

STATE OF NEW YORK SUPREME COURT,
COUNTY OF ALBANY

ALBANY LAW SCHOOL, and
DISABILITY ADVOCATES, INC.

Petitioners and Plaintiffs,

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,

SUMMONS

Index No. 10371-08

Albany County Clerk
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To the above-named defendants:

You are hereby summoned and required to serve upon Plaintiffs' attorneys an answer to the complaint in this action within twenty days after the service of the summons, exclusive of the day of service, or within thirty days after service is complete if this summons is not personally delivered to you within the State of New York. In case of your failure to answer, judgment will be taken against you by default for the relief demanded in the complaint.

The basis of the venue designated is the county where Respondent is believed to have made the determination complained of, pursuant to CPLR 506(b).

Albany, New York
Date: December 22, 2008


Disability Advocates, Inc.
Attorneys for Plaintiff
Cliff Zucker
Jennifer Monthie
5 Clinton Square 3rd Floor
Albany, New York 12207
(518) 432-7861

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Respondents and Defendants,

PETITION &
COMPLAINT

1. Petitioners/Plaintiffs, Albany Law School (“ALS”) and Disability Advocates, Inc. (“DAI”) (collectively “Petitioners”), are protection and advocacy agencies authorized by statute to investigate, advocate, and litigate on behalf of individuals with developmental disabilities and mental retardation. Petitioners’ statutory mandate includes the right of access to records of the individuals whose rights they protect. In this action Petitioners sue Respondents/Defendants (hereafter “Respondents”) New York State Office of Mental Retardation and Developmental Disabilities (“OMRDD”) and OMRDD Commissioner Diana Jones Ritter, for unlawfully denying them access to the clinical records of individuals with developmental disabilities residing in New York State facilities operated by OMRDD.

2. This civil action is both a petition pursuant to CPLR Article 78 and a suit pursuant to 42 USC § 1983 to enforce Petitioners’ rights of access to the clinical records under federal law.

PRELIMINARY STATEMENT

3. The New York State Office of Mental Retardation and Developmental Disabilities has refused to afford Petitioners access to records within its sole possession concerning the treatment of patients within its care, notwithstanding state and federal law which requires OMRDD to provide those records to Petitioners.

4. Petitioners' rights of access to records arise under laws enacted to ensure appropriate care and treatment of persons with mental retardation and developmental disabilities, and to prevent the recurrence of abuses that were widespread for many years. Respondents' denial of such access unlawfully restricts Petitioners' ability to provide the effective, independent oversight that the law requires, and threatens the rights and well being of the individuals that Petitioners have a duty to protect.

The Statutory Scheme and the Role of Protection and Advocacy Agencies

5. In the 19th century and for much of the 20th century, individuals with developmental disabilities were generally housed in New York State institutions, separated from their communities and families. While these state schools and asylums may have been created with the best of intentions, they became rife with abuse, neglect and squalid conditions of confinement.

6. The terrible severity of these problems emerged when conditions at Willowbrook State School, a state-run facility in Staten Island, were discovered. New York State and federal legislators toured the facility and reported shocking mistreatment of its residents. The legislators provided a vivid account of the "vile stench" of the facility and the "crude way of life" forced upon its residents. Joint Legislative Committee on Mental

Retardation and Physical Handicaps, *Confidential Report*, Sept. 12, 1964, pp. 15, 18, 24.

7. More investigations followed, along with media reports and public outrage; and in 1977, in response to the inhumane conditions in state facilities, the New York State Legislature created the Commission on Quality of Care (now the Commission on Quality of Care and Advocacy for Persons with Disabilities) ("CQC-APD"), a state agency responsible for independently investigating complaints of abuse or neglect, and for on-site monitoring of conditions within state operated facilities for individuals with disabilities. N.Y. MENTAL HYGIENE LAW § 45.07. The creation of CQC-APD was intended to prevent abuses like those at Willowbrook from recurring. Its mission includes extensive oversight responsibilities:

[The Commission shall] establish procedures to assure effective investigation of complaints...such procedures shall include but not be limited to receipt of written complaints, interviews of persons, patients, residents and of employees and on-site monitoring of conditions.

