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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF TALBOT V.,

Appellant,

-against-

KINGSBORO PSYCHIATRIC CENTER,

Respondent.

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NO. 53

20 Eagle Street  
Albany, New York  
May 18, 2022

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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Amanda M. Oliver  
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this  
2 afternoon's calendar is appeal number 53 in the Matter of  
3 Talbot V. versus Kingsboro Psychiatric Center.

4 Counsel, hold on until your colleagues have an  
5 opportunity to clear out.

6 Good afternoon, Counsel.

7 MR. BAER: Good afternoon, Your Honor, Arthur  
8 Baer on behalf of Talbot V. I would like to request two  
9 minutes for rebuttal, Your Honor.

10 CHIEF JUDGE DIFIORE: You may have two minutes,  
11 sir.

12 MR. BAER: Okay.

13 The primary issue before this court is whether  
14 the Office of Mental Health may abrogate the plain language  
15 of the statute. When - - - which one considered the  
16 legislative history was unequivocally enacted to protect  
17 the due process rights of patients. And referred to the  
18 clinical record as the record that should be provided which  
19 is now codified as 33.13.

20 And - - - the - - -

21 JUDGE RIVERA: Well, Counsel, let me interrupt  
22 you. Good afternoon, I'm on the screen.

23 So is the accompanying data required under the  
24 statute. Is that what you mean, what's listed as the  
25 clinical record?



1 MR. BAER: That - - - that's correct.

2 JUDGE RIVERA: That that's what we should assume  
3 that means?

4 MR. BAER: That's exactly right, Your Honor. And  
5 I - - - the legislation was - - - the language was first  
6 enacted in 1964 as part of the - - - as based on the  
7 Association of the Bar of the City of New York's  
8 essentially landmark study on mental illness and due  
9 process which made several recommendations. The first of  
10 which was to create the Mental Health Information Service.  
11 In fact, in the report, called the Mental Health Review  
12 Service. That they assemble and provide data to the  
13 courts, make recommendations with respect to whether it  
14 should be a hearing, a counsel appointed, and witnesses - -  
15 - additional witnesses provided under the - - - 35 of the  
16 judiciary law. And - - - and what the disposition should  
17 be.

18 So it was absolutely clear, the memorandum of the  
19 Administrative Board of the Judicial Conference at that  
20 time stated the following in support of the 1964  
21 essentially seminal legislation. The committee, that is  
22 the committee of the Association of the Bar, for the study  
23 of commitment procedures also recommended that machinery be  
24 set up to ensure that in the event of judicial hearings,  
25 all pertinent data with respect to the patient's case can



1 be presented to the court so they can make informed  
2 judgment on the case.

3 And to achieve the latter act, the committee  
4 recommended the establishment, and it's called the Mental  
5 Health Review Service which would operate under the  
6 supervision of the courts. It's main function would be to  
7 assemble, provide the court having jurisdiction of the  
8 case, pertinent and relevant - - - relevant data on - - -  
9 on each patient's case, the need for hospitalization, the  
10 right to discharge, and furnish the court with pertinent  
11 information.

12 So it's absolutely clear that this legislation  
13 was referring to the clinical record. And how do we know  
14 that? Because the legislation, when enacted in 1964, that  
15 is section 72.3 of the legislation, specifically referred  
16 to section 20 of the Mental Hygiene Law. Mental - - -  
17 section 20 of the Mental Hygiene Law, 1964, this is chapter  
18 738 of the mental - - - of the Laws of New York, except - -  
19 - Chapter 20 was on a - - - section 20 was amended to  
20 require for the first time that - - - to include the  
21 documents re - - - or the record required by the the  
22 Commissioner, that is the Commissioner of Health and Mental  
23 Hygiene.

24 And that - - - and that specific - - - those  
25 specific - - - section 20 at that time says - - - said the



1 case record instead of the patient's record. But it then  
 2 referred to the commissioner's regulation. Section 21 of  
 3 the commissioner's regulation was also called case records.  
 4 These are records that are required by statute and  
 5 regulations that be provided by hospitals.

