

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS : CIVIL TERM : PART 22

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THE NEW YORK STATE NURSES ASSOCIATION,  
1199SEIU UNITED HEALTHCARE WORKERS EAST,  
CONCERNED PHYSICIANS OF LICH, LLC AND  
CARL BIERS

: INDEX NO.:  
5814/2013

PLAINTIFF :

- against - :

NEW YORK STATE DEPARTMENT OF HEALTH, :  
NIRAV SHAW, MD, in his capacity as :  
Commissioner of the Department of :  
Health, STATE UNIVERSITY OF NEW YORK, :  
TRUSTEES OF STATE UNIVERSITY OF NEW YORK :  
DOWNSTATE MEDICAL CENTER, STATE :  
UNIVERSITY OF NEW YORK DOWNSTATE MEDICAL :  
CENTER COUNCIL AND JOHN F. WILLIAMS, MD :  
in his Capacity as President of State :  
University of New York Downstate Medical :  
Center. :

DEFENDANTS : HEARING

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360 ADAMS STREET  
BROOKLYN, NEW YORK 11201  
JUNE 19, 2013

BEFORE: HONORABLE JOHNNY LEE BAYNES,  
JUSTICE

APPEARANCES:

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Also Present:

KEVIN P. O'MARA  
THE STATE UNIVERSITY OF NEW YORK

RICHARD J. ZAHNLEUTER  
NEW YORK STATE DEPARTMENT OF HEALTH

JEANMARIE EPISCOPIA  
SENIOR COURT REPORTER

1 THE COURT: For the record, we have the New  
2 York State Nurses Association, 1199SEIU United  
3 Healthcare Workers East, Concerned Physicians of LICH,  
4 LLC and Carl Biers, plaintiffs, for Petitioner's versus  
5 New York State Department of Health, Nirav Shah, MD, in  
6 his capacity as Commissioner of the Department of  
7 Health. State University of New York, Trustees of The  
8 State University of New York. State university of New  
9 York Downstate Medical Center. State University of New  
10 York Downstate Medical Center Council, and John F.  
11 Williams, MD, in his capacity as President of State  
12 University of New York Downstate Medical Center,  
13 defendants.

14 Index number 5814 of 2013.

15 I will start first with the petitioners, note  
16 your appearances for the reporter.

17 MR. SELTZER: Good afternoon, Richard Seltzer,  
18 Cohen, Weiss and Simon, LLP for New York State Nurses  
19 Association and Carl Biers.

20 MR. CIANTRA: Thomas Ciantra, also from  
21 Cohen, Weiss and Simon for the NYSNA and Mr. Biers.

22 MS. MITTER: Alexander Mitter, Arnold & Porter  
23 for Concerned Physicians of LICH.

24 MS. CAMERON: Good afternoon, your Honor,  
25 Susan Cameron of Levy Ratner for 1199SEIU United

1 Healthcare Workers East.

2 MS. FOX: Good afternoon, your Honor. Hanna  
3 Folks, Arnold & Porter for Concerned Physicians of LICH.

4 THE COURT: For the respondents who do we  
5 have?

6 MS. REISBAUM: Emily Reisbaum from Clarick  
7 Gueron Reisbaum, New York City Department of Health.

8 MR. ZAHNLEUTER: Hello, Richard Zahnleuter,  
9 Director Bureau of Litigation Division of Legal Affairs,  
10 New York State Department of Health.

11 MR. CARONE: Good afternoon, Frank Carone,  
12 Abrams Fensterman, for SUNY, et al.

13 MR. O'MARA: Kevin O'Mara, Senior Managing  
14 Counsel, SUNY Downstate Medical Center.

15 MS. MAURO: Susan Mauro also of Abrams  
16 Fensterman for SUNY, at all.

17 THE COURT: I am going to repeat to an extent  
18 of what I was saying. We were e-mailed this afternoon  
19 to my chambers a revised order to show cause and that  
20 was submitted by the petitioners in this case.

21 And I just note that in the revised order to  
22 show cause, for those that have it, Page four, it says,  
23 including any communications between A, as in apple,  
24 defendant respondent SUNY, SUNY board, SUNY Downstate,  
25 SUNY Downstate Council, and John F. Williams, MD and B,

1 defendant respondents, Department of Health and Nirav  
2 Shah, M.D. regarding the closure plan.

3 It would appear to me that, Mr. Carone, when  
4 you submitted your order to show cause for signature,  
5 that pretty much was the relief that you were seeking.

6 MR. CARONE: That is correct, Judge.

7 THE COURT: The various respondents or  
8 defendants in this case could now communicate with each  
9 other, so I just want to make sure that we have at least  
10 that much of it wrapped up that, theoretically, in light  
11 of what I have before me now, there is no need for you  
12 to make that other, to some extent, that order to show  
13 cause because petitioners concede that that portion of  
14 the stay is now vacated, so you can have communication.

15 If anyone here feels another way, I think we  
16 need to hear it now. Do any of the attorneys feel that  
17 I said something inaccurate with regard to the contents  
18 of the order to show cause, because that is all that he  
19 really wanted, from what I can see, but Ms. Fox, do you  
20 feel differently?

21 MS. FOX: I just want to clarify what we are  
22 doing. If what we are doing is, if what the Court is  
23 proposing and what Mr. Carone is saying is that, yes, we  
24 can do it, we could use the order to show cause, that  
25 the order and form that we proposed, that's terrific.

1 THE COURT: I want to make clear the one which  
2 was the order to show cause submitted by the  
3 respondents, specifically Mr. Carone's office, based on  
4 the affirmation of Frank V. Carone and again, the relief  
5 being sought seems to be similar to that that  
6 petitioners would concede at that time, but you feel Ms.  
7 Fox, that it is overly broad and there is more there?  
8 If so then I will just sign his order to show cause and  
9 move on to yours.

10 I don't really feel I need to sign his order  
11 to show cause, you are conceding, all parties, that the  
12 stay is vacated with regard to the communications  
13 between the Department of Health and SUNY.

14 MR. SELTZER: Your Honor, if you are  
15 suggesting that the key part of their order to show  
16 cause is now in our order to show cause and we are going  
17 to move on to that, we are fine with that.

18 THE COURT: I thought all you have talked and  
19 made some deal. That is how I got the amended order to  
20 show cause, because the relief that was being sought by  
21 the respondents in this case, I thought you all already  
22 worked something out. That is what it would have  
23 appeared to me, to have been. Now I am hearing  
24 otherwise.

25 MR. SELTZER: I don't think that was what we

1 decided, that was the appropriate way to include that  
2 prior relief from the request for new relief, so that is  
3 what we did.

4 THE COURT: I want to address the issue, Mr.  
5 Carone's submission of an order to show cause to this  
6 Court with regards to -- you said it was the chairman of  
7 one of the departments that was seeking to resign?

8 MR. CARONE: Yes, Judge.

9 THE COURT: I want to address that. We will  
10 see where we go. Give me some background on that basis.

11 MR. CARONE: If I may, just to frame the issue  
12 and there is a lot of e-mails and communications, so it  
13 is like going through everyone's head here, I think that  
14 is why we are not as collegial as we would have been,  
15 especially maybe today with 50 or 60 e-mails.

16 The issues that I see on behalf of my client,  
17 SUNY, were just as the Court articulated. We have a  
18 narrow request and that wasn't an accident. That was  
19 really on purpose. Not that we felt we couldn't  
20 communicate with DOH's prior counsel. There may have  
21 been different opinions during our best efforts to try  
22 to come to an accommodation with the petitioners.

