

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

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

Petitioners and Plaintiffs,

-against-

**Decision & Order**

**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.

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**Motion Return Date: Albany County Special Term, July 17, 2009**

**RJI No.: 01-08-ST9750**

**Index No.: 10371**

**Justice Robert A. Sackett, Presiding**

**Appearances:**

Albany Law School  
Civil Rights and Disabilities Law Clinic  
Pro se petitioner/plaintiff  
80 New Scotland Avenue  
Albany, New York 12208  
By: Bridgit M. Burke, Esq.  
Justin Myers, Esq.

Disability Advocates, Inc.  
Pro se petitioner/plaintiff  
5 Clinton Square, 3<sup>rd</sup> Floor  
Albany, New York 12207  
By: Jennifer J. Monthie, Esq.  
Cliff Zucker, Esq.

Patterson Belknap Webb & Tyler LLP  
Attorneys for petitioners/plaintiffs  
1133 Avenue of the Americas  
New York, New York 10036  
By: Brian N. Laskey, Esq.  
Christopher M.P. Jackson, Esq.

Andrew M. Cuomo, Esq.  
Attorney General of the State of New York  
Attorney for respondents  
The Capitol  
Albany, New York 12224-0341  
By: Brian J. O'Donnell, Esq.

**Sackett, J.:**

In this combined proceeding pursuant to CPLR article 78 and complaint pursuant to 42 USC 1983, petitioners/plaintiffs Albany Law School (ALS) and Disability Advocates, Inc. (DAI), as protection and advocacy agencies authorized by statute to investigate, advocate and litigate on behalf of individuals with developmental disabilities and retardation, seek access to the clinical records of certain individuals residing in facilities of operated by the Capital District Developmental Disabilities Services Office (Capital District DDSO) and Taconic Developmental Disabilities Service Office (Taconic DDSO), both of which are certified OMRDD district offices.

Prior to answering, respondents (collectively OMRDD), who provide and regulate services and operations, and in some cases provide residences, to and for individuals with developmental disabilities and retardation, and keep the clinical records at issue herein, move pursuant to CPLR 3211(a)(7) to dismiss the petition/complaint for failure to state a cause of action or, in the alternative, for an order pursuant to CPLR 3024(b) striking paragraphs 5-8, 12-18 and 23-24 of the petition as scandalous and prejudicial material which is irrelevant to the issues presented and directing petitioners/plaintiffs to file and serve an amended petition. Petitioners/plaintiffs oppose the motion. Amicus curiae intervenors, several public interest groups authorized to intervene by this Court's Order dated July 15, 2009, submit affidavits in support of and opposed to or partially opposed to the petition/complaint.

The motion is partially granted and partially denied as follows.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the allegations of the pleading are deemed to be true; and the pleading will be deemed to allege whatever may be reasonably implied from the statements (*Foley v D'Agostino*, 21 AD2d 60 [2<sup>nd</sup> Dept 1964]). "...[T]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail..." (*Guggenheimer v Ginsburg*, 43 NY2d 268, 275 [1977]). Pleadings are to be liberally construed; and defects shall be ignored if a substantial right of a party is not prejudiced (CPLR 3026). The pleading must apprise the respondent/defendant of the nature of the petitioner/plaintiff's grievances and the relief sought (*Shapolsky v. Shapolsky*, 22 AD2d 91 [1964]).

Pursuant to New York State's scheme of cooperative federalism designed to implement the federal Developmental Disabilities Assistance and Bill of Rights (42 USCA 15001, *et seq.*), the Commission on Quality Care and Advocacy for Persons with Disabilities (CQC-APD) is the New York State agency responsible for investigating complaints of abuse or neglect and monitoring the conditions within state operated facilities for individuals with disabilities; and is designated as the Protection and Advocacy office for New York State under federal law. CQC-APD has contracted with ALS to perform the functions of New York State and federal protection and advocacy program for the Counties of Albany, Columbia, Fulton, Greene, Montgomery, Rensselaer, Saratoga, Schenectady and Schoharie. CQC-APD has contracted with DAI, a not-for-profit agency, and ALS has subcontracted with DAI, pursuant to a CQC-APD approved contract, to provide protection and advocacy services for persons with mental illness and developmental disabilities in the relevant geographic area.

