THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2020-0454

JANE DOE

v.

LORI SHIBINETTE, in her official capacity as Commissioner of the New Hampshire Department of Health and Human Services

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Appeal Pursuant to Rule 7

BRIEF OF AMICI CURIAE CLASS PLAINTIFFS IN *JOHN DOE v. COMMISSIONER*, NO. 1:18-CV-01039-JD (D.N.H), IN SUPPORT OF PETITIONER/APPELLEE JANE DOE

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QUESTION PRESENTED

Two Superior Courts and the U.S. District Court for the District of New Hampshire have all held that state law requires the Commissioner to provide probable cause hearings to people involuntarily detained in hospital emergency rooms within three days after hospital staff complete an involuntary emergency admission ("IEA") certificate.[1] Petitioner/Appellee Jane Doe was involuntarily detained in a hospital emergency room and then New Hampshire Hospital for seventeen days before receiving a probable cause hearing. Was Jane Doe entitled to a probable cause hearing within three days after the hospital completed her IEA certificate?

STATEMENT OF INTEREST OF *AMICI CURIAE*

This brief is filed on behalf of the Class Plaintiffs in the federal class action, *Doe v. Commissioner*, No. 18-CV-01039-JD (D.N.H), filed over two years ago in the U.S. District Court for the District of New Hampshire.

The Class Plaintiffs brought the federal class action on behalf of hundreds—if not thousands—of people who have languished in hospital emergency rooms for days—and sometimes weeks—at a time because the Commissioner refuses to provide them with counsel or the opportunity to contest their detention. These individuals are denied probable cause hearings, often deprived of adequate mental health treatment, isolated from family and friends, and held against their will in solitary conditions until the Commissioner authorizes them to be transferred to Designated Receiving Facilities ("DRFs") such as New Hampshire Hospital. This cruel and

[1] The form IEA petition is here: https://www.courts.state.nh.us/forms/nhjb-2826-d.pdf.

inhumane practice has been going on since at least 2012. The people who are being involuntarily detained in hospital emergency rooms are not statistics or numbers. They are real people. They have families and jobs. And under New Hampshire law and the U.S. Constitution, they are entitled to basic due process protections.

On April 30, 2020, Judge Joseph DiClerico recognized that the Commissioner's policies and practices are unlawful. He ruled that the Commissioner's refusal to provide probable cause hearings to patients involuntarily detained in hospital emergency rooms violates RSA 135-C:31, I, which requires the Commissioner to provide a probable cause hearing within three days after hospital staff complete an IEA certificate (the same issue presented in this appeal). *Doe v. Comm'r*, No. 18-CV-1039-JD, 2020 WL 2079310, at *11 (D.N.H. Apr. 30, 2020). Judge DiClerico also certified a class consisting of "all persons who are currently being, have been, or will be involuntarily detained in a non-DRF hospital under RSA 135-C:27–33 without having been given a probable cause hearing by the Commissioner … within three days (not including Sundays and holidays) of the completion of an involuntary emergency admission certificate." *Doe v. Comm'r*, No. 18-CV-01039-JD, 2020 WL 2129717, at *6 (D.N.H. May 4, 2020). He appointed John Doe, Charles Coe, Jane Roe, and Deborah A. Taylor as the class representatives. *Id.*

The New Hampshire Superior Court subsequently credited Judge DiClerico's reasoning in granting Appellee's habeas corpus petition in the case now before this Court. *Amici Curiae* believe that their experience with and knowledge of the issues presented in this appeal will be of service to this Court, especially in light of the Superior Court's correct reliance on Judge

DiClerico's decision and the fact that the Class Plaintiffs represent likely thousands of individuals who have been, are being, and will be subjected to the Commissioner's unlawful and unconstitutional practice.

BACKGROUND

The Commissioner has a systemic policy and practice of directing hospital emergency rooms to involuntarily detain people who may be experiencing mental health crises for more than three days without any due process, appointed counsel, or opportunity to contest their detention. This practice is known as "psychiatric boarding." It stems from the Commissioner's incorrect reading of the IEA statute, RSA 135-C:27–33, which sets forth procedures for the "involuntary emergency admission" of people who are "in such a mental condition as a result of mental illness to pose a likelihood of danger to [themselves] or others." RSA 135-C:27.

The IEA statute provides that a person is involuntarily admitted "to the state mental health services system under the supervision of the commissioner" when a hospital completes an IEA certificate, RSA 135-C:28, I, and dictates that "[w]ithin 3 days after an involuntary emergency admission, not including Sundays and holidays, . . . there shall be a probable cause hearing in the district court having jurisdiction to determine if there was probable cause for involuntary emergency admission," RSA 135-C:31, I. The statute also directs law enforcement to "take custody of the person to be admitted and . . . immediately deliver such person to the receiving facility identified in the certificate" "[u]pon completion of an involuntary emergency admission certificate." RSA 135-C:29, I. Based on the statute's plain language, the Superior Court in this habeas corpus case correctly concluded that "the involuntary emergency admission and the rights accruing to those

so admitted to the state mental health system are not tolled until the person arrives at the receiving facility, but are triggered when the IEA certificate is complete." *See* Addendum (Order, *Doe v. Shibinette*, No. 217-2020-CV-500 (Merrimack Cty. Super. Ct. Sept. 23, 2020)).

In recent years, there has been a shortage of available beds in DRFs.[2] Instead of finding lasting solutions to this problem, however, the Commissioner has directed hospitals to involuntarily detain IEA patients in emergency rooms for extended periods of time and simply "renew" their IEA certificates every three days until a DRF bed becomes available. And the Commissioner has consistently refused to provide any due process to these patients until they are transferred to DRFs many days or weeks later. The Commissioner adopted this official policy based on her incorrect belief that the IEA statute does not require a hearing until three days after a patient is transferred to a DRF.[3]

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[2] There are five DRFs in New Hampshire that accept patients involuntarily admitted under Chapter 135-C: (i) New Hampshire Hospital in Concord; (ii) the Cypress Center in Manchester; (iii) the Psychiatric Intensive Care Unit at Elliot Hospital in Manchester; (iv) Franklin Regional Hospital; and (v) Portsmouth Regional Hospital. *See* Hum. Servs. Rsch. Inst., Final Report: Evaluation of the Capacity of the New Hampshire Behavioral Health System 55, 57 (Dec. 22, 2017), *available at* https://www.hsri.org/publication/evaluation-of-the-capacity-of-the-new-hampshire-behavioral-health-system. No DRF beds are available in the North Country after the closure of Androscoggin Valley Hospital. New Hampshire Hospital is also one of the few options available for children in psychiatric crisis.

[3] This official policy is also on the Department of Health and Human Services' ("DHHS's") website: "Within three days *of admission to NHH* [DRF New Hampshire Hospital] (not counting Sundays and holidays), a court hearing is scheduled to consider whether there was reasonable cause to confine the person at NHH, due to alleged behaviors that were dangerous to

The end result is that, while patients are involuntarily detained in hospital emergency rooms for days or weeks awaiting admission to DRFs, they receive no lawyer, no probable cause hearing, and no opportunity to contest their detention. To make matters worse, because these emergency rooms are not designed to treat people experiencing mental health crises, many detained individuals are denied the medical and psychiatric care that they may need. In many cases, the patients are held in windowless and poorly maintained rooms, deprived of basic necessities, and denied access to the outside world. It should come as no surprise that solitary conditions, combined with a lack of due process, are likely to exacerbate a mental health crisis.

