

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

STATE OF NEW YORK,

Defendant.

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RAYMOND O'TOOLE et al.,

Plaintiffs,

ANDREW M. CUOMO et al.,

Defendants.

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RESIDENTS AND FAMILIES UNITED TO SAVE
OUR ADULT HOMES et al.,

Plaintiffs,

HOWARD ZUCKER, M.D. et al.,

Defendants.

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NICHOLAS G. GARAUFIS, United States District Judge.

ORDER

13-CV-4165 (NGG) (RML)

13-CV-4166 (NGG) (RML)

16-CV-1683 (NGG) (RER)

On January 16, 2013, the New York State Department of Health (“DOH”) and the New York State Office of Mental Health (“OMH”) promulgated regulations (the “Regulations”) which, among others things: (1) prohibit “transitional adult homes”¹ from admitting any person whose admission will increase the mental health census (i.e. the percentage of residents with

¹ A “transitional adult home” is defined as an “adult home with a certified capacity of 80 beds or more in which 25 percent or more of the resident population are persons with serious mental illness.” 11 N.Y.C.R.R. § 487.13(a)(1).

“serious mental illness”²) of a facility; and (2) prohibit psychiatric inpatient units of hospitals and freestanding psychiatric facilities licensed by OMH from discharging individuals with serious mental illness to transitional adult homes. See 14 N.Y.C.R.R. §§ 580.6, 582.6; 18 N.Y.C.R.R. §§ 487.4, 487.13. The Regulations are critical to achieving the goals of the Settlement Agreement entered into by the parties in United States v. New York, No. 13-CV-4165 (NGG) (RML), and O’Toole et al. v. Cuomo et al., No. 13-CV-4166 (NGG) (RML) (collectively the “DAI” action).³

Four separate lawsuits have been brought by various plaintiffs—including operators of New York state-licensed adult homes as well as adult home residents—challenging the validity of the Regulations: Residents and Families United to Save Our Homes v. Zucker (“Residents and Families”), No. 16-CV-1683 (NGG) (RER); Doe v. Zucker, Index No. 007079/2016 (N.Y. Sup. Ct. Albany Cty.); Oceanview Home for Adults, Inc. v. Zucker (“Oceanview v. Zucker”), Index No. 006012/2016 (N.Y. Sup. Ct. Albany Cty.); and Hedgewood Home for Adults, LLC v. Zucker, Index No. 052782/2016 (N.Y. Sup. Ct. Dutchess Cty.) (collectively, the “Regulations Actions”).

² “Individuals with serious mental illness” are “individuals who meet criteria established by the commissioner of mental health, which shall be persons who have a designated diagnosis of mental illness under the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR, American Psychiatric Association, July 2000), and whose severity and duration of mental illness results in substantial functional disability.” 11 N.Y.C.R.R. § 487.2(c).

³ Notwithstanding the removal of Section O from the Settlement Agreement, the court has stated its view and reiterates now that enforcement of the Regulations is critical to achieving the goals of the Settlement Agreement. The Regulations limit the admission of individuals with serious mental illness into adult homes whose mental health census is 25 percent or more. If the Regulations are eliminated, it will open the front doors of the adult homes to individuals with serious mental illness. Without some mechanism for limiting admissions or quickly transitioning individuals who are willing and able to move into supported housing, the adult homes could easily revert to being warehouses for individuals with serious mental illness. The State has a continuing obligation—which extends beyond the instant cases—to provide services to individuals with disabilities “in the most integrated setting appropriate to the[ir] needs,” 28 C.F.R. § 35.130(d), and to avoid “unjustified isolation” of individuals with disabilities, Olmstead v. L.C., 527 U.S. 581, 597 (1999).

Several current or former DAI class members—individuals with serious mental illness who reside in “impacted adult homes”⁴—are named plaintiffs in at least one of the Regulations Actions. The court refers to those individuals as the “Class Member Plaintiffs.” Three of the Class Member Plaintiffs have been identified by name: Walter Roberts, Joseph Simon, and Lawrence Wong are class members in DAI and plaintiffs in Residents and Families. A fourth individual, Kenneth Przyjemski, is a plaintiff in Residents and Families and has been identified as a resident of a transitional adult home that is subject to the Regulations; however, it is unclear whether Przyjemski is a class member because the court does not know whether he resides in an impacted adult home. Four other anonymous plaintiffs in the Regulations Actions are also current or former class members: John Doe in Doe v. Zucker; and Resident AA, Resident BB, and Resident CC in Oceanview v. Zucker.

The court first notes that the interests of the Class Member Plaintiffs and the interests of the adult homes who are also plaintiffs in the Regulations Actions may not be synonymous. If their interests are in fact incongruent, this begs the question of whether these groups of plaintiffs can be jointly represented as an ethical matter. Moreover, the State has expressed concern that the Class Member Plaintiffs participating in Residents and Families are not voluntary and knowing participants in the litigation. (See Defs. Opp’n to Mot. to Remand (Dkt. 19-25 in No. 16-CV-1683) at 6 (noting that “it is far from clear that all—or even most—of these resident plaintiffs actually hold the views that the adult homes’ paid representatives purport to ascribe to them”).) In a deposition taken in December 2015, class member Walter Roberts testified that: (i) he did not recognize an affidavit with his signature that was submitted in the litigation; (ii) he did

⁴ “Impacted adult homes” are adult homes “in New York City with certified capacities of 120 or more in which 25 percent or more of the residents or 25 residents, whichever is less, have serious mental illness.” (2d Am. Stip. & Order of Settlement (Dkt. 112 in No. 13-CV-4165).)

not oppose the Regulations; and (iii) he did not believe that New York State had ever threatened to violate his rights. (See Ex. D to Defs. Opp'n (Dkt. 19-30 in No. 16-CV-1683).)⁵

In view of the fact that (1) there is a potential conflict of interest as among the plaintiffs in the Regulations Actions and (2) there appears to be a disconnect between at least one of the Class Member Plaintiffs and the claims in the Regulations Actions, the court determines that it is appropriate to appoint an guardian ad litem to protect the rights of the Class Member Plaintiffs.⁶ In making this appointment, the court exercises its “inherent authority to manage [its] docket[] and courtroom[.]” Dietz v. Bouldin, 136 S. Ct. 1885, 1892 (2016); cf. James v. New York, 415 F. App'x 295, 297 (2d Cir. 2011) (summary order) (“Federal courts have inherent, discretionary power to appoint a guardian ad litem when it appears that an incompetent person’s general representative has interests which may conflict with those of the person he is supposed to represent.” (citing Ad Hoc Comm. of Concerned Teachers v. Greenburgh #11 Union Free Sch. Dist., 873 F.2d 25, 30 (2d Cir. 1989))).

The court therefore APPOINTS Katya Jestin of Jenner & Block LLP to serve as a guardian ad litem for the Class Member Plaintiffs. Jestin and her staff, who are donating their time and services pro bono, are INSTRUCTED to interview the Class Member Plaintiffs and, by no later than October 16, 2017, provide the court with a report under seal detailing: (1) the circumstances of the Class Member Plaintiffs’ participation in the Regulations Actions; and (2) whether each of the Class Member Plaintiffs understands the purpose of and their role in the litigation. The guardian ad litem and her staff may take steps including, but not limited to,

⁵ That exhibit is attached as Exhibit 1 to this order.

⁶ At least one Court of Appeals has upheld a district court’s appointment of a guardian ad litem to protect the interests of a person who was already represented by counsel. See Fonner v. Fairfax Cty., Va., 415 F.3d 325, 330-31 (4th Cir. 2005) (affirming district court’s appointment of a guardian ad litem to determine whether a mentally retarded resident of a group home (who was represented by counsel) was a willing participant in the litigation).

(1) employing the services of a psychiatric professional if deemed necessary by the guardian ad litem; (2) interviewing relevant third parties in addition to Class Member Plaintiffs; and (3) reporting to the court as is required to carry out her duties under this order. The court DIRECTS the Independent Reviewer to make himself available to the guardian ad litem in order to provide historical information related to the status of these cases.

The court further DIRECTS Jeffrey Sherrin, counsel for the plaintiffs in the Regulations Actions, to provide the court with (1) the names of the anonymous Class Member Plaintiffs; and (2) contact information for each of the Class Member Plaintiffs. Sherrin shall provide this information to the court ex parte and under seal by no later than June 23, 2017. The court will then supply the Class Member Plaintiffs' information only to the guardian ad litem.

SO ORDERED.

Dated: Brooklyn, New York
June 15, 2017

/s Nicholas G. Garaufis
NICHOLAS G. GARAUFIS
United States District Judge

Exhibit D

Page 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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RESIDENTS AND FAMILIES UNITED TO SAVE OUR ADULT
HOMES, et al,

Plaintiffs,

Index No:
- against - 9038/13
NIRAV R. SHAH, AS COMMISSIONER OF THE NEW YORK
STATE DEPARTMENT OF HEALTH, et al,

Defendants.

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120 Broadway
New York, New York
December 16, 2015
11:07 a.m.

EXAMINATION BEFORE TRIAL OF WALTER ROBERTS, a
Plaintiff, pursuant to Notice, taken at the above
place, date and time, before MARIA ACOCELLA, a
Notary Public within and for the State of New York.

1 A P P E A R A N C E S:

2
3 O'CONNELL & ARONOWITZ

4 Attorneys for Plaintiffs

5 54 State Street

6 Albany, New York 12207

7 BY: JEFFREY J. SHERRIN, ESQ.

8 STATE OF NEW YORK

9 OFFICE OF THE ATTORNEY GENERAL

10 ERIC T. SCHNEIDERMAN

11 Attorneys for Defendants

12 120 Broadway - 24th Floor

13 New York, New York 10271-0332

14 BY: MATTHEW J. LAWSON, ESQ.,

15 Assistant Attorney General

16 Litigation Bureau

17 BRADFORD S. GLICK, ESQ.,

18 Assistant Attorney General

19 Litigation Bureau

20
21 KAYE SCHOLER, L.L.P.

22 Attorneys for Intervenor

23 250 West 55th Street

24 New York, New York 10019-9710

25 BY: JANE W. PARVER, ESQ.

1 W. Roberts

2 resident council president?

3 A. Yes.

4 Q. Was the only election that was
5 held, in which you competed the first one, in
6 which you were elected as resident council
7 the president the first time?

8 A. No.

9 Q. When was the next election that
10 you participated in to become resident
11 council president, after the first one you
12 had, in 2012?

13 A. I really don't know.

14 Q. How many more elections were
15 there for resident council president, in
16 addition to the one that you had to become
17 president the first time?

18 A. Maybe one.

19 Q. Mr. Roberts, have you ever heard
20 of a group called Residents and Family United
21 to Save Our Adult Homes?

22 A. No.

23 Q. So the name Residents and Family
24 United to Save Our Adult Homes is certainly
25 nothing you came up with, is it?

1 W. Roberts

2 A. No.

3 Q. Did anybody ever tell you that
4 you should lead any organization for adult
5 home residents, other than your position as
6 resident council president?

7 A. No.

8 Q. Have you ever spoken with any
9 other residents at Wavecrest about the
10 possibility that those residents might become
11 a member of some organization other than the
12 resident council itself?

13 A. No.

14 Q. Have you filed any sworn
15 statements in the case we are here about
16 today?

17 A. Pardon?

18 Q. Have you signed any sworn
19 statements in the case we are here about
20 today?

21 A. Yes.

22 Q. What did you sign?

23 A. I signed a document that to keep
24 the adult home open. And I feel I am taking
25 place for the residents, and that had to be

1 W. Roberts

2 on paper.

3 Q. I might come back to this Roberts
4 Exhibit 2, but I will leave it aside for now,
5 but I might come back to it later.

6 MR. LAWSON: Should we take a
7 quick break?

8 MR. SHERRIN: It is up to you.

9 MR. LAWSON: Let's take a real
10 quick break.

11 (Whereupon, a short recess was
12 taken.)

13 MR. LAWSON: I would like to mark
14 this as Roberts Exhibit 3.

15 (Whereupon, a multipage document
16 was received and marked as Roberts
17 Exhibit 3 for identification, as of this
18 date.)

19 Q. Okay. Mr. Roberts, I am handing
20 you an exhibit that has been marked for
21 identification as Roberts Exhibit 3. It is a
22 multipage document with production numbers
23 RAMA 000001 to RAMA 000007. And on the front
24 page it says State of New York, County of
25 Queens. It appears to be in the form of an

1 W. Roberts

2 affidavit, and begins, Walter Roberts being
3 duly sworn, deposed, and says -- and then
4 there is a series of numbered allegations.

5 Have you ever seen this document
6 before, Mr. Roberts?

7 MR. SHERRIN: Please take your
8 time and read it.

9 A. That is one thing about getting
10 up in years, I forget. I really don't
11 remember. I will be honest with you.

12 Q. If you can turn with me, please,
13 to page four. It is number four at the
14 bottom. And it also says, RAMA 000004
15 underneath that. You can see those numbers.

16 A. Yes.

17 Q. Is that your signature that
18 appears there under paragraph 13?

19 A. Yes.

20 Q. And that says, Walter Roberts,
21 correct?

22 A. That is correct.

23 Q. And then below that, it says,
24 sworn to me this 4th day of March 2013. Did
25 I read that right?

1 W. Roberts

2 A. 2013, correct.

3 Q. And does that seem about right,
4 that you sworn out this statement on March 4,
5 2013?

6 MR. SHERRIN: Objection. He
7 testified he doesn't remember it.

8 A. I really don't remember this.

9 Q. You see where it says notary
10 public, State of New York?

11 A. Yes.

12 Q. If you can look below that, there
13 is some really small text there that says,
14 G:/data. Do you see that?

15 A. Yes.

16 Q. And then it says, health
17 department, and then there is another slash,
18 and it has the initials JJS. Do you see
19 that?

20 A. Yes.

21 Q. Do you know anybody with the
22 initials JJS?

23 A. No. No, I don't. JJS, uh-uh.

24 MR. SHERRIN: That is me. I
25 assume you knew that.

1 W. Roberts

2 by the Office of Mental Health are being
3 referred to, in paragraph one of this
4 document?

5 A. No, I really can't.

6 Q. Do you, in fact, oppose any
7 regulations by the Department of Health?

8 A. No.

9 Q. Do you, in fact, oppose any
10 regulations by the Office of Mental Health?

11 A. No.

12 Q. Have you ever had any discussions
13 with anyone about any regulations by the
14 state Department of Health?

15 A. No.

16 Q. Have you ever had any
17 conversations with anyone about any
18 regulations by the State Office of Mental
19 Health?

20 A. No.

21 Q. Let's take a look at -- before I
22 do that. Mr. Roberts, have you ever heard
23 the phrase, unincorporated association?

24 A. Not that I can remember, sir, no.

25 Q. Have you ever formed any

1 W. Roberts

2 A. Yes.

3 Q. Mr. Roberts, have you ever
4 believed that anything that the State
5 government of New York did ever threatened to
6 violate your rights?

7 A. No.

8 MR. LAWSON: I might like to take
9 a brief break, just to see if there is
10 anything else I need to get to, if that
11 is okay with everybody.

12 MR. SHERRIN: Okay.

13 (Whereupon, a short recess was
14 taken.)

15 MR. LAWSON: I don't have
16 anything further.

17 At this time, I will pass the
18 witness.

19 MS. PARVER: I just have very
20 few.

21 EXAMINATION BY

22 MS. PARVER:

23 Q. Mr. Roberts, I think we told you
24 before that I represent -- I am Jane Parver,
25 and I represent some residents who would like

CERTIFICATE

I, MARIA ACOCELLA, a Notary Public within
and for the State of New York, do hereby
certify:

That the witness whose deposition is
hereinbefore set forth, was duly sworn by me
and that the within transcript is a true
record of the testimony given by such
witness.

I further certify that I am not related to
any of the parties to this action by blood
or marriage and that I am in no way
interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my
hand this 4th day of January, 2016.



MARIA ACOCELLA