In their petition/complaint, petitioners/plaintiffs assert that in the on-going course of investigating and monitoring the discharge practices of the Capital District DDSO and the Taconic DDSO since 2004 and through representation of individual clients who were residing at Capitol District DDSO and were deemed ready to live in a less restrictive environment but were deprived of that opportunity, petitioners/plaintiffs concluded that there was probable cause to suspect neglect of individuals residing in those facilities, based on both denial of the right to live in a less restrictive setting and in the failure to provide the necessary treatment that would prepare and enable these individuals to live in such settings.

Petitioners/plaintiffs state that in furtherance of their investigation, on July 10, 2008 and August 7, 2008, pursuant to MHL 33.13(c)(4) and 45.09(b), they requested the clinical records of certain adult residents residing in Capitol District DDSO and the Taconic DDSO facilities; but that respondents refused access, stating that the Mental Hygiene Law provided petitioners/plaintiffs with no greater access to these records than federal law allows and that federal law required consent to release of the records by the individual or a family member, or without consent if there is probable cause to believe that an individual is being abused or neglected.

Petitioners/plaintiffs then commenced this action maintaining that they are unconditionally authorized by Mental Health Law 33.13 to access upon request the medical records of OMRDD clients and residents and conditionally authorized to access medical records upon receipt of a complaint by or on behalf of a person with a disability by MHL 45.09; and additionally, that they have authority as P&A agencies under 42 U.S.C. 15043(a)(2)(I)(ii) to access such records when the individuals are unable to consent or do not have a legal guardian, conservator or other legal representative and the P&A agency has received a complaint about the system, or the P&A agency has probable cause to suspect abuse or neglect and that they have met the federal requirements set forth in 42 U.S.C. 15043(a)(2)(I)(ii) for access to the records. They argue that respondents are in violation of the law by refusing access to clinical records in that the family members whose consent is required by respondents are not legal representatives of the residents, as required by federal law, and are not identified by respondents; and, in any event, petitioners/plaintiffs are entitled to unconditional access to the records under the Mental Health Law and to records of individuals who are unable to consent and for whom there is a finding of probable cause to suspect abuse and/or neglect of the individual.

Respondents assert that they have provided the clinical records for those residents who have given consent and for those residents who lack the ability to consent and who do not have a legal representative; they have also provided petitioners/plaintiffs with a list of the names and addresses of the legal representatives of the remaining residents so that they can attempt to obtain consent. Respondents argue that they are in complete compliance with the federal and state law for disclosure of clinical records to petitioners/plaintiffs.

Respondents challenge the petition/complaint on the grounds that the CQC-APD contract

with petitioners/plaintiffs conveyed authority upon petitioners/plaintiffs in accordance with the limited federal statutory powers provided to P & A agencies, which does not include unconditional access to clinical records; and on the grounds that petitioners/plaintiffs have failed to provide the information necessary to support their claims that they have met the conditions for access because of a complaint made and of probable cause to suspect neglect.

In support of the motion, respondents provide the affidavit of Chief Operating Officer Jane G. Lynch of the CQC-APD, who avers that the Commission is an independent oversight agency whose purpose is to review the organization and operations of the Department of Mental Hygiene, including the ORMDD, and to advise and assist the Governor in developing policies, plans and programs designed to ensure a high quality of care provided to individuals with disabilities. As such, the Commission has unfettered access to clinical records of ORMDD patients/clients pursuant to MHL 33.13(c)(4); and that coincidental to this unconditional access is the understanding by service providers that complete disclosure of records to the Commission will not lead to or further litigation.