MHL 45.07(c)(1).

8. The federal government also took action. In response to the discovery of similar "inhumane and despicable conditions" in state operated facilities for persons with developmental disabilities, Congress created a Protection and Advocacy system, including provisions for independent agencies charged with protecting the human and civil rights of individuals with disabilities. S. Rep. No. 99 – 109, at I; 42 U.S.C. § 6000.

9. In 1980, Governor Carey designated CQC-APD as the Protection and Advocacy (P&A) office for New York State under the federal law. The Developmental Disabilities Act requires and empowers CQC to investigate, advocate and, when appropriate, litigate to protect individuals with disabilities. 42 U.S.C. § 15043 (a)(2)(A)(i).

10. In fulfilling its mission, CQC-APD has entered into contracts with not-for-

profit law offices throughout New York State, authorizing those offices to perform the functions of the state and federal protection and advocacy programs. DAI and ALS have for decades been designated P&A agencies through such contracts with CQC-APD. These contracts enable CQC-APD to expand its capacity for investigating abuse and neglect complaints, and ensure that the P&A system in New York can pursue any and all legal remedies for its clients with complete independence

11. In 1986, the New York State Legislature enacted Mental Hygiene Law §§ 33.13 and 45.09, which give broad access to facilities and records to agencies under contract with CQC-APD, including the Petitioners. Such access is critical for Petitioners to carry out their mission of protecting individuals in the state's care.

The Continuing Need for Independent Monitoring

12. Though the despicable conditions at Willowbrook and other state facilities occurred over three decades ago, the importance of the protection and advocacy mission has not diminished with time. Although they may not be as pervasive as they once were, instances of abuse and neglect continue to occur in OMRDD facilities, and the rights of residents, including their right to live in settings integrated into the community, continue to be violated.

13. The lack of independent oversight and access to state institutions and their records is one of the reasons that unspeakable and despicable conditions occurred years ago. Continuing independent monitoring is essential to ensure that the rights of residents in facilities are not violated. Recent instances of mistreatment provide stark reminders of this continuing need for truly effective oversight.

14. For example, in October 2007, two staff members of OMRDD's O.D.

Heck Developmental Center were convicted of manslaughter of Jonathan Carey, an 11 year old disabled resident of the institution. While on an outing they improperly restrained him, causing him to stop breathing. They did not seek help for Jonathan, but instead drove him around in a van for approximately 90 minutes -- running errands, buying beverages and shopping -- while Jonathan was dying. *See* <http://timesunion.com/specialreports/jonathan> (accessed December 9, 2008).

15. This was not the first time Jonathan Carey had suffered abuse. When Jonathan was a resident of an OMRDD licensed facility, his parents alleged that he was confined in his room for weeks; left to lie naked in a urine soaked bed; deprived of food; not permitted to have toys, books or other items he enjoyed; and that his windows were covered with paper to prevent him from seeing out.

16. In June 2008, the New York State Inspector General concluded an investigation of the Jonathan Carey case. The Inspector General found that when OMRDD had itself investigated these allegations it obtained evidence of very serious violations which were not included in OMRDD's Statement of Deficiencies. The Inspector General found that OMRDD failed to mention potential violations of regulations prohibiting seclusion, unauthorized time out or neglect, all of which are classified as abuse under OMRDD regulations. *See* <http://www.ig.state.ny.us/pdfs/Jonathan%20Carey%20Report-Excutive%20Summary.pdf> at p. 11. (accessed December 9, 2008). OMRDD Commissioner Ritter did not dispute these criticisms. <http://readmc.readmcdia.com/news/show/Statement-from-OMRDD-Commissioner-Diana-Jones-Ritter-Regarding-the-Release-of-the-IG-Report/195241> (accessed December 9, 2008). The Inspector General's findings provide a powerful reminder that OMRDD's oversight of its own programs is not sufficient to prevent abuse.