I. THE COMMISSIONER HAS FAILED TO RECTIFY AN INHUMANE PSYCHIATRIC BOARDING CRISIS OF HER OWN MAKING

The number of people waiting in isolation in emergency rooms for DRF beds is disturbing, and the crisis has escalated in recent years. From the second quarter of 2015 to November 2018, the number of adults being detained without due process in emergency rooms while awaiting DRF admission increased by over 350%, as illustrated in this chart prepared by NAMI-NH:

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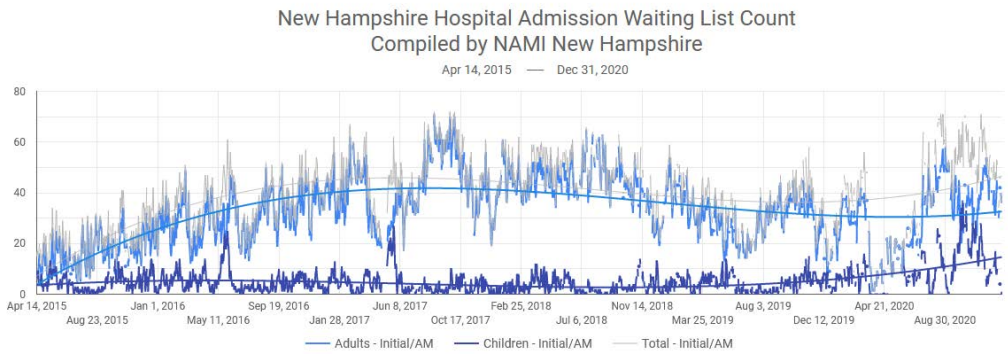
self or others, as a result of mental illness." Class Plaintiffs' Appendix 5 [hereinafter "APP"] (Involuntary Admissions, DHHS, https://www.dhhs.nh.gov/dcbcs/nhh/eligibility.htm) (emphasis added).



See NAMI-NH, NHH Delay Data, *available at* https://goo.gl/o9R1Yv.

On September 24, 2017, seventy people were waiting for admission to DRFs. *See* Hum. Servs. Rsch. Inst., *supra* note 2, at 4 ("There has been a steady increase in the number of individuals experiencing boarding in New Hampshire ERs."). And, as of January 26, 2021, the number of people waiting for placement to a DRF had risen to eighty (forty-nine adults and thirty-one children). Forty-seven of these adults were waiting in hospital emergency rooms. APP10 (NAMI-NH Facebook Page (Jan. 26, 2021)). This practice is cruel and inhumane.

Wait times in hospital emergency rooms sometimes last up to four weeks. The named Class Plaintiffs in the federal class action illustrate the severity of this crisis: Scott Stephen Johnstone waited 27 days in an emergency room without due process; Jane Roe was detained in St. Joseph's Hospital for 20 days; and Charles Coe was detained for 15 days in Concord Hospital before he was released after filing a habeas corpus petition in the Merrimack Superior Court. From July 11, 2017, to September 6, 2017, approximately 35% of all IEA patients spent three to ten days waiting in hospital emergency rooms, and 17% of patients spent more than ten days in emergency rooms. APP17 (NAMI-NH Presentation, Slide 6 (July 2018)).

Due process is critical to individuals languishing in hospital emergency rooms awaiting transfer to DRFs. Some do not need to be detained at all. In many cases, the DRF or judge determines that there is no reason to involuntarily detain a patient who has been transferred to a DRF. According to data from DHHS, in 2017, DRFs discharged 162 patients after they were transferred but *before* their probable cause hearings, and the Circuit Court found no probable cause to involuntarily detain 14 other patients. APP20 (Lynne S. Mitchell, NHH General Counsel, New Hampshire Hospital Admissions Presentation, Slide 4, Page 2 (Oct. 30, 2018)). Similarly, in 2016, DRFs released 136 patients prior to their hearings, and no probable cause was found in 159 cases. APP36 (2013–2016 IEA Data). If these patients had received probable cause hearings within three days after their IEA certificates were completed—instead of waiting to receive due process until they were transferred to DRFs days or weeks later—it is likely that many would have been released much sooner.

The Commissioner has failed to fix this crisis for years despite repeated efforts by advocates and judges to raise awareness of the problem. On November 17, 2016, then-Chief Administrative Judge Edwin W. Kelly brought the crisis to this Court's attention when he issued an order addressing three individuals who waited 17 to 20 days from their initial emergency room detention until their probable cause hearings. APP40–41 (Interlocutory Transfer Statement Order 3–4, *In re T.D.*, No. 429-2016-EA-01258 (N.H. Cir. Ct. Nov. 17, 2016)). As Judge Kelly explained: "In the cases before the court, up to four additional petitions and certificates were filed before the transfer to the receiving facility was accomplished, resulting in stays in the emergency room up to 15 days long." APP45. Judge Kelly's decision

highlighted the systemic nature of the problem, observing that a "review of 1251 IEA cases filed during 2015 found that in 43% of those cases, the person was not transferred immediately to a receiving facility," meaning these individuals were detained in emergency rooms prior to admission to DRFs without any process. *Id.* And as he recognized, when a person is detained in an emergency room, the Circuit Court "[is] not aware that the person [is] the subject of a petition" and only learns of the detention when "the individual [is] eventually transferred to the receiving facility." APP45, 48. Observing that the cases "present[ed] issues of significant statutory and constitutional dimensions," Judge Kelly explained that "[d]uring the period leading up to the probable cause hearing, the liberty interest of the person sought to be admitted is impacted." APP48.

Given these serious concerns, Judge Kelly sought to transfer the following question to this Court, among several others: "When is a person 'admitted' to the mental health system for purposes of the involuntary emergency admission time frames set forth in RSA chapter 135-C?" APP42; *see also* APP50–52 (Supplemental Order, *In re T.D.*, No. 429-2016-EA-01258 (N.H. Cir. Ct. Nov. 16, 2016)). New Hampshire Hospital objected to the interlocutory transfer, arguing that there was no longer a live case or controversy, *see* APP54–57 (Motion for Summary Disposition, *In re T.D.*, No. 2016-0618 (N.H. Dec. 7, 2016)), and on December 8, 2016, this Court declined to allow the interlocutory transfer, *see* APP59 (Order, *In re T.D.*, No. 2016-0618 (N.H. Dec. 8, 2016)).

In 2017, responding to Judge Kelly's order and the work of advocacy organizations, however, the legislature subsequently enacted House Bill 400 to require the Commissioner to "develop a plan with recommendations to

ensure timely protection of the statutory and due process rights of patients subject to the involuntary emergency admissions process of RSA 135-C who are awaiting transfer to a designated receiving facility." APP61, 64 (HB400, § 112:3, 2017 Sess. (N.H. 2017)). Yet, after being presented with another opportunity to solve the crisis, the Commissioner failed to resolve the problem. The Commissioner issued a report proposing a pilot program that would provide people who were involuntarily detained in emergency rooms with probable cause hearings by video and telephone, access to legal counsel, and adequate and humane treatment. *See* APP71–79 (Report on IEAs (Aug. 31, 2017)). But when the hospitals raised superficial security and liability concerns related to the hearings, the Commissioner acquiesced and abandoned the proposed pilot program. *See* APP81–87 (Supplemental Report on IEA Hearings (Dec. 21, 2017)). Instead, the Commissioner adopted a "back door" plan for discharging people from DRF beds at New Hampshire Hospital to open up beds for patients waiting in hospital emergency rooms and reduce the DRF waitlist. This approach also failed, in part because New Hampshire lacked appropriate transitional housing where patients could stay following their discharge.[4]

In 2018, in the wake of these failures, at least one person who was unlawfully detained in an emergency room managed to secure counsel and

[4] *See* Jennifer Crompton, *Officials: Not Enough Transitional Housing for Psychiatric Patients*, WMUR (Aug. 8, 2018) ("We have about 20 to 30 people minimum at New Hampshire Hospital that could be discharged today and free up those beds, but we don't have the transitional housing for them."), *available at* https://www.wmur.com/article/officials-not-enough-transitional-housing-for-psychiatric-patients/22692452.

