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COURT OF APPEALS
STATE OF NEW YORK

MATTER OF MENTAL HYGIENE LEGAL
SERVICES,

Respondent,

-against-

No. 2

ANITA DANIELS,

Appellant.

20 Eagle Street
Albany, New York
January 8, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: Number 2, Matter of Mental
2 Hygiene Legal Services v. Daniels.

3 Counsel?

4 MR. GRIECO: May I reserve two minutes for
5 rebuttal, please?

6 CHIEF JUDGE DIFIORE: You may.

7 MR. GRIECO: May it please the court. For two
8 independent reasons, the lower courts should have dismissed
9 this mandamus proceeding. First, MHLS lacks standing.
10 Second, because Article 9's definition of record does not
11 include a patient's clinical chart, their statutory - - -

12 JUDGE RIVERA: Counsel, how do they lack standing
13 if 9.31(b) specifically identifies them as a recipient of
14 the - - -

15 MR. GRIECO: They're only receiving - - -

16 JUDGE RIVERA: - - - of the record, right? I
17 mean, the duty and obligation is to the court to get the
18 record, the copy, and to MHLS. They're specifically
19 identified in the statute as a - - - as, if you will, a
20 beneficiary of the obligation.

21 MR. GRIECO: They're receiving it as - - - as the
22 potential agent for - - - for the client. It's analogous
23 to, for example, the provision in CPLR 2103(b) that says
24 that once a - - - a party is represented by counsel - - -

25 JUDGE RIVERA: Well, it doesn't say that because



1 of course the patient may have someone else representing
2 them, and it doesn't say that. Otherwise it would have
3 said, as of course the statute does in other sections, the
4 patient and their legal representative. But it does only
5 identify the court and MHLS.

6 MR. GRIECO: As a practical matter, MHLS is going
7 to be representing a very large number of patients. And
8 they're receiving - - - and they're receiving the record.
9 And as I will address, record does not include the clinical
10 chart, in any event, but they receive it in their - - - in
11 their role as an agent of the - - - of the client. One
12 would not say, for example, in a criminal case - - -

13 JUDGE RIVERA: Well, there could be more than one
14 beneficiary, right?

15 MR. GRIECO: There can be, but not in this case
16 because the - - - the only person whose rights are at stake
17 in a retention proceeding is - - - is the client.

18 JUDGE FAHEY: Let me ask - - -

19 JUDGE STEIN: If MHLS didn't represent the
20 patient, would - - - would there be any potential injury
21 here?

22 MR. GRIECO: There would - - - there would not.
23 There's no injury in any event because the legislature
24 designed a particular statutory scheme in which the - - -
25 in which MHLS, for the benefit of patients, has a better



1 form of access to documents than - - - than advance
2 disclosure. They have - - - they have - - -

3 JUDGE WILSON: Let me ask you about that.
4 Suppose, hypothetically, you denied MHLS access to any
5 records, right, in - - - in contravention of the statute,
6 would they have standing?

7 MR. GRIECO: They would not have standing. They
8 would, in a particular patient's case, come in and say - -
9 -

10 JUDGE WILSON: But if you block them - - -

11 MR. GRIECO: - - - we can't go forward - - -

12 JUDGE WILSON: But if you block them from access
13 categorically, they wouldn't have standing under the
14 statute?

15 MR. GRIECO: The - - - the right would always
16 belong to the - - - to the patient. They could of course,
17 in the patient's case, say we cannot - - -

18 JUDGE FAHEY: Isn't this different because - - -
19 isn't this more like a state authority or a municipality
20 where the specific right of the party is set in the statute
21 as opposed to - - - I understand your argument, the
22 strength of your argument as in responding to an
23 organizational plaintiff. I think that's a good argument.
24 What I don't understand your argument has standing for is
25 as it applies to a designated government agency or an arm



1 of the government saying this record must be provided for
2 them - - - to them. The record wasn't provided, therefore
3 - - - at least that's arguable for our - - - for our
4 purposes - - - therefore they have standing to go and say
5 we want this record in this particular form. And the
6 question of what you get it in is another question, what
7 form you get it in. But it seems to me that it's - - - the
8 analogy to be drawn is between other types of government -
9 - - arms of government, not not-for-profit corporation,
10 that have standing to go into court to assert particular
11 rights and responsibilities that they have by statute. So
12 why doesn't MHLS have the same kind of rights here, since
13 they're designated, to follow up on Judge Rivera's
14 question.

15 MR. GRIECO: MHLS is - - - is an organization
16 created for a very specific purpose, which is to represent
17 - - -

18 JUDGE FAHEY: As the Thruway Authority is. But
19 they can go into court and argue to assert their particular
20 rights. They have standing to do that.

21 MR. GRIECO: But in any event, there is no injury
22 in this case because - - -

23 JUDGE FAHEY: Well, that's a separate question.
24 You know, let's just - - - just stay with whether or not
25 this entity can go into court, because that's the question

1 that interests me. I want you to stay on that. Why can't
2 they do that? Why doesn't that analogy hold true?

3 MR. GRIECO: So I'm not aware of a case in which
4 this court has said that an entity that is representing
5 someone else's interests has standing based on a - - - a
6 denial of an interest. The injury - - -

7 JUDGE FAHEY: Well, that's - - -

8 MR. GRIECO: Any injury would be to the client.

9 JUDGE FAHEY: No, that's not - - - that's not
10 what I'm saying. And I hate to - - - I don't want to beat
11 this to death, but what I am saying is is that this agency
12 is told that they have a particular right to particular
13 information, by statute, by the state legislature. And
14 you're saying that they don't have standing to assert a
15 statutorily-given right in court and not because the injury
16 in fact but by the nature of who they are. And I'm saying
17 by the nature of who they are they've got a right to go to
18 court. Whether or not they're going to be successful is a
19 different question. But they have - - - why wouldn't they
20 have a right to go to court?