23 Continuously there were threats of contempt  
24 which our concern and I realized when it was filed  
25 yesterday and it was triggered Thursday by an e-mail

1 from Concerned Physicians of the Court saying we need a  
2 conference coming in for contempt, so we decided to be  
3 safe and not take any chances on interpretation of  
4 another, although we were okay to communicate anyway, it  
5 would be prudent to do that and to continue with our  
6 dialogue.

7 So, that is why we are here. And we did  
8 recognize in the respondent's proposal, crossing out  
9 that language, that they consented and we are happy that  
10 everyone agrees to that.

11 Without getting into the whole history of LICH  
12 and honestly say in my almost 20 year career, this is an  
13 interesting case where it is not really a winner or  
14 loser. We are all trying to do the right thing and work  
15 together toward our exodus out of LICH into a new  
16 operator.

17 We attempted to come to an understanding to  
18 give petitioners a voice, a seat at the table which they  
19 didn't have before. And during that time we were asked  
20 many questions. We didn't ask any questions, we were  
21 asked many questions. We didn't ask any in return. We  
22 answered as best as we can with the facts as we  
23 understood them and some of the answers were based on  
24 our clients good view of good medical judgment, common  
25 business sense and accepting the reality before them.



1 Not necessarily as they would hope it to be,  
2 as it is. And during that dialogue a couple of things  
3 occurred. Staff were exiting faster than we can replace  
4 them to maintain a safe environment for the patients.

5 A sustainability plan pursuant to a newly  
6 passed regulation, Reg Q. It went to the legislature.  
7 There were hearings, all parties here testified and it  
8 was signed by the governor on June 14th which  
9 contemplates an exodus of LICH from SUNY and a move to a  
10 new operator. And more on that later.

11 Then we -- the management, the medical  
12 director and otherwise heard that a Dr. Peter Smith, we  
13 believe is a Concerned Physician, but we really don't  
14 know and I only say that on hearsay, refused to admit  
15 new patients, the director of the ICU unit, unless  
16 quote, unquote, the animatic residency program was put  
17 back in place, something that we wouldn't do.

18 Now, we are faced with a real crisis. Come  
19 through ED, you need ICU, you don't have a doctor  
20 admitting under his name who is the director in that  
21 unit and the only Doctor there. We are in a real crisis  
22 and we wanted to communicate that to all parties.

23 That is what brought us to bring this order to  
24 show cause. Allowing us to communicate these realities  
25 and it doesn't really matter how we got there, we are

1 here. We hope to communicate together so to address  
2 this in a safe amicable smooth manner.

3 Now, I think we have a letter from a doctor  
4 Salifu, who alerted us to the fact of Dr. Peter Smith  
5 section chief of ICU is leaving. Prior to that, we were  
6 doing our best with local tenants bringing in and having  
7 people work overtime, all in mindful of your Honor's  
8 order to keep this operation going while we go through  
9 the RFI's, I think I shared with the Court and  
10 petitioners. Although I didn't have confidentiality  
11 agreement, I gave it anyway. Summaries, without names.

12 The next step would be RMP's, but we have to  
13 get from A to B. The amount of resignations continued.  
14 We would be in a very unsafe environment. We just would  
15 need guidance from our regulator.

16 THE COURT: Counsel for the Department of  
17 Health, I want to hear from you.

18 MR. ZAHNLEUTER: Let's see, Judge. The issue  
19 that you started with was related to the communications  
20 part of the TRO and I don't think that we have, as the  
21 Department of Health, any objection to that relief.

22 Although I think that we do not concur with  
23 the rationale presented for it by SUNY's papers. We  
24 disagree with that rationale, we don't think it is an  
25 accurate presentation of the relationship that the

1 Department of Health has with this hospital.

2 The Department of Health is a state agency.  
3 SUNY is a state agency and the sister agency, but that  
4 is not the relationship between the Department of Health  
5 here and SUNY. It is one of a regulator and a regulated  
6 entity and so when we look at operations at a hospital,  
7 we do so with compliance with the regulatory standards  
8 in mind.

9 In this case, if there are deviations from the  
10 regulatory standards, then the option that the  
11 Department of Health would exercise in the ordinary  
12 course would be to investigate and then to write up a  
13 document call a statement of deficiencies.

14 The statement of deficiencies would identify  
15 provisions of regulations of law that were violated.  
16 Then it would be up to the regulated hospital to provide  
17 a proposed plan of correction. If the plan of  
18 correction were acceptable to the Department then the  
19 situation would get fixed. If not acceptable, then the  
20 plan of correction would have to be fixed in some way or  
21 another, whether by order or by consent. By back and  
22 forth.

23 (Pause in the proceedings)

24 MR. ZAHNLEUTER: To resume where I was, I  
25 think what I was trying to explain was the Department of

1 Health doesn't operate this hospital, doesn't own it.  
2 It just oversees compliance with regulations that apply  
3 to it and in this particular case, the department has an  
4 operating certificate that it has issued to actually one  
5 entity, SUNY. And the operating certificate concerns  
6 LICH and it concerns University Hospital of Brooklyn,  
7 otherwise known as Downstate.

8           There is one operating certificate for the  
9 entire facility. If the entire facility has a staffing  
10 problem or seems to be the issues that have been  
11 presented in the papers on both sides, on my left and on  
12 my right here today, then the Department of Health will  
13 look into it and have an investigation under way.

14           As a matter of fact yesterday, the Department  
15 of Health upon my prompting, because I received the  
16 legal papers, investigated the staffing situation in  
17 that facility. I don't have the results yet, but I am  
18 not a program staff person and they have a supervisor  
19 chain there, they are working on that and they will  
20 compile findings and they will compile probably the  
21 document, if appropriate, that says the following  
22 regulations have not be complied with and these are  
23 deficiencies and we request a plan of correction within  
24 so many days. Probably ten days and it will be up to  
25 the regulated hospital, SUNY, to provide the

1 corrections.

2 In this particular case, if the situation is  
3 such that there has been a closure without a closure  
4 plan, that would be a violation of regulations that  
5 require a closure plan to be submitted. If there has  
6 been maintenance of inadequate staffing.

7 Then that could become a finding of failure to  
8 comply with certain regulations regarding governance,  
9 which is the statutory or regulatory term about  
10 administration. And now there is a duty to maintain  
11 adequate staffing at the hospital above the patients and  
12 by the hospital administration.

13 If a plan of correction were to be submitted  
14 in response that would say we wish to close, which may  
15 be part of what is happening here, I don't know, then I  
16 think the Department of Health's response would be, you  
17 may submit a closure plan to attempt to close because we  
18 don't regulate whether a facility may close, but how to  
19 make sure the transition is safe.

20 For example, ambulances may be waiting in  
21 cases, walk ups come to emergency room and find the  
22 doors are closed. We don't want them to be suffering on  
23 a sidewalk. We want an ambulance there to help them go  
24 to a safer place. But in this case, there is an anomaly  
25 because they don't have the option of closing, there is

1 no closure plan.

2 Part of the reason why there is no closure  
3 plan is because of the TRO, so if that were to be  
4 submitted to the Department of Health as a way of  
5 correcting the staffing deficiency, the Department of  
6 Health would probably not consider it to be a credible  
7 way of addressing the situation. Leaving the  
8 alternative, being restaffing.

9 Restaffing how? That would be up to the  
10 hospital to decide, whether it be by transfer, whether  
11 it be by assistant to the Health Department in terms of  
12 rallying the neighboring hospitals to try to run a short  
13 term stop basis. Provide substitute staff to work in  
14 there. To sure up things until stability could be  
15 achieved.

16 These are all options that would have to be  
17 considered by both a regulated hospital and a program  
18 staff of the Health Department to get to where they are  
19 trying to go.