6 Case records should squarely be kept, and should  
 7 contain the following. So it's both the statute and the  
 8 regulation. And the records that required to be - - - were  
 9 required to be provide - - - kept, were the original  
 10 admission paper, the patient's history, the reports of  
 11 examination, the statistical data, and the records that - -  
 12 - of the course, and treatment, or training, and changes in  
 13 the condition of the patient, the mental and physical  
 14 condition of every patient should be recorded at least once  
 15 every month during the first year, and every three months  
 16 in subsequent years. That was the statutory reference when  
 17 the - - - that statutory language was enacted.

18 That - - - those section 20 and section 24, which  
 19 was a confidentiality provision, and the regulations were  
 20 essentially recodified in 1972 as - - - as section 15.13,  
 21 which was renumbered in 1977 as section 33.13. So the  
 22 legislative history is clear that there was a reference to  
 23 the clinical record.

24 And further, the - - - you know, it was to - - -  
 25 to ensure due process. In 1964, hearings would be held - -



1 - were being held - - - there was proceedings being held  
2 without hearings. And that's why these recommendations  
3 were required. And there was no - - - no periodic  
4 retention hearing so that people became forgotten and lost.  
5 And they saved the program.

6 The Mental Hygiene Information Service, which  
7 became Mental Health Legal Service in 1985, didn't have  
8 unfettered access to records until 1977, thirteen years  
9 subsequent to the passage of this language and the statute.  
10 So that it was clear the intention of the legislature  
11 wasn't that the - - - the unfettered access of Mental  
12 Hygiene Legal Services were, it's going to supply due  
13 process. It was a requirement of the statute, which was  
14 originally 72.3, which became 31.31(b) which was then  
15 recodified as 9.31(b), that was the language that was  
16 required before - - - before the, you know, the unfettered  
17 access was required.

18 CHIEF JUDGE DIFIORE: Thank you, Counsel.

19 Counsel?

20 MR. LEVITZ: Thank you, Your Honors. Philip  
21 Levitz for Kingsboro State Hospital.

22 Talbot V.'s appeal fails for two independent  
23 reasons. First, OMH regulations reasonably interpret  
24 article 9 not to require state hospitals to copy patients'  
25 entire medical charts for MHLS before every admission and



1 retention hearing when MHLS requires - - -

2 JUDGE RIVERA: Counsel, let me interrupt you.

3 I'm - - - I'm on the screen.

4 Their argument is not, as I understand what he  
5 was just saying, their argument is that the - - - the  
6 patient's record, that clinical record, these notes, and  
7 otherwise that they want to copy of, fits within  
8 accompanying data provided by the statute separate from  
9 whatever else in addition the commissioner's regulations  
10 might require. That is to say, as I understand their  
11 argument, it - - - the commissioner cannot somehow cut - -  
12 - reduce, excuse me, the amount of data that's available  
13 that the statute provides for.

14 Can you address - - - he's gone through this long  
15 - - - your adversary's gone through this long historical  
16 discussion showing the evolution of the statute to show  
17 that accompanying data has always meant to refer to the  
18 clinical record. Can you address why he is wrong?

19 MR. LEVITZ: He's wrong - - - first of all, that  
20 entire history is found nowhere in any of the briefs that  
21 MHLS filed in - - - at this stage, in the court, or  
22 anywhere else in this proceeding at any stage, and, thus,  
23 is - - - is waived.

24 But more fundamentally, there's absolutely  
25 nothing that he cited that indicates anything about what



1 the relevant provision means now. So let's talk about what  
2 the provision means now. And let me start this way, by  
3 saying article 9 does not require that state hospitals copy  
4 patients' full medical charts, okay? To the contrary, as  
5 this court explained in Daniels, the article 9 provision at  
6 issue, section 9.31(b) is a notice provision, okay? That's  
7 language from - - - from this court's decision in Daniels.  
8 It's - - -

9 JUDGE RIVERA: Yeah, but we said we left this  
10 question open. So why don't - - - again, why don't you  
11 address - - - you said, but that's not - - - put aside the  
12 history, you say that's just not what the statute means.

13 Tell me why it doesn't mean what he says.  
14 Remember, this is not about what the commissioner may say.

15 MR. LEVITZ: Well - - -

16 JUDGE RIVERA: The argument is different. It's  
17 about what accompanying data under the statute means. Tell  
18 me what that means.

