

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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GREGORY B. MONACO, on behalf of himself
and other similarly situated
individuals, et al.,

Plaintiffs,

- against -

98 CV 3386
(NGG) (RML)

MICHAEL F. HOGAN, Ph.D., in his
official capacity as Commissioner of
the New York State Office of
Mental Health, et al.,

Defendants.

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**STIPULATION AND SETTLEMENT AGREEMENT DISMISSING
THE THIRD CAUSE OF ACTION**

WHEREAS, Gregory Monaco, on behalf of himself and other
similarly situated individuals, and the Mental Disability Law
Clinic, Touro Law Center, on behalf of itself and individuals
facing civil commitment and mentally ill individuals charged with
minor felonies and misdemeanors, are the plaintiffs in this
action ("Plaintiffs"), which was commenced on May 5, 1998 against
James Stone, in his official capacity as Commissioner of the New
York State Office of Mental Health ("OMH") and other defendants;

WHEREAS, Sharon Carpinello, R.N., Ph.D., replaced James
Stone as Commissioner of OMH and was substituted for him as a
defendant;

WHEREAS, Michael F. Hogan, Ph.D., is now the Commissioner of
OMH (the "Commissioner"), and has been substituted for Sharon
Carpinello as a defendant;

WHEREAS, this Court has certified a plaintiff class with the Plaintiffs as class representatives, which plaintiff class consists of all individuals who have been or will be: (1) charged with a minor felony or misdemeanor; (2) evaluated to determine whether they are competent to stand trial; (3) found by court-appointed psychiatrists to lack the capacity to stand trial and awaiting a determination of the competency issue by the local criminal court; and (4) if remanded pursuant to CPL § 730.40, subject to a civil commitment evaluation pursuant to MHL, Article 9 (the "Incompetency Subclass");

WHEREAS, the current version of the complaint is the Fifth Amended Complaint;

WHEREAS, in the Fifth Amended Complaint, Plaintiffs assert as their third cause of action on behalf of the Incompetency Subclass a claim against the Commissioner, as follow:

By automatically subjecting plaintiff Greg Monaco and the plaintiff class members to either the requirements of CPL § 730.60, MHL § 29.11(h) and 14 NYCRR Part 540 or an informal forensic review, while not automatically subjecting civilly admitted patients to the same provisions or informal process, defendant Carpinello denies such individuals equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983 (the "Third Cause of Action");

WHEREAS, the Commissioner denies all allegations that his conduct, or the conduct of OMH or any of its facilities, violated Plaintiffs' Constitutional rights or was otherwise unlawful;

WHEREAS, the parties wish to resolve the Third Cause of Action and all claims against the Commissioner for, or based on, a denial of equal protection of the laws in violation of the Fourteenth Amendment, and have negotiated in good faith for that purpose;

WHEREAS, the parties seek to dismiss the Third Cause of Action without the need for further litigation or trial and without admitting any wrongdoing on the part of the Commissioner;

NOW THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the parties and/or their respective counsel as follows:

1. The Third Cause of Action and all claims against the Commissioner for, or based on, a denial of equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution or any other constitutional or statutory provision, are dismissed with prejudice.

2. OMH and OMH-operated facilities may subject individuals remanded to OMH facilities pursuant to final orders of observation under CPL § 730.40 ("730.40 Patients") to formal or informal review before granting them privileges or discharging them from a facility only if a clinical reason justifies such review. In determining whether there is a clinical reason for referring such a patient for a formal, informal, or heightened review of proposed privileges or discharge, the patient's treatment team may take into consideration the nature of the criminal charge(s) and the circumstances which formed the basis

of the criminal charge(s) which was/were dismissed when the patient was remanded to the custody of the Commissioner pursuant to a final order of observation under CPL § 730.40. However, the fact that a 730.40 Patient was charged with a crime shall not, in and of itself, be the basis for subjecting that patient to formal, informal, or heightened review of proposed privileges or discharge, but the nature of a particular charge may be the basis for subjecting a 730.40 Patient to such formal, informal, or heightened review.