Officer Lynch states that the Commission has also been designated to administer the P&A system; however, both MHL 33.13(c)(4) and 45.09(b) limits the Commission to administering the P&A system “as provided by federal law;” and that in accordance with 42 U.S.C. 15043(a)(2)(A)(i), (B) and (I) and MHL 33.13(c)(4) and 45.09(b), a P&A contracting agency, such as ALS and DAI, has limited access to patient/client clinical records conditioned upon: 1) the consent of the individual or his or her legal representative; or 2) a complaint or a P&A agency determination of probable cause to believe that the individual has been subject to abuse or neglect and the individual is incapable of consent and has no legal representative or the State is the legal representative; or 3) a complaint or a P&A agency determination of probable cause to believe that the individual has been subject to abuse or neglect and the individual’s legal representative is on notice of the complaint, has been offered assistance and fails or refuses to act on behalf of the individual.<sup>1</sup> Officer Lynch opines that the statutes do not create functioning duplicates of the Commission, which has broader authority than the P & A agencies, in the mental hygiene system; and while the P&A agency has broad authority

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<sup>1</sup>Federal law provides for immediate access without consent where there is probable cause to believe the health or safety of an individual is in serious and immediate jeopardy or in the case of a death (*see* 42 U.S.C. 15043[a][3]).

to access records, it is limited to the above circumstances to trigger that authority.

By affidavit of Patricia Martinelli, Counsel and Deputy Commissioner to OMRDD, respondents argue that “actively involved”relatives (as defined by 14 NYCRR 633.99) such as spouses, parents, adult children, siblings or other adult family members (*see* 14 NYCRR 633.11, 633.12, 681.13), are considered legal representatives by OMRDD because of the broad statutory and regulatory powers granted to such persons, including: the right to consent or object to OMRDD services for a person incapable of providing consent (*see* 14 NYCRR 633.12); the right to access the OMRDD patient/client’s clinical records and to provide others with access authority (*see* MHL 33.16 and 33.13[c][7]); the right to make medical decisions and end-of-life decisions (*see* 14 NYCRR 633.11; SCPA 1750-b[1][a]); and the right to be notified of incidents and allegations of abuse and neglect involving family members and to have access to investigative reports of such matters (*see* 14 NYCRR 624.6 and 624.8). Respondents assert that while some OMRDD patients/clients have the capacity to consent or have legal guardians appointed, the majority are represented by “actively involved” family members who are considered legal representatives pursuant to the above New York State regulations and 45 C.F.R. §1386.19.

The contract between CQC-APD and ALS for the period July 1, 2008 through June 30, 2013, specifically references the federal Developmental Disabilities Assistance and Bill of Rights Act of 2000 (*see* Contract, Appendix A-1, Protection and Advocacy for the Developmentally Disabled, in respondents’ affidavit of Patricia Martinelli, Ex. C-4). The contract also addresses the efforts of ALS and DAI to “address selected systemic issues affecting the rights of individuals with developmental disabilities ... to finalize remaining issues on behalf of persons with developmental disabilities residing in institutions to receive treatment and services in the least restrictive setting appropriate” (*see* Contract, Appendix D, Work Plan, p.7, in respondents’ affidavit of Patricia Martinelli, Ex. C-4) and to fulfill the obligations of the PADD grant” (*see ibid* at p.6) .

The Court agrees with respondents that inasmuch as the contract was entered into specifically in furtherance of the federal Developmental Disabilities Assistance and Bill of Rights Act of 2000 (42 U.S.C. 15043), that law and the coordinating State statutes control the access by petitioners/plaintiffs to the clinical records at issue. Respondents’ authority to contract with and to authorize a P & A agency to access clinical records is derived from State and federal statutes and

is no broader than the authority established by the State Legislature and the U.S. Congress (*cf Reckess v N.Y. State Commission on Quality of Care for the Mentally Disabled*, 17 AD3d 941, 942 [2005], *rev'd on other grounds* 7 NY3d 555 [2006]). Further, the Court will uphold the construction of statutes and regulations by an agency responsible for their administration unless the construction is irrational, arbitrary and capricious, an error of law or an abuse of discretion (*Cooke Ctr for Learning & Development v Mills*, 19 AD3d 834, 835-836 [2005], *appeal dismissed* 5 NY3d 846 [2005]). Upon review of the federal statutes and regulations and the State statutes and regulations adopted to implement the federal program, the Court finds that the Commission's interpretation of the relevant statutes which authorize and regulate P&A services, as set forth above, is rationally based.