20 In this particular case, I keep using that  
21 phrase, in this particular case, because it is so  
22 unusual. It is unusual because there seems to be a  
23 staffing problem that recurs and becomes continual and  
24 becomes perpetual. If that is the situation that is  
25 arising, then the Department of Health staff has to look

1 at in a different way than normal.

2 A normal way to look at it would be, well, if  
3 inadequate staffing is causing a patient to be in  
4 danger, then we have to act. The mission of the Health  
5 Department, above all and primarily is to protect the  
6 health and safety of the patient and the public.

7 In that kind of a case, it might be an  
8 appropriate thing to say, close this unit because you  
9 are not staffed at a proper level to accept new patients  
10 or it might be take these patients that are there and  
11 transition them to another hospital where they can be  
12 cared for at a safe level.

13 In this case, in this particular case, options  
14 are not so grand. They have to be looked at very  
15 closely and if the desire is to reduce staffing in such  
16 a way as to cause patients safety, that is not a regular  
17 situation that the health department faces.

18 We would, I think, benefit from a situation  
19 that would be stabilized with an order that made it  
20 clear as to exactly what the responsibility of each  
21 party was with regard to staffing and with regard to  
22 patients safety.

23 If the situation could be made as specific as  
24 possible and in an order, I think, that would be  
25 helpful. And I know there has been a specific order

1 suggested by the parties on my right here, the  
2 plaintiffs.

3 I know that the SUNY order doesn't contain  
4 anything like that, but I think that the more specific  
5 the directions could be as to what activity may occur at  
6 the hospital, a more regulatory process would be  
7 efficient and the more we can all figure out where we  
8 stand in terms of what kind of actions are permitted and  
9 if they are not permitted, what kind of findings as to  
10 the deficiencies should be generated by the health  
11 department and then what kind of corrections should be  
12 made by the facility to cure the situation.

13 I think the scenario that you want to avoid,  
14 the plaintiff's want to avoid, and probably even the  
15 defendants on the left here want to avoid, is a patient  
16 that is in jeopardy in a hospital.

17 People don't go to a hospital to be in  
18 jeopardy. They shouldn't get sicker and shouldn't die  
19 and have to be in jeopardy. The Department of Health  
20 doesn't want that. Doesn't want that patient to be in  
21 that situation.

22 I think it would be easier though, to have  
23 specific requirements as to what may or may not be  
24 permitted with regard to staffing, rather than unknown  
25 as to staffing, yet also, a no closure policy.



1 I am not suggesting that closure is correct.

2 I am not suggesting that staffing is correct.

3 THE COURT: I understand what you are saying.

4 MR. ZAHNLEUTER: We are both in the middle  
5 here trying to make sure that things come out  
6 appropriate for the public health and safety of the  
7 patients.

8 THE COURT: You indicated that the petitioners  
9 had a proposed order in detail.

10 MR. ZAHNLEUTER: The proposed order --

11 THE COURT: Do the petitioners have a proposed  
12 order in detail that would address what you just said to  
13 this Court?

14 MR. ZAHNLEUTER: Yes, the amended one that  
15 they just submitted has things in there maintaining  
16 adequate staffing.

17 THE COURT: Is that clear and unequivocal  
18 enough or do you think that is vague and ambiguous?

19 Should it be clearer for the Department of  
20 Health to do what they need to do?

21 MR. ZAHNLEUTER: For example, if that order  
22 was in existence and said that it was up to SUNY to  
23 maintain adequate staffing at LICH, including residents  
24 and fellows and we investigated and made a finding that  
25 there was inadequate staffing with regard to residents

1 and fellows then we would cite the facility for having a  
2 deficiency with regard to staffing and we would request  
3 a plan of correction that resolves the situation.

4 But, the plan of correction would be, I think,  
5 oriented toward staffing, rather than closure because  
6 you have currently in place a ban on closure. Yes, it  
7 is not too vague. It is specific.

8 THE COURT: Okay Mr. Seltzer, you seem like  
9 you need to intervene in that.

10 MR. SELTZER: No, I will wait for Mr.  
11 Zahnleuter to be finished.

12 MR. ZAHNLEUTER: There is one thing that my  
13 counsel just recommended that I make sure was clear and  
14 I agree it should be clear. That whatever staffing  
15 happens at LICH or whatever staffing occurs with regard  
16 to University Hospital of Brooklyn, which is the  
17 operator on the operating certificate regarding LICH, it  
18 is not the Department of Health's responsibility. I  
19 wanted to make sure that that is clear, that the  
20 department of health does not staff hospitals, operate  
21 hospitals or close hospitals. It only looks at the way  
22 in which hospitals close, make sure that the way in  
23 which it occurs is safe for people that are in the  
24 community or in the hospital as patients.

25 THE COURT: Okay, thank you. Mr. Seltzer?

1 MR. SELTZER: Good afternoon, your Honor.

2 Richard Seltzer for plaintiff's NYSNA and Biers.

3 Your Honor was right, we all do look a bit  
4 serious today. It has nothing to do with the  
5 relationship between counsel, because I think actually  
6 despite differences of opinion, counsel in this case  
7 have a very productive relationship and have gotten  
8 along well and very professional. I think we can all  
9 agree on that.

10 What is, I think, causing the seriousness is  
11 that today LICH is operating and treating the healthcare  
12 needs of Brooklyn and there is a tremendous concern  
13 about whether that will still be continuing next week  
14 and in the coming weeks.

15 The affirmation that was submitted today or  
16 yesterday by Dr. Levy reflects sort of culmination of  
17 what we think has been happening over the last several  
18 weeks as the hospital has been moving toward closing.  
19 And to use the analogy that I think I used earlier in  
20 one of these cases, if it walks like its closing and it  
21 quacks like it is closing, it appears to be closing.

22 This Court issued a TRO, which is still in  
23 effect which enjoined the defendant from taking any  
24 action in furtherance of the closure plan, which various  
25 points the Court advised and the respondents should be

1 acting on, if there is no threat of closure then the  
2 closure wasn't going to take place.

3 Indeed, when SUNY said they were withdrawing  
4 the closure plan, it said it would continue to operate  
5 LICH consistent with the health need of the community.  
6 SUNY was obligated to continue the operations of the  
7 hospital and not to take actions in furtherance of the  
8 closure plan.

9 And with all do respect to SUNY, it is sort of  
10 like the story of the child who kills his parents and  
11 comes into court and asks for mercy because they are an  
12 orphan.

13 They have not been maintaining the operations  
14 of the hospital. They are coming to court, sort of  
15 saying, well there should be sympathy and mercy for them  
16 because they haven't maintained staffing at the  
17 hospital.

18 This is not a small rural community hospital  
19 Upstate, this is a SUNY hospital run by SUNY. Mr.  
20 Zahnleuter put it very well, it operates under the same  
21 operating certificate number as Downstate. If there are  
22 needs at LICH and there are staff at Downstate, the  
23 staff can be reallocated if there is a crisis.

24 As our papers suggest, there are residents at  
25 Downstate that can be rotated at LICH. If there are

1 issues about complying with the need to supervise  
2 residents, for example, et cetera. We are not the  
3 administrators of LICH. We represent employees of LICH.

4 We are not administrators. That is their  
5 responsibility. For the last two months since your TRO  
6 has been in effect -- since this TRO has been in effect,  
7 their job has been to work to maintain operations at  
8 SUNY. It shouldn't be a priority that is at the bottom  
9 of the list.

10 The defendants of Downstate should have called  
11 in his directors weeks or months ago and said, we have a  
12 TRO, we need to comply with it. We need to work day and  
13 night, if we need to spend money, we spend money. If we  
14 need to spend more time and effort, we need to do that,  
15 but we have an obligation to maintain the operations of  
16 this hospital.

