

NEW YORK STATE SUPREME COURT
COUNTY OF ALBANY

ALBANY LAW SCHOOL, and
DISABILITY ADVOCATES, INC.

Petitioners and Plaintiffs,

Index No. 10371-08
Sackett, J.

v.

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.

**PETITIONERS' MEMORANDUM OF LAW
IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS**

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Petitioners/Plaintiffs Albany Law School (“ALS”) and Disability Advocates, Inc. (“DAI”) (collectively, “Petitioners”) respectfully submit this memorandum of law in opposition to the motion to dismiss of Respondents/Defendants the New York State Office of Mental Retardation and Development Disabilities (“OMRDD”) and OMRDD Commissioner Diana Jones Ritter (“Commissioner Ritter”) (collectively, “Respondents”).

PRELIMINARY STATEMENT

Petitioners are Protection and Advocacy agencies with a statutory responsibility to investigate neglect and abuse of persons with developmental disabilities and to advocate and litigate on their behalf. In order to effectively protect the rights of their constituents, Petitioners must have access to the records of their treatment; and such access is unambiguously provided for under both New York State and federal law. Respondents have violated these clear statutory requirements by withholding from Petitioners the clinical records of individuals with disabilities who are in Respondents’ care. Respondents have now moved to dismiss the lawsuit brought to enforce Petitioners’ right of access to these essential records. Their motion is without merit and should be denied.

Petitioners’ right of access to the disputed materials under state law is clear from a straightforward reading of the relevant statutory provisions of the New York Mental Hygiene Law. Petitioners are agencies under contract with the New York State Commission on Quality of Care and Advocacy for Persons with Disabilities (“CQC-APD”), the agency designated by the state to administer the protection and advocacy system provided by federal law for persons with developmental disabilities. Mental Hygiene Law § 33.13 grants access to clinical records “to the commission on quality of care for the mentally disabled and 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 for by federal law.” Mental Hyg. Law § 33.13(c)(4) (Consol. 2008). Mental Hygiene Law § 45.09 similarly provides records access “to any agency or person within or under contract with the commission which provides protection and advocacy services . . . upon receipt of a complaint by or on behalf of a person with a disability.” It follows that Petitioners are entitled under state law to review the records of the individuals they have a duty to protect. That entitlement was in fact recognized by Respondent OMRDD and by the CQC-APD when the relevant statutory provisions were under consideration. Respondents and CQC-APD now attempt to disavow their prior statements acknowledging the statutes’ meaning. But the legislative intent to provide Petitioners with access to the records they seek is unmistakable.

Petitioners are also entitled to access to the same disputed records under federal law. Under 42 U.S.C. § 15043, a protection and advocacy agency is entitled to access to records where (1) it determines that it has probable cause to suspect abuse or neglect and (2) the person whose records it seeks does not have the capacity to consent to release of the records and has no “legal representative” as defined by federal law.

Petitioners have determined that there is probable cause to suspect abuse or neglect of persons in Respondents’ care. Contrary to Respondents’ view, under applicable law Petitioners are the ultimate arbiters of that determination. It is not subject to review. But even if it were, there would be no reason to doubt it – and certainly no reason to reject it at the pleading stage as Respondents suggest. As Petitioners’ affidavits attest, there is ample factual support for Petitioners’ finding of the probable cause required for records access.

Specifically, Petitioners have observed several cases where persons with disabilities, housed in OMRDD institutions, have for years been denied their legal rights to be

placed in less restrictive settings. Petitioners have also identified systemic deficiencies in Respondents' procedures and practices relating to the evaluation of institutional residents for community placement, and to the development of placements for residents who are ready for care in a less restrictive setting. In the course of discussions with Petitioners, and now in their motion papers, Respondents claim to have remedied some of these deficiencies. But their claims are either facially inaccurate or unsupported by detailed data. For example, Respondents' claim that OMRDD's current standard governing evaluations of residents for community placement is the same one recommended by Petitioners (and by implication that it conforms to applicable law) is false. In addition, despite repeated promises (the first nearly two years ago) that Petitioners would be provided reports showing case-by-case progress in community placement, Respondents have never provided any such detailed reports.

Respondents have also suggested that the disputed records need not be released under federal law because the individuals involved have "legal representatives." But these supposed "legal representatives" do not satisfy the requirements for such status under federal law: they are in fact simply family members of persons with disabilities, whom OMRDD has unilaterally, and without any formal proceedings, chosen to participate in certain decisions relating to care.

In short, Respondents' objections to the release of the disputed records, and their arguments in support of the current motion, are all unfounded; and the motion to dismiss should be denied.

STATEMENT OF FACTS

Disability Advocates, Inc., and the Civil Rights and Disabilities Law Clinic at Albany Law School ("CRDLC") have for decades been designated as Protection and Advocacy

agencies through their contracts with the CQC-APD. (Petition ¶ 37, 39-40). These contracts enable the Petitioners to pursue legal, administrative and other appropriate remedies to ensure the protection of individuals with disabilities who are or will be receiving care and treatment in New York State, including individuals in facilities operated by the OMRDD. (Petition ¶ 10).

Petitioners derive their statutory authority to investigate the abuse and neglect of individuals in the care of OMRDD from both New York State and federal laws. (Petition ¶ 19). Mental Hygiene Law §§33.13 and 45.09; Developmental Disabilities Assistances and Bill of Rights Act 42 U.S.C. § 15043(a)(2)(H) (“DD Act”) (Petition ¶ 20-22, 27).

OMRDD operates residential facilities that provide treatment and care to individuals with mental retardation and developmental disabilities at, among other places, the Taconic Developmental Disabilities Service Office (“DDSO”) and the Capital District DDSO. (Petition ¶ 46,47). As mental hygiene residential facilities, the Taconic DDSO and Capital District DDSO are subject to the provisions of Mental Hygiene Law §§ 33.13 and 45.09, as well as the provisions of the DD Act. (Petition ¶ 52,53).

Petitioners’ Investigation of Abuse and Neglect

In 2004, Petitioners initiated an investigation into the care and treatment of individuals residing at the Capital District Developmental Center (“Capital District DC”) a facility operated by the Capital District DDSO. (Affirmation of Bridgit Burke ¶ 17 (“Burke Aff.”)). This investigation revealed a pattern and practice of needlessly segregating individuals with mental retardation and developmental disabilities in public institutions, rather than placing them in more integrated community settings. *Id.* at 30. In early 2005, in response to a request, OMRDD granted the CRDLC access to the clinical records of all of the agency’s residents at the Capital District DC. *Id.* at 28. A review of these records revealed that many of the residents

were deemed by their treatment team as ready to live in a community placement with the appropriate supports and services, yet there was virtually no active effort to transfer them to community settings. *Id.* at 30. The investigation also revealed that OMRDD lacked any clear policy or procedure to facilitate the movement of these individuals into community settings. *Id.* at 27.

In 2006, in the course of its continued investigation, Petitioners made new requests for the clinical records of individuals residing at the Capital District DC. (Burke Aff. ¶ 35). Consistent with OMRDD's earlier response, the agency granted Petitioners access to all of the records of all of the residents at the Capital District DC. *Id.* at 36. A review of these records confirmed Petitioners' concern that the entire Capital District DC was failing to adequately develop and carry out appropriate discharge planning.

Petitioners made numerous attempts to resolve these deficiencies with the Respondents. (Burke Aff. ¶ 39-60). Between December 2006 and late March 2007, OMRDD repeatedly promised to meet with Petitioners and to address these concerns with specific answers, but asked for "forbearance," first because of the change in administrations, and then because of the 2007 budget process. *Id.* at 51-54.

In July 2007, Respondents proposed changes in their discharge practices and informed Petitioners they would be modifying their computerized tracking system (the "Tabs System") to include the ability to track an individual resident's readiness for discharge. *See* Mem. of Law in Support of Petition For Records Access at 7. The tracking system, OMRDD represented, would be used to measure the duration of the planning process from the time of the treatment team's decision to discharge, until the individual's entrance into a community setting. *Id.* at 8. Petitioners were told to anticipate that the modified tracking system would be active by

the fall of 2007. *Id.* Petitioners requested access to this information and explained that only through this review could they assess if progress has been made on the discharge process. *Id.*

Between July 2007 and May 15, 2008, Petitioners were again frustrated by repeated promises by OMRDD that answers were forthcoming in a matter of weeks and these answers were allegedly delayed by reorganization at OMRDD and a change in their policies. (Burke Aff. ¶ 57). In July 2008, after numerous attempts to communicate with the Respondents, the parties met again. *See* Mem. of Law in Support of Petition For Records Access at 8. The Petitioners were told at that time that the tracking system was still not operational but that OMRDD anticipated that the system would be up and running by the end of October 2008. *Id.* During this same meeting, Petitioners requested access to the data from the tracking system in order to fulfill Petitioners' monitoring responsibilities. *Id.* Again, Petitioners did not receive a response and, on November 21, 2008, Petitioners, sent a letter to Deputy Commissioner Martinelli renewing Petitioners' request for Tab tracking data. *Id.* Deputy Commissioner Martinelli again promised to send Petitioners the Tab report. *Id.* Petitioners, to date, have not received a Tab report. *Id.*

Simultaneous with Petitioners' request for access to the data of the Respondents' tracking system, Petitioners made requests for the clinical records of individuals who reside at the Capital District DC and Taconic DC, facilities operated by the Capital District and Taconic DDSOs. (Burke Aff. ¶ 8; Affirmation of Jennifer Monthie ¶ 62 ("Monthie Aff.")). Despite Respondents' prior practices of sharing these records with Petitioners, Respondents now refused to disclose these records save for a handful of records. (Burke Aff. ¶ 9; Monthie Aff. ¶ 64). Respondents, for the first time, took the position that Petitioners were not authorized to access

the great majority of these records under either state or federal law. (Petition ¶ 55, 56). This unlawful refusal to provide records to the Petitioners forms the basis of the Petition.

