some unspecified information constituting a complaint that unidentified individuals with disabilities are unnecessarily institutionalized. (Petition 68) Their allegation of probable cause is equally insufficient. "Petitioners have determined that there is probable cause of abuse or neglect of these individuals." (Petition 76) The petitioners' only other allegation of probable cause alleges monitoring and representation of individual clients, without specificity, who were "deemed ready" by some unspecified person to live in a less restrictive environment; but were somehow deprived of the opportunity to live in such a setting. (Petition 49) Petitioners do not allege any facts which would explain how individuals who voluntarily reside at OMRDD facilities, who are presumably receiving adequate care and treatment, and for whom planning for community placement is on-going are being neglected. (Martinelli 9) Incredibly, paragraph 49 of the petition also alleges that in addition to being denied the right to live in a less restrictive setting, the "abuse and neglect" which their "professional judgment" led them to conclude existed involved failure to provide these individuals who were "deemed ready" the necessary treatment that would prepare and enable them to live in such settings. The supporting affidavits served with the petition are no better. They provide no names, no dates and no specific allegations of fact. In addition petitioners appear to be characterizing advocacy work they have done at these institutions in years past as "investigations" while never announcing any such investigation to OMRDD or its DDSOs. (Martinelli 45) Furthermore in view of the dramatic reduction over the years in the number of individuals residing in OMRDD's developmental centers, the Community Placement Process program and the fact that each individual has been assessed with follow-up since June 2007 for readiness to

reside elsewhere all of which is known to the petitioners, (Martinelli 29-42) it is difficult to understand how there could be probable cause to believe that individuals are being abused and neglected by OMRDD.

Worse, the petitioners claim that they are the "final arbiter of probable cause". (petition 30) Fortunately there is judicial review. In the case of *Iowa Protection and Advocacy Services v Gerald Treatment Programs*, 152 F. Supp. 2d 1150 (D.C. Iowa, 2001), where a P & A was seeking records access, under both PAIMI and the DD Act, following a death at a treatment center, the Iowa district court stated in a footnote, "while IPAS may be the 'final arbiter' of whether or not probable cause has been shown, the court does not believe that Gerald is barred from seeking judicial review of the sufficiency of the IPAS's probable cause for its expanded investigation." See also *Disability Law Center of Alaska, Inc. v. Anchorage School District* 2007 U.S. Dist. LEXIS 72300 (DC Alaska 2007). OMRDD has tried to follow this rationale, providing access to records where there was no representative and a list of names and addresses of representatives, but preserving for judicial review the issue of whether probable cause was actually established.

Even if this court were to find that there was a basis for a probable cause determination, that determination does not justify Petitioners gaining access to the records of each and every individual at both developmental centers. Developmental Disability Act provides that P & A agencies and contractors may access the records of *any individual* when as a result of monitoring or other activities; there is probable cause to believe that *such individual* has been subject to abuse or neglect. 42 USCA § 15043 (I) (ii) (III). By its express language, this would seem to suggest that Petitioners need to

establish probable cause separately for each and every individual and cannot make a sweeping probable cause declaration which allows for all the clinical records of an institution to be opened to it.

In Pennsylvania Protection and Advocacy v Royer-Greaves School for the Blind, 199 US Dist LEXIS 4609 (E.D.Pa. 1999), the P & A announced it was initiating an investigation of the Royer-Greaves School for the Blind based upon numerous complaint calls it had received of systemic neglect. It provided no details neither concerning the calls nor concerning the neglect. The court discussed how the statute provided for access to records on an individual basis, and said that the Petitioners had failed to provide details to justify probable cause as to any particular individual. The court did mention in a footnote that could envision a situation where “a P & A receives complaints of serious widespread abuse against numerous residents, or has probable cause to suspect that the health and safety of numerous residents is in serious and immediate jeopardy.” It went on to say that, even accepting all of plaintiff’s allegations as true, they fell well short of that standard. Similarly, in this matter, Petitioners’ allegations do not approach that standard.

This precise question was at issue in *Connecticut OPA v Hartford BOE, supra*. The Academy maintained that OPA had exceeded its statutory authority by seeking the names and addresses of all individuals that it needed probable cause to obtain the list, and that probable cause must be established on an individual basis. First, the court examined this from the perspective of the district court’s power to grant equitable injunctive relief. The court then turned to the OPA’s probable cause determination and examined it to see if it actually justified access to all individuals’ records, and found that

it did. That finding, however, was expressly based upon the fact that OPA had established that the Academy had received actual complaints and that those complaints were concerning a school-wide policy regarding inappropriate restraints and seclusion. The court reasoned that if it turned out that the school wide policy did exist and was being implemented as the complaints had alleged, each and every student was at risk of abuse.

