

**Matter of McCurry v New York State Office for  
People with Dev. Disabilities**

2014 NY Slip Op 30968(U)

April 8, 2014

Sup Ct, Albany County

Docket Number: 663-12

Judge: Jr., George B. Ceresia

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of  
FREDERICK MCCURRY,

Petitioner,

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

-against-

THE NEW YORK STATE OFFICE FOR  
PEOPLE WITH DEVELOPMENTAL DISABILITIES,

Respondent.

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Supreme Court Albany County  
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding  
RJI No. 01-12-ST3359 Index No. 663-12

Appearances: Scoppetta Seiff Kretz & Abercrombie  
Attorneys for Petitioner  
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(Roland R. Acevedo, Esq.,  
Of Counsel)

Hon. Eric T. Schneiderman  
Attorney General  
State of New York  
Attorney for Respondent  
(Kevin P. Hickey, Assistant Attorney General,  
Of Counsel)  
Department of Law  
The Capitol  
Albany, New York 12224

**DECISION/ORDER**

George B. Ceresia, Jr., Justice

The petitioner is the former executive director of Tanglewood Acres  
Adult Home, Inc. ("Tanglewood"), a non-profit group home providing housing

and services in a family-like setting to around a dozen mostly elderly people with developmental disabilities. Respondent is the state agency responsible for ensuring that people with developmental disabilities receive adequate, skilled, and safe care and supervision. The Hudson Valley Developmental Disabilities Services Office (“Hudson Valley DDSO”) is one of 14 regional offices operated by respondent, and is the regional office responsible for coordination and delivery of services to residents of Tanglewood.

GM, a 47 year-old man in 2010, had resided at Tanglewood for approximately 29 years.<sup>1</sup> He was diagnosed with Moderate Mental Retardation, Mood Disorder (Not Otherwise Specified), Intermittent Explosive Disorder and various medical conditions. In 2010 a member of GM’s family lodged a complaint that GM was being mistreated at Tanglewood, specifically, that he was being psychologically abused.

The charge of abuse prompted the commencement of an investigation. Respondent’s employee Barbara L. Huff (“Huff”) was assigned to conduct the investigation. She was assisted by one Elaine Zoldan (“Zoldan”). Together, they reviewed 64 documents and 59 statements (given by residence counselors, other staff members, family members and others). They conducted 12 interviews, and ultimately issued a 30 page Incident Investigation Report (the “Huff-Zoldan Report” or “Report”) dated October 12, 2010 (revised November

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<sup>1</sup>G.M. passed away on February 9, 2011.

24, 2010). The Report found that “[t]he allegation of psychological abuse of [GM] by staff at Tanglewood Acres is substantiated.” It mentioned that GM “has been subjected to humiliation and scorn since he was chastised in front of his family by Mr. McCurry and was provoked to exhibit negative and aggressive behaviors resulting in hospitalization.” The Report described alleged incidents during which GM exhibited aggressive behaviors, but where the petitioner was not then physically present on-premises to immediately address the problem. In such situations, the petitioner would be contacted, and GM would be restrained in a SCIP<sup>2</sup> hold until such time as the petitioner could arrive at the Tanglewood facility “to lecture [GM]”. The Report indicated that there was circumstantial evidence that GM may have been provoked during some incidents, causing an escalation in violence which resulted in the need to call 911 for assistance. The Report mentioned that there existed an “overwhelming negativity and lack of empathy for [GM, which] created an atmosphere of psychological abuse”; and that GM “did not comprehend why he was being provoked and why he was to be expelled from Tanglewood Acres<sup>3</sup>, but he felt the pressure of being forced out.”

As relevant here, the Report recommended that the results of the investigation, and the conclusion that GM had been psychologically abused, be

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<sup>2</sup>An acronym for Strategies in Crisis Intervention & Prevention.