21 MR. GRIECO: Your Honor, my - - - my answer is
22 that they - - - the right belongs to the client, and they
23 are only given - - - they are only - - - there's only a
24 requirement that any - - -

25 JUDGE FAHEY: So why doesn't the legislation say



1 then that, as has been pointed out, the - - - the client
2 and their - - - their legal representative.

3 MR. GRIECO: Because, as a practical matter, MHLS
4 is going to be deter - - -

5 JUDGE FAHEY: But they all aren't represented - -
6 - I've done a lot of these things, and they aren't all - -
7 - all represented by MHLS. Yes, the vast majority are, but
8 - - - but we both know they all aren't. So that's - - -
9 that's not an adequate answer.

10 JUDGE STEIN: But when we talk about standing, so
11 - - - so the fact that the - - - that the statute refers to
12 MHLS and - - - and maybe I'm mistaken here, but my
13 understanding is is that means that MHLS is in the zone of
14 interests sought to be protected by the statute. But there
15 - - - there are other requirements that have to be
16 satisfied before they get the right to come into court, one
17 of which is is that they have to show particularized
18 injury, correct?

19 MR. GRIECO: That is correct. And there is no
20 injury here because the legislature made a determination
21 that the best way to ensure full access to - - - to the
22 clinical chart is to give MHLS twenty-four-hour access.
23 Now - - -

24 JUDGE WILSON: No, it said two things. It said
25 that first, but then it has another provision, right after



1 the sentence you're referring to, that says that the Mental
2 Hygiene Legal Service may require from the officers and
3 employees - - - and it - - - it continues. I mean, your
4 answer makes that second sentence superfluous, doesn't it?

5 MR. GRIECO: Well, first of all, that - - - that
6 statute is not the one under which the petitioner is
7 seeking mandamus relief today. But second of all, that is
8 simply a right to go in and get a copy. It is not - - - it
9 does not - - - it does not involve the statute that is
10 before the court today, which is the contents of the record
11 of a patient, as defined in Article 9, that has to be
12 delivered to - - - to MHLS five days in advance of a
13 hearing. These are two different sets of documents. The
14 clinical record is not part of the Article 9 record of a
15 patient.

16 JUDGE RIVERA: But why is there not an injury
17 that they have to - - - as the Appellate Division majority
18 pointed out - - - expend resources where the statute
19 appears to place the burden not on MHLS but on the
20 facility. Why is that not a sufficient injury?

21 MR. GRIECO: Putting aside for a moment that the
22 record doesn't include the clinical chart anyway, there is
23 not an injury because - - -

24 JUDGE RIVERA: No, but that's a question of the
25 merits.



1 MR. GRIECO: Correct, and - - -

2 JUDGE RIVERA: We're just on the standing issue.
3 Don't conflate the two now.

4 MR. GRIECO: No, that's why I say putting it
5 aside for one moment.

6 JUDGE RIVERA: All right. Okay.

7 MR. GRIECO: The MHLs can, in any individual
8 case, obtain their fees. We pointed that out in our - - -
9 in our opening brief, and they did not even address that in
10 their respondent's brief. Now, I do want to turn - - -

11 JUDGE RIVERA: But that's post-hoc; that's not
12 dealing with the standing question which is the diversion
13 of resources, not just getting money back. It's diversion
14 of resources to do something that the statute clearly does
15 not put on their shoulders.

16 MR. GRIECO: The - - - the statute - - - the
17 statutory scheme, taken as a whole, does place it upon them
18 to use their twenty-four-hour access to gain access to the
19 clinical chart.

20 And I do want to move - - - move to the - - - to
21 the merits. The definition of a record, for purposes of
22 Article 9, as defined in 9.01, is the "admission, transfer
23 or retention papers and orders and accompanying data
24 required by this article and the regulations of the
25 commissioner".



1 Those are akin to the pleadings in a - - - in a
2 civil case. And the - - - the section under which MHLS is
3 seeking mandamus only requires those - - - those documents
4 that are key to the initiation of an Article 9 retention
5 hearing.

6 The legislature gave OMH the option to, through
7 regulation, if it found it necessary to do so, define
8 additional accompanying data that would be included as a
9 part of those materials. OMH has not found it necessary to
10 do so at this point.

11 JUDGE RIVERA: I understand your argument to be
12 that the only regulations that would be relevant would be a
13 regulation that either specifically says: pursuant to the
14 authority recognized in the other section, we now are
15 choosing the following documents to be required to be
16 provided, correct? Or something that says accompanying
17 data is defined as.

18 MR. GRIECO: Yes, at a minimum - - -

19 JUDGE RIVERA: But - - - excuse me.

20 MR. GRIECO: Sorry.

21 JUDGE RIVERA: But the fact that they define a
22 patient's record in a particular way, somehow, does not fit
23 this final part of the statute?

24 MR. GRIECO: So the term that is defined in
25 Article 33, which is what the statute refers to, is



1 clinical record, and that provision is used in sections of
2 the statute that deal with confidentiality and rights of
3 access, not with any sort of disclosure requirements. And
4 what OMH did not and could not have done by regulation is
5 actually swap out the definition of record of a patient,
6 that already exists by statute in Article 9, and just
7 replace it with a different definition of record.