Unlike *Connecticut OPA v Hartford BOE, supra*, Petitioners have cited to no institutional or agency wide policy which is keeping individuals in developmental centers. To the contrary, OMRDD has initiated a policy to facilitate their movement out of developmental centers and into the community. Nor have Petitioners pointed to the kind of troubling conditions – the use of aversive therapies - that were allegedly being used at the Academy. Respondents' exhaustive search of case law has failed to uncover one reported case in which the broad based access to clinical records and/or to the names and addresses of legal representatives of developmentally disabled individuals was based upon merely a P & A agency's dissatisfaction with the pace at which a State system was moving individuals out of institutional settings.

Finally, most of the vague allegations in Petitioners' affidavits regarding observations and complaints appear to relate back four and five years ago and have no relevance to any risk to any individual today. In *Disability Law Center of Alaska v Anchorage School District*, 2007 US Dist LEXIS 72300 (2007), the P & A sought the records of all students based upon alleged complaints concerning abuse by one special education teacher and his teaching assistant. The court rejected the probable cause determination on the basis that the teacher and aide would not be returning to the

school in the fall and therefore there was no risk to students. Similarly, any observations or complaints which Petitioners perceived in 2004 or 2005 are irrelevant to the current situation at these two developmental centers, especially in light of the Community Placement Process which has been instituted and the progress which has been made under it.

Involved family members are Legal Representatives within the Meaning of §15043 (I) (ii) (II) of the DD Act

Section 15043 (I) (ii) (II) provides that a P & A contractor may access an individual's clinical records if that individual is not capable of providing consent; has no legal guardian, conservator, or legal representative; and there is probable cause to believe that the individual whose records are sought has been subject to abuse or neglect. Petitioners take issue with Respondents' treating "involved family members," a defined term within OMRDD's statutory and regulatory system, as legal representatives. As set forth in the previous section, this court need not reach this issue if it finds that probable cause has not been established by Petitioners. If it does reach this issue, this court should determine "involved family members" to qualify as "legal representatives," because "involved family members" meet the federal criteria of broad-based powers and because divesting them of their role as primary decision makers and advocates for their relatives would cause a dramatic upheaval in OMRDD's service delivery system.

The regulations promulgated under the DD Act define "legal representative" as:

"...an individual appointed and regularly reviewed by a State court or agency empowered under State law to appoint and review such officers and having authority to make all decisions on behalf of individuals with developmental disabilities. It does not include persons acting only as a representative payee, person acting only to handle financial payments, attorneys or other persons

acting on behalf of an individual with developmental disabilities only in individual legal matters, or officials responsible for the provision of treatment or habilitation services to an individual with developmental disabilities or their designees.”
45 CFR 1386.19.

As explained in the affirmation of Patricia Martinelli, Capital and Taconic DDSOs provided Petitioners with the names and addresses of guardians and actively involved family members for those individuals who had such representatives and who lacked capacity to consent. “Actively involved” is defined in OMRDD regulations as having “significant and ongoing involvement in a person’s life so as to have sufficient knowledge of the person’s needs. 14 NYCRR 633.99. While the State has no formal appointing or reviewing process for designating family members as actively involved or as legal representatives, staff at facilities do consider the relationship between the individual and each family member and make a determination as to whether particular family members are actively involved and who amongst them is best suited to make decisions for the individual. The person is, in effect, designated, and the designation is noted in the facility’s records. As circumstances change, that designation is reviewed. These “actively involved family members” in OMRDD’s system have expansive powers, akin to those contemplated by the federal regulatory definition of “legal representatives.” The powers of “involved family members” are far greater than those of the excluded regulatory category – those with power of attorney or representative payees.

As a general rule, when an adult individual residing in an OMRDD operated or provider operated facility is not capable of consenting and does not have a court appointed guardian or conservator, there are a number of statutory and regulatory provisions that are available to provide parents and certain other family members with significant and broad authority to consent, object and make decisions on their behalf.

The critical issue in whether a family member has these powers is whether they are “actively involved.” Because OMRDD’s statutory and regulatory scheme grants these family members broad powers, only a small minority of family members in New York State actually seek guardianship. In New York State, conservators are no longer appointed for individuals who are incapacitated.

In OMRDD’s system of State and provider operated facilities, “actively involved” parents, spouses and adult children have authority to consent to placement and service planning on behalf of their adult relatives living in those facilities. 14 NYCRR 633.12. Because actively involved parents, spouses and adult children can consent to care and treatment, they are considered “qualified persons” within the meaning of Mental Hygiene Law 33.16 (a) (6); (b) (4). Pursuant to MHL § 33.16, “qualified persons” can have access to clinical records of their family members who reside in OMRDD operated or provider operated facilities, as do the individuals themselves and any legal guardians. Under MHL 33.13 (c) (7), actively involved parents, spouses and adult children, as qualified persons, can consent to the disclosure of the clinical records of those on whose behalf they act.