file a petition for a writ of habeas corpus.[5] Ruling on the petition, the Merrimack County Superior Court held that RSA 135-C:31 requires due process within three days of the completion of an IEA certificate, as opposed to within three days of the person's admission to a DRF. *See* APP90–96 (Order, *Doe v. Concord Hospital*, No. 2018-CV-448 (Merrimack Super. Ct. Aug. 9, 2018) (McNamara, J.)); *see also* APP98–101 (Petition, *Doe*, No. 2018-CV-448 (Merrimack Super. Ct. Aug. 3, 2018)). However, the court later held that the earlier decision did not bind the hospital "now that [Plaintiff] is not restrained of his liberty," and did not have preclusive effect. *See* APP110–11 (Order 7–8, *Doe*, No. 2018-CV-448 (Merrimack Super. Ct. Sept. 6, 2018)); *see also* APP113–28 (Objection to Motion for Reconsideration, *Doe*, No. 2018-CV-448 (Merrimack Super. Ct. Aug. 27, 2018)). Despite that court's significant and correct interpretation of the statute, the Commissioner has flouted the ruling to this day.

II. THE CLASS PLAINTIFFS BROUGHT SUIT IN AN EFFORT TO END THE COMMISSIONER'S UNLAWFUL POLICY AND PRACTICE

On November 10, 2018, given the severity of the boarding crisis and with all prior efforts having failed, *Amici Curiae* brought a putative class action against the Commissioner to address the boarding crisis, *Doe v. Commissioner*, No. 18-CV-01039-JD (D.N.H). This resulted in two important events.

First, in 2019 through Senate Bill 11, the New Hampshire legislature enacted RSA 151:2-h, which states:

[5] This habeas petitioner would later become one of the named Class Plaintiffs in the federal litigation—Charles Coe.

> No later than 30 days following the first decision on the merits in *Doe v. NH Department of Health and Human Services, et al*. #1:18-CV-01039, or a court-approved agreement of all parties in the case, the commissioner of the department of health and human services shall initiate emergency rulemaking consistent with either the first decision on the merits or the court-approved agreement.

This section became effective May 15, 2019.

Second, on April 30, 2020, the federal court denied the Commissioner's second motion to dismiss and agreed with the Class Plaintiff's interpretation of state law. In a carefully reasoned, 32-page order, Judge DiClerico held that (i) "involuntary emergency admission to the state mental health services system occurs when an IEA certificate is completed," and (ii) "[t]he Commissioner has a statutory duty to provide IEA-certified persons with probable cause hearings within three days after an IEA certificate is completed." *See Doe*, 2020 WL 2079310, at *11.

However, instead of complying with Judge DiClerico's order or the legislature's mandate in RSA 151:2-h requiring the Commissioner to address the problem through rulemaking, the Commissioner decided to take another bite of the apple. After the Superior Court granted the Appellee's habeas corpus petition in this case, the Commissioner appealed the decision, asking this Court to reject the construction of the IEA statute adopted by both the Superior Court in this case and Judge DiClerico in the federal class action. The Commissioner pursued this strategy despite previously representing to Judge DiClerico that it was unnecessary to certify the question of the statute's proper construction to this Court. *See Doe*, 2020 WL 2079310, at *8 n.8; *see also* APP314 (Apr. 2, 2020 Transcript of Mot. Hearing in *Doe*, at p. 47:5-7).

III. THE COMMISSIONER'S PRACTICE IS HARMING REAL PEOPLE

Today, the Commissioner continues to deny probable cause hearings to people who are involuntarily detained in hospital emergency rooms. The personal experiences of the four named Class Plaintiffs in the federal case highlight how the individuals involuntarily detained in hospital emergency rooms without due process are victimized by the Commissioner's practice every day.

A. Scott Stephen Johnstone's Story

Scott Stephen Johnstone is currently 32 years old. Class Plaintiff Deborah A. Taylor is his mother and legal guardian.[6]

On July 17, 2018, Johnstone was involuntarily admitted to the emergency room of Memorial Hospital in North Conway pursuant to an IEA petition. Class Plaintiff Deborah Taylor was the petitioner because she was concerned that Johnstone was not taking his medication, could not take care of himself, and was endangering himself by sleeping in a closet with a lamp kept near flammable material. However, Johnstone did not believe that he needed medical treatment for a mental health condition and denied having any suicidal or homicidal thoughts. He wanted to go home.

Johnstone was involuntarily detained for 27 days—until approximately August 13, 2018—while awaiting placement at a DRF. Johnstone's IEA petition was successively renewed eleven times.

As her son's detention at Memorial Hospital dragged out, Taylor became dismayed. Taylor believed that Johnstone was not getting medical

[6] Ms. Taylor's declaration can be found at APP130–34.

attention for his mental health condition. Johnstone was originally placed in an isolated room with no windows, and was only let out of that room when Taylor demanded that he be moved. Johnstone was not allowed to access his cell phone or anything with cords. He was also upset by his detention.

In light of the restrictive conditions and the fact that Johnstone was not getting mental health treatment, Taylor decided that she wanted her son to be released so she could find better care for him. But Memorial Hospital and the local community mental health center said that release was not an option. As a result, Taylor became desperate. She wrote New Hampshire political leaders, including the Governor, and went to the press to express her concerns. This ultimately led to an August 8, 2018 *WMUR* story reporting that Johnstone had been involuntarily detained then for 22 days with no end in sight. As Taylor told *WMUR*: "I feel like I'm living in a Third World country. Any other illness, you would not wait in the emergency room . . . . The animals at our local shelter get better treatment."[7]

On approximately August 13, 2018, Johnstone was transferred to New Hampshire Hospital. A hearing was conducted, and the judge determined

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[7] *See* Jennifer Crompton, *Shortage of Mental Health Beds Forces Man into ER for More than 3 Weeks*, WMUR (Aug. 8, 2018), *available at* https://www.wmur.com/article/shortage-of-mental-health-beds-forces-man-into-er-for-more-than-3-weeks/22680883; *see also* Jennifer Crompton, *Mental Health Patients Continue to Languish in NH Emergency Rooms*, WMUR (Nov. 9, 2018), *available at* https://www.wmur.com/article/mental-health-patients-continue-to-languish-in-nh-emergency-rooms/24868843?src=app; *see also* Daymond Steer, *Bartlett Mom Seeks Relief for Mentally Ill Son*, CONWAY DAILY SUN (Aug. 8, 2018), *available at* https://www.conwaydailysun.com/news/local/bartlett-mom-seeks-relief-for-mentally-ill-son/article_63ddd712-9a69-11e8-9179-37823772a3fb.html.

that there was probable cause to believe that that Johnstone was in such a mental condition as a result of mental illness to pose a likelihood of danger to himself or others. Johnstone was treated at New Hampshire Hospital for approximately one month.

Though Taylor was the petitioner in her son's case, she believes that Johnstone should have been given a probable cause hearing within three days of his admission to Memorial Hospital (by July 20, 2018). She believes that due process could have provided closure to Johnstone while he was being held, and that Johnstone should have been given the opportunity to explain to a judge his view of why he should not be detained.

B. Charles Coe's Story

Class Plaintiff Charles Coe is currently 30 years old. For the last 9 years, Coe has been gainfully employed in the meat processing industry.[8]

On July 20, 2018, Coe's family brought him to Concord Hospital's emergency room when he was experiencing significant anxiety. Coe and his family hoped that a voluntary admission to Concord Hospital would lead to prompt outpatient treatment. When Coe arrived at Concord Hospital, he was told that he would be admitted voluntarily. He expected to be there, at most, for a few days if necessary. Nobody told him that he would be involuntarily detained. After staying in Concord Hospital's psychiatric ward for five days, on July 25, 2018, Coe asked to be discharged because he was dissatisfied with his treatment.