DISCUSSION

The standards governing the Court's determination of Respondents' motion to dismiss are well-settled. The Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Nonnon v. New York*, 9 N.Y.3d 825, 827 (2007). The standard is no different in the context of an Article 78 proceeding. *See, e.g., Northway 11 Cmtys., Inc. v. Town Board*, 300 A.D.2d 786, 787 (3d Dep't 2002). Respondents' motion and supporting papers are replete with factual assertions that purportedly contradict the allegations in the Petition. In addition to being inaccurate,¹ none of these assertions has any legitimate bearing on the pending motion.

I. MENTAL HYGIENE LAW SECTIONS 33.13 AND 45.09 AFFORD PETITIONERS ACCESS TO THE REQUESTED RECORDS

Petitioners are entitled to access the records they seek under state law. The relevant state statutes unambiguously provide such access, and the available legislative history provides confirmation of Petitioners' authority.

A. A Literal Reading of Mental Hygiene Law Sections 33.13 and 45.09 Supports Petitioners' Claims

The rules of statutory construction direct this Court to ascertain and effectuate the purpose of the Legislature by looking at the entire statute as whole, its legislative history, and any extraneous connected circumstances, laws, and writings. McKinney's Cons. Laws of N.Y.,

¹ As discussed more fully below, many of the factual averments contained in Respondents papers concededly do not even address issues relevant to the Petition, and many also appear to have been made without personal knowledge.

Statutes, §§ 92, 95-98, 111.² The Court should first attempt to determine legislative intent through a literal reading of the statute itself. McKinney's Cons. Laws of NY, Statutes § 94(b); *see also Finger Lakes Racing Assn. v. New York State Racing & Wagering Bd.*, 45 N.Y.2d 471, 410 (1978); *Matter of Albano v. Kirby*, 36 N.Y.2d 526 (1975). "In construing a given statutory enactment, a court should not by construction extend such statute beyond its express terms or the reasonable implications of its language." *Drelich v. Kenlyn House, Inc.*, 86 A.D.2d 648, 649 (2d Dep't 1982); *see also* McKinney's Cons. Laws of NY, Statutes § 74.

Petitioners are both agencies that provide protection and advocacy services under contract with the CQC-APD and as such are entitled to the records of any individual residing in an OMRDD facility. Petitioners' records access authority is explicitly defined in Mental Hygiene Law §§ 33.13 and 45.09.

Mental Hygiene Law § 33.13 authorizes facilities operated or licensed by New York State's Office of Mental Health ("OMH") or OMRDD to disclose "clinical records or clinical information tending to identify patients or clients" to select persons or agencies, including:

To the commission on quality of care for the mentally disabled and *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 for by federal law.

Mental Hyg. Law § 33.13 (c)(4) (Consol. 2008) (emphasis added).

Mental Hygiene Law § 45.09(b) contains similar language allowing access to "all books, records and data" pertaining to any office or agency of the state serving a person with a disability:

² *See also Matter of Hogan v. Culkin*, 18 N.Y.2d 330, 335, (1966); *Levine v. Bornstein*, 4 N.Y.2d 241, 244, (1958); *Rankin v. Shanker*, 23 N.Y.2d 111 (1968); *Schwartz v. Lefkowitz*, 21 A.D.2d 13 (1st Dep't 1964).

Pursuant to the authorization 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 facility upon receipt of a complaint by or on behalf of a person with a disability...

Mental Hyg. Law § 45.09(b) (Consol. 2008) (emphasis added).

Literally read, the statute affords records access to those persons and agencies within or under contract with CQC-APD that are a part of the protection and advocacy system. Petitioners are such an agency, and are therefore entitled to access to the requested records by the plain terms of both § 33.13 and § 45.09.

B. Contrary to Accepted Principles of Statutory Construction, Respondents Attempt to Read Limitations into § 33.13 and § 45.09 and Thereby Distort Their Plain Meanings

Respondents contend that §§ 33.13(c)(4) and 45.09(b) limit Petitioners' records access to the somewhat narrower access provided for under the provisions of the federal DD Act. Respondents suggest that the phrase "as provided for by federal law" imposes a limitation on the access conferred by the statutes. But a literal and reasonable interpretation of the statute shows that this phrase is intended merely to describe the protection and advocacy system that Petitioners serve, and not to qualify or limit the access provided to P&A contract agencies under the Mental Hygiene Law. Again the relevant sections of Mental Hygiene Law §§ 33.13 and 45.09 provide:

To the commission on quality of care for the mentally disabled and 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 for by federal law.*

Mental Hyg. Law § 33.13(c)(4) (Consol. 2008) (emphasis added).

Pursuant to the authorization 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 facility upon receipt of a complaint by or on behalf of a person with a disability...

Mental Hyg. Law § 45.09(b) (Consol. 2008) (emphasis added).

Statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction. McKinney's Cons. Law of NY, Statutes § 94. In its "natural and most obvious sense," the statutory language at issue describes those persons or agencies under contract with the CQC-APD as being part of the protection and advocacy system created under federal law. The phrase "as provided for by federal law" refers to the P&A system, not the records access of P&A entities. Read jointly with its preceding phrase, "the protection and advocacy system," the phrase "as provided for by federal law" serves to define those entities granted access to records by § 33.13(c)(4) and § 45.09(b). Without this descriptive phrase, it would be unclear whether these statutes refer only to those persons and agencies within the federal protection and advocacy system, and arguably *all* persons and agencies employed within or under contract with the CQC-APD would have access to confidential information.

The grammatical rules of statutory construction support Petitioners' interpretation. Statutes § 254 ("Ascertainment of Antecedents") directs that "[r]elative or qualifying words of clauses in a statute ordinarily are to be applied to the words or phrases immediately preceding, and are not to construed as extending to others more remote, unless the intent of the statute clearly indicates otherwise." McKinney's Cons. Laws of NY Statutes § 254. Respondents inappropriately contend that the qualifying words, "as provided for by federal law,"

should be read to refer to more remote language within §§ 45.09(b) and 33.13. The words immediately preceding the phrase “as provided for by federal law,” are “the authorization of the commission to administer the protection and advocacy system.” Therefore the phrase, “as provided for by federal law” refers to CQC-APD’s federally granted authorization to administer the protection and advocacy system and not the scope of the access afforded P&A agencies.³

Protection and advocacy systems in each state and U.S. territory are all established pursuant to federal law; but that does not mean that they may not be provided broader access to records than federal law requires, as the Legislature did in New York, to effectuate their purpose. The implementing regulations of the DD Act, clearly provide,

Protection and Advocacy System may exercise its authority under State law where the authority *exceeds* the authority required by the Developmental Disabilities Assistance and Bill of Rights Act, as amended.

45 CFR § 1386.21(f) (emphasis added). Therefore, access to records under the DD Act represents the minimum access afforded to the P&A agency and a state, as New York did, may broaden the P&A’s access authority.⁴

The punctuation of Mental Hygiene Law § 45.09(b) leaves no doubt as to the New York Legislature’s intent. In § 45.09(b), the Legislature inserted a comma after the words

³ CQC-APD has been designated by the Governor as New York State’s federally funded protection and advocacy system. In order for a State to receive federal protection and advocacy funds, an eligible system must be in place to provide protection and advocacy services. 42 U.S.C. § 15043; 42 U.S.C. § 10803. It is pursuant to this authorization that persons or agencies, including Petitioners, contract with the CQC-APD to provide protection and advocacy services as part of New York State’s protection and advocacy system. The DD and PAIMI Acts define the type of agencies and not-for-profit entities that may be allotted protection and advocacy funding. Not-for-profit organizations must be independent of any agency which provides treatment or services and must have the capacity to protect and advocate for the rights of individuals with disabilities. These statutes also define the manner in which the protection and advocacy agency (CQC-APD) may subcontract with not-for-profit entities to serve as protection and advocacy subcontractors. 42 U.S.C. § 10804(a)(1)(A)-(B).

