

L.A. v Adapt Community Network

2020 NY Slip Op 30416(U)

February 11, 2020

Supreme Court, New York County

Docket Number: 154330/2018

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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INDEX NO. 154330/2018

L. A. (Anonymous), an infant under the age of fourteen by her mother and natural, guardian, JULIA AMAYO, and JULIA AMAYO, individually,

MOTION DATE 11/18/2019

MOTION SEQ. NO. 002

Plaintiffs,

- v -

ADAPT COMMUNITY NETWORK, UNITED CEREBRAL PALSY OF NEW YORK CITY, INC., and CITY OF NEW YORK,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39

were read on this motion to/for DISCOVERY.

This is a personal injury action in which the blind and disabled three-year-old infant plaintiff allegedly fell in the course of boarding a bus while in the care of the defendant ADAPT Community Network (ADAPT), formerly known as United Cerebral Palsy of New York City, Inc. ADAPT operates state-licensed daycare/preschool programs for disabled children in facilities allegedly owned by the defendant City of New York. The plaintiffs move pursuant to CPLR 3124 and 3126 to compel the defendants to respond to a July 18, 2019 notice of discovery and inspection or, in the alternative, to strike their answer for failure to make disclosure. The defendants oppose the motion, contending that the documents sought are exempt from disclosure by Education Law § 6527(3). The motion is granted in part in accordance herewith.

After the court conducted a compliance conference on July 16, 2019, the plaintiffs served the defendants with a demand for discovery and inspection dated July 18, 2019, requesting the following documents:

1. A complete copy of infant plaintiff's file, including but not limited to, plan of care reports, oversight plans, oversight plans attendance reports, as well as any interim reports of same.
2. Any incident reports in relation to the subject occurrence
3. Any party statements in relation to the subject occurrence.
4. Any attendance/supervision reports in relation to the subject occurrence.
5. A completed Form OPWDD 149: Investigative Report in relation to the subject occurrence.
6. A completed Form OPWDD 147: Reportable Incident and Notable Occurrence Report in relation to the subject occurrence.

On September 26, 2019, the defendants responded to demand number 1 by requesting a HIPAA authorization, but objected to the remaining demands on the ground that they were exempt from disclosure by virtue of Education Law § 6527(3) and Mental Hygiene Law § 29.29. The plaintiffs thereafter provided the defendants with the requested authorization, and the defendants produced the infant's file on December 2, 2019, thus satisfying their obligation to respond to demand number 1.

The plaintiffs now move to compel a response to demand numbers 2 through 6 or, in the alternative, to strike the defendants' answer for failing to respond thereto. At a December 3, 2019 status conference, the parties could not resolve their dispute with respect to these requested documents.

Education Law § 6527(3) exempts certain records from CPLR article 31 disclosure. It provides that

"[n]either the proceedings nor the records relating to performance of a medical or Quality Assurance review function or participation in a medical and dental malpractice prevention program nor any report required by the department of health pursuant to section twenty-eight hundred five-1 of the public health law described herein, including the investigation of an incident reported pursuant to section 29.29 of the mental hygiene law, shall be subject to disclosure under article thirty-one of the civil practice law and rules."

ADAPT is a private, not-for-profit agency. It contends that documents memorializing internal investigations of the infant plaintiff's accident necessarily fall within the statutory exemptions

from disclosure for records relating to medical review and quality assurance functions or reports required by the New York State Department of Health pursuant to Public Health Law §2805-1, which include incident reports prepared pursuant to Mental Hygiene Law § 29.29. That statute authorizes the State Commissioners of Mental Health and the Office of People With Developmental Disabilities (OPWDD) to promulgate policies and regulations governing incident reports, which are defined as “reports of accidents and injuries affecting patient health and welfare at facilities.” Mental Hygiene Law § 29.29(1) provides that institutional mental hygiene providers such as ADAPT must establish a patient care and safety team at the facility level to

“investigate and report to the facility director on: (i) suicides or attempted suicides; (ii) violent behavior exhibited by either patients or employees; (iii) frequency and severity of injuries incurred by either patients or employees; (iv) frequency and severity of injuries occurring on individual wards or in buildings at such facilities; (v) patient leave without consent; (vi) medication errors; and (vii) recommendations for corrective actions in response to incident reports to ensure the care and safety of all patients.”

A “notable occurrence” is a reportable event at an agency’s facility that includes accidental injury to a patient (see 14 NYCRR 624.4[c][2][ii][b]). Crucially, pursuant 14 NYCRR 624.6(f)(7), OPWDD incident reports of notable occurrences are expressly required to be disclosed, upon request, to parents of an injured minor patient. Hence, the defendants must provide documents in response to demands 5 and 6 in accordance with that regulation to the extent that they are in possession of such documents, regardless of whether they are exempt from CPLR article 31 disclosure.