17. Although these examples are certainly among the most grievous, they are not the only examples of improper treatment of individuals residing in OMRDD facilities, and violations of residents' rights are by no means isolated.

18. In light of the serious risks faced by individuals with mental retardation or developmental disabilities served by OMRDD, the importance of vigorous independent oversight is beyond reasonable dispute. Indeed, the June 2008 report by the New York State Inspector General, underscores the important role played by outside agencies like the Petitioners. See <http://www.ig.state.ny.us/pdfs/Jonathan%20Carey%20Report-Executive%20Summary.pdf> (accessed December 9, 2008).

Governing Law Providing Records Access

19. Petitioners' rights to the records sought in this action are conferred by state law, which provides Petitioners with unconditional access, and by federal law, under which all the requirements for access have been satisfied.

State Records Access Authority

20. In 1986, the New York State Legislature enacted Mental Hygiene Law § 33.13(c)(4) and § 45.09, in order to ensure that CQC-APD and its contract offices had adequate access to records. L 1986, c. 184.

21. Section 33.13 (c)(4) of the Mental Hygiene Law gives agencies that provide protection and advocacy services under contract with CQC-APD access to clinical records at mental hygiene facilities. The clinical records must be produced upon request. No further showing is required.

22. In addition, Section 45.09(b) of the Mental Hygiene Law gives agencies

that provide protection and advocacy services under contract with CQC-APD access, at any and all times, to any facility serving a person with a disability, and to all books, records, and data pertaining to any such facility upon a receipt of a complaint by or on behalf of a person with a disability.

23. When §§ 33.13(c)(4) and 45.09 were enacted by the legislature, Paul Stavis, Counsel to CQC, urged the Governor to approve Senate Bill 7578-A because it would “enable 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.”

24. Recognizing that the new law would indeed provide contract agencies with the same unconditional records access afforded the Commission, Paul Keitzman, then General Counsel to OMRDD wrote to the Governor on behalf of the agency and vigorously urged the Governor to veto Senate Bill 7578-A. Mr. Keitzman and the department opposed the broad access that the new law provided, but the Governor signed it over these objections.

25. Despite the clear state statutory authority provided by the Mental Hygiene law, and OMRDD’s prior interpretation of the broad access provided for by Senate Bull 7578-A, Respondents have nevertheless denied Petitioners access to scores of clinical records necessary for Petitioners to carry out their protection and advocacy mission.

Federal Records Access Authority

26. In addition to their broad access authority under state law, Petitioners have separate federal rights to access records of individuals with developmental disabilities through the Protection and Advocacy for Individuals with Developmental Disabilities (“PADD”) program.

27. Under the Federal Developmental Disabilities Assistance and Bill of Rights Act ("DD Act"), a protection and advocacy agency has authority to access records when (1) the individual is unable to consent, (2) the individual does not have a legal guardian, conservator, or other legal representative, and (3) the P&A agency has received a complaint about the system, or the P&A agency has probable cause to suspect abuse or neglect. 42 U.S.C. § 15043 (a)(2)(I)(ii).

28. A P&A agency has probable cause to conduct an investigation when the agency has reasonable grounds for the belief that an individual with developmental disabilities has been, or may be, subject to abuse or neglect. The P & A 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.

29. The standard that the P&A agency must use when assessing neglect is found in the implementing regulations. Neglect is defined as:

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.

45 C.F.R. § 1386.19

30. The P&A agency is the final arbiter of probable cause, and a facility may not refuse access to records merely because it disagrees with an agency's determination that probable cause exists.

31. As used in the federal records access provisions, the terms “Legal Guardian, conservator and legal representative” are all expressly defined pursuant to the implementing regulations as, “an individual appointed and regularly reviewed by a State court or agency . . . having authority to make all decisions on behalf of individuals with developmental disabilities.” 45 C.F.R. §1386.19.

32. The regulations provide that the terms do 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 C.F.R. §1386.19.

33. These records access provisions reflect an understanding that the rights and well being of individuals with disabilities in state care cannot be effectively protected if the agencies entrusted with monitoring their care are kept in the dark. P&A agencies cannot perform their vital statutory functions without the broad access to records that the law provides.