It is clear that federal law does not authorize a P & A agency, in this case the petitioners/plaintiffs, to have unconditional access to the clinical records of ORMDD clients/patients. Authorization of petitioners/plaintiffs to access the clinical records of the residents at issue is conditioned upon either: 1) consent of the resident or his legal representative, which includes a designated "actively involved" family member (see 14 NYCRR 633.99, 633.11, 633.12, 681.13; MHL 33.16 and 33.13[c][7]; 45 C.F.R. §1386.19); or 2) in the case of an individual incapable of consent and who has no legal representative, upon the receipt by petitioners/plaintiffs of a complaint with regard to the individual or a finding by petitioners/plaintiffs of probable cause to suspect neglect or abuse of an individual; or 3) in the case of an individual incapable of consent and whose legal representative has been notified of a complaint or a finding of probable cause to suspect neglect or abuse of an individual, has been offered assistance to resolve the situation and has failed or refused to act (*see* 42 U.S.C. 15043[a][2][I]); and subject to relevancy to the investigation as set forth (*see* 42 U.S.C. 15043[a][2][J][i]).

Accordingly, that part of the petition/complaint which seeks a declaratory judgment declaring that petitioners/plaintiffs are unconditionally authorized to access the clinical records of all OMRDD clients/patients is dismissed.

To the extent that petitioners/plaintiffs seek access to the records of individuals capable of consent who have not consented or individuals incapable of consent who have a legal representative who has not been notified of the request, the petition/complaint as to those individuals is dismissed.

Additionally, respondents have demonstrated that ALS is authorized by contract to advocate as a P & A agency under federal law for ORMDD clients/patients in the districts delineated in its contract with respondents, not statewide. To the extent that DAI seeks an order directing respondents to grant unconditional access to clinical records of any and all ORMDD clients/patients on a statewide basis, the Court finds that the allegations in this petition/complaint addressed to alleged conditions at two DDSO's do not state a cause of action for the creation of such a policy which would be in derogation of the rights of individual ORMDD clients/patients under the federal HIPAA Privacy Act. Accordingly, that part of the petition/complaint which seeks an order directing respondents to develop and distribute a statewide policy granting unconditional access by petitioners/plaintiffs to clinical records of ORMDD residents is dismissed.

As to respondents' challenge to the remaining petition/complaint on the grounds that it is vague and lacks information specific enough to inform respondents of the nature of the charges made against them, petitioners/plaintiffs respond that since 2004, their ongoing investigation of the discharge planning process of the DDSOs has disclosed a systemic and a particular (with regard to certain individuals) lack of significant planning and procedures to prepare residents who are capable of residing in a less restrictive setting for discharge/transfer to such settings.

Contrary to respondents' protestations that they are unaware of any investigation, the copies of letters provided by petitioners/plaintiffs between the parties over the years support the allegations of petitioners/plaintiffs that since 2004 they have engaged in an ongoing investigation into the discharge process in general and the discharge planning for specific individuals; and that there has been an ongoing cooperation between the parties to improve the discharge process which petitioner/plaintiffs allege has been overly prolonged and finally stalled in 2008, resulting in this proceeding. The role of the Court here is to credit the factual allegations of petitioners/plaintiffs for the purposes of the motion and determine if a cause of action is stated. The historical information provided by respondents of successful discharge of clients/patients to less restrictive settings is not dispositive as to whether a cause of action is stated but only raises issues of fact for eventual resolution.