Concord Hospital refused to release Coe. Instead, hospital staff

[8] Mr. Coe's declaration can be found at APP137–40.

completed an IEA petition and then transferred Coe to the "yellow pod," which is the wing of the hospital for behavioral health emergencies. Coe's family was upset that Concord Hospital made his admission involuntary. Concord Hospital then successively renewed this IEA petition on three occasions in approximately three-day increments (on July 28, July 31, and August 3) using boilerplate and conclusory language. For example, the July 31 renewal states that Coe "will remain in IEA status due to lack of ability to care for self" without any specific facts justifying the view that he was a continued danger.

With these successive IEA renewals, Concord Hospital involuntarily detained Coe for a total of 15 days without a probable cause hearing. During Coe's detention, Concord Hospital also involuntarily detained 12 to 15 other individuals who were awaiting placement to DRFs.[9]

While frustrated with his detention, Coe remained polite and calm, and said nothing threatening during the renewal reassessments. He was not a danger to himself or others. During his involuntary detention, Concord Hospital effectively kept Coe in solitary confinement. Concord Hospital held Coe in the "yellow pod" section of the hospital in a ten-by-fifteen foot, ant-infested room containing only a bed, video monitoring camera, and television. The room had no window to the outside—only a window to the rest of the pod. Though the door to Coe's room was unlocked and his family

[9] *See* Caitlin Andrews, *Mental Health Remains a Challenge for N.H. Hospitals*, CONCORD MONITOR (Aug. 11, 2018), *available at* https://www.concordmonitor.com/Concord-Hospital-mental-health-patients-bed-overload-19236373 ("Last week, Concord Hospital had about 12 patients waiting in its emergency department; the week before that, it was 15.").

allowed to visit, Concord Hospital did not allow him to leave his room except to use the bathroom in another area of the pod. He was only allowed to shower two to three days after he requested one. Concord Hospital prevented him from speaking to other patients in the pod.

Coe hired an attorney and challenged his detention through a habeas corpus petition. When he filed the petition, Coe had been held for approximately 10 days without due process. Five days later, Concord Hospital released Coe on August 8, 2018, after concluding that Coe's clinical and mental condition had improved. Coe subsequently received hospital bills for his involuntary detention.

C. Jane Roe's Story

Class Plaintiff Jane Roe is currently 62 years old.[10] Prior to the COVID-19 pandemic, she worked as an administrative support professional for approximately 15 years.[11]

On Thursday, September 20, 2018, Roe left work with her employer's permission because she was experiencing significant stress and anxiety as a result of the demands of her work and her responsibility as the sole caregiver of her disabled husband. She planned on recovering at home for a few days before returning to work the following Monday. On the following day, September 21, 2018, Roe's daughter came to her home. Roe and her

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[10] Ms. Roe also shared her story with New Hampshire Public Radio. *See* Jason Moon, *Held for 20 Days: How N.H.'s Shortage of Mental Health Beds Erodes Patients' Rights*, NHPR (Sept. 16, 2019), *available at* https://www.nhpr.org/post/held-20-days-how-nhs-shortage-mental-health-beds-erodes-patients-rights#stream/0.

[11] Ms. Roe's declaration can be found at APP143–46.

daughter had a contentious relationship, and a confrontation soon ensued, culminating in Roe's daughter calling the police and an ambulance. When the local police and EMTs arrived, Roe refused to leave with them. The EMTs then injected her with a sedative to take her into custody.

Roe next recalls being involuntarily admitted to the emergency room of St. Joseph's Hospital pursuant to an IEA certificate. Roe's daughter was the petitioner. Employees of St. Joseph's Hospital told her that she could not leave. The hospital staff then successively renewed Roe's IEA certificate on six occasions in approximately three-day increments, each time relying on conclusory allegations. The renewals contained little substantive analysis of Roe's condition or any changes since her admission, and instead re-alleged the facts of the original September 21, 2018 incident. As one September 27, 2018 entry from her medical file stated: "Pt notified she needs to remain in this hospital until she is placed in a facility that will further help her." Roe believes that the Hospital simply wanted to hold her until a bed opened at New Hampshire Hospital so that she could then become that facility's responsibility. Of course, if Roe's condition had improved such that she was no longer a danger to herself or others, which she never was, the hospital was obligated to rescind the petition even before her transfer to a DRF. Yet the Hospital never seriously evaluated her condition.

Throughout her detention, Roe denied that she was a danger to herself or others and maintained she was not suicidal or homicidal. She therefore declined to take any sedatives. She wanted to go home, but hospital employees would not let her. Roe was understandably upset by her detention.

The conditions of Roe's confinement were poor. Her room was

unclean, and for at least one week of her detention, Roe was only allowed to sleep on a small four-foot mattress. She was denied fresh air and exercise. Hospital staff restricted her water intake. Her knees swelled, causing her incredible pain, and Roe believes she was not adequately treated for this condition. She also remembers staff threatening to and ultimately taking away privileges—like visits from a priest and phone access—if she did not comply with their orders.

On October 10, 2018, after Roe had been detained for 20 days at St. Joseph's Hospital without due process, she was transferred to New Hampshire Hospital. There, the IEA petition was dismissed because Roe's daughter failed to appear for the scheduled probable cause hearing. Roe was then released the same day after approximately 23 total days of needless involuntarily detention.

St. Joseph's Hospital later sent Roe bills totaling $2,703.05 for her involuntary detention (excluding related services billed by other St. Joseph's Hospital providers). She believes that this bill has been sent to collections.

D. John Doe's Story

Plaintiff John Doe is a 28-year-old man who works as a plasterer. Doe is married and has two young daughters. He is the breadwinner for his family, and they depend on his income to survive.[12]

On November 5, 2018, Doe was admitted to the emergency room of Southern New Hampshire Medical Center ("SNHMC") after a suicide attempt. At the time, Doe acknowledged that he needed help, but expressed

[12] John Doe's declaration can be found at APP149–51.

worry that being admitted to SNHMC for a significant period of time would cause him to miss work, which could financially devastate his family. The SNHMC clinicians took this statement to mean that Plaintiff was reluctant to receive treatment, and as a result, they completed an IEA petition.

However, Doe ***was*** willing to undergo treatment for any mental health issues he was experiencing, including by taking medication and receiving outpatient care. Doe strongly believed that he was no longer a danger to himself, and that his issues could best be managed through community-based mental health support, as well as through the loving support of his family while under their watchful eye. Doe's wife wanted him back at home and wanted to supervise his transition.

Instead, SNHMC involuntarily detained him, causing his family financial uncertainty and preventing Doe from being with his children. SNHMC refused to transition Doe to "voluntary" status. Doe was deeply frustrated by his involuntary detention. He had no idea when he would be released, and SNHMC staff told him that it could take weeks. Doe was desperate to get back to his family and his work. His family needed him. Doe should have received a probable cause hearing by November 8, 2018, which would have allowed him to make his case to the Circuit Court. But the Commissioner did not provide a hearing. Instead, SNHMC renewed his IEA certificate on November 8, 2018.

At approximately 6:00 p.m. on Friday, November 9, 2018, Doe's wife contacted the ACLU of New Hampshire ("ACLU-NH") about her husband's ongoing involuntary detention. The ACLU-NH then filed a putative class action on behalf of Doe and all others similarly situated at approximately 4:30 a.m. on Saturday, November 10, 2018. Doe had been detained for

approximately five days at that point. A day or two after the lawsuit was filed—and presumably in response to the lawsuit—SNHMC transitioned Doe to "voluntary" status, and his IEA petition was rescinded. Doe was ultimately discharged on approximately November 15, 2018.