<sup>3</sup>There are allegations that the petitioner sought to have GM relocated to a new group home.

shared with the Board of Directors of Tanglewood. It also recommended that the petitioner and his staff be re-trained in the definitions of abuse and how to appropriately handle individuals with behavioral issues. Notwithstanding the finding of abuse, the Report made no recommendation that any member of the Tanglewood staff be punished. The Report was subsequently adopted by Hudson Valley DDSO's Quality Improvement Coordinator Larry Kravitz ("Kravitz").

The petitioner was ultimately discharged as Executive Director of Tanglewood. He thereafter commenced the above-captioned CPLR Article 78 proceeding to review the finding set forth in the Huff-Zoldan Report that he had psychologically abused GM. The Court denied that portion of the petition seeking CPLR Article 78 relief, but remanded the matter to the respondent to conduct a name-clearing hearing.

The name-clearing hearing was subsequently commenced. On September 4, 2013 counsel for the petitioner issued a subpoena duces tecum addressed to Barbara Huff of New York State Office of People with Developmental Disabilities, requesting production of the Huff-Zoldan Reports and other documents. The respondent has made a motion to quash the subpoena pursuant to CPLR 2304 on grounds that the documents are confidential under Mental Hygiene Law ("MHL") § 33.13, and subject to the physician-patient privilege and HIPAA (the Health Insurance Portability and Accountability Act of 1996; see Pub. L. 104-191, 110 U.S. Stat. 1936 [1996] [codified as amended in

scattered sections of titles 18, 26, 29 and 42 of the United States Code]). The petitioner opposes the motion and cross-moves for an order compelling production of the documents, and for an order compelling testimony of Barbara Huff and one James F. Moran.

A subpoena to compel production of a patient's clinical record maintained under the provisions of MHL 33.13 must be accompanied by a court order (see CPLR 2302). As stated in MHL 33.13:

“(c) Such information about patients or clients reported to the offices, including the identification of patients or clients, clinical records or clinical information tending to identify patients or clients, and records and information concerning persons under consideration for proceedings pursuant to article ten of this chapter, at office facilities shall not be a public record and shall not be released by the offices or its facilities to any person or agency outside of the offices except as follows:

(1) *pursuant to an order of a court of record requiring disclosure upon a finding by the court that the interests of justice significantly outweigh the need for confidentiality, provided, however, that nothing herein shall be construed to affect existing rights of employees in disciplinary proceedings.*”  
(MHL § 33.13, emphasis supplied)

Clearly, the attorney-issued subpoena duces tecum here, did not satisfy the requirements of CPLR 2302 or MHL § 33.13.

According to the attorney for the petitioner, the Huff-Zoldan Report has already been received into evidence by the Hearing Officer presiding over the name-clearing hearing. Counsel indicates that the documents requested in the

subpoena duces tecum are derived from the list of supporting documents identified in the Huff-Zoldan Report, upon which the authors of the Report relied.

Under Rule 602.2 of the Rules of the Department of Mental Hygiene the hearing officer has the power to issue subpoenas for the production of witnesses and documents (see 14 NYCRR § 602.2 [h] [4] [iv]). She/he is expressly directed to protect the confidentiality of the “identity, condition or clinical record of a person” (see 14 NYCRR § 602.2 [k] [4] [viii]).<sup>4</sup>

“The physician-patient privilege prohibits disclosure of any information acquired by a physician in attending a patient in a professional capacity, and which was necessary to enable [the physician] to act in that capacity” (Jackson v Jamaica Hospital Medical Center, 61 AD3d 1166 [3<sup>rd</sup> Dept., 2009], at 1168, quotations and citations omitted; see also CPLR 4504)). It has not been demonstrated here, however, that any confidential medical information is being sought from any health care professional or entity mentioned in CPLR 4504 (a). Thus, while the records appear to be confidential under MHL § 33.13, respondent has failed to adequately demonstrate how the physician-patient

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<sup>4</sup>“If evidence at a hearing relates to the identity, condition or clinical record of a person (see Glossary), the hearing officer shall exclude all others from the room except parties to the proceeding, their counsel, the witness being examined, others determined by the hearing officer to be essential to the presentation of its case by a party and any others the presence of whom is consented to by all parties, the hearing officer and the person whose identity, condition, or clinical record is being examined. The record of this proceeding shall not be available to anyone outside the OMRDD, other than a party to the proceeding or his or her counsel, except by order of a court of competent jurisdiction.” (14 NYCRR § 602.2, [k] [4] [viii]).

privilege is directly implicated. For this reason, the Court finds that the argument has no merit.

