APPENDIX A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

G. REHMI DENTON, M.D. et al.,

Plaintiffs,

-against-

BOARD OF REGENTS OF THE STATE OF NEW YORK
et al.,

Defendants.

(Supreme Court, Albany County Special Term, June 13, 1980)
(Calendar No. 70)

(JUSTICE HAROLD J. HUGHES, Presiding)

APPEARANCES:

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HUGHES, J.:

In this action for a judgment declaring that section 29.2 (a) (6) of the Rules of the Board of Regents relating to access to certain health records by patients and succeeding practitioners to be invalid, both sides have moved for summary judgment.

Plaintiffs are physicians who protest the promulgation of a regulation by defendants which defines unprofessional conduct in the health professions to include:

> "[U]pon a patient's written request, failing to make available to a patient, or, to another licensed health practitioner consistent with the practioner's authorized scope of practice, copies of the record required by paragraph (3) of this subdivision and copies of reports, test records, evaluations or X rays relating to the

patient which are in the possession or under the control of the licensee, or failing to complete forms or reports required for the reimbursement of a patient by a third party. Reasonable fees may be charged for such copies, forms or reports, but prior payment for the professional services to which such records relate may not be required as a condition for making such records available. A practitioner may, however, withhold information from a patient if, in the reasonable exercise of his or her professional judgment, he or she believes release of such information would adversely affect the patient's health, and this section shall not require release to the parent or guardian of a minor, of records or information relating to venereal disease or abortion except with the minor's consent. This provision shall apply in lieu of section 29.1 (b)(7) of this Part;"

Plaintiffs attack 8 NYCRR 29.2(a)(6) upon the grounds that (1) it conflicts with section 17 of the Public Health Law and is therefore beyond the regulatory authority delegated to the Board of Regents; and (2) conduct which accords with standards accepted as proper by the consensus of the profession may not be punished as unprofessional and here the medical profession recognizes health records as the property of the health practitioner who is under no duty to allow a patient direct access thereto. Defendants contend that the regulation is a reasonable regulation promulgated pursuant to the authority expressly delegated by the Legislature in subdivision 9 of section 6509 of the Education Law which provides that a licensed professional is subject to penalty when found guilty of "committing unprofessional conduct, as defined by the board of regents in its rules, or by the commissioner in regulations approved by the board of regents".

Turning to plaintiffs' first contention, a regulation must fall "if it contravenes the will of the Legislature as expressed in the statute" (State Div. of Human Rights [Valdemarsen] v Genesee Hosp., 50 NY2d 113, 188). Ordinarily this rule comes into play when

a regulation is alleged to be out of harmony with the legislation creating the administrative body or granting it rule-making power. However, the rationale would be equally applicable to a regulation or rule that directly contravened any statute. The function of the court is to ascertain the legislative will and compare the administrative promulgation to it to determine if a conflict exists. The courts are not anxious to find a conflict between a statute and rule regulating the same subject matter since "the cornerstone of administrative law is derived from the principle that the Legislature may declare its will, and after fixing a primary standard, endow administrative agencies with the power to fill in the instices in the legislative product by prescribing rules and regulations consistent with the enabling legislation" (Matter of Nicholas v Kahn, 47 NY2d 24, 31). In dealing with the Board of Regents in the area delegated to them by the Legislature, latitude is the byword (Matter of Warder v Board of Regents of Univ. of State of N.Y., 75 AD2d 666).

Section 17 of the Public Health Law requires physicians and hospitals upon the written request of a patient to turn over copies of medical records and tests to any other physician or hospital named by the patient. The section contains certain exceptions, one of which is that a physician need not turn over his personal notes. Plaintiffs contend that the Legislature intended this statute to encompass what records a physician is required to furnish and the parties to whom he must furnish them, and that the rule here under review improperly extends the records which are to be disclosed, and the parties to whom such records are to be made available.

This court agrees that the rule impermissibly expands section 17 of the Public Health Law and that the Board of Regents has exceeded its authority in adopting it (Matter of Johnson v Director, Downstate Med. Center, 41 NY2d 1061).

The court need not consider plaintiffs' second argument concerning the Board of Regents' authority to regulate the conduct of physicians.

The motion of the plaintiffs for summary judgment declaring 8 NYCRR 29.2(a)(6) to be invalid shall be granted and the cross motion of the defendants for summary judgment shall be denied, without costs to either party.

Dated: December 10, 1980