8 JUDGE RIVERA: Well, see there's where I had a
9 little bit of difficulty with your argument. So the
10 statute says: "Record of a patient shall consist of", and
11 then it says: "admission, transfer or retention papers and
12 orders"; you've already taken - - - set forth your position
13 on that.

14 Then it says: "and accompanying data required by
15 this article", and I assume there's nowhere else in the
16 article that it makes any reference to what might be the
17 accompanying data, right?

18 MR. GRIECO: No, there is. And we - - - we
19 explain - - -

20 JUDGE RIVERA: Well, let me finish it.

21 MR. GRIECO: Okay.

22 JUDGE RIVERA: Okay. You can correct me. "And
23 the regulations of the commissioner". So it is already the
24 legislature that is authorizing the commissioner to
25 identify what would be part of a patient's record.



1 MR. GRIECO: Right. And OMH has not exercised
2 that option.

3 I do want to address the other part.

4 JUDGE RIVERA: Well, how is that when they've
5 defined a patient's record to include the clinical record?

6 MR. GRIECO: So that - - - that regulation does
7 not apply to Article 9. It applies - - -

8 JUDGE RIVERA: Why not?

9 MR. GRIECO: It is not a regulation that - - -
10 that ever refers to Article 9 or to retention proceedings.
11 That regu - - -

12 JUDGE RIVERA: But it's a general Mental Hygiene
13 regulation. It's the definition section. You mean for
14 each of them they would have to say this is applying to the
15 following articles?

16 MR. GRIECO: It is - - - it is there to define
17 the term where it doesn't already have a statutory
18 definition. In Article 9 there already is a statutory
19 definition. And it's not the - - - and it's not the same
20 term. It's record of a patient is the term that's used in
21 Article 9.

22 And I do want to address the other part - - -

23 JUDGE RIVERA: So you think that's different from
24 patient record?

25 MR. GRIECO: Because - - - the point is that



1 Article 9's own - - -

2 JUDGE RIVERA: Facility and efficiency of saying
3 patient record you think is different from record of
4 patient?

5 MR. GRIECO: That - - - well, the principal term
6 that is used throughout Article 33 is "clinical record".
7 There - - - there is also a reference to patient record.
8 But OMH could not have simply superseded the definition of
9 record of patient in Article 9 by adopting a regulation
10 that refers to a - - -

11 JUDGE RIVERA: No, I agree with you, but my - - -
12 my point is that record is defined with a list of things
13 and then says whatever the commissioner identifies in the
14 regulations. And then the regulation, tracking back to
15 that, says a patient record means the following.

16 MR. GRIECO: Right, but except that the reg - - -
17 that regulation doesn't - - - doesn't apply to Article 9.

18 And I do want to address the other part of - - -
19 of what you - - -

20 JUDGE FEINMAN: So that's the part that I think
21 some of us are struggling with.

22 MR. GRIECO: It - - - it doesn't apply to Article
23 9 because - - -

24 JUDGE FEINMAN: Because - - -

25 MR. GRIECO: - - - it does not - - - it does not



1 refer to Article 9, it never mentions retention
2 proceedings. It deals with entirely different concerns
3 such as confidentiality requirements - - -

4 CHIEF JUDGE DIFIORE: Quality assurance of
5 programming - - -

6 MR. GRIECO: Quality assurance, correct.

7 CHIEF JUDGE DIFIORE: - - - and operating
8 certificates, things of that nature, correct?

9 MR. GRIECO: That's right. And it would actually
10 have been beyond OMH's power to use a regulation to take
11 that definition from Article 3 and just put it in the place
12 of Article 9 - - - Article 9. It would be overinclusive
13 and underinclusive because the documents - - -

14 JUDGE RIVERA: It's not a replacement. The other
15 things that the legislature has identified of course are
16 the record. It simply - - - as the legislature has said,
17 and whatever else the commissioner identifies. You're now
18 filling in that blank with this. The commissioner
19 certainly, if they disagreed, could have written something
20 else. But this is a definitional provision; it applies
21 throughout. There's no limitation in the definitional
22 provision.

23 MR. GRIECO: What they would have defined would
24 have been the term "accompanying data".

25 I do quickly, if I may, want to address what you



1 said before about there not being anything else in Article
2 9 referring to accompanying.

3 JUDGE RIVERA: Yes, please.

4 MR. GRIECO: There is; it's the physician
5 certificates. The statute specifically says that the way
6 you initiate an Article 9 proceeding is that the
7 certificate - - - you send an application; it's the
8 certificates of two examining physicians, accompanied - - -
9 it uses the word "accompanied" by an application for the
10 admission of such person. Those are the ones required by
11 this article referred to in 9.01. And the remainder of the
12 section required by the commissioner gives the - - - a
13 commissioner the option to require additional accompanying
14 data. And that is the term that OMH would have defined.
15 It could - - - it could not have done what MHLS suggests
16 because that would actually take documents that are already
17 mentioned in record, such as the physician - - - physician
18 certificates, and it would be underinclusive by omitting
19 those and be overinclusive because it would include
20 voluminous clinical records that have never been part of -
21 - -

22 JUDGE RIVERA: But - - -

23 MR. GRIECO: - - - the Article 9 record.

24 JUDGE RIVERA: - - - facilities have turned over
25 these documents, though, as part of these hearings, have



1 they not?

2 MR. GRIECO: There are some facilities in which
3 there has been a - - - as a courtesy, something has been
4 turned over. But there has never - - - there has never
5 been a - - -

6 JUDGE RIVERA: So it would not be accurate to say
7 that the commissioner has determined that this is not part
8 of the record.