19 MR. LEVITZ: So what accompanying data means in  
20 the statute is simple. It's the medical certificates that  
21 are required to accompany the applications for admission or  
22 retention. And we know that in the statute because the  
23 word accompany is actually used repeatedly in section 9.27,  
24 9.27(a), and 9.27(e) to refer to the medical certificates  
25 accompanying the application for admission.



1 JUDGE RIVERA: Yes, but the application - - - you  
2 can't have an application without the certificates. So it  
3 strikes me that the certificates are part of the  
4 application itself.

5 MR. LEVITZ: Well - - -

6 JUDGE RIVERA: There's no - - - right? You - - -  
7 you cannot proceed without the certificates; is that not  
8 correct?

9 MR. LEVITZ: The certificates are always  
10 associated with the application. But again, the word that  
11 the statute itself uses is accompany. And so it's clear  
12 that what the drafters of the statute intended is that the  
13 accompanying data is the medical certificate.

14 JUDGE RIVERA: Then why didn't it just say that?  
15 Why create all this challenge if - - - if it doesn't mean  
16 something broader than what you suggest?

17 MR. LEVITZ: I - - - I mean, I - - -

18 JUDGE RIVERA: Why wouldn't it just say, and the  
19 certificates; why wouldn't it just say that?

20 MR. LEVITZ: I mean, think it does effectively  
21 say that in 9.27(a) and (e). But in any event, absolutely  
22 nothing in the statute says that it's anything more than  
23 the certificate. But what the statute does say in 9.01 is  
24 what the - - - what the record is, is you know, the  
25 application for the admission and retention, and the



1 accompanying data required by this article, so the  
2 certificates, and the regulations of the commissioner. So  
3 again, built into the definition in 9.01 is this ability  
4 for the commissioner to define by regulation what the  
5 accompanying data is.

6 And that's crucial here. And I think it goes to  
7 something that Your Honor was getting at initially, which  
8 is actually what the commissioner thinks is crucial and is  
9 owed great deference here because the statute itself  
10 embodies this view that the commissioner has to define what  
11 the accompanying data is, okay? And so the commissioner -  
12 - -

13 JUDGE WILSON: Well, it doesn't - - -

14 MR. LEVITZ: - - - had done so - - -

15 JUDGE WILSON: - - - it doesn't actually - - -  
16 the - - - the language doesn't actually read that way,  
17 right? It says the accompanying data and whatever  
18 additional data or information the commissioner wants. It  
19 doesn't suggest - - - that and part doesn't suggest the  
20 commissioner can contract the meaning of whatever the data  
21 is, right?

22 MR. LEVITZ: I agree the commissioner can't  
23 contract from what the statute requires. But it can decide  
24 to add to that or not. And in this particular case, the  
25 commissioner has decided not to add to what the statute



1 itself requires. And article 9 - - - and again, it's not  
2 what's required by any provision of the Mental Hygiene Law  
3 in 9.01. What 9.01 says is it - - - it's - - - the  
4 accompanying data is what's required by article 9, by this  
5 article, and by the regulations of the commissioner.

6 All that's required by this article as  
7 accompanying data is the medical certificates. And the  
8 commissioner has expressly issued a regulation through  
9 notice and comment saying that's all that's required at  
10 this time is the - - - is the medical certificates and  
11 accompanying data simply means the medical certificates,  
12 nothing else is required.

13 Now that makes good sense. And let me explain  
14 why. And it goes back to this idea that the court  
15 recognized in Daniels which is that this whole provision is  
16 at - - - in 9.31 is a notice provision. It's providing  
17 notice of a hearing to MHLS of a request to a - - - for a  
18 hearing to MHLS and to the court. And so what's required  
19 to be provided is what's necessary to put them on notice of  
20 the hearing and the basis for the hospital's case for  
21 admission or retention.

22 And what's required to do that is the application  
23 and the medical certificates that provide the basis for the  
24 - - -

25 JUDGE RIVERA: So then Counsel, the reason MHLS



1 has access, not the copies, but has access is another  
2 provision of the statute; is that - - - that's your  
3 position, correct?