3. No later than thirty (30) days after the date that the Court so-orders this stipulation and settlement agreement ("Stipulation"), the Commissioner or his designee will issue a memorandum to the Executive Directors of all OMH-operated facilities advising them that an OMH-operated facility: (a) should subject 730.40 Patients to formal or informal review before granting them privileges or discharging them only if a clinical reason for such heightened review exists, (b) may subject such individuals to formal or informal or heightened review if a clinical reason justifies such review, and (c) the fact that a 730.40 Patient was charged with a crime shall not, in and of itself, be the basis for subjecting that patient to formal, informal, or heightened review of proposed privileges or discharge, but the nature of a particular charge may be the basis for subjecting a 730.40 Patient to such formal, informal, or heightened review.

4. The Commissioner or his designee, at the next meeting of Clinical Directors of OMH-operated facilities following the issuance of the memorandum described in paragraph 3, above, will advise the Clinical Directors that an OMH-operated facility may subject 730.40 Patients to formal or informal review before granting them privileges or discharging them only if a clinical reason justifies such heightened review, but that a facility may subject such individuals to formal or informal or heightened review if a clinical reason justifies such review, and that the fact that a 730.40 Patient was charged with a crime shall not, in and of itself, be the basis for subjecting that patient to formal, informal, or heightened review of proposed privileges or discharge, but the nature of a particular charge may be the basis for subjecting a 730.40 Patient to such formal, informal, or heightened review.

5. When OMH designates a facility to which an individual is to be remanded pursuant to a final order of observation under CPL § 730.40, it sends the facility a designation form containing certain information about the individual, which is placed in the individual's medical chart (the "Designation Form"). Beginning on or before the thirtieth (30th) day following the date that the Court so-orders this Stipulation, when OMH sends a facility a Designation Form it will include on the Designation Form a statement reminding administrators and physicians at the facility that the facility may subject 730.40 Patients to formal or

informal review before granting them privileges or discharging them only if a clinical reason justifies such heightened review, but that the facility may subject such individuals to formal or informal or heightened review if a clinical reason justifies such review, and that the fact that a 730.40 Patient was charged with a crime shall not, in and of itself, be the basis for subjecting that patient to formal, informal, or heightened review of proposed privileges or discharge, but the nature of a particular charge may be the basis for subjecting a 730.40 Patient to such formal, informal, or heightened review.

6. Plaintiffs may monitor the Commissioner's compliance with the undertakings set forth in this Stipulation by identifying a reasonable number of individuals remanded to three OMH-operated facilities pursuant to final orders of observation under CPL § 730.40, whose charts Plaintiffs' counsel may review. The total number of individuals who may be identified and whose charts may be reviewed during the entire monitoring period may not exceed sixty (60) in the aggregate. Plaintiffs' counsel will identify the individuals whose charts may be reviewed by submitting a written request to the Assistant Attorney General handling the referenced action. Plaintiffs' counsel will review the charts at the OMH-operated facilities.

7. The parties acknowledge and agree that it is a matter of professional judgment as to whether a clinical reason is sufficient to warrant a formal, informal, or heightened review of

a decision to discharge or grant privileges. Accordingly, a violation or alleged violation of this Stipulation shall not constitute grounds for a motion for contempt, and the parties agree that they will not move for a finding or order of contempt based on a violation or alleged violation of this Stipulation. The sole and exclusive remedy for a violation or alleged violation of any term or provision of this Stipulation shall be the right to apply to this Court for a determination as to whether a party to this Stipulation has failed to perform its obligations hereunder.

8. The parties acknowledge that the Commissioner cannot predict or guarantee that the number or percentage of 730.40 Patients who are subjected to formal or informal review before the granting of privileges or discharge at any facility or in the aggregate will decline, and cannot predict or guarantee any particular result or outcome as to what the number or percentage of 730.40 Patients who are subjected to formal or informal review before the granting of privileges or discharge at any facility or in the aggregate will be. Accordingly, the Commissioner's sole and exclusive obligations under this Stipulation are those expressly set forth in paragraphs 3, 4, 5, and 6, above.

9. Before making any motion to the Court to enforce the Commissioner's obligations set forth in paragraphs 3, 4, 5, and 6, Plaintiffs shall notify counsel for the Commissioner in writing of the specific obligations that Plaintiffs reasonably

believe have not been implemented or carried out, and shall advise of specific facts and circumstances forming the basis of such belief. Before making any motion to the Court to enforce Plaintiffs' obligations under this Stipulation, the Commissioner shall notify counsel for Plaintiffs in writing of the specific obligations that the Commissioner reasonably believes have not been implemented or carried out, and shall advise of specific facts and circumstances forming the basis of such belief. Upon such notification by either party, the parties shall negotiate in good faith to resolve such disagreement.