SUMMARY OF ARGUMENT

The Court should affirm the Superior Court's decision for the same reasons outlined in the federal court's order, which correctly concluded that "[t]he Commissioner has a statutory duty to provide IEA-certified persons with probable cause hearings within three days after an IEA certificate is complete." *See Doe*, 2020 WL 2079310, at *12.

I. A. The plain text of the statute establishes that "involuntary emergency admission" commences when hospital staff complete an IEA certificate and begin holding a patient against their will. At that point, the patient is no longer at liberty and is clearly within the state mental health services system. Accordingly, the Commissioner is obligated to provide a probable cause hearing within three days of the IEA certificate's completion.

B. The Commissioner's interpretation also violates the core policies underlying the IEA statute, which aim to protect the rights and wellbeing of people who are involuntarily admitted. Flouting these policy objectives, the Commissioner routinely causes hospitals to detain patients in isolation in emergency rooms, refuses to provide timely probable cause hearings to those patients, and ultimately transfers them to centralized DRF locations, rather than facilitating treatment in community-based settings that would divert them from emergency rooms and alleviate the waitlist. Contrary to the Commissioner's assertions, the Superior Court's

interpretation of "involuntary emergency admission" will only mitigate the crisis the Commissioner has wrought.

C. The Commissioner's interpretation of "involuntary emergency admission" is entitled to no deference because it not only defies the plain text of the statute, but also conflicts with the statute's underlying policy objective of protecting patients' fundamental due process rights.

II. The Commissioner's assertion that providing timely probable cause hearings to people involuntarily detained in emergency rooms would impede her ability to oversee the state mental health services system is baseless.

A. The Commissioner is already overseeing the involuntary admission process and directing hospitals to hold patients and continuously renew their IEA certificates every three days.

B. Under the legislature's mandate, the Commissioner has authority to facilitate due process hearings while patients are involuntarily detained in hospital emergency rooms.

III. The doctrine of constitutional avoidance should inform how this Court construes the IEA statute. Under the Fourteenth Amendment and the New Hampshire Constitution, the Commissioner may not detain patients without providing timely procedural due process. The Commissioner's argument—that the IEA statute only mandates a hearing three days after a patient is admitted to a DRF—denies IEA patients detained in emergency rooms this fundamental right. Therefore, this Court should reject the Commissioner's construction to avoid rendering the statute unconstitutional.

ARGUMENT

I. THE SUPERIOR COURT'S DECISION CONFORMED WITH THE PLAIN TEXT AND POLICY OBJECTIVES OF THE STATUTE

A. A Probable Cause Hearing Is Required Within Three Days After an IEA Certificate Is Completed

The plain text of the IEA statute requires the Commissioner to provide a patient with a probable cause hearing within three days after hospital staff complete an IEA certificate, regardless of where the patient is involuntarily detained. The text states that "[w]ithin 3 days after an involuntary emergency admission, . . . there shall be a probable cause hearing in the district court having jurisdiction to determine if there was probable cause for involuntary emergency admission." RSA 135-C:31, I. This provision is meant to protect patients' constitutional due process rights and ensure that they are not subjected to the type of indefinite and inhumane involuntary detention that Ms. Doe experienced in this case (and that the named Class Plaintiffs experienced before her).

The statute also explains that "[t]he involuntary emergency admission of a person shall be to the state mental health services system under the supervision of the commissioner." RSA 135-C:28, I. Although the statute does not specifically define the phrase "state mental health services system," it is clear from the text that a patient has been admitted to the system and is no longer at liberty once the hospital completes the IEA certificate and begins involuntarily detaining her pursuant to that certificate. In fact, RSA 135-C:29-a sets forth certain circumstances in which "the person who is the subject of the certificate" may be "released" "[f]ollowing completion of an involuntary emergency admission certificate," but before transfer to a DRF.

This provision would be unnecessary if the patient is still at liberty and has not yet been involuntarily admitted to the state mental health services system when the IEA certificate is completed. Moreover, the statute indicates that "[u]pon completion of an involuntary emergency admission certificate under RSA 135-C:28, any law enforcement officer shall . . . take custody of the person to be admitted and immediately deliver him to the receiving facility identified in the certificate"—again demonstrating that a patient's liberty is limited once hospital staff complete an IEA certificate. RSA 135-C:29, I.

Rather than adopting the Commissioner's strained misinterpretation of these words, the Superior Court recognized that the statutory scheme, when viewed as a whole, makes clear that a patient is under the Commissioner's supervision once an IEA certificate is completed and must receive a probable cause hearing within three days. That assessment was correct.

B. The Commissioner's Interpretation Is Inconsistent with the Statute's Policy Objectives and Is Causing Mayhem Throughout New Hampshire

This Court should reject the Commissioner's interpretation of "involuntary emergency admission" because it "frustrates the policy that the legislature sought to advance by the overall statutory scheme." *State v. Brouillette*, 166 N.H. 487, 490–91 (2014).

A fundamental purpose of the IEA statute is protecting the rights of people who are involuntarily detained. When the legislature amended RSA 135-C:27 in 1997 to add subsection (d)—which includes an additional criteria for determining whether a person is a danger—lawmakers emphasized the importance of holding due process hearings within three

days. The bill's main sponsor, Rep. Manning, explained that "within 3 days" of the completion of an IEA petition, a patient must have a "medical appearance with a court appointed lawyer." APP153 (Hearing on H.B. 448 Before H. Comm. on Health, Human Servs. & Elderly Affairs, 1997 Sess. (N.H. Feb. 5, 1997)). This appearance, as Rep. Manning explained, serves as a safeguard to ensure "that somebody doesn't just get put away." APP164 (Hearing on H.B. 448 Before S. Comm. on Pub. Insts./Health & Human Servs., 1997 Sess. (N.H. Apr. 22, 1997)).

Ignoring this central precept, the Commissioner contends that the Superior Court's interpretation conflicts with the other purposes of the statute, and she sets out a parade of horribles that will supposedly occur if this Court affirms that interpretation. Appellant's Br. 35–38. But the Commissioner's arguments are divorced from reality. The facts in the federal case demonstrate that the parade of horribles is *already happening* under *the Commissioner's interpretation* of the statute.

In the real world, "admission to the system is unlimited," *see id.* at 35, and involuntary admissions are occurring on a massive scale because there is currently no due process mechanism in place to assess whether people in emergency rooms are appropriately being detained. Patients are held involuntarily for long periods of time and are completely deprived of their "freedom of movement and ability to function normally in society." *See id.* at 37. Moreover, these patients are not receiving *any* of "the mental-health treatment and services necessary to relax those restrictions, eliminate the need for services, and work toward independence." *See id.* at 36, 37. And the lack of mental-health treatment and the inhumane conditions patients experience while involuntarily detained in emergency rooms are

"*increasing*," rather than ameliorating, "the occurrence, severity and duration of mental, emotional, and behavioral disabilities" and "the risk that mentally ill persons will harm themselves or others." *See id.* at 35–36.