In addition, actively involved parents, spouses and adult children can make medical decisions on behalf of their adult relatives, 14 NYCRR 633.11, and, pursuant to recent legislative enactment, make end of life decisions for them. SCPA § 1750-b (1) (a). Actively involved parents, spouses and adult children can also object to service plans and challenge the plan in an administrative hearing. 14 NYCRR 633.12. Further, as qualified persons, actively involved parents, spouses and adult children are entitled to be notified of incidents and allegations of abuse and neglect involving their family

members, 14 NYCRR 624.6, and to get copies of otherwise confidential, internal investigative reports of those matters, 14 NYCRR 624.8.

While actively involved parents, spouses and adult children enjoy the broadest array of powers and fall within OMRDD's definition of "qualified persons," they are not the only relatives representing individuals with disabilities who reside in ORMDD operated or provider operated facilities. Most individuals who reside in these facilities do not have spouses or children, and, inevitably, their parents age and can no longer represent them. Consequently, many individuals are represented by siblings or other family members. In OMRDD's regulatory system, siblings and other family members have the same authority to make medical decisions, 14 NYCRR 633.11, and consent and object to service plans, 14 NYCRR 681.13; 633.12. Pursuant to statute, they also have the right to end of life decisions making. SCPA § 1750-b (1) (a). Therefore, involved siblings and other involved family members are also considered by OMRDD to be legal representatives within the meaning of the DD Act.

Petitioners argue that actively involved family members cannot qualify as legal representatives under the DD Act because they lack the authority to consent to the disclosure of clinical records. This is not the case. As noted above, those who are qualified persons under the Mental Hygiene Law have the ability to consent under MHL § 33.13 (c) (7). In addition, all involved family members would be considered personal representatives under the federal HIPAA Privacy Rule, 45 CFR Part 164, because they are authorized by New York's regulations, as set forth above, to make decisions related to the care and treatment of individuals in State or provider operated facilities. As such, they are entitled to access and may authorize disclosure of the clinical records of the

individuals they represent. The case of *Application of Bryant*, 105 NYS 2d 446 (Ct of Claims 1950), cited by Petitioners for the proposition that parents may not access or grant access to records was decided before the regulations relied upon by Respondent were promulgated and before the enactment of MHL § 33.16 and the federal HIPAA Privacy Act. The other case upon which they rely, *In the Matter of Derek*, 12 Misc 3d, 1132, (Surrogates Court 2006), is inapplicable to this case as it involved an individual who did not live in an OMRDD operated or provider operated facility. As such the regulatory scheme which governs records access in OMRDD operated and provider operated facilities and which provides parents and other involved family members with broad rights including the right to access records was inapplicable.

A decision by this court to the effect that actively involved family members are not legal representatives would be extremely disruptive to OMRDD's system of partnership with parents and other involved family members of adult individuals who are served in our system. See Parent to Parent affidavit.

In addition it is important that the court be fully cognizant of the scope of the relief that the Petitioners are seeking. The relief sought either under state or federal law is not limited to the developmental centers at the Capital District and Taconic Developmental Centers even though the dangers they claim they are seeking to protect and advocate against are institutionally based. In paragraphs 80 (b) of their petition, they seek records of all individuals residing at the Capital District and Taconic DDSO facilities, and in paragraph 80 (c) they seek a statewide policy pertaining to records of individuals at facilities operated by OMRDD across the State. "Facilities" is defined in the Mental Hygiene Law as being any place in which services for the mentally disabled

are provided, MHL § 1.03 (6), and include Intermediate Care Facilities – Mental Retardation (ICF/MR) both institutional and community based, Individual Residential Alternatives (IRAs), and community residences, known as “group homes.”

Consequently, if this relief were granted, Respondents would be obligated to promptly turn over to Petitioners, not only the records of the individuals at the developmental centers at the Capital District and Taconic DDSOs, but the clinical records of more than 5000 individuals who reside in over 1200 community residences in those two DDSOs.

Similarly, in paragraph 80 (d), Petitioners seek the records of those residing in the Capital District DDSO or the Taconic DDSO who have no “legal guardian, conservator, or other legal representative.” The reach of this paragraph could be even greater, since no reference is made to facilities at all and therefore, presumably the prayer for relief would include individuals with developmental disabilities who live independently or with family members or in other uncertified settings.

Point 3

In the Event That the Court Does Not Dismiss the Petition, Scandalous and Prejudicial Material Should Be Stricken from the Petition and the Petitioners Should Be Ordered to Serve an Amended Petition.

The petitioners allege that they are investigating the respondents' discharge practices (Petition 48) and that they have sought clinical records of individuals in connection with that investigation (Petition 50). Their entitlement to those records depends upon whether state or federal law gives them the access they seek and whether they have met the criteria contained in state and federal law triggering that access.