34. Despite the clear and acknowledged need for independent oversight, and in violation of clear statutory authority, Respondents have chosen to deny Petitioners access to records which are critical to insuring that developmentally disabled individuals are not abused, neglected or deprived of their rights.

JURISDICTION AND VENUE

35. This Court has jurisdiction over this action pursuant to Article 78 New York Civil Practice Law and Rules §§ 7803(1), 7803(3), and 7806 and 42 USC § 1983.

36. Venue lies in the Supreme Court of Albany County and is proper pursuant

to New York Civil Practice Law and Rules §§ 7804(b) and 506(b).

PARTIES

37. For more than twenty-five years Petitioner Albany Law School has been an agency with whom CQC-APD has contracted to provide Protection and Advocacy for Individuals with Developmental Disabilities (“PADD”). 42 U.S.C. § 15043 *et seq*

38. ALS, through its Civil Rights and Disability Law Clinic (CRDLC) simultaneously serves as a clinical legal education program at the law school and as a P&A agency for the following counties: Albany, Columbia, Fulton, Greene, Montgomery, Rensselaer, Saratoga, Schenectady, and Schoharie.

39. Petitioner Disability Advocates Inc. is a not-for-profit corporation authorized to practice law in New York State.

40. For almost twenty years, Petitioner DAI has been one of the not-for profit agencies with whom CQC-APD has contracted to provide protection and advocacy services.

41. DAI is under contract with CQC-APD to provide protection and advocacy services for persons with mental illness throughout New York State under the Protection and Advocacy for Individuals with Mental Illness Program (“PAIMI”); for persons with other disabilities in the upper Hudson Valley Region under the Protection and Advocacy for Individual Rights Program (“PAIR”); and to disabled recipients of Social Security benefits in the Greater Hudson River Valley under the Protection and Advocacy for Beneficiaries of Social Security Program (“PABSS”). DAI also provides protection and advocacy services for persons with developmental disabilities in the upper Hudson Valley under the Protection and Advocacy of Person with Developmental Disabilities Program (PADD) pursuant to a CQC-APD approved

contractual arrangement with ALS.

42. ALS and DAI are pursuing this action to ensure access to clinical and patient records so that ALS and DAI can effectively provide protection and advocacy services to the residents of the Capital District Developmental Disability Service Office and Taconic Developmental Disability Service Office.

43. Respondent New York State Office of Mental Retardation and Developmental Disabilities (“OMRDD”) is an agency of the State of New York and is responsible for providing and regulating services and operations for the mentally retarded and developmentally disabled residents of the State of New York.

44. Respondent Diana Jones Ritter is the Commissioner of OMRDD and is sued in her official capacity.

45. OMRDD is the keeper of the clinical records at issue here.

46. The Capital District Developmental Disabilities Service Office (“Capital District DDSO”), a district office of OMRDD, operates the O.D. Heck Developmental Center (“O.D. Heck D.C.”), which is a certified Intermediate Care Facilities for the Mentally Retarded (“ICF-MR”) and a residential school for individuals with autism and mental retardation.

47. The Taconic Developmental Disabilities Service Office (“Taconic DDSO”), also an OMRDD district office, operates a residential support facility for individuals with developmental disabilities, which is a certified Intermediate Care Facilities for the Mentally Retarded (“ICF-MR”).

FACTS

48. Petitioners are investigating the discharge practices of the Capital District

DDSO and the Taconic DDSO in order to ensure that individuals with developmental disabilities are not unnecessarily institutionalized or denied their legal right to be treated in the most integrated setting appropriate for their individual situations.

49. In the course of Petitioners ongoing monitoring of the Capital District DDSO and the Taconic DDSO discharge practices, and through the representation of individual clients residing at the Capital District DDSO who were deemed ready to live in a less restrictive environment but were deprived of the opportunity to live in such a setting, the Petitioners 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.

50. On July 10, 2008 and August 7, 2008 Petitioners requested clinical records of residents of these facilities based upon sections 33.13(c)(4) and 45.09(b) of the New York Mental Hygiene Law.