Contrary to the Commissioner's contentions, the system she is maintaining also "forces statewide centralization of emergency mental health treatment" and "result[s] in patients being transported outside of their communities to receive necessary care." *See id.* at 37. Patients never receive due process hearings to assess whether their detention is permissible until they are transferred to a handful of DRFs in centralized locations. In fact, the Commissioner has, in many respects, not adequately developed effective community-based solutions that would address the boarding crisis by, in part, diverting people from emergency rooms, despite her legal obligations to do so under a preexisting settlement.[13]

By contrast, the Superior Court's (correct) interpretation of the statute serves the purposes of the IEA statute and ensures that patients have access to both timely due process and essential mental-health services. First, it makes certain that people are only involuntarily detained when there is actually probable cause for holding them (thereby decreasing the number of people unnecessarily funneled into the mental health system). Second, it incentivizes the Commissioner to pursue lasting community-based solutions

[13] *See* N.H. Community Mental Health Agreement, Expert Reviewer Report Number Twelve at 2 (Aug. 18, 2020) ("[T]here are areas of continued non-compliance with the CMHA."), *available at* https://drcnh.org/wp-content/uploads/2020/08/Twelfth-Expert-Reviewer-Report_8.18.20-1.pdf; Class Action Settlement Agreement, *Amanda D. v. Hassan*, No. 1:12-CV-53-SM (D.N.H. Feb. 7, 2014), ECF No. 103-1.

to divert people away from emergency rooms and the centralized DRF system—an approach that would alleviate stress on the existing system. And third, community-based solutions will enable people to access meaningful mental-health treatment more promptly when they actually need it.

C. The Commissioner's Erroneous Interpretation of the Statute Is Not Entitled to Deference

This Court should also reject the Commissioner's argument that her construction of the IEA statute is entitled to "substantial deference." *See* Appellant's Br. 35–38. "In matters of statutory interpretation," it is this Court—not an executive branch agency—that is "the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole." *State v. Addison*, 165 N.H. 381, 418 (2013). This Court is "not bound by an agency's interpretation of a statute," and, thus, reviews "an agency's interpretation of a statute de novo." *Appeal of Town of Seabrook*, 163 N.H. 635, 644 (2012) (internal citations omitted).

As explained above, the Superior Court correctly concluded that the plain text of the statute requires a probable cause hearing within three days of an IEA certificate's completion. By contrast, the Commissioner's interpretation "clearly conflicts with the express statutory language" and is "plainly incorrect." *Id.*; *accord N.H. Ctr. for Pub. Interest Journalism v. N.H. Dep't of Justice*, No. 2019-0279, 2020 WL 6372970, at *5 (N.H. Oct. 30, 2020) (rejecting longstanding Department of Justice construction of RSA 105:13-b because it conflicted with the statute's plain text). Indeed, "[a]n administrative agency must comply with the governing statute, in both spirit and letter," and "[e]ven a long-standing administrative interpretation of a statute is irrelevant if that interpretation clearly conflicts with express

statutory language." *See, e.g., Appeal of N.H. Dep't of Envtl. Servs.*, 173 N.H. 282, 293 (2020). That is no doubt the case here.

Furthermore, the Commissioner's construction flouts the IEA statute's overall purpose. *See id.* at 292 ("We still must examine the agency's interpretation to determine if it is consistent with the language of the regulation *and with the purpose which the regulation is intended to serve*." (emphasis added)). Under the Commissioner's interpretation, people are regularly detained in emergency rooms for many days or weeks without access to counsel or the opportunity to contest their detention. Thus, her construction directly undermines the statute's purpose of protecting the due process rights of IEA patients.

Finally, the Commissioner's interpretation is not actually based on a longstanding agency practice. Before 2012, there was typically no waitlist for DRF beds. Nearly all patients were "immediately deliver[ed]" to DRFs, where they received probable cause hearings within three days of the completion of their IEA certificates. *See* RSA 135-C:29, I. Thus, the Commissioner had no occasion to assess when the three-day period began to run under the IEA statute. In short, this Court should give no deference to the Commissioner's efforts to rewrite history and the law.

II. THE COMMISSIONER ALREADY IS RESPONSIBLE FOR OVERSEEING THE INVOLUNTARY EMERGENCY ADMISSION PROCESS

According to the Commissioner, the Superior Court's determination that "involuntary emergency admission" begins when an IEA certificate is completed "threatens to render the state mental health system non-functional by placing it outside of the Department's regulatory authority and requiring

that the State provide unlimited services regardless of whether the resources exist to do so." Appellant's Br. 15. This argument stems from the Commissioner's continued refusal to take responsibility for the wellbeing and constitutional rights of patients who have been involuntarily detained in hospital emergency rooms without any mental health treatment for days or weeks at a time. Her fears are unfounded: The Commissioner is already involved in involuntarily detaining patients in emergency rooms, and the IEA statute requires the Commissioner to oversee all aspects of the IEA process.

A. The Commissioner Refuses to Take Responsibility for IEA Patients Under Her Supervision

The Commissioner contends that the Superior Court's "construction permits private actors employed by private hospitals to impose upon the State a monetary obligation to fund the state mental health services system in order to provide full benefits to all persons for whom an IEA certificate has been signed." Appellant's Br. 27. But this theory is little more than a repackaging of the same arguments she raised in the federal litigation in a failed effort to claim that Class Plaintiffs had not alleged state action and lacked standing to seek injunctive relief. *See* Second Mot. Dismiss 19–30, *Doe v. Comm'r*, No. 18-CV-01039 (D.N.H. Sept. 16, 2019), ECF No. 103-1; Third Mot. Dismiss 23–25, *Doe*, No. 18-CV-01039 (D.N.H. Nov. 3, 2020), ECF No. 185-1. The Commissioner's arguments rest on the false premise that the hospitals alone are responsible for detaining patients and that anything that occurs in a hospital emergency room is not the Commissioner's responsibility. In reality, the Commissioner is already responsible for overseeing hospitals' involuntary detention of patients.

Indeed, the Commissioner relies on hospitals to serve as makeshift detention centers when DHHS lacks capacity in DRFs. As initially conceived, the IEA statute envisioned a system in which hospital personnel evaluate a patient, they issue an IEA certificate, and authorities immediately transfer the patient to a DRF where the patient may receive needed care. *See* RSA 135-C:27–29. For the past several years, however, the Commissioner has lacked capacity to provide DRF beds to all incoming IEA patients. Yet, on the assumption that all IEA patients pose a risk of harm to themselves or others, the Commissioner does not want IEA patients released to the public. Appellant's Br. 36. So, when no DRF beds are available for new patients, she instead relies on hospitals to detain IEA patients until additional DRF beds become available.

At the same time, the Commissioner hopes to avoid all liability for the involuntary detention of patients in hospital emergency rooms—including liability for depriving patients of their constitutional rights to due process—by disclaiming responsibility for the hospitals' actions. To walk that thin line, the Commissioner has continuously insisted that the hospitals—and not the Commissioner—are independently responsible for issuing IEA certificates and involuntarily detaining patients in emergency rooms. *See, e.g.*, Second Mot. Dismiss, *supra*, at 3 (asserting that "[e]ach person or entity who is alleged to have chosen to pursue an involuntary emergency admission petition and certificate against one of the plaintiffs is either a private person or private entity"); Third Mot. Dismiss, *supra*, at 24 (similar).

But the facts in the federal class action refute that assertion. As the Class Plaintiffs allege, the Commissioner has "directed hospitals to simply 'renew' the IEA certificate after three days under the ruse that this renewal

would restart the 3-day clock again." APP205 (Am. Compl. ¶ 72, *Doe v. Comm'r*, No. 18-CV-01039 (D.N.H. July 19, 2019)). Similarly, the hospitals have alleged that the Commissioner "direct[s] Hospitals not to immediately transport IEA patients to a DRF," "requir[es] a Hospital to hold an IEA patient in its [emergency department] until there is space available at a DRF," "requir[es] Hospital physicians or APRNs to file a new IEA certificate every three days until [DHHS] informs the Hospital that it may transport the IEA patient to a DRF," and "requir[es] Hospital staff to perform a mental and physical examination of an IEA patient for completion of a new IEA certification every three days." APP245 (Intervenors' Am. Compl. ¶ 41, *Doe*, No. 18-CV-01039 (D.N.H. July 19, 2019)).