4 MR. LEVITZ: Absolutely. There's a totally  
5 separate provision of the - - - the statute in article - -  
6 -

7 JUDGE RIVERA: So they - - - they can go and look  
8 at the full record at any time they want before the  
9 hearing; correct, that's your view?

10 MR. LEVITZ: Absolutely.

11 JUDGE RIVERA: They can even make copies on your  
12 copy machines, correct?

13 MR. LEVITZ: Absolutely. They can do that - - -

14 JUDGE RIVERA: All right. Would you take the  
15 same - - - but let me ask you this. Would - - - if you - -  
16 - I understand part of the issue is your - - - that - - -  
17 that this is not digitized, right? Are you the only  
18 facility that doesn't have them digitized, or is this  
19 common - - -

20 MR. LEVITZ: No.

21 JUDGE RIVERA: - - - a common problem?

22 MR. LEVITZ: It is an - - - it is an issue at  
23 multiple facilities. The - - - OMH has basically been  
24 making great efforts in recent years and at great expense  
25 to transition the facilities across the state towards



1 medical - - - I'm sorry, towards electronic medical  
2 records. That process is not yet complete. It's not  
3 complete at Kingsboro Hospital, and it's not complete at  
4 other hospitals. It's a process that's ongoing.

5 But yes, Your Honor is correct, that a lot of the  
6 burden here is associated with the fact that at Kingsboro,  
7 these records - - - these medical charts are physical  
8 documents, and they have to be physically copied. And as a  
9 result of that, it makes great sense for MHLS, which as  
10 Your Honor rightly pointed out, has access at any and all  
11 times under the statute to these charts to be able to go  
12 in, make a copy of any portion that is - - -

13 JUDGE RIVERA: And - - - and do you let MHLS know  
14 in advance what you're going to rely on?

15 MR. LEVITZ: The - - -

16 JUDGE RIVERA: For the - - - to support the  
17 continued retention?

18 MR. LEVITZ: I mean, that's the purpose of this  
19 notice provision. Again, is you provide the application,  
20 the application attaches the basis for the admission or the  
21 retention. For retention applications, there's a whole  
22 clinical summary from the examining clinician there at the  
23 hospital who explains this is the basis for retaining this  
24 person.

25 JUDGE RIVERA: But you will go beyond that. Are



1 - - - is it incorrect - - - I thought that the whole record  
2 is brought to the hearing and often attempted to be  
3 admitted at the hearing; is that not correct?

4 MR. LEVITZ: That is - - - that is often the  
5 case. And what's going on there is the clinical record -  
6 - - I'm sorry, the clinical chart is being used as evidence  
7 at the hearing. And any party can introduce the clinical  
8 chart, or any portion of the clinical chart, as evidence at  
9 the hearing. The hospital can do that, or MHLS can do  
10 that. So MHLS can go look at it before and make copies of  
11 any parts that it wants to introduce at the hearing, and  
12 introduce it at the hearing, or the hospital's counsel can  
13 do that.

14 JUDGE RIVERA: True. But it's your burden,  
15 right? It's the hospital burden?

16 MR. LEVITZ: It's the hospital's burden to prove  
17 its case, absolutely. Not to - - -

18 JUDGE RIVERA: Yes. To prove the need for the  
19 retention; it's your burden?

20 MR. LEVITZ: Right. And so the hospital will go  
21 in and present the evidence that it feels it necessary to -  
22 - - to offer that proof. And it does so.

23 Let me also make sure I mention, Your Honors,  
24 that there's a totally independent basis that the appeal  
25 here fails which we haven't talked about which is that it's



1 moot. There's no dispute here that Talbot V. is no longer  
2 - - - no longer retained at a state facility. He was  
3 discharged to a nursing home some time ago. And the  
4 mootness exception simply doesn't apply here because this  
5 is not an issue that will evade review.

6 And the reason for that is Talbot V., himself,  
7 demonstrates. Talbot V., himself, was in a state facility  
8 continuous - - - essentially, continuously for about a  
9 decade. He could have raised this issue at any time in the  
10 course of his period of retention at any of the prior  
11 admission or retention hearings that he had. He didn't do  
12 that. And eventually, this issue was mooted for him.

13 But that's not true of any other, you know,  
14 patient who can bring the same - - - raise the same issue  
15 and have it addressed in a future case.