17 It may be that there is -- and hopefully there  
18 is another solution for LICH that is coming at some  
19 point in the future, but, in the meantime and while your  
20 Honor's order is in effect, it is important they  
21 maintain appropriate staffing. And because the  
22 admonition not to implement the closure plan doesn't  
23 seem to have been clear enough because it doesn't seem  
24 to have been complied with, the plaintiff's submitted a  
25 revised order eliminating the communication problems

1 there.

2 I don't think it was a problem eliminating any  
3 possible issue whether they can communicate with the  
4 Department of Health, but making very affirmative their  
5 obligation to maintain staffing and to maintain an  
6 appropriate residency program.

7 And again, the issue isn't difficult. The  
8 issue is complying with this Court's order and complying  
9 with their legal obligations.

10 We are in a crisis and we are going to be in a  
11 crisis and to some extent the responsibility is relevant  
12 because if SUNY defendants are not doing what they need  
13 to do, they need to be reminded that they have an  
14 obligation to comply with this Court's order and to  
15 affirmatively maintain appropriate staffing.

16 And I think those are the reasons why we  
17 believe the Court should enter the order to show cause  
18 that we submitted. Thank you.

19 THE COURT: Let me ask you, Ms. Fox, on your  
20 contempt motion, whoever prepared it, do you have a  
21 statutory language in all of the warnings in bold print  
22 pursuant to the statute, pursuant to the judiciary law?

23 On the actual face of the order, because I  
24 have done a number of these contempt motions and I know  
25 the order like this might be deficient. It might be

1 deficient right now before I sign it --

2 MS. FOX: Your Honor --

3 THE COURT: The 8 point bold or 12 point bold  
4 or 14 point bold?

5 MS. FOX: Yes, your Honor. The order has the  
6 statutory language here on the cover. That is the  
7 format that our lawfirm typically uses. If you are  
8 advising us that it should be somewhere else in the  
9 papers --

10 THE COURT: If it is there it is there. Now,  
11 someone else might argue that it should be someplace  
12 else on the actual face of the order to show cause, but  
13 that is not for today.

14 In contempt motions that I have done in the  
15 past and I have actually denied applications on contempt  
16 motions because the statutory language was not where it  
17 should be. I will leave it at that.

18 Make no mistake, if somebody needs to be held  
19 in contempt, this Court will put them in contempt. That  
20 is not even an issue of that, but I want to make sure  
21 that no one has a way out by saying that your statutory  
22 language does not comply with the statute and also, who  
23 is in the contempt order in the event that the sheriff  
24 has to go get someone, who are they going to get?

25 If I rule for you, the long and the short of

1 it is, who is going to be arrested. You must have a  
2 physical being, a person, a human being that the sheriff  
3 can go get. Because the type of contempt that you are  
4 looking for, that is pretty much what is going to  
5 happen.

6 Now, you may have wanted to go for sanctions  
7 where you can go into "X" amount of dollars in the event  
8 I rule for you, but we are going to deal with what we  
9 have before us.

10 So, who is going to be arrested in the event  
11 that I hear this motion and you win? There has to be a  
12 person. The sheriff has to go get somebody. Who is it  
13 going to be?

14 MS. FOX: Well, your Honor, certainly the only  
15 person among the SUNY defendants, the only individual  
16 who being among the SUNY defendant who is responsible is  
17 Doctor Williams.

18 Our application is for civil contempt. We  
19 certainly have talked about criminal contempt and we  
20 thought our first foray into the contempt would be with  
21 civil. I would need to talk to my clients about who  
22 this person would be and co-counsel about who the People  
23 would be at SUNY among the trustees and at Downstate who  
24 we would have to talk about that kind of request and  
25 would. As of now, Dr. Williams is an individual named



1 here.

2 THE COURT: You have to be honest about it.  
3 If that is the case, whoever is representing Dr.  
4 Williams needs to let he him know he needs to make  
5 himself available in the event that this thing goes in a  
6 way that he may not want it to go.

7 MR. CARONE: Understood.

8 THE COURT: If he is being held in contempt  
9 and the sheriff has to come get him.

10 Who are the people responsible for allegedly  
11 letting this hospital just go in violation of my order?  
12 I assume you are going to be naming certain other  
13 individuals in their professional capacity. Not as  
14 individuals, but in their professional capacity.

15 MS. FOX: Your Honor --

16 THE COURT: We have to do it. I want to make  
17 sure everyone understands what we are getting into.

18 MS. FOX: The management at SUNY and SUNY  
19 Downstate is somewhat opaque to us. We hear various  
20 things, but if we are going to move toward describing  
21 individuals, I would want to consult with my co-counsel  
22 and client, but they have a president. They also have a  
23 restructuring officer and decision maker there.

24 They also are directly under the board of  
25 SUNY. That's the way that their bi-laws are in

1 regulation and certainly the SUNY board is in charge of  
2 every SUNY institution and the Chancellor of SUNY is in  
3 charge of every SUNY institution.

4 THE COURT: Okay. As indicated, if it has to  
5 go -- to be completely honest, I would prefer not to  
6 even deal with the contempt issue, that the attorneys  
7 try to fashion some other remedy, if at all possible.

8 But, if it has to go that way and the law  
9 requires it, I am going to do my job. Make no mistake  
10 about it. Ship forward in that.

11 I was hoping we would never reach this point,  
12 but we are reaching that point where it appears as if  
13 individuals are just not listening to what I have to  
14 say, may and not be following my order. Just  
15 disrespecting me, disrespecting the robe, disrespecting  
16 the Court.

17 If you were sitting where I was sitting, what  
18 would you do to vindicate the integrity of this Court,  
19 because that is what it has to come down to.

20 MR. CARONE: May I be heard?

21 THE COURT: Yes.

22 MR. CARONE: Well, a lot of substance was just  
23 said starting with the respondents, Department of Health  
24 and if I may just respond to these, to the comments  
25 orderly. We started with discussion of the proposed

1 order from the petitioner. I will get to the contempt  
2 in a moment.

3 What I do know one thing that is far from the  
4 truth, that respondent SUNY is not respecting the  
5 Court's order and we are happy to have a hearing and put  
6 on witnesses when the time comes for that. We hope we  
7 can avoid it as well, but we are very comfortable with  
8 that. In all of the respondents upon those in  
9 supervisory authority, are aware of the possibility of  
10 contempt.

11 I think they have acted sort of courageously  
12 by making difficult medical decisions with that  
13 possibility. The last thing we want to do is violate  
14 any order by any Court.

15 But, going back to comments from the  
16 Department of Health, the first part of comments I  
17 agreed with, that as described the role as a regulator.

18 The parties disagree with this specific order,  
19 so it is easier for a regulator to regulate specific  
20 hiring or staffing. SUNY is aware of its obligation to  
21 staff this hospital in a safe, compliant fashion. It  
22 has done everything possible, despite what petitioners  
23 may have articulated.

24 It is easy to say let's just have a meeting,  
25 do everything possible and spend any amount of money.

1 Of course SUNY will do that. When you have over 140  
2 resignations fast and furious, some of the petitioners  
3 themselves, it makes it a little challenging.

4 We think that the proposed order, we being  
5 SUNY, is not really a proposed order for the TRO, but in  
6 effect a mandatory injunction of which the standard is  
7 much, much, higher, requiring us to go and to do things.

8 We think it is sufficient to say that SUNY  
9 should be obligated under this order to maintain  
10 adequate staffing to operate a safe and sound hospital  
11 pursuant to the regulation of a regulator.