9 MR. GRIECO: Well, it is not turned over as a
10 part of the record; it is turned over as a courtesy to MHLS
11 counsel. It is affirmatively not part of the record.

12 JUDGE FEINMAN: And what could happen, let's say,
13 because having presided, as Justice Fahey, and I don't know
14 about Justice Stein - - - Judge Stein, but literally, you
15 walk in with these evidence carts and they're full of
16 binders that are yay high with lots of records of what's
17 going on every day, you know, the patient, you know, spit
18 at so-and-so, the patient kicked so-and-so, all of this
19 stuff, right? It's voluminous.

20 From a practical point of view, doesn't it make
21 sense to turn over what you're going to offer to the judge
22 ahead of time so that you're not all sitting there with the
23 thirty cases on the calendar? And yes, you're saying it's
24 a courtesy when they do do that, but why couldn't that be
25 what the legislature meant when it said give the record?



1 MR. GRIECO: Well, a couple of points, Your
2 Honor. First of all, it's important to remember that the -
3 - - the only term that is being - - - that is before the
4 court today on this mandamus proceeding is the definition
5 of record of a patient in 9.01. So even if the problem
6 that you're describing is a problem, the - - - the solution
7 that MHLS is seeking here is not the solution because that
8 statute deals with a different concern; it deals with
9 giving the court and with - - - and the - - - and the
10 attorney the - - - it's - - - it's akin to service of
11 pleadings in a civil case, as I said before. Secondly, the
12 - - - the right to - - - to any - - -

13 JUDGE FEINMAN: So the solution to the problem
14 then is a legislative one, is what you're saying?

15 MR. GRIECO: The legislature devised a different
16 solution, which is - - - which is unlimited access. And I
17 also wanted to say that the - - -

18 JUDGE RIVERA: May I ask when - - - when - - -
19 just to clarify, when the lawyer comes in with the binders,
20 or binder, if there's only one, do they make reference to
21 what's in the binder? Yes? Correct?

22 MR. GRIECO: The - - -

23 JUDGE RIVERA: But they don't turn over copies -
24 - -

25 MR. GRIECO: The - - -



1 JUDGE RIVERA: - - - they're not admitted, they
2 take this binder back?

3 MR. GRIECO: The - - - the way that the process
4 works, because everyone involved is in the same physical
5 building, the patient is on the ward, the binder, which is
6 the up-to-date records on the ward, it is wheeled in, as
7 your colleague said, on a cart - - - on a cart, and
8 available there. It's available to counsel, it's available
9 to the court, it's available to witnesses.

10 MHLS could, at the end - - - before the hearing,
11 after the hearing, take what's in the cart, photocopy it.
12 It's all available to them twenty - - - twenty-four hours a
13 day. That is the system that the legislature intended.
14 Now, the alternative - - -

15 JUDGE FAHEY: So if that's the - - -

16 JUDGE STEIN: What does the court consider?
17 Because let's just assume, and I know this is rare, that
18 the court doesn't want to give a decision from the bench,
19 wants to reserve decision. And according to what's been
20 presented to us, that entire record on that cart stays
21 within the hospital; it does not go back with the judge to
22 the judge's chambers for consideration.

23 So how - - - what I - - - what I am having
24 trouble understanding is is how does - - - how do both - -
25 - how does the court and MHLS, which are the two entities



1 described in the statute, how do they know what it is that
2 the court is actually to consider in rendering its
3 decision? And do they both have copies of the same thing?
4 How do they know that?

5 MR. GRIECO: Well, it's there physically on the
6 cart, so it's not as though a copy is being made for the
7 judge and not for MHLS. There's not a copy being made.
8 The - - - the expert witness is going to come in and
9 testify. And both OMH counsel, MHLS counsel, and the
10 presiding judge can ask the - - - the witness what are the
11 documents that you relied on, are there any new
12 developments. And the legislature determined that it had
13 to be - - - be done this way because these are short
14 intensive hospitalizations in which people might be in for
15 a very short amount of time. The - - - the - - - and
16 therefore the change in the person's condition, either for
17 better or for worse, is going to continue to change right
18 up until the moment of the hearing. And that is why the
19 legislature determined that constant access - - -

20 JUDGE STEIN: So the problem is is that MHLS or -
21 - - or not MHLS, I'm sorry, OMH or who - - - or OMRDD is -
22 - - is - - - is marking this entire thing as evidence. And
23 I don't know if it's being received in evidence. But - - -
24 but I mean, that seems to be the nub of the problem rather
25 than receiving in evidence those items that are being



1 referred to and - - - and relied upon and considered, so I
2 - - - that's - - -

3 CHIEF JUDGE DIFIORE: Counsel, one last question
4 for you. If we were to find standing here and get to the
5 merits, do we need to defer to the Agency's interpretation
6 of record?

7 MR. GRIECO: The Court - - - the Court should
8 defer because this - - - this involves the procedures used
9 at OMH-run facilities. And furthermore, even if - - - even
10 if there is no deference granted, this is also a mandamus
11 proceeding which is why it's not sufficient for MHLS to
12 show that perhaps the - - - the regulation they're relying
13 on refers - - - applies in Article 9. Our position is that
14 OMH affirmatively represents to the court that it did not
15 adopt a regulation.