⁴ It is perhaps not surprising that the New York Legislature exercised its discretion to provide greater access than that provided for by federal law, as the tragic events at the Willowbrook State School had occurred at a New York State-run facility. See Petition ¶¶ 6-7.

“as provided for by federal law,” making clear that the phrase was intended to modify the clause immediately preceding language, “[p]ursuant to the authorization of the commission to administer the protection and advocacy system.” “Common marks of punctuation are used to clarify the writer’s intended meaning and thus form a valuable aid in determining legislative intent.” *A.J. Temple Marble & Tile, Inc. v. Union Carbide Marble Care, Inc.* 87 N.Y.2d 574 (1996). The use of the comma to separate it from the prior clause further indicates that the phrase “as provided for by federal law” describes the protection and advocacy system and the CQC-APD’s administrative authority, not the language that follows pertaining to access. Where punctuation supports a reasonable and workable construction of the statute, it is not to be ignored. *Id.* at 581. As multiple parts of a statutory scheme should be treated as a harmonious whole, Mental Hygiene Law 33.13(c)(4) should be interpreted in accordance with § 45.09(b)’s grammatical clarification. Statutes §§ 97 & 98.

C. Mental Hygiene Law § 33.13(c)(4) Does Not Require Receipt of a Complaint.

Respondents argue that Mental Hygiene Law § 33.13 does not actually grant any access rights but instead merely lists the statutory exceptions to the general rule protecting clinical records against disclosure. Respondents claim that the power to access records is found only in Mental Hygiene Law § 45.09(b) and that therefore, protection and advocacy agencies must, as §45.09(b) requires by its express terms, receive a complaint before access to records can be granted.

Respondents’ interpretation is not borne out by a fair reading of the statutes. Most tellingly, § 33.13 also lists entities such as the state board of professions, which have no analogous provision in Mental Hygiene Law § 45.09 that would grant them access authority. If the Court were to adopt Respondents’ interpretation of § 33.13, it would effectively eliminate access granted to these entities which have no other statutory authority establishing their access.

It is also notable that § 33.13(c) grants access authority to several individuals and entitles only when specific conditions have been met. *See* Mental Hyg. Law § 33.13(c)(5) (only after the death of an individuals or upon the consent of that individual); § 33.13(c)(6) (only when a treating psychiatrist or psychologist has determined that the patient presents a serious or imminent danger to the endangered individual); §33.13(c)(7) (only with the consent of the patient and a demonstration of need); § 33.13 (c)(9) (only with the consent of the appropriate commissioner). Consistent with these provisions, one would expect the legislature to have listed any preconditions for CQC-APD and the protection and advocacy system in order to receive clinical records in §33.13(c)(4), but the legislature did not. It is therefore clear that the legislature's intention was to allow access to such clinical records even without a complaint.

Respondents incorrectly contend that Mental Hygiene Law §§ 33.13(c)(4) and 45.09(b) must be harmonized by grafting the complaint provision from § 45.09(b) onto § 33.13(c)(4). But no such departure from the plain language of § 33.13 is warranted. Section 45.09 provides access to several categories of records from several types of sources that are not provided for in § 33.13⁵; therefore, § 45.09 reasonably conditions access on a complaint whereas §33.13 does not. Section 45.09(b) addresses the protection and advocacy system's access to a broad range of records and agencies, for which the receipt of a complaint⁶ is reasonably required.

⁵ Mental Hygiene Law § 33.13(c)(4) applies only to the clinical records maintained by facilities licensed or operated by OMH or OMRDD, whereas Mental Hygiene Law § 45.09(b) applies to the books, records, and data of any office or agency of the state serving a person with a disability. The clinical records maintained by facilities licensed or operated by OMH or OMRDD (the subject of § 33.13) are included among "books, records or data" referenced in § 45.09.

⁶ Petitioners satisfy the "complaint" requirement under § 45.09(b) by meeting the federal standard for probable cause. *See infra* Section II A. According to the DD Act's regulations, P&A access rights provided for pursuant to state law may be broader than those provided under federal law, but they may *not* be more restrictive. 45 CFR § 1386.21; 42 CFR § 51.31(I). Pursuant to the DD Act, a P&A agency is entitled to records access where it has either received a "complaint" relating to the status or treatment of an individual *or* it has determined that there is "probable cause" to believe the individual is the subject of abuse or neglect. 42 U.S.C. § 15043 (a)(2)(I). Section 45.09 of the Mental Hygiene Law, in turn, grants

Moreover, where there is identical subject matter in more than one subdivision of the law, and a definite provision (in this case, the requirement of a receipt of a complaint) is made with reference to that subject matter but is omitted from the other subdivisions thereof, courts construe the particular reference as applying solely to the subdivision in which it is contained. *Lenard v. 1251 Americas Associates*, 241 A.D.2d 391, 393 (1st Dep't 1997) quoting *Cannon v. Towner*, 188 Misc 955 (Sup. Ct. 1947).

D. Legislative History and the Prior Conduct of State Agencies Support Peitioners' Right of Access to Records

The legislative history of §§ 33.13 and 45.09 confirms that these provisions provide Petitioners the authority to obtain the records they have requested. As Petitioners have already recounted in their Memorandum in Support of the Petition, immediately before the relevant revisions of §§ 33.13 and 45.09 were enacted, representatives of both OMRDD and CQC-APD expressed the view that the revised provisions would give P&A contract agencies the same records access as was already available to the Commission itself. *See* Mem. of Law in Support of Petition For Records Access at 13 -14.

In addition, Petitioners have repeatedly obtained access to records under these provisions since their passage in 1986 and their authority to do so has not previously been challenged. In fact it has been universally accepted by OMRDD, OMH and other state agencies

records access "upon receipt of a complaint" by or on behalf of a person with a disability. Given the express requirements of the DD Act's regulations that state law access rights cannot be more narrow than those provided for by the DD Act itself, "complaint" as used in § 45.09 of the Mental Hygiene Law must necessarily also include a finding of probable cause of abuse or neglect by the P&A agency. In any event, as set forth in the affidavits of Bridgit Burke and Jennifer Monthie, although not required, Petitioners *have* received one or more complaints on behalf of individuals residing in Respondents' facilities of undue delay in the discharge planning for individuals who reside in these facilities. *See* Monthie Aff. ¶ 61 Burke Aff. ¶ 75

until OMRDD suddenly and unexpectedly reversed course in connection with the present dispute. *See* Affirmation of Cliff Zucker ¶¶ 18, 21, 22 (“Zucker Aff.”); Burke Aff. ¶¶ 28, 36.

E. The Court Should Not Afford Deference to the Affidavit of Jane Lynch

In support of their motion, Respondents have offered the Affidavit of Jane Lynch,⁷ which purportedly reflects the current views of CQC-APD relating to records access for P&A contract agencies. Respondents suggest that the Court should defer to Ms. Lynch’s view that the access afforded Petitioners under §§ 33.13 and 45.09 is narrower than the access afforded CQC-APD. No such deference is warranted.

Because §§ 33.13 and 45.09 unambiguously provide Petitioners with access to the records they seek, there is no need for the Court to consider extrinsic evidence of any kind in construing these provisions. But even if the Court does find that these records access provisions are ambiguous, and that extrinsic evidence may therefore be considered, the Lynch Affidavit should be afforded no deference in the Court’s construction.

Although, as Respondents note, “[j]udicial construction of an ambiguous statute is often aided by the way the statute is interpreted by those administering it . . . ,” McKinney’s Cons. Laws of NY Statutes § 129, such administrative interpretation is given no weight where, as here, the construction of a statute does not call upon the specialized knowledge or expertise of a government agency.

[W]here the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent,

⁷ Ms. Lynch is the “Chief Operating Officer,” a title that does not appear in Mental Hygiene Law Chapter 45 which creates the state commission on quality of care and advocacy for persons with disabilities, and states that “[i]t shall consist of three persons to be appointed by the governor, by and with the consent of the senate.” Mental Hyg. Law § 45.03. The “Chair” is the “Chief Executive Officer.” Mental Hyg. Law § 45.05. The governor has not nominated her as a commissioner or chair and the Senate has not confirmed her. Therefore she cannot speak for the commission. The duly appointed and confirmed commissioners have submitted no affidavit. Furthermore, Ms. Lynch has worked at CQCAPD for only approximately one year, and her statements about the legislative history and prior agency interpretation of the statutes are hearsay.

there is little basis to rely on any special competence or expertise of the administrative agency. In such a case, courts are free to ascertain the proper interpretation from the statutory language and legislative intent.