The respondents move pursuant to CPLR 3024 (b) to strike paragraphs 5-8, 12-18 and 23-24 of the petition as scandalous and prejudicial material which is irrelevant to the issues presented in this proceeding. In those paragraphs the petitioners allege conditions in the 19th century and 20th Century which were "rife with abuse, neglect and squalid conditions of confinement." (Petition 5). They make allegations about the now closed Willowbrook State School including "shocking mistreatment of its residents", "vile stench" and "crude way of life forced upon its residents" (Petition 6). They also allege "media reports and public outrage" in 1977 (Petition 7) and "inhumane and despicable conditions" (Petition 8).

Likewise, paragraphs 12-18 serve up more of the same and in addition include allegations about the death of Jonathan Carey which has been and is the subject of other criminal and civil litigation and on which the respondents are precluded from commenting by confidentiality requirements. None of these allegations have the slightest relevance to the respondents' discharge practices in 2008-2009. None of this would be admissible in evidence at trial. In addition at paragraphs 23-24 they make allegations about a letter written by a former counsel of OMRDD under a former administration with respect to his opinion about what the effect of proposed state legislation would be. Again, this would not be admissible in evidence at trial. Whatever opinions were offered at that time do not work an estoppel against the State here. *Schorr v. New York City Department of Housing Preservation and Development* 10 N.Y.3d 776 (2008); *Greene County Department of Social Services v Ward* 8 N.Y.3d 1007 (2007).

The Appellate Division Third Department has considered a motion to strike scandalous and prejudicial material in a case commenced by a man who was denied building permits. Among other things he alleged a meretricious relationship between the town supervisor and other defendants and alleged that the defendants had engaged in a series of wrongful acts as part of a conspiracy to cause him financial harm. The court described the allegations as a "rambling narrative of wrongdoing by defendants dating back to 1982..." none of which was relevant to the cause of action the plaintiff sought to assert. The Appellate Division affirmed the decision of Supreme Court to dismiss the complaint and direct the plaintiff to serve an amended complaint omitting the improper material. *Della Villa v. Constantino* 246 A.D.2d 867 (3rd Dept. 1998). In the present case the petitioners' allegations date back much farther than 1982. They allege events at Willowbrook in 1977 and conditions dating back to the 19th century. See also *Soumayah v. Minnelli* 41 A.D.3d 390,393 (1st Dept. 2007).

The Appellate Division Second Department shares the view that if matter is irrelevant and unnecessary to the cause of action it should be stricken.

"The respondents have incorporated in their verified answer and counterclaims references to collateral matters relative to the petitioners' corporate principals that are unrelated to the instant litigation. These matters should be stricken from the respondents' verified answer and counterclaims as both unnecessary to the viability of their counterclaims, and as prejudicial to the petitioners (see *Soumayah v Minnelli*, 41 AD3d 390, 393, 839 N.Y.S.2d 79; *Van Caloen v Poglinco*, 214 AD2d 555, 557, 625 N.Y.S.2d 245; *JC Mfg. v NPI Elec.*, 178 AD2d 505, 506, 577 N.Y.S.2d 145; *Wegman v Dairylea Coop.*, 50 AD2d 108, 111-112, 376 N.Y.S.2d 728; *Schachter v Massachusetts Protective Assn.*, 30 AD2d 540, 291 N.Y.S.2d 128)." *Plaza at Patterson, LLC v. Clover Lake Holdings, Inc.* 51 A.D.3D 931, 932 (2nd Dept. 2008).

See also *Kinzer v. Bederman* A.D. 3d 2009 NY Slip Op 1086; 2009 N.Y. App.

Div. LEXIS 1131 (2nd Dept. 2009) in which allegations unnecessary to sustain the viability of a dental malpractice claim and prejudicial to the defendants were stricken.

In the present case paragraphs 5-8, 12-18 and 23-24 are irrelevant to the issue of whether federal and state law authorize the relief the petitioners seek or whether the petitioners have met the criteria triggering access to the clinical records of individuals. They would not be admissible in evidence at a trial. They were included in the petition for the sole purpose of shock value and prejudice to the respondents. They are exactly the kind of allegations that CPLR 3024 (b) was written to address. The court should grant an order striking them and directing the petitioners to serve an amended petition without them.

Conclusion

The Petitioners Have Been Given the Names and Contact Information for Individuals Who Have the Capacity to Consent and for the Representatives of Individuals Who Do Not Have the Capacity to Consent. Before the Petitioners Are Given the Clinical Records of Those Individuals They Should Be Required to Obtain Their Consent. This Proceeding Should Be Dismissed with Prejudice and Costs.

Dated: Albany, New York
March 20, 2009

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