16 JUDGE RIVERA: Under your theory, there is no
17 description by the Agency of the accompanying data. There
18 is no regulation that's been actually published that
19 indicates - - -

20 MR. GRIECO: OMH has not exercised - - -

21 JUDGE RIVERA: Excuse me - - - indicates OMH's
22 position, under your theory.

23 MR. GRIECO: OMH has not exercised - - -

24 JUDGE RIVERA: What's the def - - -

25 MR. GRIECO: - - - its option to - - -



1 JUDGE RIVERA: Where is the def - - -

2 MR. GRIECO: - - - define additional accompanying
3 data.

4 JUDGE RIVERA: How could there be any difference?
5 It's not - - - you haven't spoken of it.

6 MR. GRIECO: Because the - - -

7 JUDGE RIVERA: Under your theory.

8 MR. GRIECO: Because the - - - because the - - -
9 first of all, it's longstanding Agency practice that until
10 the recent Gary F. case, out of which this case grew, no
11 one had ever suggested that the regulation MHLS is relying
12 on applied in Article 9. And secondly, because - - -

13 JUDGE RIVERA: Yeah, but the practice has also
14 been to turn it over, apparently.

15 MR. GRIECO: There - - - there - - - again, there
16 have been cases where it's been turned over as a courtesy
17 but not as a part of the 9 point - - -

18 JUDGE RIVERA: Let me ask you; I'm going to ask
19 them too. It's the last question because I know you have
20 the red light. What - - - BPC, of course, the center at
21 issue here, apparently doesn't have electronically-
22 preserved records, and that seems to really be a great deal
23 of the problem. Are they unique? Are there many other of
24 these facilities that function in the same way where
25 everything's paperbound in a - - - in a volume?

1 MR. GRIECO: I - - - I don't know the answer to
2 that question. I don't know how many - - - I don't know
3 how many hospitals use a paper system, electronic system,
4 but - - -

5 CHIEF JUDGE DIFIORE: Thank you, counsel.
6 Counsel?

7 MS. ISHEE: Good afternoon. I'm Saidee Ishee on
8 behalf of respondent, MHLs.

9 I'd like to just jump into the practical concerns
10 that were raised by this panel, and I guess picking up
11 where Judge Rivera left off - - -

12 JUDGE FAHEY: Before you do that, just so we can
13 get some sense of order on it, the standing issue is the
14 argument that interested me, and we tortured opposing
15 counsel on this issue, so I think that you should suffer
16 the same fate.

17 MS. ISHEE: Fair enough.

18 JUDGE FAHEY: My reading of your briefs is - - -
19 is that you - - - you argue as an organizational plaintiff.
20 But in point of fact, you're not a separate organization,
21 are you? You're not a not-for-profit corporation?

22 MS. ISHEE: That's correct.

23 JUDGE FAHEY: Fine.

24 MS. ISHEE: We're not a membership organization.

25 JUDGE FAHEY: Because most of the case law that



1 sets out what the standard is for standing for
2 organizational plaintiffs involves not-for-profit
3 corporations that come before the court, Novello. There's
4 a - - - there's a number of cases that you've relied on and
5 the other side has relied on. But that argument as an
6 organizational plaintiff is, in my mind, somewhat
7 irrelevant because you're - - - you're actually a
8 governmental agency. So what is it? Are you argue - - -
9 is your brief correct? Are you arguing as an
10 organizational plaintiff, or are you arguing as a
11 government agency?

12 MS. ISHEE: So I think, Your Honor, that this
13 question gets in a little bit to the differences between
14 New York law and federal law.

15 JUDGE FAHEY: Um-hum.

16 MS. ISHEE: In the U.S. Supreme Court case of
17 Hunt there was a governmental organization, an apple
18 growers association, that was the organizational plaintiff
19 in that case. And the Supreme Court said in that case that
20 the basic test for organizational standing applies to
21 nonmembership organizations as well. They talked about
22 something called indicia of membership.

23 Now, it's my argument that there's no need for
24 this court to import this separate "indicia of membership"
25 test that the Second Circuit has recognized flowing out of



1 the Hunt test; it's enough to look at the organizational
2 standing test, which this court has, in the - - -

3 JUDGE FAHEY: But you're not - - -

4 MS. ISHEE: - - - Dental Society - - -

5 JUDGE FAHEY: But you're not an organization. It
6 seems to me - - -

7 MS. ISHEE: Right.

8 JUDGE FAHEY: - - - that none of those tests
9 apply.

10 MS. ISHEE: So I don't see the need to have a
11 separate test for nonorganizational versus organizational -
12 - - I'm sorry, for nonmembership versus membership
13 organizations when you're talking about organizational
14 standing. To the extent that it - - - this court does
15 believe that a separate test is required, the First
16 Department has - - -

17 JUDGE FAHEY: Let - - -

18 JUDGE RIVERA: The statute - - -

19 JUDGE FAHEY: Let me just - - -

20 JUDGE RIVERA: - - - identifies you specifically.
21 Isn't that the grounding for your standing?

22 MS. ISHEE: Yes, Your Honor. The - - -

23 JUDGE FAHEY: All right. But let me just go back
24 then. If you say that's the basis, where do you say that
25 in your brief? Where do you argue that?

1 MS. ISHEE: So we argued extensively about
2 individual standing. And the individual standing flows
3 directly from - - -

4 JUDGE FAHEY: Right, but you're not suing on
5 behalf of an individual. Where do you argue that, not an
6 organizational argument, that you're actually - - - that
7 you're a statutory-authorized governmental entity that has
8 a right to protect their particular obligations that were
9 given you by the legislature.