As to the other demands, the cases applying the statutory exemption, although couched in broad language, involve only situations in which the care and treatment of the patient, or a facility’s operations or deployment of personnel, were at issue (see *Katherine F. v State of New York*, 94 NY2d 200 [1999] [sexual abuse at state psychiatric center]; *Brathwaite v State of New York*, 208 AD2d 231 [1st Dept 1995] [wrongful admission to state psychiatric hospital and concurrent adverse effects thereof]; *Smith v State of New York*, 181 AD2d 227 [3d Dept 1992] [fall from a 4th-story window that might have been a suicide]; *Phillips v State of New York*, 54

Misc 3d 294 [Sup Ct, Bronx County 2016] [assault by patient upon a teacher]). As the Court of Claims explained, Public Health Law § 2805-*l* expressly requires certain hospitals to investigate and report on incidents relating to patients' deaths or impairments of bodily functions in circumstances other than those related to the natural course of illness, disease, or proper treatment, fires that disrupt patient care or cause harm, equipment malfunctions during diagnosis or treatment which could adversely affect patients or hospital personnel, poisoning occurring within the hospital, strikes by hospital staff, disasters or emergency situations affecting hospital operations, and the termination of utilities or other services vital to the safe operation of the hospital and the safety of patients and hospital personnel; as the court noted, these incident reports, and the information collected in producing them, are privileged from disclosure under Public Health Law § 2805-*m* and Education Law § 6527[3] (*see Finnegan v State of New York*, 179 Misc 2d 694 [Ct. Claims 1999]). The State Commissioner of Health is authorized by that statute to promulgate regulations that add, modify, or eliminate one or more advise events described in Public Health Law § 2805-*l* (2).

None of the cases cited herein involved traditional premises liability for a slip-and-fall or trip-and-fall accident, and research has revealed no authority for the defendants' contention that incident reports referable to such accidents fall within the ambit of the statutory exemption from disclosure (*see Spakoski v Amsterdam Mem. Hosp.*, 6 Misc 3d 757, 759 [Sup Ct, Montgomery County 2005] [accident report prepared by nursing home was not completed solely for quality assurance purposes, but was required by 10 NYCRR 415.30(f), applicable to accidents in nursing homes]; *see also Park Assoc. v New York State Atty. Gen.*, 99 NY2d 434 [2003]).

In *Marte v Brooklyn Hosp. Ctr.* (9 AD3d 41, 45 [2d Dept 2004]), a case involving a physical attack by one patient upon another, the Court explained that

"[i]t is the burden of the entity seeking to invoke the privilege to establish that the documents sought were prepared in accordance with the relevant statutes. A review of the affirmation in support of the Hospital's motion for a protective order and the attached documents does not reveal any statement by the Hospital that it actually prepared any committee review incident reports for the Department of

Health as required under Public Health Law § 2805-1. The Hospital thus failed to establish its burden that any documents were prepared under Public Health Law § 2805-1 and/or Education Law § 6527(3). Moreover, some of the documents demanded are not the type that would be subject to the privilege, such as records of complaints made by visitors, and the production of visitor logs. Accordingly, the Hospital is not entitled to a blanket protective order with respect to the demands set forth above [citations omitted].”

The Court thus directed the defendant hospital to prepare and submit a privilege log and provide all allegedly exempt documents to the court for an in camera inspection. As several appellate courts and at least one trial court have concluded, if the incident report or relevant document was not generated in connection with a facility's or agency's quality assurance review function, it will not be exempt from disclosure (*see id.*; *Maisch v Millard Fillmore Hosps.*, 262 AD2d 1017 [4th Dept 1999]; *Hale v Odd Fellow & Rebekah Health Care Facility*, 188 Misc 2d 498 [Sup Ct, Niagara County 2001] [maintenance records generated with respect to accident in which plaintiff fell through an unguarded construction hole were not generated for quality assurance purposes and thus not exempt from disclosure]).

The plaintiffs correctly point out that an investigation into a slip-and-fall or trip-and-fall accident such as the one here is not one that necessarily implicates medical or dental malpractice or quality control issues at a facility. They thus assert that any investigation into the accident in dispute does not necessarily involve the professional standard of care or the quality of the operations of a licensed medical or mental health facility, but may involve only garden-variety negligence in the maintenance of premises that would be applicable to any school or facility that provides transportation services to children. Nonetheless, to the extent that any documents responsive to demand numbers 2, 3, or 4 might include the results of any investigation of the adequacy of the deployment of ADAPT's personnel to supervise children's boarding of a bus, those portions of the documents may indeed be subject to the Education Law and Mental Hygiene Law exemptions for quality control incident reports. Hence, the court will require the defendants to submit those documents for in camera inspection to ascertain whether

they implicate review of care, medical and mental hygiene operations, and quality control issues.

In light of the foregoing, it is,

ORDERED that the plaintiffs' motion is granted to the extent that the defendants shall (a) on or before March 13, 2020, provide the plaintiffs with documents responsive to demand numbers 5 and 6 as set forth in the plaintiffs' demand for discovery and inspection dated July 18, 2019 or an affidavit stating that they are not in possession of such documents and (b) no later than April 28, 2020, submit to the court for in camera inspection all documents responsive to demand numbers 2, 3, and 4 as a set forth in the plaintiffs' demand for discovery and inspection dated July 18, 2019, along with a privilege log articulating the privilege claimed for each such document, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

2/11/2020
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: