IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

LAW PROJECT FOR PSYCHIATRIC RIGHTS, Inc., an Alaskan non-profit corporation, Plaintiff, vs. STATE OF ALASKA, *et al.*, Defendants,	)
Case No. 3AN 08-10115CI	

MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF HIPAA QUALIFIED PROTECTIVE ORDER

Plaintiff, the Law Project for Psychiatric Rights (PsychRights®) has moved for the entry of a qualified protective under 45 CFR §164.512(e) promulgated under the Health Insurance Portability and Accountability Act of 1996, Pub.L. No. 104-191, §264, 110 Stat. 1936 (HIPAA).

I. Purpose

As set forth in paragraph 1 of the Complaint and the Prayer for Relief, this action seeks to obtain declaratory and injunctive relief that Alaskan children and youth have the right not to be administered psychotropic drugs unless and until:

(i) evidence-based psychosocial interventions have been exhausted,

(ii) rationally anticipated benefits of psychotropic drug treatment outweigh the risks,

(iii) the person or entity authorizing administration of the drug(s) is fully informed, and

(iv) close monitoring of, and appropriate means of responding to, treatment emergent effects are in place,

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and that all children and youth currently receiving such drugs be evaluated and brought into compliance with the above.

Discovery in this case by PsychRights will thus necessarily include relevant records pertaining to the administration of psychotropic drugs to Alaskan children and youth, which is covered by HIPAA and PsychRights is now at the point of issuing subpoenas and deposition notices to do so. The regulations promulgated under HIPAA have specific provisions regarding the authorization to release records in such situations and the protections required. This motion seeks what is called a "Qualified Protective Order" under those regulations.

By filing this motion, under the HIPAA regulations, "covered entities" will be authorized to disclose the subpoenaed information. This will not prevent any deponent from objecting to the subpoena or seeking additional protection, or both, as provided in the Civil Rules.

II. HIPAA Provisions

Under 45 CFR 164.512 "covered entities" are authorized to disclose "protected health information" without

(1) written authorization of the individual under 45 CFR 164.508, or

(2) the individual being given the opportunity to agree or object under 45 CFR 164.510,[1]

[1] PsychRights is not in a position to obtain written authorization or give the individuals the opportunity to agree or object at this time because their identities are not known.

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in judicial or administrative proceedings in compliance with 45 CFR 164.512(e). As pertinent to this motion, 45 CFR 164.512 provides:

> **(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:
>
> . . . (ii) In response to a subpoena, discovery request, or other lawful process . . ., if:
>
> . . . (B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section. . . .
>
> (iv) For the purposes of paragraph (e)(1)(ii)(B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:
>
> (A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or
>
> (B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.
>
> (v) For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:
>
> (A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and
>
> (B) Requires the return to the covered entity or destruction of the

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However, such an opportunity may be devised in connection with specific discovery requests.

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protected health information (including all copies made) at the end of the litigation or proceeding.

PsychRights believes the proposed Qualified Protective Order lodged herewith complies with the requirements of 45 CFR 164.512(e)(v).

PsychRights sought agreement from the defendants State of Alaska, et. al., to present a Qualified Protective Order to this Court under 45 CFR 164.512(e)(A), but they declined, thus necessitating this motion.

This is a straightforward discovery housekeeping motion to ensure that discovery in this case proceed in compliance with HIPAA. *See*, *Caines v. Addiction Research and Treatment Corporation*.[2]

For the foregoing reason, Plaintiff, the Law Project for Psychiatric Rights, respectfully requests the Court grant its motion by executing the lodged Qualified Protective Order.

DATED: January 30, 2009.

Law Project for Psychiatric Rights

By: _____
James B. Gottstein
ABA # 7811100

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[2] 2007 WL 895140 (S.D.N.Y. 2007), footnote omitted, a copy of which is attached hereto as Exhibit A for the Court's convenience.

United States District Court, S.D. New York.
Vera P. CAINES, Plaintiff,
v.
ADDICTION RESEARCH AND TREATMENT CORPORATION, Defendant.
No. 06Civ.3399(PAC)(MHD).

March 20, 2007.

MEMORANDUM & ORDER

DOLINGER, Magistrate J.