Smith v. Donovan, 61 A.D.3d 505, 2009 WL 1011087, *3 (1st Dep't 2009) (citing *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980); *Seittelman v. Sabol*, 91 N.Y.2d 618, 625 (1998); *Matter of Gruber*, 89 N.Y.2d 225, 231-232 (1996)) (internal quotation marks omitted); *Roberts v. Tishman Speyer Properties, L.P.*, 874 N.Y.S.2d 97, 104 -105 (1st Dep't 2009); *Teachers Ins. & Annuity Ass'n of America v. City of New York*, 82 N.Y.2d 35, 41 (1993).

Neither § 33.13 nor § 45.09 depends for its meaning on knowledge of specialized terminology or other background information with which CQC-APD is uniquely familiar. Nor is this an instance where the legislature “after fixing a primary standard, endow[ed an] administrative agenc[y] with the power to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation.” *Medical Society of State v. Serio*, 100 N.Y.2d 854, 865 (2003) (citing *Matter of Nicholas v. Kahn*, 47 N.Y.2d 24, 31 (1979)). Respondents do not contend (nor could they) that §§ 33.13 and 45.09 somehow endowed CQC-APD, or any other agency, with the power to determine the scope of Petitioners’ access to records: these provisions, by their terms, either give Petitioners access to the requested records, or they do not, and the Court is in as good a position as Ms. Lynch or CQC-APD to determine the legislature’s intent.

Even if the interpretation of §§ 33.13 and 45.09 did somehow implicate specialized knowledge or expertise belonging to CQC-APD, the Lynch Affidavit would still be entitled to no weight. “[D]oubtful meaning of a statute cannot be clarified or aided by practical construction of officers unless it first appears that such construction has been long established and continuous.” McKinney’s Cons. Laws of NY Statutes § 129; *see also id.* § 128 (citing

Faingnaert v. Moss, 295 N.Y. 18, 25-26 (1945)). Needless to say, Ms. Lynch's statement of CQC-APD's opinion, offered for the first time only weeks ago, does not represent any such "long established and continuous" construction, and it is accordingly entitled to no deference.

To the contrary, the Lynch Affidavit is a sudden and unexplained departure from prior pronouncements by the same agency on the same statute, and it directly contradicts CQC-APD's previously expressed and long-standing views on records access. CQC-APD Counsel Paul Stavis's memorandum in support of the amendment of §33.13 and his later letter to the Governor in support of the legislation [Ex. A and B to Monthie Aff. in Support of Petition], reflected the view that P&A contract agencies would be entitled to the same records access as the Commission under the statutory grant. Before this litigation, that view had never been publicly repudiated by CQC-APD.

Even if CQC-APD had never previously taken a position on the scope of Petitioners' records access under §§ 33.13 and 45.09, its new position, stated publicly for the first time in this litigation, many years after the relevant statutes were enacted, would not be entitled to deference. The fact that CQC-APD's new position reverses its prior interpretation of the statutes, and that it does so without substantial explanation, only makes it more clear that the Lynch Affidavit should be given no consideration in the Court's analysis. An unexplained departure from prior agency precedent is, as a matter of law, arbitrary and capricious. *Matter of Car Barn Flats Residents' Assn. v. New York State Div. of Hous. & Community Renewal*, 184 Misc.2d 826, 833 (N.Y. Sup. Ct. 2000). Courts will not defer to an asserted practical construction where "the proffered interpretation has been erratically applied or is contrary to the plain wording of the statute itself." *Doctors Council v. New York City Employees' Ret. Sys.*, 71 N.Y.2d 669, 676 (1988).

The Lynch Affidavit fails to explain CQC-APD's about-face on records access for the P&A contract agencies. Ms. Lynch asserts that affording the P&A agencies broader records access than they receive under federal law would render the federal records access provisions "superfluous." (Lynch Aff. ¶ 8). But this supposed problem is no reason to conclude that Petitioners' records access must be no more extensive than federal law provides. Federal regulations promulgated under the DD Act explicitly provide that a protection and advocacy system may under state law exceed the authority required by the DD Act. 45 C.F.R. § 1386.21(f). It should go without saying that New York State may, as it has done here, give P&A agencies broader records access than required by federal law.

Ms. Lynch emphasizes the need to avoid "confusion" in the application of records access provisions. (Lynch Aff. ¶ 10). Contrary to her assertion, state mental hygiene officials are *less* likely to be confused by rules giving P&A agencies equal access to the CQC-APD when the two are referenced jointly in the same statutory clauses contained in §§ 33.13(c)(4) and 45.09(b), as advocated by the Petitioners. A much more likely source of confusion is the belated effort by CQC-APD to reinvent its interpretation of the relevant statutes – an interpretation that has not been the understanding of OMH and will only add to the confusion that would be caused by the inconsistent access authority propounded by Respondents. (Zucker Aff. ¶ 18)

Ms. Lynch also contends that it is "critical" that OMRDD officials understand "that a request for records by the Commission does not carry with it an overlay of potential litigation concerns." It is not clear how this assertedly "critical" concern relates to the access afforded to P&A contract agencies – how records access for *Petitioners* would affect anyone's expectations with respect to records requested by the *Commission*. In addition, it is irrational to suppose that requests for records from the CQC-APD do not in any event carry with them some

“overlay” of litigation concerns: the CQC-APD has both the power and the obligation to investigate instances of possible abuse, and to refer matters to other investigative and enforcement authorities. The CQC-APD itself, as the agency responsible for administering the Protection and Advocacy system, is required by federal law to have the authority to “pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights” of persons with developmental disabilities. 42 U.S.C. § 15043.

Under such circumstances it should be apparent to any OMRDD employee that materials delivered to the CQC-APD could, in appropriate circumstances, ultimately be used in litigation.

Ms. Lynch's contention that Petitioners' records access authority must be more limited than CQC-APD's is unsupported by the terms of the statutes. She contends that the CQC-APD has “unconditional oversight authority,” as compared with the “conditional authority - exactly mirroring the Federal statute accorded to the P&A offices.” Yet, Mental Hygiene Law §§ 33.13(c)(4) and 45.09(b) confer identical rights of access to records upon *both* the CQC-APD and upon any person or agency under contract with the Commission which provides protection and advocacy services.⁸ There is no language in the statute which supports Ms. Lynch's statements that more limited access under federal law applies only to the subcontractor and not to the commission itself.

⁸ The relevant subsection of § 33.13(c)(4) states, “*To the commission on quality of care for the mentally disabled and any person or agency under contract with the commission which provides protection and advocacy services...*” (emphasis added.)

The relevant subsection of § 45.09(b) states, “Pursuant to the administration 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 off or agency of the state, and to all books, records, and data pertaining to any such facility...” (emphasis added.)

All of Ms. Lynch's purported justifications for CQC-APD's revised reading of the records access laws are insubstantial. Moreover, none refer to any circumstances that have changed or become apparent for the first time since CQC-APD's original interpretation, reflected in CQC-APD's counsel Mr. Paul Stavis's statements in support of the legislation. Accordingly, none of the justifications offered in Ms. Lynch's affidavit can reasonably be viewed as supporting a *change* in CQC-APD's interpretation. With no material change in circumstances, CQC-APD has simply announced that it is changing its mind. Such an unexplained departure from prior interpretation has no persuasive weight in construing the scope of records access.⁹

To the extent that any consideration of extrinsic evidence is warranted in analyzing §§ 33.13 and 45.09, the Court should focus not on Ms. Lynch's affidavit, but rather on the opinions expressed by both CQC-APD and OMRDD when the statutes were first enacted. Although defendants seek to minimize their importance, the June 19, 1986 statement by OMRDD counsel Paul Kietzman and the February 1, 1986 and June 18, 1986 statements by Mr. Stavis are especially compelling pieces of extrinsic evidence, as they are adverse to the positions that OMRDD and CQC have now adopted. *See McKinney's Cons. Laws of NY, Statutes § 128.*

In addition, because these statements were made at the time the relevant provisions were enacted, it must be assumed that they are more likely to reflect an accurate understanding of the considerations that prompted the provisions' enactment. In construing the

⁹ It should also be noted that to the extent that CQC-APD's interpretation (or reinterpretation) of §§ 33.13 and 45.09, as reflected in Ms. Lynch's affidavit, represents a rule or regulation for the purposes of the State Administrative Procedures Act ("SAPA"), CQC-APD's failure to comply with the procedures required by SAPA to promulgate the rule would render it invalid. *See e.g. Matter of Schwartzfigure v. Hartnett*, 83 N.Y.2d 296 (1994). Similarly, to the extent that Defendants suggest that CQC-APD's interpretation should be treated with the same deference that might be afforded a regulation properly promulgated under SAPA, clearly no such deference is warranted. Ms. Lynch's statement of CQC-APD's views is at most an "informal advisory opinion" and according cannot command the same deference that might be given to a properly issues regulation. *Application of Park Radiology P.C. v. Allstate Ins. Co.*, 2 Misc.3d 621, 626 (N.Y.City Civ.Ct., 2003).

force and effect of a statutory provision the Court cannot wrench it from their historical setting and prior interpretations. *Stevens Medical Arts Bldg. v. City of Mount Vernon*, 72 A.D.2d 177 (2d Dep't 1980); *see also Schwartz v. Lefkowitz*, 21 A.D.2d 13 (1st Dep't 1964) (when statutory construction is required, extraneous connected circumstances, laws, and writings indicating legislative intent may be used).