HIPAA governs the disclosure of certain medical information by “covered entities”. As stated in Arons v Jutkowitz (9 NY3d 393, 402 [2007]):

“the Privacy Rule forbids an organization subject to its requirements (a ‘covered entity’) from using or disclosing an individual’s health information (‘protected health information’) except as mandated or permitted by its provisions (45 CFR 164.502[a]). ‘Covered entities’ generally include health plans, health care clearinghouses and health care providers such as physicians, hospitals and HMOs (45 CFR 160.103, 164.104[a]). ‘Protected health information’ encompasses any individually identifiable health information held or transmitted by a covered entity in any form or medium, whether electronic, paper or oral (45 CFR 160.103).” (Arons v. Jutkowitz, 9 NY3d 393, 412-13 [2007]).

In this respect, because it has not been shown, that either Barbara Huff or the respondent is a covered entity, the Court finds that the respondent has not demonstrated that the provisions of HIPAA apply. However, even if HIPAA does apply, federal rules and regulations permit disclosure by Court order. As stated in 45 CFR 164.512:

(e) Standard: Disclosures for judicial and administrative proceedings. (1) Permitted disclosures. *A covered entity may disclose protected health information in the course of any judicial or administrative proceeding: (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; []*” (see 45 CFR 164.512, emphasis supplied)

The case of State-Office of Mental Retardation & Dev. Disabilities v Mastracci (77 AD2d 473 [4<sup>th</sup> Dept., 1980]) has similarities to the one at bar. There an agency employee was accused of physical assault of four mental patients. In a disciplinary proceeding the employee's attorney subpoenaed the patients' medical records. The agency made a motion to quash the subpoena. Supreme Court denied the motion and ordered the records released to the arbitrator for his/her *in camera* inspection with regard to which entries were relevant and material to the disciplinary proceeding. The Appellate Division affirmed in a decision which discussed MHL Article 33. The Appellate Division stated:

“Here the need for maintaining the confidentiality of the patients' records must be balanced against the concern for respondent's rights and any adverse impact on his reputation, livelihood and future employment. Clearly, confidentiality, on these facts must yield to respondent's right to conduct an effective defense to the disciplinary action. ‘The confidentiality accorded the hospital records of mental patients by the Mental Hygiene Law is not absolute. In a proper case it must yield to the needs of justice.’” (*id.*, at 476, quoting Matter of Civil Serv. Employees Assn. [Director, Manhattan Psychiatric Center], 72 AD2d 526, and citing Perry v Fiumano, 61 AD2d 512, 519).

In this instance, as noted, it appears that the Hearing Officer has already received the Huff-Zoldan Report. The petitioner has made what the Court deems a reasonable and compelling argument that supporting documentation should also be produced. The Hearing Officer has the ability to maintain the

confidentiality of G.M.'s records, both through an *in camera* review, and through control of the hearing room (see 14 NYCRR 602.2 [k] [4] [viii], supra). The Hearing Officer can determine what documents, if any, are material and relevant.

To conclude, the Court finds that that the interests of justice significantly outweigh the need for confidentiality (see MHL 33.13 [C] [1]). The motion to quash the subpoena duces tecum addressed to Barbara Huff is denied in all respects. The Court will further deny respondent's request to quash documents already received by the Hearing Officer, as unwarranted interference with the administrative process. The petitioner may present to the Court a new subpoena duces tecum addressed to Barbara Huff, in the same form as that included in the instant motion, on notice to the respondent, to be so-ordered by the undersigned. Per respondent's request, the Court will direct that the subpoenaed records be disclosed only to the Hearing Officer, the petitioner and petitioner's attorney, and will direct that such records not become a part of the public record.