Both the terms of the contract and the statutory authorization allow petitioners/plaintiffs, as P & A agencies, to investigate and monitor "selected systemic issues," and "to finalize remaining

issues on behalf of persons with developmental disabilities residing in institutions to receive treatment and services in the least restrictive setting appropriate” (*see* Contract, Appendix D, Work Plan, p.7, *supra*). Within this context petitioners/plaintiffs have alleged an ongoing investigation, recalcitrance on the part of respondents to formulate standards and procedures for discharge planning and preparation and lack of planning and preparation with regard to specifically named individuals in the Capital District DDSO and Taconic DDSO facilities which could be said to support a determination of probable cause to suspect neglect in that respondents have failed to adequately plan and prepare for the discharge of residents found ready for discharge to a less restrictive setting.

Additionally, petitioners/plaintiffs are not required to provide particulars of the allegations in the petition/complaint; such information may be provided by a bill of particulars and discovery. The attorneys are reminded of the privacy of rights of the individuals whose records are sought herein and directed to provide all relevant discovery in a discrete manner with names redacted in public documents and privileged material filed under seal.

The Court determines that as to the specifically named individuals who are incapable of consent and have no legal representative, and the specifically named individuals who are incapable of consent and whose legal representatives, as defined herein, have been notified of a complaint or a finding of probable cause to suspect neglect of the individual, have been offered assistance to resolve the situation and following notification have failed or refused to act, petitioners/plaintiffs have sufficiently alleged a condition which may entitle them to access to such clinical records. Accordingly, the motion to dismiss is denied in regard to the request to access to the clinical records of these individuals.

As to the alternative relief requested by respondents, much of the historical information set forth in paragraphs 5-8, 12-18 of the petition/complaint which pre-dates petitioners/plaintiffs’ investigation and monitoring of discharge planning commencing in 2004, is remote, scandalous and prejudicial as it has no relevant bearing on the complaints presented in the petition/complaint.

Therefore, an order pursuant to CPLR 3024(b) striking paragraphs 5-8, 12-17 and the second sentence of paragraph 18 of the petition/complaint is granted; the motion is denied with respect to all other material.

Petitioners/plaintiffs are directed to file and serve an amended petition/complaint in

accordance with this decision and order within 30 days of the date of this decision.

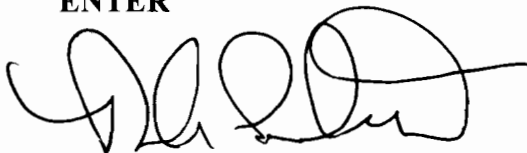
Respondents are directed to file and serve their answer to the amended petition/complaint within three weeks of the receipt of the amended petition.

This shall constitute the decision and judgment of the Court. The original Decision & Order and all papers are being forwarded to the Attorney General who is not relieved from the provisions of CPLR 2220 regarding filing and service with notice of entry.

**SO ORDERED.**

Dated: Monticello, New York  
October 22, 2009

**ENTER**

A handwritten signature in black ink, appearing to read 'R. A. Sackett', written over a horizontal line.

**ROBERT A. SACKETT, JSC**

Papers considered:

Notice of petition, summons, petition & complaint dated December 22, 2008; sealed affidavit of Bridgit M. Burke, Esq. dated January 9, 2009, sealed affidavit of Jennifer J. Monthie, Esq. dated January 9, 2009, redacted affidavit of Bridgit M. Burke, Esq. dated February 12, 2009, redacted affidavit of Jennifer J. Monthie, Esq. dated February 10, 2009.

Notice of motion and affirmation of Patricia Martinelli, Esq. dated March 20, 2009, affidavit of Jane G. Lynch dated March 19, 2009, affidavit of Brian J. O'Donnell, Esq. dated March 20, 2009, affidavit of Janice Fitzgerald dated February 25, 2009, affidavit of David Liscomb dated February 26, 2009; affirmation of Jennifer J. Monthie, Esq. dated June 5, 2009, affirmation of Bridgit M. Burke, Esq. dated June 4, 2009, affirmation of Cliff Zucker, Esq. dated June 5, 2009, affidavit of Michael Carey dated June 4, 2009.