10 MS. ISHEE: We didn't argue it in that manner,
11 Your Honor, but we did argue that, as an entity that is
12 named in the statute - - -

13 JUDGE FAHEY: No, I understand you - - -

14 MS. ISHEE: - - - we have standing, individually
15 - - -

16 JUDGE FAHEY: Right.

17 MS. ISHEE: - - - to come in that we have - - -
18 we are within those individuals - - -

19 JUDGE FEINMAN: So you are the individual.

20 MS. ISHEE: - - - we are a beneficiary - - - I'm
21 sorry?

22 JUDGE FEINMAN: So you are the individual - - -

23 MS. ISHEE: Exactly.

24 JUDGE FEINMAN: - - - as opposed to the - - -

25 JUDGE FAHEY: Um-hum.



1 JUDGE FEINMAN: - - - patient.

2 JUDGE WILSON: And then - - -

3 MS. ISHEE: Yes, exactly, Your Honor.

4 JUDGE WILSON: And then what is the injury to
5 you?

6 MS. ISHEE: The injury to MHLS is in the burdens
7 to our staff from the manner - - - from the lack of the
8 records - - - the copy of the records being provided. And
9 this really goes to the practical point that I was about to
10 get to earlier about the practical realities of the
11 situation where you have carts full of binders being
12 wheeled into court. The record extensively documents how
13 fluid these records are. Things are constantly being added
14 in, pulled out of the records, and MHLS - - -

15 JUDGE GARCIA: But going back to Judge Stein's
16 point, I think, you have access to all of that.

17 MS. ISHEE: Yes.

18 JUDGE GARCIA: So there may be some records on
19 that cart, hypothetically, that you haven't seen - - -

20 MS. ISHEE: Yep.

21 JUDGE GARCIA: - - - right, because you're saying
22 it's fluid. But isn't that really an issue for a
23 particular case? This case, these records are on the cart,
24 or I'm - - - I make that motion. Here we're speculating.
25 Maybe, maybe not; it's fluid. You have access to



1 everything, unlike, I think, Judge Stein's concern, which
2 is what's the court relying on, really what's the specific
3 injury here, that hypothetically there may be something on
4 the cart that you didn't have access to?

5 MS. ISHEE: Your Honor, it's far from a
6 hypothetical. This petition was commenced specifically
7 because MHLS started - - -

8 JUDGE GARCIA: But why wasn't it commenced - - -

9 MS. ISHEE: - - - noticing - - -

10 JUDGE GARCIA: - - - in that case? Why was it
11 commenced by your organization?

12 MS. ISHEE: In fact, Your Honor, it was commenced
13 initially. The attorney who raised the issue said I am
14 raising - - -

15 JUDGE GARCIA: Raised it on behalf of your
16 organization - - -

17 MS. ISHEE: No, Your Honor.

18 JUDGE GARCIA: - - - as I recall.

19 MS. ISHEE: The record documents that he
20 initially raised it on behalf of all of the cases that were
21 on the calendar on that particular day.

22 JUDGE STEIN: Yeah, but - - -

23 MS. ISHEE: And then - - -

24 JUDGE STEIN: - - - was any - - - and, you know,
25 I realize that this is a pleading stage really - - -



1 MS. ISHEE: Yes.

2 JUDGE STEIN: - - - but for standing purposes,
3 injury has to be alleged particularly. And I couldn't find
4 any particularized allegation as to any one of those cases,
5 in anything that was missing from the record that was
6 brought in, or any injury to anybody as a result of
7 something that was missing. So where is your allegation of
8 particularized injury here?

9 MS. ISHEE: So in the record on page 140, MHLS
10 discusses the injury in fact as a result of the burdens on
11 its attorneys in having to essentially not only review the
12 record when it is on the unit but then try, at the last
13 minute, in the course of, you know, thirty hearings on the
14 calendar, to compare what is there on the cart with what
15 they knew to be there when it was on the unit two days
16 earlier. And it's just a chaotic situation, Your Honor.

17 And I would just point out here, in terms of the
18 fluidity of the record, these are records that BPC, in
19 particular, any number of people are using - - -

20 JUDGE STEIN: So you don't allege that there has
21 to be any harm to your clients as a result of this?

22 MS. ISHEE: So for purpose - - - so for purposes
23 of MHLS's standing as an entity that is harmed by the lack
24 of a copy of records, we are not alleging that harm to our
25 clients is required. I do think it does result in harm to



1 our clients because they have a due process right,
2 certainly, to disclosure of whatever evidence the state is
3 relying on and the - - -

4 JUDGE STEIN: Well, but it's not that it's not
5 being disclosed; it's right there. Your argument is is
6 that - - - is that they should have to pay to copy the
7 entire thing, right, even - - - even if it's not all going
8 to be considered by the court.

9 MS. ISHEE: Well, the State has said - - - BPC
10 has said that it is offering these charts into evidence in
11 every single 9.31 hearing. So these are in fact - - -

12 JUDGE FAHEY: But did that - - -

13 JUDGE STEIN: Did you ever - - -

14 MS. ISHEE: - - - offered into evidence.

15 JUDGE STEIN: - - - object to that? Have you
16 ever objected - - -

17 MS. ISHEE: Yes, of course.

18 JUDGE FAHEY: I don't think that's - - - you can
19 correct me if I'm wrong, because you guys have done more of
20 these than I have, but what happens is is the file is put
21 in, the expert comes in. Usually it's the doctor or the
22 senior staff doctor who's in charge of it. There's a file
23 for a particular patient. That's marked in as a court
24 exhibit. Then the doctor makes reference to it when giving
25 testimony. But the file itself isn't put into evidence.



