THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0454

Jane Doe

v.

Lori Shibinette, Commissioner
New Hampshire Department of Health and Human Services

SUPREME COURT RULE 7 APPEAL FROM THE JUDGMENT OF THE MERRIMACK COUNTY SUPERIOR COURT

BRIEF OF THE APPELLANT

LORI SHIBINETTE, COMMISSIONER
NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES

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Fifteen Minute Oral Argument Requested

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QUESTION PRESENTED

Whether the superior court erred in denying the appellant's motion to dismiss and granting the appellee's petition for a writ of habeas corpus. DA91-103; DD52-55.[1]

[1] "T_" refers to the transcript of the September 21, 2020 habeas corpus hearing.
"DA__" refers to the appellant's appendix.
"DD__" refers to the appellant's addendum.

TEXT OF RELEVANT AUTHORITIES, CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The full text of RSA chapter 135-C and of the administrative rules cited in this brief is included in the appellant's appendix.

STATEMENT OF THE FACTS AND THE CASE

On August 25, 2020, private physicians at a private hospital completed an involuntary emergency admission ("IEA") petition and certificate seeking the appellee's IEA to the state mental health services system under RSA 135-C:28, I. DA13-19. On September 11, 2020, the appellee was transported and admitted to New Hampshire Hospital ("NHH"), a designated "receiving facility" under RSA 135-C:26, on an involuntary emergency basis. DA68. On September 15, 2020, the appellee received a probable cause hearing in the circuit court–district division ("circuit court") in accordance with RSA 135-C:31, I. DA61. At the probable cause hearing, appellee's counsel moved to dismiss based on an interlocutory decision issued by the federal district court. DA68-69; *see Doe v. Commissioner*, No. 18-cv-1039-JD, 2020 WL 2079310 (D.N.H. April 30, 2020) (*DiClerico*, J.). In that decision, the federal district court concluded that an "involuntary emergency admission" occurs under RSA 135-C:27-:33 when an IEA certificate is completed, not, as the appellant (hereinafter "the Commissioner" or "the Department") contended, when a person is actually involuntarily admitted to a receiving facility for mental-health treatment. *Id.* at *30-31. Appellee's counsel asserted that the IEA petition should be dismissed and the appellee released. DA68.

The judicial referee disagreed, noting that "there remains principled disagreement concerning whether the Circuit Court should follow Judge DiClerico's statutory analysis." DA68. She observed that RSA 135-C:30, which immediately precedes the provision governing probable cause hearings, "mandates that notice of important rights must be given to 'any

person sought to be involuntarily admitted for involuntary emergency admission' when the person is '[a]t the receiving facility,' not when the certificate is completed." DA68 (quoting RSA 135-C:30). She noted that the federal district court's "statutory analysis notably does not recite the entirety of the language of RSA 135-C:30, omitting that this notice occurs 'at the receiving facility.'" DA68. She further observed that RSA 135-C:24, a separate notice provision, requires that notice be given "[b]efore any judicial hearing commences . . . ." DA68. She thus concluded that, under "the plain and ordinary language of the statute itself . . . , including all relevant provisions within the statute, an argument may be made that 'admission' for the purposes of RSA 135-C:31 occurs when the person reaches the designated receiving facility." DA68-69 (internal citation omitted). She nonetheless deferred to the presiding judge to determine whether "an 'admission' occurs when the IEA certificate is completed or when the individual arrives at the designated receiving facility." DA69.

The judicial referee also found that probable cause existed for appellee's IEA and disposed of other arguments. DA67-71. She issued her recommendation on September 16, 2020. DA71. That same day the Court (Spath, J.) denied the appellee's motion to dismiss, concurred with the finding of probable cause, and granted the IEA petition. DA71-72.

On September 16, 2020, appellee's counsel filed an ex parte petition for writ of habeas corpus with the Merrimack County Superior Court. DA4-11. The petition sought the appellee's release primarily based on the federal district court's interpretation of the term "involuntary emergency admission." DA7-11. The superior court denied the appellee's request for an ex parte order and set a habeas corpus hearing for September 21, 2020.

DA398. Prior to the hearing, the Commissioner moved to dismiss, arguing that, under RSA 135-C:27-:33, an "involuntary emergency admission" means an actual, physical admission to a receiving facility within the state mental health services system. DA91-103. The parties advanced additional argument during the September 21, 2020 hearing.