Respondents rely solely on a footnote in *Magweski v. Broadalbin-Perth CSD*, 91 N.Y.2D 587 (1998), in an attempt to convince the Court to disregard the statements of Mr. Keitzman and Mr. Stavis. The Court of Appeals has clearly held that statements contemporaneous to the passage of legislation, such as those offered by the Petitioners, may be examined by the Court in an analysis of legislative intent and statutory construction. *See e.g., Crane Neck Assn. v. New York City/Long Is. County Serv. Group*, 61 N.Y.2d 154 (1984) (relying on gubernatorial memorandum to interpret legislative intent). The belated efforts by Respondents and CQC-APD to play down their prior constructions of §§33.13 and 45.09 are unpersuasive. Indeed, it is both ironic and noteworthy that Respondents dismiss statements by Messrs Keitzman and Stavis – suggesting that they are of no value in determining Petitioners' statutory entitlement to records – while at the same time contending that CQC-APD's new view of the law, reflected in Ms. Lynch's Affidavit, is entitled to deference. Such a view defies both common sense and basic principles of statutory construction.

F. Respondents' Contention that CQC-APD's Contracts with Petitioners Do Not Confer Records Access Is Irrelevant

Respondents argue at great length that CQC-APD's contracts with Petitioners do not expressly confer access to records. Respondents state that, “[t]he contract does not mention Mental Hygiene Law §§ 33.13 or 45.09,” and there is no, ‘delegation by CQC-APD of its authority other than that contained in the federal PADD program.’ It should go without saying

that §§ 33.13 and 45.09 by themselves confer access on P&A contract agencies, and the only role that the contracts play in the analysis is to confer on Petitioners the status of P&A contract agencies entitled to records access under the statutes. There is simply no need for the contracts to provide access to records when such access is already expressly provided for by statute.

II. PETITIONERS ARE ENTITLED TO THE REQUESTED RECORDS UNDER FEDERAL LAW

For the reasons set forth above, Petitioners are entitled to the records pursuant to the New York State Mental Hygiene Law. But even if Petitioners were not entitled to the records under the Mental Hygiene Law, Respondents' failure to disclose the records would still be contrary to federal law.

Under the DD Act, in order to receive funding, a state must "have in effect a system to protect and advocate the rights of individuals with developmental disabilities." 42 U.S.C. § 15043(1). Pursuant to the Act, protection and advocacy ("P&A") offices, such as Petitioners, "shall . . . have access to all records" of:

[A]ny 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;

42 U.S.C. 15043(a)(2)(I) (emphasis added).

Respondents do not challenge that the individuals for whom Petitioners have requested records are "unable to authorize" the P&A agencies to access their records.

Accordingly, Petitioners need only establish that: (1) any individual for whom records have been requested “does not have a legal guardian, conservator, or other legal representative,” and (2) there is “probable cause” to believe that the individual has been subject to “abuse or neglect.” *Id.* Here, Petitioners have adequately alleged that they have probable cause to justify their request for records. In addition, Respondents have themselves all but conceded that the great majority of individuals for whom Petitioners have requested records do not have a “legal guardian or “legal representative” within the meaning of the DD Act and its implementing regulations. Accordingly, Respondents refusal to turn over these records is contrary to federal law.

A. Petitioners Had “Probable Cause” to Determine That the Residents of the Capital District and Taconic DDSOs Are Subject to Abuse or Neglect

Petitioners request for the disputed records was supported by “probable cause.”

The regulations implementing the DD Act define probable cause as:

a reasonable ground for belief that an individual with developmental disabilities has been, or may be, subject to abuse or neglect. The individual making such determination may base the decision on reasonable inferences drawn from his or her experience or training regarding similar incidents, conditions or problems that are usually associated with abuse or neglect.

45 C.F.R. § 1386.19.

As has been “overwhelmingly agreed” by courts throughout the nation, “it is by now a settled principle that the P&A is the ‘final arbiter of probable cause for the purpose of triggering its authority to access all records for an individual that may have been subject to abuse or neglect.’” *Office of Protection & Advocacy for Persons with Disabilities v. Armstrong*, 266 F. Supp. 2d 303, 321 (D. Conn. 2003), *quoting Arizona Ctr. for Disability Law v. Allen*, 197 F.R.D. 689, 693 (D. Ariz. 2000); *see also Armstrong*, 266 F. Supp. 2d at 321 (“[C]ourts have rejected attempts to require judicial review of the P&A’s probable cause determination”); *Protection &*

Advocacy Sys., Inc. v. Freudenthal, 412 F. Supp. 2d 1211, 1219 (D. Wyo. 2006) (“The law is well established that in requesting records, P&A makes the decision as to whether probable cause exists”); *Iowa Prot. & Advocacy Servs. v. Rasmussen*, 521 F. Supp. 2d 895, 904 (S. D. Iowa 2002) (“the statute is clear that it is the protection and advocacy systems that shall make the relevant probable cause determination”). This is perhaps because “when a P&A makes a finding of probable cause, no liberty interest of the developmentally disabled person is threatened, as it is precisely that individual’s interest that the P&A seeks to protect.” *Alabama Disabilities Advocacy Program v. J.S. Tarwater Dev. Ctr.*, 97 F.3d 492, 499 (11th Cir. 1996). Likewise, the “facility can claim no interest in avoiding investigations of harm or injury to a person with a disability.” *Id.*

Petitioners determined that they had probable cause to seek the subject records in order to investigate Respondents’ systemic failure to undertake appropriate discharge planning. The DD Act’s implementing regulations make clear that such a failure may constitute “neglect”:

A negligent act or omission by an individual responsible for providing treatment or habilitation services which caused or may have caused injury or death to an individual with developmental disabilities or which placed an individual with developmental disabilities at risk of injury or death, and includes acts or omissions such as failure to: establish or carry out an appropriate individual program plan or treatment plan (*including a discharge plan*); provide adequate nutrition, clothing, or healthcare to an individual with developmental disabilities; provide a safe environment which also includes failure to maintain adequate numbers of trained staff.

Id. (emphasis added). Moreover, it is by now well-established that if a P&A agency determines, through its “monitoring or other activities,” as is the case here, that it has a reasonable basis to believe that there are systemic issues leading to the possible neglect of many of the residents of an institution, the P&A is entitled to access *all* of the records of the institution’s residents. See *Connecticut Office of Prot. & Advocacy for Persons with Disabilities v. Hartford Bd. of Educ.*,

464 F.3d 229, 241-42 (2d Cir 2006) (authorizing access to school and its students under the DD Act “both to investigate specific allegations and to monitor whether the school is respecting students’ rights and safety”).¹⁰

Here, prior to making their access requests, Petitioners made a well-founded determination that they had a reasonable basis to conclude that individuals under the care of the Capital District and Taconic DDSOs were being neglected through the Respondents’ failure to engage in appropriate discharge planning for the residents in the facilities. As the affirmations of Bridgit Burke of ALS and Jennifer Monthie of DAI set forth, this determination was made on the basis of, among other things, Petitioners’ monitoring, prior investigations, and representation of residents over the course of several years leading up to the access request.

Petitioners each have more than twenty-five years experience as part of the P&A system. (Burke Aff. ¶ 3; Monthie Aff. ¶ 4). Since 2004, they have conducted two prior investigations of the discharge practices at the Capital District DC and one prior investigation at Taconic DC. (Burke Aff. ¶¶ 16 – 38; Monthie Aff. ¶¶ 12-58). In connection with those investigations, Petitioners have actively monitored the Respondents’ discharge practices through multiple meetings at both the state and local level and by the examinations of policies, procedures and training materials authored by OMRDD. (Burke Aff. ¶¶ 16, 38-60).

In addition, Petitioners have directly represented numerous individuals at the Capital District DC. That representation has involved representation at many treatment team

¹⁰ Respondents’ reliance upon *Iowa Prot. & Advocacy Servs. v. Gerard Treatment Programs, LLC*, 152 F. Supp. 2d 1150, 1172 (N.D. Iowa, 2001) is misplaced, as that case is actually supportive of Petitioners’ position. In that case, the defendant claimed, as Respondents do here, that the P&A organization had “made only a ‘generalized’ determination of probable cause, not a probable cause determination as to specific individuals.” *Id.* 1171. Specifically, the defendant challenged the P&A agency’s claim that it had “received information sufficient to provide it with probable cause to believe that the health and safety of *all* of the residents of the Gerard facility is in serious and immediate danger.” *Id.* The court rejected the defendant’s argument that the agency’s “assertion of probable cause is too generalized,” noting that since “the present case is before the court on little more than the pleadings and a request for a preliminary injunction,” plaintiff’s allegations were sufficient. *Id.* at 1172.

meetings since 2004. (Burke Aff. ¶ 16, 60-75). At these meetings the treatment teams have readily admitted that they have no idea of the status of the discharge plans; that they had not discussed the discharge process with anyone within the agency for at least ninety days; or that they did not know what they would need to do to facilitate discharge. (Burke Aff. ¶¶ 65,69,70,73,75).