51. Each facility operated by the OMRDD is required to maintain a clinical record for each patient or client.

52. Each facility is subject to the provisions of Mental Hygiene Law § 33.13 and § 45.09.

53. Each facility is also subject to the provisions of the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15043 (a)(2)(H); 45 C.F.R. § 1386.22

54. All of the individuals whose records have been requested are adults. On information and belief, all lack the capacity to consent to the release of their records. OMRDD has not asserted that these individuals have the capacity to give or withhold consent, or advised

Petitioners that they would have to seek such consent.

55. On August 29, 2008, Respondents refused access to the Capital District DDSO clinical records. Respondents have denied access to these records under both New York State and federal law and have incorrectly taken the position that New York State law imposes the same conditions on access that apply under federal law. In particular, in its August 29, 2008 letter, OMRDD stated:

After a careful review of the law . . . we have concluded that State law [(L 1986, Ch 184, amending MHL §33.13; 45,09)] merely implements the federal law and does not provide P&As with any broader access to records than they would otherwise have under federal law.

56. In a subsequent letter dated August 29, 2008 Respondents refused to provide access to the Taconic DDSO clinical records on the same grounds.

57. Respondents insist that access to these records (under either state or federal law) requires the consent of certain family members of the residents. These family member, however, are *not* legal representatives of the residents whose records have been requested as defined by applicable law, and Respondents have not identified any such representatives. Accordingly, even to the extent that federal law may require the consent of true legal representatives, Respondents may not require Petitioners to obtain the consent of family members with no such status for access to the residents' records.

58. In any event, even if Respondents' position with respect to access under federal law were correct, Petitioners would still be entitled to access under New York State law, which provides for access without conditions.

CLAIMS FOR RELIEF

Violation of Mental Hygiene Law § 33.13

59. Petitioners repeat and reallege the above paragraphs.

60. Respondent has violated Mental Hygiene Law § 33.13 by refusing to permit the Petitioners to have access to the records of individuals residing at Respondent's Capital District and Taconic DDSO facilities.

61. Petitioners are agencies under contract with the CQC-APD as Protection and Advocacy agencies.

62. Capital District and Taconic DDSO are mental hygiene facilities.

63. Petitioners made requests for clinical records for individuals who reside at the Capital District DDSO and Taconic DDSOs.

64. Respondents have refused to provide the records that Petitioners are entitled to, in violation of § 33.13.

Violation of Mental Hygiene Law § 45.09

65. Petitioners repeat and reallege the above paragraphs.

66. Respondent violated Mental Hygiene Law § 45.09 by refusing to permit the Petitioners to have access to its facilities, books, records, and data pertaining to the Capital District and Taconic DDSOs.

67. Petitioners are agencies under contract with the CQC-APD as Protection and Advocacy agencies.

68. Petitioners, through investigation and review of records at the Capital District and Taconic DDSOs, received information constituting a complaint that individuals with disabilities are unnecessarily institutionalized at these facilities.

69. Petitioners made requests for access to review records at the Capital

District and Taconic DDSOs.

70. The Capital District DDSO and Taconic DDSO are Mental Hygiene facilities under MHL § 45.09.

71. Respondents have refused to provide the records Petitioners are entitled to, in violation of § 45.09.

Violation of Developmental Disabilities Act and 42 USC § 1983

72. Petitioners repeat and reallege the above paragraphs.

73. Petitioners are Protection and Advocacy agencies entitled to access to records of individuals with disabilities in facilities under 42 U.S.C. § 15043 (a)(2)(I)(ii).

74. Petitioners have requested access to the records of individuals in the care of the OD Heck and Taconic DDSOs.

75. On information and belief, all of the individuals whose records are at issue in this case are unable to consent to the release of their records.

76. Petitioners have determined that there is probable cause of abuse or neglect of these individuals.

77. The individuals whose records have been requested do not have legal guardians, conservators, or other legal representatives as defined by applicable federal law.