12 Saying we should go to staffing before closure  
13 is, quite frankly, not realistic and what number is  
14 that? It gets into a lot of argument.

15 Maintaining a safe hospital is the primary  
16 focus the SUNY and all of our meetings, all of our  
17 decisions, have been geared for that reality.

18 I have tried to articulate that as best as I  
19 can with petitioners and I asked them to join in some of  
20 the discussions as well.

21 So, I would object to the order as presented.  
22 I don't think it is a TRO, I do think it is a request  
23 for a mandatory injunction. And I would ask that we can  
24 maybe come up with some language that is acceptable to  
25 all parties and I would suggest the language simply say,

1 maintain adequate staffing for safe operation of LICH.

2 Moving on to discussions regarding contempt.

3 As I said, we are fully aware of the risk. Fully aware  
4 of their obligation. We take it very serious. We would  
5 like an opportunity, of course, to and I don't have a  
6 physical paper from petitioner, I have an e-mail, very  
7 difficult to print exhibits, I have ready it all  
8 quickly, I will read it as soon as I can.

9 We would like an opportunity to respond in  
10 writing, to have a hearing if need be, maybe not and  
11 during that time we will work, as we worked in the past,  
12 continuously speaking with petitioners to come to some  
13 understanding of the facts together and hopefully an  
14 amicable resolution toward all of the collective goals  
15 here.

16 I would ask your Honor to separate those two.  
17 The e-mail from the Court, the way I understood it, was  
18 two mutual TRO requests today. I should say that we  
19 will be asking the Court's permission to withdraw on  
20 behalf of SUNY the motion to dismiss as filed by the  
21 Attorney General and filing a new one because there are  
22 additional arguments and theories that provided we can't  
23 work it out, we have to explore and we think under the  
24 CPLR we can't have both, so we will do that in a couple  
25 of days provided that this doesn't work out.

1 THE COURT: I have no problem with that. That  
2 is okay.

3 MR. CARONE: Thank you.

4 Back to the issue before us now, we agreed  
5 that portion of the TRO in place -- and by the way, the  
6 order, it says it, we kind of take it loosey goosey, but  
7 no action in furtherance of the closure plan submitted.

8 There is no closure plan anymore. We have  
9 withdrawn it in adherence to your Honor's order. We  
10 understand that and we will continue down that road, but  
11 that language has been stricken we all agree.

12 The question now is as raised by respondent  
13 DOH and are raised in the paperwork of the petitioners  
14 what is the appropriate remedy that is specific enough  
15 for the Court's purposes and for all of us here.

16 I would suggest simple language that the  
17 respondent in furtherance of the order, SUNY defendant,  
18 respondent shall maintain adequate staffing at LICH to  
19 maintain a safe and secure environment for the patient  
20 pursuant to its regulations to the best of its ability.

21 THE COURT: I am going to stop you for a  
22 minute. I want to go back to the Department of Health.

23 You heard what he just said, is that language  
24 legally sufficient for the Department of Health to make  
25 the determination if the time comes?

1 MR. ZAHNLEUTER: I don't think it is because  
2 it doesn't specify what a safe level of patient  
3 population is. I think we have now, according to the  
4 information submitted by the plaintiffs, a lower level  
5 of population than existed when the TRO was entered in  
6 April one. A much lower level of patients since a lot  
7 of what the Department of Health is doing is driven by  
8 patients census.

9 If there is one patient there, you might say  
10 okay, you only need one physician. If you have more  
11 staff there on April 1, 2013, and now you don't, what is  
12 appropriate patient census that should be staffed for,  
13 so I don't think that is sufficient.

14 THE COURT: What day are you going back to in  
15 terms of census, in terms of personnel where hopefully  
16 all parties could agree there was adequate staffing  
17 there?

18 Any particular day that we can go back to that  
19 would be the quickest, more efficient way as of such and  
20 such a day?

21 What is this adequate staffing at LICH and  
22 what were the numbers, what types of doctors were  
23 present? How many beds were filled, et cetera?

24 Hold on, Mr. Carone.

25 MS. FOX: Yes, your Honor. As in our draft,

1 the staffing as of before the announcement of the  
2 closure plan is before February 20th and the reason for  
3 that is that at the closure plan, once the closure plan  
4 was announced, there was kind of domino effect, patients  
5 are gone because of the announcement. Then patients  
6 come back because of the TRO.

7 In the first case, patients go and then come  
8 back for the TRO in the second case. Then the doctors  
9 are looking for other jobs. The psych department and  
10 the psych department staffing goes down. SUNY sends out  
11 notices to outpatients in the psych department that they  
12 have to go elsewhere. That census goes down also.

13 All of those -- this it is like a domino  
14 affect based on SUNY's continued actions since that  
15 announcement, so we feel that is an appropriate date and  
16 we feel fairly confident that if appropriate staffing is  
17 back in place the patient base will be back in place.

18 Particularly, if it is made known that LICH is  
19 up and running, they don't really have a census problem.  
20 People will want to go there.

21 MR. CARONE: Your Honor, is not realistic to  
22 just say, let's go back in and unwind. I don't think  
23 that is really what is possible. What is possible is  
24 there is an accurate consensus.

25 Today we have 200 patients in the entire



1 hospital. We should base what is safe and sound and  
2 what is proper staffing based on today. In light of the  
3 people -- if the word gets out and more patients come,  
4 then that order is a morphosis that we will say, okay,  
5 200 patients today, but now we have 250, that means we  
6 have adequate staffing for whatever our consensus is.  
7 Perhaps that is the right language. As the patient  
8 population grows, the staffing grows.

9           Conversely, the word will never get out  
10 because as I said earlier, there is in a way that the  
11 petitioners imagine, because there is a sustainability  
12 plan in place now signed by the legislature which says  
13 publicly that LICH will be -- that SUNY will be exiting  
14 LICH. LICH will maintain to be open, but not in the  
15 form that it looks like today.

16           THE COURT: It will not be a teaching hospital  
17 anyway.

18           MR. CARONE: That depends on the new operator,  
19 whoever that may be. They will have to have their own  
20 accreditation and their own program. It wouldn't be a  
21 teaching hospital on behalf of SUNY Downstate of which I  
22 should tell the Court, SUNY Downstate has 54 residency  
23 programs, only six before the closure was at LICH. The  
24 prior owner continuum sought to remove some of the  
25 residency programs because of the deterioration, New

1 York State Controllers report exacerbated -- there is a  
2 lot going on that exacerbated this issue, not just what  
3 SUNY is doing, according to petitioners, nefariously to  
4 try to close without closing.

5 We are dealing with real life situations on  
6 the ground, making the best decisions possible. So I  
7 can't say what a new operator will do. The Legislature  
8 contemplates LICH staying open, that is what the  
9 sustainability plan says. So that is out there now.

10 It is on the Governors's website, it is there.  
11 How that plays out remains to be seen. We would like  
12 there to be an orderly transition to a new operator.  
13 Maybe they could do a better job and recruit better  
14 recruits, better staffing, different staff.

15 From the doctors prospective, I think it won't  
16 affect, and this really goes to some of issues regarding  
17 contempt which I will address in our papers, two out of  
18 three petitioners anyway, there won't be -- their  
19 position is will not be jeopardize because they will  
20 maintain a stakeholder in the regulations in the  
21 hospital regardless of who the operator is, but to  
22 answer the question, I believe, the language should  
23 reflect consensus that exists, not as we hope it should  
24 be.

25 If it gets better, then we must ramp up and if

1 it gets lower, than we can make an adjustment  
2 accordingly. All pursuant to our already established  
3 regulations for safety. Thank you, your Honor.