1 So the evidence is the doctor's testimony, based on the
2 file. As in most medical cases the file - - - the whole
3 thing isn't put into evidence because you'd have to redact
4 sixty or seventy percent of that, if you actually put that
5 into evidence. Most of it couldn't go into evidence. So -
6 - - and there would be no way for the court, since the - -
7 - since the - - - and now we're talking in the real world;
8 there's no way in the real world that you can bring all
9 that stuff there, have someone review all that stuff, and
10 then mark it into evidence in the context of thirty
11 retention hearings to be held on the morning in the Bronx
12 Hospital.

13 That's, it seems to me, an impossible task for
14 anyone to do that. The only thing that could be done is
15 the records could be forwarded electronically, if they were
16 in evidence and the parties could share them, or they were
17 required discovery. That seems to me a practical solution,
18 but there's no way that they can - - - they aren't used the
19 way that counsel is being - - - is characterizing them.

20 MS. ISHEE: So Your Honor, just to be clear, the
21 record in this case does document that it is BPC's policy
22 and practice to proffer the binders into evidence at every
23 one of these hearings - - -

24 JUDGE FAHEY: Right.

25 MS. ISHEE: - - - not as a court exhibit - - -



1 JUDGE FAHEY: Right, right.

2 MS. ISHEE: - - - but as evidence in the case.

3 JUDGE FAHEY: I understand that, but let me ask
4 you this. Is it your experience that it's done that way?

5 MS. ISHEE: Yes.

6 JUDGE FAHEY: Because my experience is they're
7 not put into evidence. My experience is they're put in as
8 a court exhibit and that the expert testifies, and based on
9 that expert's testimony in reference to a court exhibit,
10 that's the proof that determines whether or not the
11 standard is met to retain somebody or hold him overnight,
12 whatever.

13 MS. ISHEE: So Your Honor, in my experience, yes,
14 it is offered into evidence, it is often accepted into
15 evidence. And I do think that, as a practical matter, the
16 legislature envisioned that both the court and MHLS would
17 be provided with a copy of this record in advance so that
18 to facilitate making the hearing - - -

19 JUDGE FEINMAN: So for example, because my
20 experience is a little different, down at Kirby and
21 Manhattan Psychiatric, but - - - so for example, the court,
22 let's say the recommendation is to release, but the court
23 looks through the file, the entire binder, and can then
24 pull out portions of it and say, no, I'm going to retain
25 because of what I've read here, here, and here.



1 MS. ISHEE: Yes, Your Honor.

2 JUDGE FEINMAN: It may not even be what the - - -
3 you know, the expert is relying on.

4 MS. ISHEE: Yes, Your Honor, and the places where
5 that comes up most commonly is actually when a case is
6 appealed, when the trial judge has granted release and then
7 on appeal the Appellate Division - - -

8 JUDGE FEINMAN: Well, then the Appellate Division
9 is - - -

10 MS. ISHEE: - - - acting as fact finder, is
11 looking at the entire - - -

12 JUDGE FEINMAN: - - - exercising its own fact-
13 finding power, yeah.

14 MS. ISHEE: Right. So you know, as a practical
15 matter, it really is critical that everybody be looking at
16 the same evidence, that any time that one party is
17 proffering something into evidence that the other party
18 have a copy of it - - -

19 JUDGE RIVERA: So let me - - -

20 MS. ISHEE: - - - so that everybody knows what
21 they're talking about.

22 JUDGE RIVERA: Just to be clear on the - - -

23 MS. ISHEE: Sure.

24 JUDGE RIVERA: - - - injury in fact - - -

25 MS. ISHEE: Yes.



1 JUDGE RIVERA: - - - because I thought, in part -
2 - - I understand what you're arguing here, and - - -

3 MS. ISHEE: Yes.

4 JUDGE RIVERA: - - - I understood that. But I
5 thought you were also arguing that there are these staff
6 resources - - -

7 MS. ISHEE: Yes.

8 JUDGE RIVERA: - - - and money that are spent or
9 would be spent if they don't make the copies because, you
10 argue, other facilities do this.

11 MS. ISHEE: Yes.

12 JUDGE RIVERA: So you don't expend your resources
13 when you're dealing with those facilities.

14 MS. ISHEE: Right.

15 JUDGE RIVERA: This particular facility you do
16 have to; I thought that was part of the injury in fact.

17 MS. ISHEE: That's exactly right, and that is
18 referred to on page 140 - - -

19 JUDGE STEIN: Can you seek reimbursement from the
20 court for those expenses of copying, if they were your
21 obligation? And if so, how are you injured?

22 MS. ISHEE: Your Honor, it's the expenditure of
23 staff time and diversion of staff resources. Although the
24 monetary impact of having to make copies is a real thing it
25 is this diversion of staff that's really - - -

1 JUDGE RIVERA: Well, you may have an injury
2 that's mitigated, but for standing purposes, you haven't
3 been injured.

4 MS. ISHEE: Correct.

5 JUDGE RIVERA: Let me just, because I don't - - -
6 I'm sorry if you've said this before. Is BPC unique not
7 having electronic documents?

