

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DISABILITY ADVOCATES, INC.,

Plaintiff,

v.

GEORGE PATAKI, in his official capacity as
Governor of the State of New York, ANTONIA C.
NOVELLO, in her official capacity as
Commissioner of the New York State Department of
Health, JAMES STONE, in his official capacity as
Commissioner of the New York State Office of
Mental Health, THE NEW YORK STATE
DEPARTMENT OF HEALTH, AND THE NEW
YORK STATE OFFICE OF MENTAL HEALTH,

Defendants.

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT, E.D.N.Y.

★ MAY 19 2004 ★

BROOKLYN OFFICE

03 CV 3209 (NGG)(MDG)

PROTECTIVE ORDER

Pursuant to the plaintiffs' motion, in order to protect against the public disclosure of information and records which are CONFIDENTIAL under federal or state law which may be obtained in the course of or in connection with this litigation, it is ORDERED that:

1. This Protective Order shall govern the treatment of all CONFIDENTIAL documents, information and records that have been or will be produced in connection with this Action, whether in response to a formal discovery request pursuant to the Federal Rules of Civil Procedure, in response to a public records request, or in response to an informal request for information (collectively referred to below as "discovery"), and regardless of whether the producing person is a party or a non-party to the action. This includes, without limitation, produced documents, answers to requests for admission, answers to interrogatories, and any deposition transcript.

2. The parties, their counsel, and agents and employees of the parties and of their counsel shall treat as CONFIDENTIAL the following:

- a. Documents and information, obtained in discovery, from which the identity of any resident of an adult home, state-run psychiatric hospital, or an individual with a mental illness under the care of mental health professionals may be determined and;
- b. Records of the New York State Department of Health and the New York State Office of Mental Health, or any provider licensed by or contracting with those departments to provide mental health services, obtained in discovery, that are confidential under federal or state law.

3. The Court finds that there is good and substantial need for the parties and their counsel, experts and consultants to have access to CONFIDENTIAL information to litigate this case, including but not limited to records and medical records of current residents of Queens Adult Care Center, which, given the protective features of this order, significantly outweighs the affected individuals' interests in complete confidentiality.

4. The parties shall produce CONFIDENTIAL information and records otherwise available through discovery notwithstanding their CONFIDENTIAL character.

5. Material may be designated as CONFIDENTIAL prior to producing or furnishing the documents or things, by stamping "Confidential" on each

page and each thing to which the designation applies or requesting a court reporter to designate certain portions of a deposition transcript "Confidential" and to bind them separately.

With respect to information produced in electronic form, substantially the same designation shall be affixed to the medium on which the information is provided. This designation will be made by the producing party based on its good faith determination that such designation applies.

6. Documents, information and records which are CONFIDENTIAL under Paragraph 2 may be used only for purposes of this litigation and may be disclosed only to the following:

- a. The Court;
- b. The Defendants, Defendants' counsel, and the employees, agents and in-house counsel of any of them;
- c. Plaintiff, counsel for the Plaintiff, and the employees, agents and in-house counsel of any of them;
- d. A person with independent legal authority to have access to the documents and information;
- e. Court officials involved in this litigation, including court reporters;
- f. Potential witnesses or persons noticed with depositions or designated as trial witnesses to the extent reasonably necessary to prepare them to testify; and

- g. To outside consultants or experts retained for the purpose of assisting counsel in this litigation, or in anticipation of such.

7. Any person being given access to CONFIDENTIAL information pursuant to Paragraph 6 above is directed not to disclose such information to any person other than those described in Paragraph 6. In addition, CONFIDENTIAL information may not be disclosed to persons in 6(f) or 6(g), unless such person has executed an undertaking in substantially the following form, which undertaking shall be retained by the attorney who provides the person the CONFIDENTIAL information:

That s/he has read this Protective Order and agrees to be bound by it, and further, will not divulge to persons other than those specifically authorized by Paragraph 6 of the Protective Order and will not copy or use, except solely for purposes of this litigation, any CONFIDENTIAL document or information as defined by the Protective Order, except as provided therein.