4 THE COURT: Anybody else?

5 MS. FOX: Your Honor, it is possibly a  
6 redundant theme, SUNY has done this. They are making a  
7 mockery of this TRO. They are making a mockery of DOH's  
8 regulations. They are saying, well, we are here today,  
9 what can we do? We are here today, this is the  
10 situation, it doesn't matter who did this. SUNY  
11 Downstate did this.

12 They pulled the residency program, they said,  
13 oh, its hard. We don't know what else to do. In all of  
14 their papers they haven't told us what they have tried  
15 to do. They haven't told us about trying to transfer  
16 doctors from their other campus over to this campus.  
17 They haven't told us about trying to work with the  
18 accreditation, with a residency program. They haven't  
19 told us about outlining whatever deficiencies they may  
20 have identified and tried to fix them.

21 As far as we know, they have tried nothing and  
22 they are coming here and complaining that this is  
23 difficult. It should be difficult to run a hospital,  
24 that is their job, to run the hospital.

25 We have heard that ambulances -- our client

1 members -- our clients are telling us that they are  
2 being told ambulances are to go on diversion this  
3 evening at five.

4 THE COURT: What do you know about that, Mr.  
5 Carone?

6 MR. CARONE: This is the first time I am  
7 hearing about it, Judge.

8 MS. FOX: We heard that LICH's, the chief  
9 medical officer at LICH, yesterday, Tuesday, told the  
10 doctors that they were on critical care diversion, which  
11 means that no patients could come to the hospital with  
12 certain very severe issues. Those departments are  
13 staffed now.

14 It is closing now. Residents are to be gone  
15 starting Friday. And SUNY for weeks has been saying we  
16 are going to replace the residents with a company who  
17 have nurse practitioners and PA's and temporary  
18 physicians and we were never confident that plan could  
19 work. They are not even talking about that plan  
20 anymore. There was never really a plan.

21 Among the physicians, some of the physicians  
22 take the position, this is an outrage, period. Many  
23 other physicians are trying to work with SUNY. Members  
24 of Concerned Physicians are trying very hard against  
25 some of the principals. They are trying to come up with

1 compromise plans, including Dr. Smith, who is bearing --  
2 somehow, SUNY wants to blame one of the intensivists for  
3 the downfall. They seem to want to blame one of the  
4 intensivists for the downfall of LICH.

5 He was told, you are going to lose your  
6 residents. He said let's have a meeting. Let's come up  
7 with a staffing plan. He was in a meeting where a  
8 staffing plan was agreed on by the senior management at  
9 Downstate and intensivists, including Dr. Smith. He  
10 thought that plan was being implemented, then he learned  
11 it wasn't. Thank you.

12 THE COURT: Mr. Carone, how much time do you  
13 need to respond to the order to show cause for contempt.  
14 I am signing it right now and I need to know how much  
15 time you need.

16 MR. CARONE: Seven days, Judge.

17 THE COURT: When can papers be served,  
18 officially, served?

19 MS. FOX: If we can serve them by hand we can  
20 do it now.

21 THE COURT: No, not in the courthouse unless  
22 you do it out of my presence.

23 MS. FOX: Tomorrow.

24 THE COURT: I will give you to the 21st day of  
25 June for service of your papers. Opposing papers no

1 later than June 28th.

2 Is that enough time for you, Mr. Carone, June  
3 28th?

4 MR. CARONE: Yes, your Honor.

5 THE COURT: I am going to say by 12 noon p.m.  
6 What day do you want to come back, if I can  
7 accommodate you.

8 MR. CARONE: Your Honor, my only problem is  
9 the week of July 4th. The 29th to the 5th I will be  
10 away on vacation. Any time after that. The 5th is okay  
11 with me, Judge.

12 MS. FOX: July 10th, your Honor?

13 THE COURT: Okay, the return date is July  
14 15th. July 15th, just in case if I have a morning  
15 calendar I am not taking any chances. I am going to say  
16 2:30 p.m. to get started. Then after that if I have to  
17 clear my calendar you may go day-to-day until it is  
18 done.

19 MR. SELTZER: Your Honor, would it be all  
20 right if I filed the files on July 10th or July 9th?

21 THE COURT: Is there a space in the order to  
22 show cause for reply. I didn't draft those papers. I  
23 am going with what I have before me now.

24 MR. CARONE: Your Honor, I would object to,  
25 it's in your Honor's disgression, to plan a reply.

1 THE COURT: At this stage I am not granting  
2 replies. We are going to stay within the parameters of  
3 this.

4 I will be liberal to let you argue whatever it  
5 is. Then the respondent can say you caught them by  
6 surprise and something to that affect.

7 I will always create some type of remedy.  
8 Thank you.

9 Is there anything else we can discuss in the  
10 nature of trying to resolve this, to settle this case.

11 MR. CARONE: Your Honor, I said it before and  
12 I will say it again. SUNY is ready, willing and able to  
13 sign the stipulation of settlement proposed. I asked  
14 Concern Physicians the beginning of last week, I could  
15 be wrong, but is what is I think.

16 THE COURT: You know, I am going to ask a  
17 question that I probably shouldn't as a judge, what do  
18 you want. You don't even need to say it in open Court.  
19 We don't know who is sitting in here. If you want to  
20 write it down on a piece of paper, tell me and I will  
21 convey it to Mr. Carone.

22 What do you want that is going to resolve this  
23 case. Nobody is getting everything that they want. Let  
24 me be real here. That is the nature of the settlement.  
25 Nobody is going to walk away with the best possible

1 settlement. Nobody is liking the judge. You know, you  
2 feel like nobody got the best of each other, so what you  
3 do you want?

4 MR. SELTZER: We want operations maintained  
5 for a reasonable period of time.

6 THE COURT: That is not saying anything. I am  
7 going to be blunt with you, that is not saying anything.  
8 Be specific. What is the problem? Is there something I  
9 can reach out and you put my hand on? That is what I am  
10 looking for here, then I am going to tell Mr. Carone,  
11 however you want to do it and he is going to have to  
12 explain to me why it is not happening, if it is  
13 reasonable.

14 MS. FOX: We did lay this out in the letter to  
15 Mr. Carone last week, but the number one thing on our  
16 list that is immediate and we think is going to cause --  
17 that is causing the concern and crisis is the removal of  
18 the residents. He is removing a huge portion of the  
19 hospital's work force and particularly, the residents in  
20 the ICU, CCU.

21 So, these are internal medicine residents.  
22 There are, approximately, 70 of them right now at LICH  
23 on Saturday their are plan is for there to be zero. So  
24 in particular, that is what we want now.

25 THE COURT: Isn't there something with the



1 Department of Health that they would have to approve the  
2 continued existence of residents?

3 MS. FOX: I believe that is not the case.  
4 Residency program is accredited by an agency within the  
5 -- it is an acronym, ACGME. I don't know the letters.  
6 They have a process for accrediting a residency program.

7 THE COURT: Accreditation of the various  
8 residents.

9 MS. FOX: LICH had been an independent  
10 internal medicine program. The directors of that  
11 program were directed by Downstate to withdraw, so  
12 Downstate's plan is to absorb those residents into  
13 Downstate's program. We know they are currently looking  
14 for other hospitals to take those residents.

15 They sent notices out through a trade group  
16 and their own e-mail, I want those residents to be put  
17 back at LICH, to remain at LICH.

18 THE COURT: Assuming that happens, is the case  
19 settleable or not or you are going ask for something  
20 else?

21 If I put him on the spot and say, do this, are  
22 you coming back tomorrow with something else because you  
23 got this? Because that is normally the way sometimes  
24 when we deal with these settlements there comes a point  
25 where we draw the line. This is what you get. This is

1 what you want. This is the most important thing. If I  
2 get this for you, is this it or are you coming back for  
3 more because now you got this one?