*1 *Prose* plaintiff Vera P. Caines has sued defendant Addiction Research and Treatment Corporation ("ARTC") to challenge her dismissal as an employee, alleging that it was motivated by impermissible discrimination. In the course of discovery she has sought production of certain documents reflecting matters that she dealt with during her employment as an ARTC health care worker. These documents include a letter written by plaintiff regarding a specific patient and a patient termination letter. (*See* Feb. 27, 2007 Letter to Ct. from Vera P. Caines; Feb. 28, 2007 Letter to Pl. from Leroy J. Watkins, Jr., Esq.). Defendant has objected, contending that these documents reveal patient identity and that therefore their production is barred by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub.L. No. 104-191, §§ 261-264, 110 Stat.1936.[FN1]

FN1. Sections 261 through 264, known as the Administrative Simplification provisions of HIPAA, authorized the Department of Health and Human Services to promulgate standards related to the privacy of individually identifiable health information. *See*Standards for Privacy of Individually Identifiable Health Information, 67 Fed.Reg. 53,182 (Aug. 14, 2002) (codified at 45 C.F .R. pts. 160, 164). These standards govern our analysis.

We directed defendant to submit a brief on HIPAA's effect on the discoverability of the documents at issue and whether redaction of patient names would satisfy the Act's requirements. (*See* Endorsed Order dated March 8, 2007). Defense counsel has provided a memorandum of law in which he contends that production even of redacted documents is precluded, principally because plaintiff, based on her experience as an ARTC employee, could readily identify the patients.

Defendant misstates the applicable legal principles. The pertinent regulations issued under the statute explicitly provide that documents containing protected health information are to be produced in discovery in response to a court order, 45 C.F.R. § 164.512(e)(1)(i), or even in response to a discovery request without a court order if the patient has been given notice or the discovering party has made reasonable efforts to obtain "a qualified protective order." § 164.512(e)(1)(ii)(A)-(B).[FN2]

FN2. A qualified protective order is "an order of a court ... or a stipulation by the parties to the litigation ... that: (A) [p]rohibits the parties from using or disclosing the protected health information for any purpose other than the litigation ... and (B) [r]equires the return ... or destruction of the protected health information ... at the end of the litigation."45 C.F.R. § 164.512(e)(1)(v).

It is a routine matter in litigation for courts to require production, where necessary, of records that reflect medical treatment of non-parties, sometimes with the identities of the patients redacted. *See,e.g.*, *MacNamara v. City of New York*, 2006 WL 3298911, at *8 (S.D.N.Y. Nov. 13, 2006); *Haus v. City of New York*, 2006 WL 1148680, at *3-4 (S.D.N.Y. Apr. 24, 2006); *accord Lora v. Bd. of Educ.*, 74 F.R.D. 565, 573-74 (E .D.N.Y.1977); *cf. Fletcher v. Atex*, 156 F.R.D. 45, 50 (S.D.N .Y.1994). This practice is fully consistent with the privacy provisions of HIPAA. *See,e.g.*, *Nat'l Abortion Fed'n v. Ashcroft*, 2004 WL 555701, at *6-7 (S.D.N.Y. Mar. 19, 2004); *accord,e.g.*, *Ryan v. Staten Island Univ. Hosp.*, 2006 WL 3497875, at *5-6, *8 (E.D.N.Y. Dec. 5, 2006).

Defendant argues that production should be denied because plaintiff will be able to identify the patients even if the documents are redacted. This argument is

less than persuasive. First, HIPAA does not condition production on the discovering litigant's inability to identify the patient whose records are to be released. Second, in this case, defendant's assertion is uniquely unreasonable since plaintiff dealt directly with these patients, already knows their identities, and has disclosed their identities to defendant and the Court in requesting these documents. In sum, while redaction would serve little purpose in this case, non-production is unjustified. Since HIPAA does not preclude production and defendant has cited no other reason why these documents should not be produced, its application to withhold the documents is denied.

***2** Consistent with HIPAA, the documents in question are to be produced on the following conditions:

1. Plaintiff is to use the documents solely for purposes of her lawsuit and is not to disclose their contents to anyone else for any other purpose.

2. At the conclusion of the litigation, plaintiff is to return the documents and any copies that she has made to defendant's attorney.

Production is to be made within seven days.

S.D.N.Y.,2007.
Caines v. Addiction Research and Treatment Corp.
Not Reported in F.Supp.2d, 2007 WL 895140 (S.D.N.Y.)

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