Throughout these activities, Petitioners' observed one constant failure – Respondents have failed to undertake appropriate discharge planning to ensure that individuals do not needlessly remain institutionalized when they are appropriate for residence in a community setting. This neglect is evident in the records which Respondents previously shared with Petitioners, *see* Burke Aff. Ex. B and Monthie Aff. ¶ 25-58, as well as in the woefully inadequate discharge planning procedures that the administration at the Capital District DDSO have adopted. *See* Burke Aff. Ex. A at 20 -22. Based upon the forgoing observations, Petitioners reasonably concluded that they had a basis to believe that the Taconic and Capital District DDSOs suffered from systemic deficiencies that impact all of the residents at those facilities.

Indeed, as set forth in the affirmation of Ms. Burke, Respondents have now adopted a meaningless standard for determining an individual's readiness for discharge – a standard which Respondents now falsely claim was initially suggested by the Petitioners in this action. *See* Burke Aff. ¶ 88-100 and Ex. D.

Respondents now challenge Petitioners' determination mainly through the affidavit of Patricia Martinelli, counsel to OMRDD, which appears designed to convince the Court that OMRDD's discharge planning process is beyond reproach. As the affidavits of Ms. Burke and Ms. Monthie demonstrate, however, Ms. Martinelli's claims are self-serving and are

belied by a record that shows significant defects in OMRDD's practices and procedures. In any event, at best, Ms. Martinelli's affidavit creates issues of fact that are inappropriate for resolution on a motion to dismiss. *Nonnon*, 9 N.Y.3d 825, 827 (2007), citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994) (when considering a motion to dismiss under CPLR § 3211, the Court must "accept the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory"). The determination of whether the Petitioners had probable cause is deeply enmeshed in the facts underlying Petitioners' request for records. The Court should not now attempt to supplant Respondents' version of the facts for Petitioners' well-pleaded allegations supporting their probable cause determination. In short, Respondents urge the Court to engage in a weighing of the facts underlying Petitioners' probable cause determination that is simply not appropriate at this stage of the litigation.

B. Petitioners Are Entitled to the Records of Individuals Who Do Not Have a Formally Appointed Legal Representative

Respondents have taken the position that they will not turn over to Petitioners the records of any individuals who have "involved family members," without the prior authorization of the family member. This position is contrary both to the express language of the DD Act and to good public policy.

1. The Express Language of the DD Act and Implementing Regulations

The DD Act is clear that the State may only deny access to the records of individuals within its care who are unable to consent to such access if the individual either has a "legal guardian," "conservator," or a "legal representative." 42 U.S.C. 15043(a)(2)(I). The regulations implementing the DD Act expressly define these terms:

Legal Guardian, conservator and legal representative all mean *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.

C.F.R. § 1386.19 (emphasis added). Accordingly, only “an individual appointed and regularly reviewed” by a State court or a duly-empowered State agency qualifies as a “legal guardian,” “conservator,” or “legal representative.”

Respondents concede, as they must, that, “*the State has no formal appointing or reviewing process for designating family members as actively involved or as legal representatives.*” Respondents’ Mem. at 31 (emphasis added). This should be the end of the inquiry: since “involved family members” are not formally appointed or reviewed, as required by the express terms of the regulations, they need not pre-authorize Petitioners to access these records. Nevertheless, Respondents ask this Court to treat individuals that OMRDD unilaterally deems “involved family members” as “legal representatives” because these individuals have “broad-based powers,” and allege that, “divesting them of their role as primary decision makers and advocates for their relatives would cause a dramatic upheaval” for OMRDD. Respondents’ Mem. at 30.

The Court should decline Respondents’ invitation to ignore the plain language of the federal regulations implementing the DD Act. OMRDD is not authorized to unilaterally designate an individual as a “legal representative” based upon its own undisclosed criteria and the Court could not and should not grant the agency this power where the legislature has not seen fit to do so itself.

The decision of the federal district court in *Indiana Prot. & Advocacy Servs. v. Indiana Family & Soc. Servs. Admin.*, 1:06 Civ 1816-LJM-TAB, (S.D. Ind. 2008) (“*IPAS*”) is directly on point. (Burke Aff. Ex. K). In *IPAS*, a P&A agency requested the medical records of an individual who had recently died at a hospital. *Id.* at 5. The Indiana Division of Mental Health and Addiction refused to turn over the individual’s records because she “had parents who had been active in her case,” even though “there is no record that prior to her death, [the individual] had a court-appointed guardian, power of attorney or health care representative.” *Id.*

The court in *IPAS* held that the defendants had erred in withholding access to these records on the sole basis that the individual had parents who were active in their child’s care. *See id.* at 11. In reaching this decision, the court considered both the definition of “legal guardian, conservator, and legal representative” contained within 42 C.F.R. § 1386.19, as well as the fact that Congress “expressly differentiated” between family members of individuals with mental illness and a “legal guardian, conservator or legal representative” of the Protection and Advocacy for Individuals with Mental Illness Act (“PAIMI”).¹¹ *Id.* On this basis, the court determined that “a construction of the term ‘legal representative’ to include the parents of adult

¹¹ Section 10801(a)(2) of PAIMI draws a clear distinction between *legal* guardians and representatives, and family members:

[F]amily members of individuals with mental illness play a crucial role in being advocates for the rights of individuals with mental illness where the individuals are minors, the individuals are legally competent and choose to involve the family members, and the individuals are legally incompetent and the legal guardians, conservators, or other legal representatives are members of the family.

42 U.S.C. § 10801(a)(2). Although PAIMI and PADD are separate laws, the Congressional intent behind each is very similar and the acts mirror each other in many respects. For this reason courts have regularly determined that decisions interpreting one of the acts are useful in determining how the other act should be interpreted. *See, e.g.*, S Rep. 454, 100th Cong., 2d Sess. 10 (1998); S. Rep. 109, 99th Cong., 1st Sess. 3 (1986); S. Rep. 113, 100th Cong., 1st Sess. 24 (1987); *see also Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Center*, 894 F.Supp. 424, 428 (M.D. Ala. 1995), *aff’d*, 97 F.3d 492 (11th Cir. 1996).

children would eliminate Congress' intent to include a parent as an advocate of such individuals *only when they have been appointed* by the relevant state agency or court; therefore, "[t]he Court has construed the term 'legal representative to mean a *State agency or court-appointed* guardian, conservator or health care representative." *Id.* at 11 (emphasis added).

The same result should follow here – Petitioners should only be required to obtain prior family authorization for those individuals who have a State agency or court-appointed legal representative. OMRDD itself is not an agency empowered under State law to appoint legal representatives. Rather, in New York, the Surrogate's Court is empowered to appoint legal guardians¹² for people with mental retardation or developmental disabilities. Surrogate's Court Procedure Act ("SCPA") Art. 17-A. A parent or "any interested person" may petition the court to become the individual's guardian." SCPA 1751.¹³ OMRDD's contention that it should be permitted to unilaterally decide whether a family's members relationship with the individual is sufficiently "close" that it should be accorded functional "legal representative" status is a plain effort to usurp this clearly-defined role of the Surrogate's Court.¹⁴

Without such formal appointment by the court, a parent or family member of an adult child does not have legal authority to act on behalf of the individual, except in certain limited situations.¹⁵ For example, an "actively involved" spouse, parent, adult child, sibling, or

¹²The PADD regulations define the terms "legal representative" and "legal guardian" in the same manner. 45 C.F.R. § 1386.19 The terminology in New York for a "legal representative" is "legal guardian." Surrogate's Court Procedure Act ("SCPA") Art. 17-A.

¹³ Indeed, OMRDD and CQC-APD encourage parents to obtain legal guardianship over their adult children, something that would not be necessary if the designation of "actively involved" accomplished the same thing. *See* Monthie Aff. ¶ 72; *see also* Article 17: A Guardianship Self-Help Available Online, available at <http://www.cqc.state.ny.us/newsletter/80guard.htm>.

¹⁵ Petitioners in no way intend to minimize that family members are an important factor in caring and advocating for individuals with developmental disabilities. "[F]amily members, friends, and community members" can greatly enhance the lives of individuals with developmental disabilities when they "are provided with the necessary community services, individualized supports, and other forms of assistance."

other family member may consent to major medical treatment. 14 NYCRR § 633.11(a)(1)(iii)(b). Likewise, parents, guardians, correspondents, and advocates of persons receiving services may initiate an objection to other treatments or services (including plans for community placement) that do not require informed consent. 14 NYCRR § 633.12(a)(4). But while these family members may have some measure of decision-making authority, courts do not consider them a “legal representative” within the meaning of the DD Act. *See Offices of Protection & Advocacy for Persons with Disabilities v. Armstrong*, 266 F. Supp. 2d 303, 318-19 (D. Conn. 2003) (“family members or relatives without such court authority are not considered ‘legal representatives’”).