4 That is really what it is because I have  
5 nothing but respect for Mr. Carone over there as I do  
6 you and everyone has proven their skill and ability as  
7 an attorney in this courtroom, but there comes a point  
8 where if we are going to settle this, there is not going  
9 to be any happy faces in this one.

10 I wish there were. I would love to see it.  
11 Everybody is going to pretty much feel some pain. He  
12 may have to do something he doesn't want to do. You may  
13 have to do something you may not want to do. In the end  
14 everybody gets something out of the deal.

15 Everybody looks good as opposed to just  
16 walking away. I want everyone to walk away with  
17 something opposed to leaving with a decision by this  
18 court that you going to have to appeal and then I will  
19 be pretty certain of what I do.

20 If I press him on this, is there more? Are  
21 you coming back to the table? Again, that is really  
22 what I need to know.

23 MS. FOX: Your Honor, I cannot in good faith  
24 say that I would not come back and the reason is that  
25 this is not status situation.

1           Now, I could say I would compromise. We feel  
2           that they should -- that the psych unit should be  
3           restaffed, for instance. So for instance, if we would  
4           compromise and say we are going to let that go, but we  
5           need the residents.

6           THE COURT: You want the residents and you  
7           want the staff and you want the psych unit.

8           Now, there was questions with the psych unit  
9           before. I want you to know that I addressed that issue  
10          as early as the last oral argument, when I made my last  
11          decision and I indicated to the Attorney General or  
12          representative from the Attorney General's office that  
13          was here, that I have no objection to going out and  
14          hiring other members of the psych department. That  
15          would not be deemed a violation of my stay.

16          Now, if what I am hearing is accurate and I  
17          rendered this decision back in February, March or  
18          whatever it was, nobody did anything with the psych  
19          department. No one went out and rehired for the psych  
20          department.

21          MS. FOX: No, sir.

22          THE COURT: After I made it clear that -- and  
23          as I said this is months ago, this stuff has been all  
24          over the papers what I did. So there is no surprise,  
25          the record is clear. And when I saw the issues with the

1 psych department and petitioner's order to show cause  
2 that was the reason for me to have concern because this  
3 is something that was addressed months ago.

4 The gentleman sitting next to you at the  
5 table, he was here. He knows what I said and I thought  
6 that we resolved that issue. These are things, so now  
7 we have the psych department and residency. If that  
8 happens, is that it or you coming back for more.

9 MS. FOX: Again, because it is not a stable  
10 situation, because we thought that the psych department  
11 was the big issue. Then they pull the residency issue.  
12 We were here before and we resolved the psych department  
13 issue. We would have thought we were in good shape,  
14 then the residency program got pulled, so we don't know  
15 what is the next.

16 The issue that they are not maintaining the  
17 hospital according to regulation and according to their  
18 obligations. There seems endless ways they can  
19 undermine the viability of the hospital and our view  
20 they have to maintain the hospital until there is a  
21 closure pursuant to valid regs that is properly  
22 submitted and that is approved.

23 And they promised in the sustainability plan,  
24 now to the Legislature as well as the judiciary that the  
25 idea is to transfer this entity to a new operator and

1 that is being undermined as well by turning LICH into a  
2 shell.

3 MR. CARONE: May I be heard?

4 Again, it is several different topics. The  
5 colloquy started with settlement possibilities and I  
6 will try my best to schedule a settlement conference  
7 outside of the courtroom with petitioners because there  
8 is some real differences of opinion on what certain  
9 things are.

10 We hear the residents are part of the  
11 workforce. They are not part of the workforce. They  
12 are an educational component of a doctor's growth. It  
13 is an academic vehicle and has nothing to do with  
14 workforce. Yes, they work, but they have to work under  
15 specific guidelines, with specific faculty, with  
16 specific supervision and the class is graduating this  
17 month. The new class --

18 THE COURT: Let me stop you for one minute.  
19 When we talk about this doctor who claims that he is  
20 leaving, if he leaves, does that mean that the residency  
21 program is gone? I think that this person who may well  
22 be one of the Concerned Physicians.

23 MS. FOX: Dr. Smith has made it known  
24 repeatedly he will not leave if the residents stay. His  
25 concern is proper staffing in the ICU and he will stay

1 if the residents are there. He would also stay if the  
2 ICU were properly staffed by some other company who are  
3 a combination of temporary physicians PAs and NPs. He  
4 doesn't want to leave, his whole career has been at  
5 LICH. He is heart broken.

6 MR. CARONE: We believe that doctor took the  
7 position at Brooklyn Hospital, but assuming that is not  
8 true, I think we are in agreement if the doctors will  
9 stay, provided it is properly staffed, but not using the  
10 term residency program continuously, I think we can  
11 accommodate that and we will try to.

12 Just I have with me a chart and I am happy to  
13 share it, with the Court's permission, with petitioners  
14 and the Court, just a small microcosm of the residency  
15 problem that dates back to the beginning of the year  
16 2013 as is relates to radiology.

17 There is a minimum amount of cases per day  
18 that a resident must work on and learn from in order to  
19 meet the accreditation requirements.

20 With the Court's permission I would like to  
21 hand one up.

22 This shows, the line across is the minimum  
23 amount. This is one example that is problematic from  
24 ACGME accreditation point of view.

25 The GMEC which is the Graduate Medical

1 Education Committee that comprises the body for SUNY  
2 when it meets to decide what is the best case decision  
3 as it relates to continuing the residency program. I  
4 have a copy and I am happy to share it.

5 There is over 20 well regarded doctors and  
6 medical professionals who voted unanimously for the  
7 actions that were taken. I think in our papers Dr.  
8 Wadowski's affidavit, Paragraph 14, sums it up the best.  
9 And with the court's permission I would like to read a  
10 few sentences.

11 "It is really important that we have an  
12 understanding of what a residency is. The  
13 responsibility, objectives and the moral obligations of  
14 a sponsoring institution are to assure the best quality  
15 resident and fellows enrolled into its programs and  
16 rotate to any affiliate and participating sites to  
17 provide a stable, safe and appropriately clinical  
18 learning environment that substantially fills all of  
19 ACGME's institutional common specialty and sub specialty  
20 requirements".

21 I will skip down to the last sentence.  
22 "Failure to fulfill those obligations not only puts  
23 accreditation of the sponsoring institutions, here SUNY  
24 Downstate has 54 programs, and all of its programs in  
25 jeopardy, would leave us remiss in our societal

1 obligation to train and graduate highly competent, well  
2 qualified, sufficiently experienced, independent  
3 physicians who are competent to practice without direct  
4 supervision and HGCME requires a provider for every  
5 graduate resident."

6 This was a difficult decision. One, there was  
7 no choice in the matter. Hopefully we can and we will  
8 find another solution for staffing, but saying just  
9 reinstate the residency program next week is not  
10 realistic. It is impossible.

11 THE COURT: Okay, you have some -- what is it  
12 Mr. Seltzer, Ms. Fox, whoever wants to tell me.

13 MR. SELTZER: A couple of things, your Honor.  
14 As your Honor has learned, this is tough case to crack  
15 in terms of settling it. And we are open to that idea,  
16 we haven't in the past.

17 I would have to consult -- I haven't had an  
18 opportunity to sit down with my client, to sit down  
19 where we are right now. I think we would be open for  
20 further discussion with the respondent and a Court  
21 conference or conference with your law secretary, if  
22 that makes sense. I think we all need a little time to  
23 respond to it.