With regard to petitioner's cross-motion for the Court to issue a subpoena ad testificandum to James F. Moran and Barbara Huff, the Court observes that the Hearing Officer has ample authority to address this request (see 14 NYCRR 602.2 [h] [4] [iv]). The Court discerns no need for judicial relief at this time.

Accordingly, it is

**ORDERED**, that respondent's motion to quash the subpoena duces tecum dated September 4, 2013 addressed to Barbara Huff, and for all related relief is

denied, other than as set for below; and it is

**ORDERED**, that the subpoenaed records be disclosed only to the Hearing Officer, the petitioner, petitioner's attorney, officers and/or employees of the respondent, and respondent's attorney, and such records not become a part of the public record; and it is further

**ORDERED**, that the parties are prohibited from using or disclosing the protected health information for any purpose other than the name clearing hearing; and it is

**ORDERED**, with respect to any document or information governed by the provisions of HIPAA, that such documents and/or information and all copies thereof, upon conclusion of the name clearing hearing, be securely sealed and returned to the covered entity, to be preserved by the covered entity for purposes of future judicial review, if any; and it is further

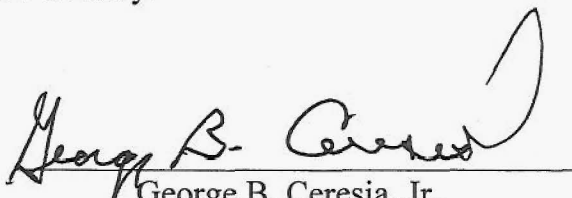
**ORDERED**, that within twenty (20) days, the petitioner submit a new subpoena duces tecum addressed to Barbara Huff, in the form set forth in the moving papers, to be so-ordered by the Court; and it is

**ORDERED**, that petitioner's cross-motion for an order granting subpoenas ad testificandum addressed to James F. Moran and Barbara Huff be and hereby is denied.

This shall constitute the decision and order of the Court. The original decision/order is returned to the attorney for the petitioner. All other papers are being delivered to the Supreme Court Clerk for delivery to the County Clerk or

directly to the County Clerk for filing. The signing of this decision/order and delivery of this decision/order does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

Dated: April 8, 2014  
Troy, New York

  
George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

1. Respondent's Notice of Motion dated September 19, 2013
2. Affirmation of Pamela J. Le'Mon, Esq. dated September 18, 2013 and Exhibits
3. Affirmation of Kevin P. Hickey, Esq., dated September 18, 2013
4. Petitioner's Notice of Cross-Motion dated October 2, 2013
5. Affirmation of Roland R. Acevedo, Esq., dated October 2, 2013 and Exhibits
6. Reply Affirmation of Pamela J. Le'Mon, Esq., dated October 9, 2013 and Exhibit
7. Reply Affirmation of Kevin P. Hickey, Esq., dated October 10, 2013

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of  
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Supreme Court Albany County  
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding  
RJI No. 01-12-ST3359 Index No. 663-12

**SEALING ORDER**

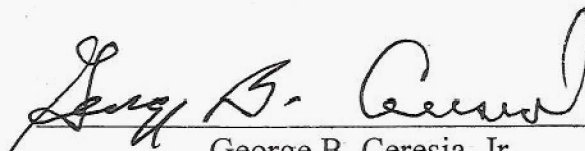
The following document containing information protected from disclosure under the provisions of Mental Hygiene Law § 33.13 (c), having been filed by the respondent in connection with the above matter, namely, Affirmation of Pamela J. Le'Mon, Esq., dated September 18, 2013 and Exhibits.

For good cause shown, it is hereby .

**ORDERED**, that the foregoing designated document, including all duplicates and copies thereof, shall be filed as sealed instruments and not made available to any person or public or private agency unless by further order of the Court.

ENTER

Dated: April 8, 2014  
Troy, New York



George B. Ceresia, Jr.  
Supreme Court Justice