Respondents incorrectly rely upon the federal Health Insurance Portability and Accountability Act (“HIPAA”) to support their contention that “involved family members” should be treated as “legal representatives.” Respondents’ Mem. at 33. HIPAA protects the privacy of individuals’ records, but allows P&A agencies to obtain records in accordance with their authority under federal and state laws. 45 C.F.R. § 164.512(a)(1). P&A agencies must simply comply with the applicable statutes; “HIPAA imposes no further conditions.” *Protection & Advocacy Sys., Inc. v. Freudenthal*, 412 F. Supp. 2d 1211, 1218 (D. Wyo. 2006); *see also Ohio Legal Rights Serv. v. Buckeye Ranch, Inc.*, 365 F. Supp. 2d 877, 889 (S.D. Ohio 2005); Rules and Regulations for the Department of Health and Human Services, 65 Fed. Reg. 82462, 82525, 82668 (proposed Dec. 28, 2000) (to be codified at 45 C.F.R. pts. 160, 164). Therefore, to comply with the DD Act, the P&A agency must obtain consent from the “legal representative,” not from persons authorized under other HIPAA provisions (which may include family members

42 U.S.C. 15001(a)(9). The Petitioners have been extremely sensitive to the role parents and other family members by repeatedly reaching out to family members to obtain assistance with determining advocacy goals. *See Burke Aff.* ¶¶ 64, 67, 75 & 86. Despite this important role, family members of adults with developmental disabilities do not have authority to make all decisions on behalf of the individual.

or a “close personal friend”). *See* 45 C.F.R. § 164.510(b) (regulating when disclosure can be made to a person involved in the individual’s care).

2. Policy Considerations Requiring Authorization from “Involved Family Members”

Even the most well-intentioned family members are often unaware of abuse or neglect, usually because of circumstances that prevent them from being able to observe the signs. *See* Affidavit of Michael Carey (“Carey Affidavit”); *see also* *J.S. Tarwater Dev. Center*, 97 F.3d at 498 n.3 (opining that “[r]egular telephone calls or visits often will not uncover abuse or neglect” and that parents’ “faith in the institution does not alter the fact that abuse or neglect may have occurred.”). Additionally, family members are often only provided redacted versions of records and are unable to fully investigate suspected incidents of abuse or neglect. *See* Carey Aff. ¶ 9-10.

In contrast to Respondents’ assertions to the contrary, excluding “actively involved family members” from being legal representatives would not be disruptive of OMRDD’s administrative processes because family members would retain their existing rights. Petitioners would continue to work closely with actively involved family members regarding advocacy goals, including community placements and treatment plans in general. *See* Burke Aff. ¶ 64, 69, 75. Family members would retain all of the independent powers and rights provided for by law, including the right to consent to medical procedures and to object to services and treatments. *See* *J.S. Tarwater*, 97 F.3d at 497–98 (noting that P&A’s access to records “does not weaken the role of the family, nor does it deprive the parents of any rights”). These powers are not reliant upon the family member being a “legal representative.” In addition, the procedure for becoming a legal representative in New York is fairly simple and can be pursued by any family

member without legal counsel. *See* CQC-APD, Article 17-A Guardianship Self-Help Available Online, available at <http://www.cqc.state.ny.us/newsletter/80guard.htm>.

Finally, the scope of Petitioners' request for records is not as broad as Respondents assert and would not be unduly disruptive. *Cf. J.S. Tarwater*, 97 F.3d at 499 (noting that "[m]inor inconveniences to staff or some disruption of the facility's routine" do not justify denial of access, and "[i]ndeed, one would suppose that a facility's legitimate interests are served when abuse and neglect are uncovered and can be corrected"). Petitioners are *not* seeking "the clinical records of more than 5000 individuals who reside in over 1200 community residences." Respondents' Mem. at 35. Rather, as the Petition makes clear, Petitioners are only seeking access to the clinical records of individuals residing at the Capital District and Taconic DCs. (Petition ¶ 80(b)). In addition, Petitioners seek an order "requiring Respondents to develop and distribute a statewide policy" that would require Respondents to comply with its disclosure obligations upon a request by a state P&A organization. (Petition ¶ 80(c)). Respondents' claim that Petitioners seek the records of all of the individuals within any OMRDD facility is simply a misreading of the Petition.

For the foregoing reasons, the Court should determine that Petitioners are entitled under federal law to the records of any individual at both the Capital District and Taconic DCs who do not have a formally appointed legal representative.

III. THE COURT SHOULD STRIKE PORTIONS OF RESPONDENTS' AFFIDAVITS

While affidavits may be considered on a motion to dismiss in limited circumstances, "they are generally intended to remedy pleading defects and not to offer evidentiary support for properly pleaded claims." *Nonnon*, 9 N.Y.3d at 827. The Third Department has gone even further holding that "on a motion to dismiss a CPLR article 78 proceeding on objections in point of law," the court "will review the petition by accepting the

facts alleged as true and *without considering the opposing affidavits.*” *N.J. Koss, Inc. v. Regan*, 149 A.D.2d 785, 787 (3d Dep’t 1989) (emphasis added).

In those limited circumstances where the consideration of an affidavit on a motion to dismiss may be proper, the proposed testimony must still meet the threshold requirements of being based upon the affiant’s own personal knowledge and in compliance with the evidentiary rules on admissibility. *See, e.g., Lapin v. Atlantic Realty Apts. Co.*, 48 A.D.3d 337, 338 (1st Dep’t 2008) (holding plaintiff’s evidence “constituted inadmissible hearsay, absent firsthand evidence”); *Beal Bank v. Melville Magnetic Resonance Imaging, P.C.*, 294 A.D.2d 320, 321 (2d Dep’t 2002) (affidavit “had no probative value” where affiant “was not involved in the loan negotiations” and “had no personal knowledge of the intent of the parties”); *Republic National Bank v. Luis Winston, Inc.*, 107 A.D.2d 581, 582 (1st Dep’t 1985) (affidavit “lacks any probative value” where “[i]t is implicit in it that the president’s knowledge has been obtained either from unnamed and unsworn employees or from unidentified and unproduced work records”); *Oleg Barshay, DC, P.C. v. State Farm Ins. Co.*, 14 Misc. 3d 74, 78 (N.Y. App. Term 2006) (holding “facts set forth in the affirmation of defendant’s counsel were without probative value as she had no personal knowledge of those facts”).

Respondents’ papers make no pretense of complying with these settled rules. Instead, Respondents have filed a total of five affidavits in support of their motion that raise a wide range of contested issues of fact often on issues that are in no way germane to the resolution of this motion.¹⁶ For example, Janice Fitzgerald, the Executive Director of the

¹⁶ The affidavits and affirmation are as follows: (1) Affidavit of Janice Fitzgerald, Executive Director of Parent to Parent of New York State (“Fitzgerald Aff.”); (2) Affidavit of David Liscomb, President of the Self-Advocacy Association of New York State (“Liscomb Aff.”); (3) Affidavit of Jane Lynch, Chief Operating Officer of CQC-APD (“Lynch Aff.”); (4) Affirmation of Patricia Martinelli, OMRDD Counsel and Deputy Commissioner (“Martinelli Aff.”); and (5) Affirmation of Brian O’Donnell, New York State Assistant Attorney General (“O’Donnell Aff.”).

advocacy group Parent to Parent of New York State, has submitted an affidavit whose sole purpose is to convey that the “relief” that Petitioners seek “is contrary to the philosophy of Parent to Parent of NYS.” (Fitzgerald Aff. ¶ 13). With all due respect to this organization, such an affidavit does not assist the Court in deciding the matter before it – namely, how to interpret the state and federal statutes at issue and the legislative intent behind those statutes. Likewise, the “advocacy view” of David Liscomb, the President of the Self-Advocacy Association of New York State, admittedly has no bearing on the “legal issues of this case,” the resolution of which, Mr. Liscomb concedes “is the Judge’s job.” (Liscomb Aff. ¶ 8).

Most troubling, however, are the repeated efforts by Respondents’ affiants to testify as to matters that are either plainly beyond their personal knowledge or flatly inadmissible under the rules of evidence. Petitioners submit that *none* of the affidavits filed on behalf of Respondents should be accorded any probative value for the purposes of the present motion. See *Nonnon*, 9 N.Y.3d at 827. At a minimum, however, Petitioners respectfully request that the Court strike the following portions of these affidavits as beyond the appropriate scope of the affiants’ testimony.