Through these interventions, the Commissioner has ensured that hospitals detain patients when the Commissioner cannot. Indeed, as the Commissioner herself admits, "she relies on private individuals and medical providers to properly *initiate* the IEA process." Third Mot. Dismiss, *supra*, at 24 (emphasis added). And as the federal district court has recognized, "[a]lthough the Commissioner may rely on others to perform certain actions and functions for purposes of operating the mental health system, that reliance does not relieve her of her statutory authority and responsibility to supervise and administer the mental health system." *Doe v. Comm'r*, No. 18-CV-01039, 2020 WL 7481735, at *5 (D.N.H. Dec. 18, 2020). The Commissioner oversees the admission process from beginning to end, including when the process starts in hospital emergency rooms.

B. The Commissioner Is Capable of Providing Due Process Hearings to Patients Involuntarily Detained in Hospitals

The Commissioner's assertion that DHHS is powerless to provide due process hearings within hospitals is equally flawed. *See* Appellant's Br. 33. The Commissioner raised the same argument in the federal case, claiming that Class Plaintiffs' claims are not redressable—as required for Article III standing—because the relief sought would involve the "Circuit Court, private healthcare providers, law enforcement, and private individuals, none of whom the Commissioner controls." Third Mot. Dismiss, *supra*, at 25. But the Commissioner's supposed inability to facilitate hearings is, again, plainly false.

In fact, the New Hampshire legislature has explicitly instructed the Commissioner to adopt rules that may require hospitals to facilitate due process hearings. In 2019, the legislature passed RSA 151:2-h, which directs the Commissioner to "initiate emergency rulemaking consistent with either the first decision on the merits or the court-approved agreement" in the federal class action. The legislature knew exactly what this rulemaking could entail. New Hampshire law and the Fourteenth Amendment require the Commissioner to provide due process hearings within three days after an IEA certificate is issued, and Class Plaintiffs brought suit to induce the Commissioner to comply with her legal and constitutional obligations to provide timely hearings. *See* APP227–28 (Am. Compl., Request for Relief). Thus, a final decision or a court-approved agreement in the federal class action may very well require the Commissioner to provide hearings to patients while they are held pursuant to IEA certificates in hospital emergency rooms. RSA 151:2-h unmistakably reflects the legislature's

intent to confer authority on the Commissioner to facilitate due process hearings for people involuntarily detained in hospital emergency rooms.

This grant of legislative authority is consistent with the Commissioner's plenary authority to adopt rules "relative to the requirements for services within the state mental health services system," RSA 135-C:5, I, and her obligations to "establish, maintain, implement, . . . coordinate," and "supervise[]" "a system of mental health services," RSA 135-C:3. Accordingly, as the federal court recognized, even though "others may be involved in the procedures necessary to provide probable cause hearings to IEA-certified persons who are detained in hospital emergency rooms, the Commissioner bears the ultimate responsibility for supervising and administering the mental health services system, including the procedures necessary to provide due process to IEA-certified persons." *Doe*, 2020 WL 7481735, at *7.

As a practical matter, the Commissioner is perfectly capable of facilitating hearings. Nothing is stopping the Commissioner from immediately securing counsel for people in emergency rooms awaiting transfer to DRFs, sending IEA petitions to the Circuit Court to begin the hearing process, coordinating transportation for patients to and from hearings, and arranging for certain patients to be placed in community-based treatment programs when space is not available in DRFs. Her ostensible lack of control over the hospitals themselves is no excuse for depriving patients of their rights to due process. The legislature gave her authority and responsibility for overseeing the IEA process from start to finish, and she needs to find constructive solutions to this problem facing people under her

care, rather than wasting time and the taxpayers' money trying to evade her legal and constitutional duties through litigation.

III. THE COMMISSIONER'S INTERPRETATION OF THE STATUTE IS UNCONSTITUTIONAL

This Court should also reject the Commissioner's interpretation of "involuntary emergency admission" because it leads to an unconstitutional result. The plain text of the statute shows that "involuntary emergency admission" occurs when an IEA certificate is completed. If this Court determines that the term is somehow ambiguous, however, the canon of constitutional avoidance should guide the Court's construction of the statute. As this Court has long recognized, "a statute will be construed to avoid a conflict with constitutional rights whenever that course is reasonably possible." *Sibson v. State*, 110 N.H. 8, 11 (1969); *accord State v. Paul*, 167 N.H. 39, 44–45 (2014); *State v. Ploof*, 162 N.H. 609, 620 (2011); *see also United States v. Rumely*, 345 U.S. 41, 45 (1953). Thus, if one possible interpretation of a statute presents constitutional concerns, the Court should reject that interpretation in favor of a reasonable alternative. *See, e.g.*, *State v. Smagula*, 117 N.H. 663, 666 (1977); *see also Gomez v. United States*, 490 U.S. 858, 864 (1989). Here, the Court should not defer to the Commissioner's interpretation because that would allow the Commissioner to deny patients procedural due process in violation of the Fourteenth Amendment and the New Hampshire Constitution.

Without question, the United States Constitution prohibits the State of New Hampshire from involuntarily detaining people without providing timely due process. The Fourteenth Amendment provides that no state may "deprive any person of life, liberty, or property, without due process of law."

U.S. Const. amend. XIV, § 1. Likewise, the New Hampshire Constitution dictates that "[n]o subject shall be arrested, imprisoned, despoiled . . . or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." N.H. Const. pt. I, art. 15; *see also Gantert v. Rochester*, 168 N.H. 640, 647 (2016) (holding that "law of the land" means "due process of law"). Thus, when a state curtails a person's liberty, "that person is entitled to notice and an opportunity to be heard." *Vazquez-Robles v. CommoLoCo, Inc.*, 757 F.3d 1, 2 (1st Cir. 2014). Indeed, "[n]o principle is more firmly embedded in American jurisprudence." *Id.*

As the U.S. Supreme Court has made clear, "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection"—the State of New Hampshire may not involuntarily detain patients without providing them an opportunity to be heard. *Addington v. Texas*, 441 U.S. 418, 425 (1979); *accord Zinermon v. Burch*, 494 U.S. 113, 131 (1990) ("[T]here is a substantial liberty interest in avoiding confinement in a mental hospital."); *Rockwell v. Cape Cod Hosp.*, 26 F.3d 254, 256 (1st Cir. 1994) ("[I]nvoluntary confinement for compulsory psychiatric treatment is a 'massive curtailment of liberty.'"). Although the Supreme Court "usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty," the government must at the very least provide "a postdeprivation hearing." *Zinermon*, 494 U.S. at 127–28.

The Commissioner's interpretation places the IEA statute in direct conflict with this fundamental constitutional mandate. As explained above, the Commissioner has compelled hospitals to detain numerous patients against their will for days or weeks on end without *any* due process

whatsoever and has "directed hospitals to simply 'renew' the IEA certificate after three days" to "restart the 3-day clock." APP205 (Am. Compl. ¶ 72). She bases this practice on a misguided reading of the IEA statute, insisting that "involuntary emergency admission" can only mean admission to a "receiving facility." Appellant's Br. 23. But the IEA statute does not say that "involuntary emergency admission" only occurs upon "admission to a designated receiving facility"—no matter how much the Commissioner wishes that were so.

If the Commissioner's interpretation were correct—and due process is not required until she allows patients to be transferred to DRFs days or weeks after hospitals begin detaining them pursuant to a process that the state legislature established and the Commissioner oversees—then the IEA statute would deprive patients of their liberty without any opportunity to be heard. The Fourteenth Amendment and the New Hampshire Constitution do not tolerate such a drastic curtailment of liberty without due process. The Commissioner's interpretation of "involuntary emergency admission" violates patients' rights and renders the statute patently unconstitutional. And the term "involuntary emergency admission" may reasonably be construed as occurring when a hospital completes an IEA certificate and begins involuntarily detaining a patient in accordance with the procedure set forth by the legislature—an interpretation that would require the Commissioner to afford due process protections to all patients held under her authority, whether in hospital emergency rooms or DRFs. Under the canon of constitutional avoidance, the Commissioner's interpretation must be rejected.