16 So there are two independent reasons that the  
17 appeal here fails. And I see I'm out of time.

18 CHIEF JUDGE DIFIORE: Thank you, Counsel.

19 MR. LEVITZ: Thank you, Your Honors.

20 CHIEF JUDGE DIFIORE: Counsel, why don't we  
21 resolve this appeal on mootness grounds?

22 MR. BAER: Pardon me, Your Honor?

23 CHIEF JUDGE DIFIORE: On mootness?

24 MR. BAER: Oh, because it's not moot, Your Honor.  
25 It's an exception to mootness. That it's technically moot,



1 but it's an exception to mootness is that it's issue that -  
2 - - of statewide importance. It's capable and it has the  
3 re - - - it's capable repetition and evading review of the  
4 - - - the hearings are from sixty days to two years, and is  
5 unlikely to be resolved during the time of appeal. It's  
6 been here, this is the second time, and it should be  
7 addressed.

8 I'd like to get back to some of the arguments and  
9 some of the questions raised, and some of the arguments  
10 that I didn't get a chance to make initially.

11 First, though, with respect to the legislative  
12 history, I just refer the court to the - - - chapter 738 of  
13 1964, chapter 251 of 1972, chapter 978 of 9 - - - 1977, so  
14 the court can refer to the legislative history itself.

15 JUDGE GARCIA: Is that - - - is that material  
16 cited in any of your briefs, Counsel?

17 MR. BAER: The legislative history, I don't  
18 believe it is, Your Honor. It's something I read when I  
19 prepared for it, understanding that there's no exact  
20 definition as it currently stands. But I wanted to look at  
21 it and see where the language came from. And I found it.  
22 And it is a proper exercise of this court to actually look  
23 at the legislative history. But the plain - - - the plain  
24 language of the statute is clear. It says record of  
25 patient, and that's what it means.





1           But I mean, I would like to first of all say that  
2           - - - as I said earlier, that the State's argument  
3           nullifies the language of the statute, that is it conflates  
4           and papers, and admission papers, retention papers,  
5           transfer papers with accompanying data. And that just  
6           nullifies completely the accompanying data. Essentially,  
7           what they say they should provide is only the accompanying  
8           data.

9           It's discriminatory - - -

10          JUDGE RIVERA: Yeah, but let me - - - Counsel,  
11          let me interrupt you there because they raise an  
12          interesting issue. They say the record is defined as  
13          accompanying data required by this article, which would be  
14          article 9, and you were referring to article 33.

15          MR. BAER: Well - - -

16          JUDGE RIVERA: So how do you address that  
17          regarding the plain text?

18          MR. BAER: Well let me - - - let me explain, Your  
19          Honor. That was the original language. That was - - -  
20          that language was first enacted in 1972. And it referred  
21          to essentially this article, and this article then - - -  
22          that same language of - - - of - - - what became 9.31(b)  
23          included both - - - was included both for those who are  
24          being confined with - - - because of issues of mental  
25          illness, those who were developmentally disabled, and those



1 with respect to people being - - - the confined with  
2 respect to alcoholism. And there's only one regulation, so  
3 you create subclasses of persons with disabilities. And  
4 this only applies to persons who have mental disabilities,  
5 but none of the others.

6 But that language in 9.01 was 31.01 then. It - -  
7 - it's 15.01 currently. And it's also part of the general  
8 statutory definition of Mental Hygiene Law 1.03, 1.03(46)  
9 which says, applies throughout the chapter. The chapter is  
10 chapter 27, laws of New York, which is in the Mental  
11 Hygiene Law.

12 So that - - - and adding ambiguity because of the  
13 phrasing of it, is because of the way the legislation was  
14 promulgated over time. But the actual reference was the  
15 reference to the statutes that the facility - - - that  
16 required the facilities to keep medical records, and the  
17 regulations that require the facilities to keep medical  
18 records. And that became 33.13, Your Honor.

19 CHIEF JUDGE DIFIORE: Thank you, Counsel.

20 MR. BAER: Well - - - okay.

21 (Court is adjourned)

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C E R T I F I C A T I O N

I, Amanda M. Oliver, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Talbot V. v. Kingsboro Psychiatric Center, No. 53 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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