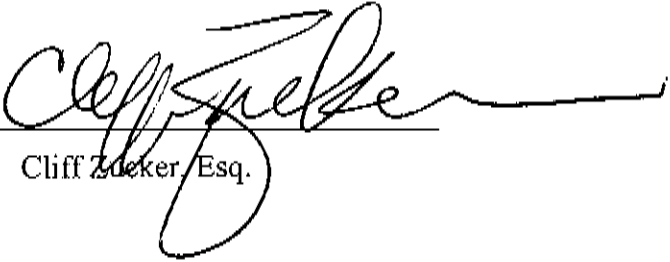
78. Petitioner is accordingly entitled to all records of individuals at the Capital District and Taconic DDSOs.

79. Respondents have refused to provide the records Petitioners are entitled to in violation of 42 U.S.C. § 15043 (a)(2)(I)(ii)

RELIEF REQUESTED

80. WHEREFORE, Petitioners pray for the following relief:
- a. Declaratory and injunctive relief;
 - b. An order requiring Respondent to promptly permit Petitioners to have access to the clinical records of all individuals residing at the Capital District and Taconic DDSO facilities;
 - c. An order requiring Respondents to develop and distribute a statewide policy directing facilities operated by OMRDD to grant access to clinical records when requested by Petitioners or any agency under contract with the CQC-APD to provide protection and advocacy services pursuant to the authorization of CQC-APD to administer the protection and advocacy system as provided for by federal law;
 - d. Alternatively, an order requiring access to all records of individuals who do not have "legal guardian, conservator, or other legal representative," residing at the Capital District DDSO or the Taconic DDSO; and
 - e. Attorneys fees and costs pursuant to state law and 42 USC § 1988.
 - f. Such other relief as the Court deems appropriate.

DATE: December 22, 2008
Albany, New York


By: Cliff Zucker, Esq.

Jennifer Monthie, Esq.
Disability Advocates, Inc.
Attorney for Petitioner
5 Clinton Square, 3rd Floor
Albany, NY 12207
(518) 432-7861

Christopher Jackson, Esq. &
Brian Lasky, Esq.
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036
(212) 336-2000

Bridgit Burke, Esq. &
Justin Myers, Esq.
Civil Rights & Disabilities Law Clinic
Albany Law School
80 New Scotland Avenue
Albany, NY 12208
(518) 445-2328

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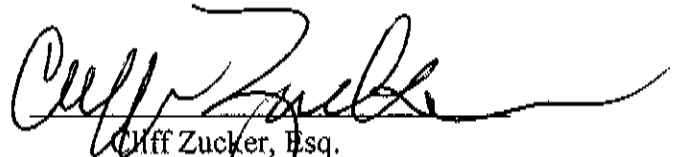
Respondents and Defendants,

VERIFICATION

Index No. 10371-08

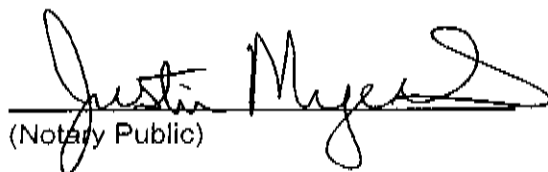
CLIFF ZUCKER, being duly sworn deposes and says:

1. I am the executive director of Disability Advocates, Inc., the Petitioner and Plaintiff herein.
2. I have read the attached Petition.
3. I have personal knowledge of the facts alleged in the petition and know them to be true with the exception of the paragraphs noted below.
4. As to paragraphs 6 to 11, upon information and belief I believe them to be true. The basis for my information and belief is my knowledge of the history of the care, treatment and mistreatment of persons with mental retardation and other disabilities.



Cliff Zucker, Esq.
Disability Advocates, Inc.
5 Clinton Square, 3rd Floor
Albany, NY 12207

Subscribed and sworn to before me
this 22 (date) day of December, 2008 (Month and Year).



(Notary Public)

JUSTIN D. MYERS
Notary Public, State of New York
No. 02196194157
Qualified in Albany Co., No. 02196194157
Commission Expires 3/24/2010