A. The following paragraphs of Respondents’ affidavits should be stricken because the testimony is inadmissible **hearsay** evidence that apparently has “been obtained either from unnamed and unsworn employees or from unidentified and unproduced work records.” *Republic National Bank*, 107 A.D.2d at 582 (1st Dep’t 1985):

- Martinelli Aff. ¶ 46: Affiant purports to testify that although “I was not employed by OMRDD during that time period, I have inquired both in the Counsel’s Office and at Capital DDSO, and OMRDD has no record of any ‘investigation’ being initiated by the clinic at that time.”
- Martinelli Aff. ¶ 52: Affiant purports to testify that although “I was not employed by OMRDD at that time, I have been informed . . . by my staff and the staff at Capital District DDSO that CRDLC had many more authorizations

at that time, and that [the] former Director . . . misunderstood the scope of the clinic's authority."

- Martinelli Aff. ¶ 70: Affiant purports to testify that she "consulted with Counsel to the Office of Mental Health ('OMH')," another New York State agency, and purports to set forth OMH's interpretation of its disclosure obligations.
- Martinelli Aff. ¶ 71: Affiant purports to testify that she "also consulted with the Counsel to CQC-APD" and purports to set forth CQC-APD's interpretation of State law disclosure requirements.

B. The following paragraphs of Respondents' affidavits should be stricken because they are not based upon the affiant's **own personal knowledge**. See, e.g., *Oleg Barshay*, 14 Misc. 3d at 78 ("facts set forth in the affirmation of defendant's counsel were without probative value as she had no personal knowledge of those facts").

- Martinelli Aff. ¶ 51: Affiant purports to testify that in 2004, Albany Law School "was merely representing individuals at OD Heck on a case by case basis over issues related to their care and development."
- Martinelli Aff. ¶ 55: Affiant purports to testify as to reason for Petitioners' engagement of outside law firm and offers her "opinion" as to why Petitioners have not yet filed an *Olmstead* lawsuit against OMRDD.
- Lynch Aff. ¶ 9: Affiant purports to testify as to what "Congress intended" with "its creation of the P&A system."

In each instance, the testimony cited above is either inadmissible under the governing rules of evidence or outside the personal knowledge of the testifier. Accordingly, the court should strike these paragraphs and refrain from considering them when resolving the present motion.

IV. **RESPONDENTS' MOTION TO STRIKE PARAGRAPHS CONTAINING "SCANDALOUS AND PREJUDICIAL MATTER" SHOULD BE DENIED**

Respondents' request to strike certain paragraphs of the Petition should be denied as unsupported and contrary to the law. Paragraphs 5-8, 12-18, 23, and 24 of the Petition contain matter that is neither scandalous or prejudicial, nor unnecessarily inserted in the pleading. These

paragraphs address highly valuable information relating to the circumstances leading to the passage of the statutes in question, as well as events substantially similar to the present matter.

The CPLR's broad pleading rules provide that matter may only be stricken in the limited circumstances when such matter is unnecessarily inserted into a pleading, and the scandalous or prejudicial nature of the statement affects the substantial rights of a party. See McKinney's CPLR §§ 3013, 3026, 3024(b). Motions to strike portions of pleadings should be denied if the material in controversy pertains to the events and circumstances leading to the passage of the statute in question (*Riley v. County of Broome*, 95 N.Y.2d 455, 463 (2000)), or has "any bearing upon the subject matter of the litigation" (*Matter of Stevens*, 101 Misc. 2d 1013, 1014 (Fam. Ct. Monroe Co. 1979) citing *Merrick v. New York Subways Adv. Co.*, 14 Misc. 2d 456, 460 (N.Y. Supr. Ct. 1958)). Even if not fully adjudicated, facts which collectively spell out an element of the cause of action should not be removed from pleadings. *Kaufman v. Hoff*, 624 N.Y.S.2d 107, 108 (1st Dep't 1995); *Hafnia Ham Co. v. Cheese Corp.*, 178 N.Y.S.2d 488 (New York Co. 1955). Accordingly, Respondents' motion to strike under CPLR § 3024(b) should be denied because paragraphs 5-8, 12-18, and 23-24 are not scandalous or prejudicial, nor are they unnecessarily inserted into the complaint.

A. Paragraphs 5 - 8

Each of the paragraphs alleged to be "scandalous" or "prejudicial" by Respondent recount the well documented motives for creating the federal and New York State P&A systems. (Petition ¶¶ 5-8). They provide the Court with the "comprehensive statement of facts" making up the "chain of circumstances" described by the court in *Hafnia*. See 13 Misc. 2d 733. Their historical nature makes them inherently incapable of producing future harm to Respondents.

Paragraphs 5 and 6 of the Petition introduce the Court to the OMRDD created culture of institutionalization which, when discovered, provoked state and federal legislatures to remedy the widespread abuse and neglect found. Paragraphs 7 and 8 provide similar “links” in the chain of circumstance by explaining the Congressional action that created the federal P&A system (Petition ¶ 8), and define the responsibility of CQC-APD, the contracting entity from whom Petitioners DAI and CRDLC claim authority (Petition ¶ 7).

These well documented events pose no undue prejudicial threat to any present OMRDD interest. See Joint Legislative Committee on Mental Retardation and Physical Handicaps, *Confidential Report*, Sept. 12, 1964, pp. 15, 18, 24. A description of the motivation for establishing the P&A system is appropriate matter that was not “unnecessarily inserted” into the Petition.

B. Paragraphs 12 – 18

As discussed above, a probable cause determination is an element of Petitioners’ claim under federal law. 42 U.S.C. § 15043(a)(2)(I)(iii); *Kaufman*, 624 N.Y.S.2d at 108. Paragraphs 12- 18 contain facts widely disseminated prior to this litigation regarding the abuse and neglect of Jonathan Carey. The abuse, neglect, and eventual death of Jonathan Carey serves as a chilling reminder that OMRDD’s reclusive system requires independent oversight by agencies like Petitioners who can access records in order to prevent systemic issues of abuse and neglect.

While it may be the case here, as in *Kaufman*, that OMRDD is still actively defending litigation resulting from these facts, the information is relevant to the “reasonableness” of Petitioners’ probable cause determination. This Court should deny Respondents’ motion to strike paragraphs 12 -18 because these paragraphs describe acts of abuse and neglect

substantially similar to the matter of litigation and should therefore not be precluded by this Court. *See Stevens*, 101 Misc. 2d at 1014 (facts of abuse as to one child appropriate where alleging neglect of another).

C. Paragraphs 23–24

Paragraphs 23 and 24 directly pertain to the events and circumstances leading to the passage of N.Y. Mental Hygiene Law §§ 33.13(c)(4) and 45.09 and as such are meaningful and relevant evidence of the legislative history that should not be stricken motion. *See Riley*, 95 N.Y.2d 455, 463 (2000).

Contrary to Respondents' bare assertion that the statements made in paragraphs 23 and 24 are "scandalous and prejudicial which is irrelevant to the issues" (Respondents' Mem. at 36), both paragraphs address statements made by OMRDD's and CQC-APD's respective former counsels to legislative officials considering Mental Hygiene Law §§ 33.13 and 45.09. (Petition ¶¶ 23, 24). Paragraph 23 presents former Counsel to CQC Paul Stavis's opinion as to the effect of the current §§ 33.13(c)(4) and 45.09 on the ability of P&A agencies like Petitioners to obtain records and information. Similarly, paragraph 24 presents former OMRDD General Counsel Paul Keitzman's opinion as to the effect of Senate Bill 7578-a, and reflects OMRDD's prior position --- contrary to the one they now advance --- that the bill would provide agencies like Petitioners broad access rights. (Petition ¶¶ 24).

Respondents ask this Court to come to a conclusion in direct contradiction to the Court of Appeals in *Riley* despite substantially identical facts. In the case at bar, just as in *Riley*, the Court is presented with a statute whose intent would be more fully realized through the use of a state agency counsel's prior opinions on the effect of legislation as reflected in a memorandum to the Legislature in the period leading up to approval of the bill. The statements in these

paragraphs were made by interested and knowledgeable persons contemporaneously with the events leading to the enactment of the bill. Accordingly, they are relevant to the issue at bar and should not be stricken.

Respondents' reliance on the rule that estoppel is not applicable against the state is misguided. While OMRDD may not be forever barred by its prior positions, its past interpretations of §§ 33.13 and 45.09 are certainly relevant resources for courts determining legislative intent. McKinney's Cons. Laws of N.Y., Statutes, § 171. OMRDD may certainly try to marshal evidence to the contrary, but it cannot bar these allegations through a mistaken reliance on "estoppel."

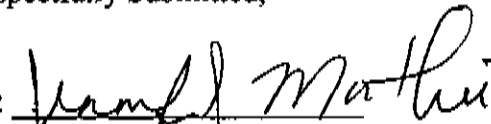
Accordingly, Respondents' motion pursuant to strike certain portions of the Petition should be denied.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court deny Respondents' motion to dismiss the Petition.

Albany, New York
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