8. The parties shall produce CONFIDENTIAL information and records, without the individual's consent, which are otherwise discoverable notwithstanding their CONFIDENTIAL character, including but not limited to mental health records of any resident of an adult home or state-run psychiatric hospital or an individual with a mental illness under the care of a mental health professional.

9. Any pleading or other documents containing CONFIDENTIAL information served on the opposing party will be treated as CONFIDENTIAL pursuant to this Protective Order.

10. Any pleading or other documents filed in this Court shall be filed redacted of details identifying particular individuals so as to avoid disclosure of CONFIDENTIAL information.

11. Copies of transcripts and recordings of court proceedings or depositions may not be publicly released unless reviewed by the parties and those parts designated as CONFIDENTIAL by counsel are redacted. All court reporters involved in this case shall be provided with a copy of this Order and be bound by its terms.

12. Depositions involving CONFIDENTIAL information shall be conducted only in the presence of the parties, their agents or employees, their representatives, their counsel, their counsel's agents or employees, outside consultants or experts retained for the purpose of assisting counsel in this litigation, the person from whom discovery is sought, his or her legal counsel and a court reporter.

13. Statistical information, compilations, and analysis of information based in whole or in part upon CONFIDENTIAL information, as well as redacted documents, may be released to the public or press without violating this order, so long as the following material is not released without the consent of the individual involved:

- a. Information, obtained in discovery, from which the identity of any resident of an adult home, state-run psychiatric hospital, or a individual with a mental illness under the care of mental health professionals may be determined and;
- b. Records that are confidential under applicable law.

14. In the event of an inadvertent disclosure of CONFIDENTIAL information of another party, the receiving party or producing party making the inadvertent disclosure shall upon learning of the disclosure:

- a. Promptly notify the person or entity to whom the disclosure was made that it contains CONFIDENTIAL information subject to this Order;
- b. Promptly make all reasonable efforts to retrieve such CONFIDENTIAL information from, and to preclude dissemination or use by, the person or entity to whom disclosure was inadvertently made; and
- c. Promptly notify the producing party of the identity of the person(s) or entity to whom disclosure was inadvertently made, the circumstances of the disclosure, and the steps taken to prevent the dissemination or use of the information.

15. Nothing in this Order shall preclude any party from seeking a determination by the Court in the form of a noticed motion that any matter designated CONFIDENTIAL under this Protective Order is not entitled to protection, or is entitled to a more limited form of protection.

16. Records containing CONFIDENTIAL information shall be maintained in a secure and confidential location when not in use and used only by those persons listed in paragraph 6, above, who need access in connection with the litigation of this case.

17. If plaintiff wishes to show to any patient or resident ("patient") their own clinical records covered by New York Mental Hygiene Law § 33.16 which were received under this order, plaintiff shall first transmit to the entity which created

such records (to defendants' counsel if that entity is one of the defendant agencies) a list containing sufficient information to enable the entity to identify the patient and the records in question. Upon receipt of such a list, the entity shall reply within 10 days designating any portions of such records that the treating practitioner believes should not be shown to the patient because showing the patient those records can reasonably be expected to cause substantial and identifiable harm to the patient or others which would outweigh the patient's right to access, according to the standards set forth in MHL § 33.16. Plaintiff will structure and submit its lists so that no more than 10 patients are under this 10 day review period for any entity at any time. If the entity that created the records does not reply within 10 days, plaintiff may proceed. If the entity does so reply, then plaintiff may notify the entity that it wishes to contest the practitioner's determination. The plaintiff and the entity shall cooperate in attempting to resolve the issue, and if they are unable to do so, plaintiff may seek a determination by the Court. Until such a determination is rendered, plaintiff will not show to the patient any clinical records so designated, or any memorandum, affidavit, exhibit or other information submitted to the court or plaintiff in connection with the dispute.

SO ORDERED

Dated: Brooklyn, NEW YORK
May 19, 2004

signed/

MARILYN DOLAN GO
UNITED STATES DISTRICT JUDGE