10. If within thirty (30) days after such notification, the parties are unable to resolve their disagreement, a party may move as set forth in paragraph 7, above. The opposing party shall have thirty (30) days after receipt of the motion to oppose it or otherwise respond.

11. Upon the Court's so-ordering this Stipulation, the parties' obligations, rights, and responsibilities under this Stipulation and the terms and conditions thereof shall commence, and the Third Cause of Action will be dismissed with prejudice except that this Court shall retain jurisdiction (a) to enforce this Stipulation, and (b) over the remaining causes of action. This Stipulation and all of the parties' obligations, rights, and responsibilities under this Stipulation, and the Stipulation's terms and conditions shall automatically expire three (3) years after the date this Stipulation is fully executed and so-ordered.

12. The Commissioner agrees to pay to Plaintiffs' counsel the amount of ten thousand (\$10,000) dollars as payment in full for all attorneys' fees, expenses, costs, and disbursements attributable to Plaintiffs' counsel's work on or in connection with the Third Cause of Action and all claims brought under it. It is acknowledged and agreed that this payment of \$10,000 includes all attorneys' fees, expenses, costs, and disbursements that will or may be incurred or generated for work performed during the term of this Stipulation, including but not limited to, all work performed in connection with the monitoring described in paragraph 6, above, such as the identifying of individuals and the reviewing of charts. Payment is subject to the approvals of all necessary state officials as required by Public Officers Law, Section 17, subdivision 3(d). If payment is not approved, counsel for the Commissioner shall so notify Plaintiffs' counsel within five (5) business days of the disapproval, and Plaintiffs shall have ninety (90) days from such notice to make a motion seeking from the Commissioner attorneys' fees, expenses, costs, and disbursements. In the event that payment of the agreed amount is approved but not made within 120 days after Plaintiffs notify the New York State Department of Law in writing of the "so ordering" by the Court of this Stipulation, interest on the unpaid amount shall begin to run on the 121st day at the statutory rate pursuant to 28 U.S.C. § 1961.

13. If Plaintiffs move for enforcement of the Commissioner's obligations set forth in paragraphs 3, 4, 5, and 6, then they may move for an award of reasonable attorneys' fees in connection with such enforcement only if the motion for enforcement is granted and not reversed on appeal. The Commissioner may object to or oppose the motion on the ground that the fees requested are not reasonable.

14. Nothing contained herein shall be deemed to be an admission by the Commissioner, OMH, or any of OMH's officers, employees, agents, or representatives that they have in any manner or way violated any of Plaintiffs' rights, or the rights of any other person, as defined in the constitution, statutes, ordinances, rules, or regulations of the United States, the State of New York, or any other governmental entity.

15. The Commissioner reserves the right to change, amend, or adapt the procedures and requirements of this Stipulation if required by intervening changes in federal or State statute or regulation that are inconsistent with the terms of this Stipulation. The Commissioner will provide counsel for Plaintiffs with written notification, by facsimile or electronic mail, of a required change, amendment, or adaptation at least thirty (30) days prior to its commencement, unless the Commissioner is required to commence implementation of such a change, amendment, or adaptation in less than thirty (30) days, in which event the Commissioner shall provide notice no later

than seven (7) business days after learning of the need for a change, amendment or adaptation.

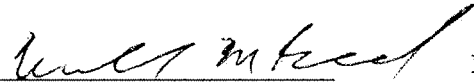
16. This Stipulation shall not have any precedential effect and may not be introduced as evidence in any action, except in this action to enforce its terms.


17. This Stipulation constitutes and contains all of the terms and conditions agreed upon by the parties hereto. No oral agreement entered into at any time or any written agreement entered into prior to the execution of this Stipulation regarding it or its terms and provisions shall be deemed to exist, or to bind the parties hereto, or to vary the terms and conditions contained herein.

Dated: New York, New York
December 9, 2009

MENTAL DISABILITY
LAW CLINIC

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SO ORDERED:

U.S.D.J.