8 MS. ISHEE: In some respects, yes.

9 JUDGE RIVERA: Is this a widespread problem?

10 MS. ISHEE: So yes, Your Honor, in some respects.
11 You had earlier asked the Attorney General about electronic
12 records. MHLS did a study which showed that seventy-eight
13 percent of hospitals statewide are currently using
14 electronic records. We'd be happy to provide that
15 information by letter to the court, if this court would
16 find that beneficial. In those hospitals - - -

17 JUDGE RIVERA: Is it a public report?

18 MS. ISHEE: No, it was internal, but I'm happy to
19 provide it to the court if you need it.

20 In those cases it is virtually not an
21 administrative problem because at the push of a button you
22 can have a copy of all of these records. Also under the
23 CPLR, if you want to admit them into evidence, you
24 certainly do need to push that button and have a copy
25 present in court. Many of the hospitals provide them to



1 MHLs via email, encoded PDF, et cetera.

2 I know my time is up, but if - - -

3 CHIEF JUDGE DIFIORE: Thank you, counsel.

4 Counsel?

5 MR. GRIECO: I want to begin by addressing the -
6 - - I call it the fluidity problem that Judge Stein was
7 talking - - - talking about, the changing nature of the
8 record. It's precisely because of - - - because that is
9 the system used in this statutory scheme that the - - -
10 that the scheme is designed the way that it is.

11 I'd ask the court to remember that this is a - -
12 - a complete statutory scheme being - - - being construed.
13 And the legislature did not intend the BPC to be limited
14 from using events that have occurred right up to the moment
15 of the hearing. The only way that you could have a fixed
16 document that is frozen in time and given in advance would
17 be to violate the statutory scheme and limit BPC from using
18 records up to the moment of the hearing.

19 JUDGE RIVERA: No, but you could have ninety-
20 eight percent of that record and then you update it at the
21 hearing. I don't think that that's - - - I don't think
22 they're complaining about that; they would certainly
23 understand that. They're talking about records that
24 pre-date and that you have time to make photocopies of.

25 MR. GRIECO: And which they also have time to



1 make photocopies of, and that's the way that the
2 legislature - - -

3 JUDGE RIVERA: But - - -

4 MR. GRIECO: - - - intended it to work.

5 JUDGE RIVERA: I understand your argument on
6 that, but that's not what the statute says.

7 MR. GRIECO: I - - - I disagree.

8 JUDGE RIVERA: That's an argument you make to the
9 legislature, that it's over burdensome.

10 MR. GRIECO: No, I - - -

11 JUDGE RIVERA: But that's not what the statute
12 says.

13 MR. GRIECO: I disagree. The legislature did
14 intend the - - - MHLS to do it. MHLS is an organization
15 designed as a litigation entity, which BPC is not. BPC is
16 represented by the Attorney General's office.

17 JUDGE STEIN: Well, this gets into what is the
18 record that we're talking about because I should not
19 assume, but I should ask you, you would agree - - - would
20 you agree that the statute requires the record, as you've
21 defined it - - -

22 MR. GRIECO: Of course.

23 JUDGE STEIN: - - - to be provided copies and
24 provided to MHLS?

25 MR. GRIECO: Of course, Judge Stein.



1 JUDGE STEIN: Okay. So - - - so - - -

2 MR. GRIECO: Whatever "record" means, we have to
3 - - - we have to turn - - - the hospital has to turn over
4 five days before the hearing; nobody disputes that. This
5 is a statutory construction case and - - -

6 JUDGE FEINMAN: So let me ask you this. The
7 court's doing the hearing, and going back to, I think, the
8 scenario I suggested earlier with your adversary, they
9 don't - - - they want to reserve decision, as Judge Stein
10 said, or there's an issue later on where there's an appeal
11 because somebody's granted release and they want to go up
12 on a stay to the Appellate Division. These things happen.
13 They're the exception. And the court says I need the
14 record. Where do they get the record from? From you,
15 right?

16 MR. GRIECO: I - - - I don't know what is done in
17 that particular - - -

18 JUDGE FEINMAN: When I say "you" I mean BPC - - -

19 MR. GRIECO: Sure.

20 JUDGE FEINMAN: - - - or the relevant hospital.

21 MR. GRIECO: I - - - I don't know what is done in
22 that particular circumstance. I know that what Judge Fahey
23 was describing earlier is the way that I understand these
24 proceedings to happen is that - - -

25 JUDGE FEINMAN: Well, there may be a difference -



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MR. GRIECO: And there may be a difference - - -

JUDGE FEINMAN: - - - departmentally, um-hum.

MR. GRIECO: I would just - - - I would close by asking the court to - - - to remember that although it is our position that the legislature has designed a scheme that gives everyone the access they need at all times and that that was the intended - - - intended form of access, the ultimate question before this court is only whether MHLS has, in a mandamus proceeding, met the burden of showing that record of a patient, that specific term as defined mandamus MHL 9.01, that that specific term must be read to include the patient's clinical chart.

As I explained earlier, the regulation that they're relying upon to sort of make that intuitive leap from Article 9 to Article 33 and swap in a different statute, it is an incorrect reading of the statute, but even if it were debatably correct, it is not clearly correct, and mandamus relief is not available. Any other issue should be resolved in a particular patient's case.

JUDGE RIVERA: Counsel, if we disagreed on the merits, standing and on the merits, is there anything that would prevent the commissioner from passing a regulation indicating that the clinical record is not part of accompanying data?



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MR. GRIECO: No, OMH absolutely could do that.

JUDGE RIVERA: You could expressly have that kind of regulation.

MR. GRIECO: It - - - it could expressly do that. And in fact OMH - - - OMH is here today before this court affirmatively representing that it did not intend that regulation that MHLS is relying on to refer to Article 9. And we do not believe, given that there are no references to Article 9 in that regulation, that it should be read that way. But even if the court were to disagree with us on that, OMH could still solve the problem by simply adopting a new regulation that specifically defines the term "accompanying data" and therefore unwind that result, yes.

CHIEF JUDGE DIFIORE: Thank you, counsel.

(Court is adjourned)



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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of MATTER OF MENTAL HYGIENE LEGAL SERVICES v. ANITA DANIELS, No. 2, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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