24 I think at the moment the note I was just  
25 handed by a representative of my client is that they



1 just heard that the ER is closed, it is closed to the  
2 ambulances at the end of day. So one of the reasons we  
3 are here is because we felt the need for some --

4 THE COURT: I don't know what just happened.  
5 The emergency room was closed to ambulances. Somebody  
6 in the audience just handed this note. I am sure they  
7 are in contact with LICH and come to the conclusion that  
8 -- so they know this. They are not taking anymore  
9 ambulances at the emergency room at LICH.

10 If that is the case, that is in violation,  
11 clear violation of my order. So if anybody can settle  
12 this case, Mr. Carone, I know it is you.

13 Make no mistake about it, I know I just  
14 dropped the big two ton thing on you. I know you can do  
15 this. So you need to be calling your clients now, let  
16 them know that people are -- individuals will be named  
17 and they may well have to come before this Court and  
18 show cause why they shouldn't be held in contempt.

19 MR. CARONE: Understood.

20 THE COURT: I may well institute some remedies  
21 differently than those sought by this Court, but I can  
22 do whatever I see fit if it reaches that stage.

23 I am hoping nobody has to come down here. It  
24 is as simple as that. I would be fair, impartial and  
25 unbiased. Don't let it come to that. Don't let it come

1 to that. If everybody is good at what they do, don't  
2 let it come to that.

3 Okay, so if you want to talk to somebody back  
4 in the audience and find out how they found out that  
5 there is no more ambulances being permitted to go to  
6 LICH.

7 That is shameful, on the day that they are  
8 coming to see the Judge. Does it get any worse than  
9 that?

10 MR. CARONE: Your Honor, I don't know how to  
11 respond to a note. I am happy to speak to anyone.

12 THE COURT: I don't think anyone is going to  
13 come here and misrepresent. Your word is your bond in  
14 this courtroom. I don't care who you are, so I am going  
15 to go off the record for a minute because I am not  
16 saying anything.

17 (Whereupon an off-the-record discussion was  
18 held.)

19 THE COURT: Back on the record. Before we do  
20 that, counsel for the Department of Health, in the event  
21 I want to appoint a special administrator, is there  
22 going to be a problem in the Department of Health if  
23 this Court appointed some type of administrator itself.

24 MR. ZAHNLEUTER: Do you mean an administrator  
25 of the hospital?

1 THE COURT: Why not? Apparently whoever is  
2 there is not getting the job done.

3 MR. ZAHNLEUTER: When a similar situation  
4 arises in bankruptcy situation and the bankruptcy Court  
5 has jurisdiction over a failing --

6 THE COURT: I don't want to hear that. You  
7 are the man with the expertise from the Department of  
8 Health.

9 MR. ZAHNLEUTER: Yes, there will be a problem.  
10 What we will do is ask for an opportunity to review the  
11 character and competence of the proposed administrator  
12 to make sure that person was qualified to run the  
13 hospital and provide the approval.

14 That is what we do in bankruptcy courts. When  
15 they went to appoint a trustee to run a hospital, that  
16 is in bankruptcy --

17 THE COURT: It has to be somewhat approved by  
18 you with regard to the expertise.

19 MR. ZAHNLEUTER: And to their competency.

20 THE COURT: Do you have any recommendations?  
21 Anybody have any?

22 MR. ZAHNLEUTER: We can put something together  
23 for you.

24 THE COURT: Don't jump up too quick. Be  
25 serious now and I take it serious. I am just really not

1 happy. On a day when you know you are coming to see me,  
2 I expect to hear good thing not someone coming into the  
3 courtroom saying, Judge, they are closing the emergency  
4 room.

5 Theoretically, it is the last thing that  
6 should be closed in the emergency room not the first,  
7 because somebody could be dying right now and that is  
8 what the Department of Health is charged with the  
9 responsibility of taking care of. Made no mistake about  
10 it. The Court understands what is going on here.

11 MR. CARONE: Your Honor, I would like an  
12 opportunity to speak with my clients in the hospital. I  
13 will e-mail the Court tomorrow morning, tonight, what I  
14 find.

15 It is difficult to respond. I did see a text  
16 message and it did say that the emergency room is open,  
17 but not for ambulances. I am not sure of the background  
18 of what it means. I do take it at face value and I will  
19 take it seriously and report back to the Court.

20 THE COURT: It means they are not accepting  
21 ambulances. If somebody gets sick, let's say, just use  
22 this as an example, in this building right now somebody  
23 had a heart attack, they can't walk over here.  
24 Definitely nobody wants to put them in their car. You  
25 need an ambulance to transport you there and you get

1 there and you are turned around and maybe the other two  
2 or three hospitals that are very close going over the  
3 bridge to Manhattan, Brooklyn Bridge could be clogged  
4 you might not even make it to Manhattan.

5 So, realistically, I need this cleared up.  
6 That is as simple as that. And then we can go and come  
7 back here.

8 I will let you set something up with my Court  
9 attorney on the following. I want to hear positive  
10 things or I am going to sua sponte whatever I feel needs  
11 to be done, that is whatever it is.

12 So, this is the time for all the attorneys to  
13 do the right thing. As best we can.

14 MR. SELTZER: Your Honor, just following that  
15 idea, I don't know what your Honor's schedule is, but we  
16 are going to suggest perhaps Monday just to have a short  
17 status conference with the Court to just talk about  
18 whether we can sort of start a settlement process and  
19 also just to review where things are in terms of  
20 hospital operations.

21 I think it might be helpful if the hospital  
22 knows there was going to be a further reporting back to  
23 the Court on Monday. It would be helpful for all of us.

24 THE COURT: Monday three p.m. I will see  
25 everyone. Clear your schedules because that is what I

1 am doing, whatever I have to do. I am seeing you all  
2 Monday at three p.m. All right, thank you.

3 MR. SELTZER: The other thing is, and I am not  
4 endorsing anything, the other possibility is and Mr.  
5 Zahnleuter understands the health law better than I do,  
6 but the other thing that occurred to us overtime is that  
7 maybe rather than have an administrator somebody like a  
8 monitor appointed by the Court.

9 THE COURT: A special master.

10 MR. SELTZER: A special master might be a  
11 possibility.

12 THE COURT: If I have to find the right  
13 special master, I may well reach out and say submit  
14 names, if it comes down to that. Again, I am hoping  
15 that it doesn't.

16 I am hoping that with all of the attorneys in  
17 this room, we don't need to do that, but I will if I  
18 need to. I don't think I do. I am hoping that come  
19 Monday I am hearing positive things about the emergency  
20 room. Nobody is messing around, playing games, et  
21 cetera. Pretty much that is it.

22 E-mail my Court attorney any potential  
23 candidates for a special master or administrators no  
24 later than five p.m. tomorrow. Thank you.

25 MR. ZAHNLEUTER: May I seek a clarification on

1 the record regarding this order that you signed because  
2 I am looking at the paragraph that talks about  
3 furtherance of this order defendants shall A and B, but  
4 there is a reference to staff in place at LICH prior to  
5 SUNY announcement of the plan --

6 THE COURT: February of 2013, that is the  
7 operative date. I believe it is February 20 of 2013.

8 MR. ZAHNLEUTER: That is the day that the  
9 program staff of the health department will use to  
10 determine if there has been a deficiency or not and I  
11 would like to thank you for clarifying.

12 THE COURT: There won't be a problem with  
13 that. That is the date to use. Thank you.

14 \* \* \* \* \*

15 CERTIFIED TO BE A TRUE AND ACCURATE  
16 TRANSCRIPT OF THE MINUTES TAKEN IN THE  
17 ABOVE-CAPTIONED PROCEEDING.

18  
19   
20 JEANMARIE EPISCOPIA  
21 SENIOR COURT REPORTER  
22  
23  
24  
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