The Commissioner agrees that the doctrine of constitutional avoidance should guide this Court's interpretation of the statute, but applies the doctrine to suggest that the Court avoid an imagined constitutional conflict. *See* Appellee's Br. 32. The Commissioner believes that, if "involuntary emergency admission" occurs when hospital staff complete an IEA certificate, it would mean that the statute "authorizes private hospitals to detain patients subject to IEA certificates and hold them in state custody indefinitely on the strength of the certificate alone." *Id.* at 31. Not true. The statute clearly requires the Commissioner to provide "a probable cause hearing" "[w]ithin three days after an involuntary emergency admission." RSA 135-C:31, I. That process is in place to assess the strength of the certificate and determine whether the Commissioner can continue to detain the person involuntarily. The Superior Court's interpretation merely acknowledges this procedural due process requirement and insists that the Commissioner follow it (something she has consistently refused to do). The Superior Court's interpretation poses no constitutional problem.

CONCLUSION

This Court should affirm the Superior Court's order granting Petitioner/Appellee Jane Doe's petition for habeas corpus because she did not receive a probable cause hearing within three days of her involuntary emergency admission.

STATEMENT REQUESTING ORAL ARGUMENT

The Class Plaintiffs believe that their participation at oral argument will be of service to this Court.

Respectfully Submitted,

John Doe, et al., in their individual capacities and on behalf of themselves and all others similarly situated,

By and through their attorneys affiliated with the American Civil Liberties Union of New Hampshire Foundation and Weil, Gotshal & Manges LLP,

/s/ Gilles Bissonnette

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February 1, 2021

STATEMENT OF COMPLIANCE

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with New Hampshire Supreme Court Rule 26(2)-(4). Further, this brief complies with New Hampshire Supreme Court Rule 16(11), which states that "no other brief shall exceed 9,500 words exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters." Counsel certifies that the brief contains 9,498 words (including footnotes) from the "Question Presented" to the "Statement Requesting Oral Argument" of the brief.

/s/ Gilles Bissonnette
Gilles R. Bissonnette, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was served this 1st day of February 2021 through the electronic-filing system on all counsel of record.

/s/ Gilles Bissonnette
Gilles R. Bissonnette, Esq.

ADDENDUM

Clerk's Notice of Decision
Document Sent to Parties
on 09/24/2020

The State of New Hampshire

JUDICIAL BRANCH

MERRIMACK COUNTY SUPERIOR COURT

NO. 217-2020-CV-500

JANE DOE

v.

LORI SHIBINETTE,
In her Official Capacity as Commissioner
of the New Hampshire Department of Health and Human Services

ORDER

Jane Doe is confined involuntarily at New Hampshire Hospital and seeks a writ of habeas corpus for her release. The defendant is the Commissioner of the New Hampshire Department of Health and Human Services, who moves for dismissal. A hearing was held on September 21, 2020. The parties do not disagree on the facts that bear on the motion and how they are stated in the complaint. The issue is one of statutory construction.

The background to the case begins on August 25, 2020, when Dr. Jonathan Greenberg, a resident in adult psychiatry at Dartmouth-Hitchcock Medical Center in Lebanon, New Hampshire, prepared a complaint for a compulsory medical examination of Ms. Doe pursuant to RSA 135-C:28, II. The purpose of the examination was to determine whether to order Ms. Doe's involuntary emergency admission under RSA 135-C:28, I. A Justice of the Peace directed law enforcement officials to take Ms. Doe into custody for

purposes of conducting the examination. Hanover Police executed the order and brought Ms. Doe to Dartmouth-Hitchcock.

On August 25, Dr. Greenberg petitioned for Ms. Doe's involuntary emergency admission. A physician assistant gave medical approval for her admission to an inpatient psychiatric designated receiving facility within the meaning of RSA135-C:2, XIV, and a Licensed Independent Clinical Social Worker conducted a mental examination. The examinations were under the direction of Dr. Christine Finn, a psychiatrist employed by Dartmouth-Hitchcock, who was approved by West Central Behavioral Health to certify involuntary admissions. West Central Behavioral Health is a community mental health center designated by the state Health and Human Services department's Bureau of Behavioral Health. Following the examinations of Ms. Doe, Dr. Finn issued a certificate of examining physician for involuntary emergency admission.

Dartmouth-Hitchcock is not a designated receiving facility within the meaning of RSA 135-C:2, XIV, but contrary to RSA 135-C:29, I, Ms. Doe was not delivered immediately to such a facility. In fact, the certificate did not identify a "receiving facility" to which Ms. Doe was to be transported. Instead, due to the system's lack of bed space she was kept at Dartmouth-Hitchcock's emergency room until September 11, 2020, when she was brought to New Hampshire Hospital. On September 15, 2020 – three days (excluding Sundays and holidays pursuant to RSA 135-C:31, I) after arrival at this designated receiving facility, but 17 days after the IEA certificate was completed, the court for the 6th Circuit-District

Division in Concord held a hearing and found probable cause. It overruled Ms. Doe's motions to dismiss and for immediate release.

The crux of the legal issue is whether Ms. Doe was afforded the prompt probable cause hearing mandated by state law. The Commissioner has not disputed that Ms. Doe has a constitutional right and a statutory due process right to a timely probable cause hearing. The Commissioner's position, however, supported by the circuit court, is that the three-day period for holding the hearing does not begin to run until the person is delivered to a designated receiving facility.

The issue was addressed recently and thoroughly by the United States District Court for the District of New Hampshire, which reached a different conclusion. A copy of the court's order in *Doe v. Commissioner, N.H. Department of Health and Human Services, et al.*, No. 18-cv-1039-JD, 2020 WL 2079310 (D.N.H. Apr. 30, 2020) is included in the pleadings and the Commissioner addresses it at length in her motion. I agree with the federal district court's analysis and will forego repeating it. It is sufficient to note that I concur with the federal court's view that when RSA chapter 135-C is considered as a whole, the involuntary emergency admission and the rights accruing to those so admitted to the state mental health system are not tolled until the person arrives at the receiving facility, but are triggered when the IEA certificate is complete. *Doe*, 2020 WL 2079310 at *11.

The Commissioner and the circuit court found it important that the statute requires the receiving facility to provide the person admitted with notice of her rights "at the receiving facility." See RSA 135-C:30. They reason that fulfilling this obligation is a

prerequisite to holding a probable cause hearing and infer that the hearing cannot be required until the person is at the receiving facility and receives notice of her rights. But the chapter also contemplates the person's prompt delivery to a receiving facility without the delay that occurred here. And apart from any duty to give notice placed on the receiving facility, RSA chapter 135-C has a separate requirement that the person receive notice of her right to counsel prior to the probable cause hearing. See RSA 135-C:31, I (probable cause hearing is "subject to the notice requirements of RSA 135-C:24," which requires that "[b]efore any judicial hearing commences, the client or the person sought to be admitted shall be given written and oral notice, in a language he understands, of his right to be represented by legal counsel and to have legal counsel appointed for him if he is indigent."

Conclusion

For the reasons given, I find that Ms. Doe did not receive a probable cause hearing within three days of her emergency admission, and that her continued confinement is unlawful. The motion to dismiss is denied and the petition for writ of habeas corpus is granted. Ms. Doe shall be released from New Hampshire Hospital forthwith.

SO ORDERED.

SEPTEMBER 23, 2020

BRIAN T. TUCKER
PRESIDING JUSTICE