In a decision noticed on September 24, 2020, the trial court agreed with the appellee's interpretation of the statutes, denied the Commissioner's motion to dismiss, granted the appellee's petition for writ of habeas corpus, and ordered the appellee released from NHH. DD52-55. This appeal followed.

SUMMARY OF THE ARGUMENT

The trial court's interpretation of the term "involuntary emergency admission" is incorrect and should be reversed. An "involuntary emergency admission" occurs within the meaning of RSA 135-C:31, I, when a patient is physically present at, and admitted to, a "receiving facility" within the "state mental health services system." The unambiguous statutory text supports this construction. The term "admission," particularly as used in the hospital context, is commonly understood to mean the physical admission of a patient to a particular facility. The "state mental health services system" is a tangible system of state-run treatment facilities and private treatment facilities that voluntarily contract with the Department to provide mental-health treatment. These facilities are designated as "receiving facilities" under the statutory scheme and subject to regulation by the Department. RSA 135-C:3; RSA 135-C:26. Thus, an "involuntary emergency admission" under RSA 135-C:31, I, and under RSA chapter 135-C more generally, refers to the physical admission of a patient to a "receiving facility" on an involuntary basis for mental health treatment.

The statutory structure confirms this construction. RSA 135-C:27-:33 set forth a sequential process for IEAs. Those provisions that refer to events occurring before a patient is admitted to a receiving facility consistently use language indicating that the IEA has not yet occurred but will at some point in the future. RSA 135-C:28, I; RSA 135-C:29, I; RSA 135-C:30. In contrast, those provisions that refer to events that occur once a patient is at a receiving facility use language indicating that an IEA is imminent or has already occurred. RSA 135-C:30; RSA 135-C:31. This

shift in usage demonstrates that the legislature did not intend to deviate from the common usage of the word "admission" in the context of an IEA, and that events that occur prior to physical admission to a receiving facility—including the completion of an IEA petition and certificate—do not constitute an IEA.

The Commissioner has also promulgated rules under RSA chapter 135-C defining an "involuntary emergency admission" as "admission to a receiving facility . . . ." *N.H. Admin. R.*, He-M 613.02(l); *see also N.H. Admin. R.*, He-M 612.02(g). This definition has existed since at least 1990. DA140, 162, 191, 219. "It is well settled that the legislature may delegate to administrative agencies the power to promulgate rules necessary for the proper execution of laws." *In re Mays*, 161 N.H. 470, 473 (2011). The administrative rules promulgated pursuant to the Commissioner's express authority under RSA chapter 135-C further reflect the unambiguous understanding that an "involuntary emergency admission" occurs *to* a "receiving facility" and is not an abstract concept.

RSA chapter 135-C further authorizes the Department to limit admission to the state mental health services system based on the availability of resources. *See* RSA 135-C:13. The Commissioner has promulgated N.H. Admin. R. He-M 405.06 pursuant to that authority, which specifies that a receiving facility may "refuse admission of a person sent to such facility" when "no beds are available at the time of admission." This Court has likewise recognized that a state agency may reasonably restrict access to services under a public-benefit system based on available resources, including legislative appropriations. *See Petition of Strandell*, 132 N.H. 110, 115-22 (1989).

The trial court's and federal district court's construction of RSA chapter 135-C is inconsistent with the statutory language, structure, and context, and the Department's administrative rules. It undermines RSA chapter 135-C's express purposes and policy objectives, and potentially harms the very individuals RSA chapter 135-C is intended to serve. It creates potential constitutional problems not present under the plain language of RSA chapter 135-C. It also threatens to render the state mental health services 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.

The trial court's and federal district court's construction of RSA chapter 135-C is accordingly not reasonable and this Court should reject it. If, however, this Court believes RSA chapter 135-C is somehow ambiguous as to the timing of an "involuntary emergency admission" for the purposes of RSA 135-C:31, I, it should still defer to the Department's longstanding construction because that interpretation does not "clearly conflict[] with the express statutory language" nor "is [it] plainly incorrect." *In re Town of Seabrook*, 163 N.H. 635, 644 (2012). The legislative history also consistently supports the Department's longstanding construction.

For all of these reasons, the trial court erred in adopting the federal district court's construction of RSA chapter 135-C. A careful statutory construction analysis reveals that interpretation to be incorrect. This Court should accordingly reverse.

STANDARD OF REVIEW

This appeal requires this Court to interpret the term "involuntary emergency admission," as used in RSA 135-C:31, I, and determine when an "involuntary emergency admission" to the "state mental health services system" occurs under RSA 135-C:27-:33. This Court reviews questions of statutory interpretation *de novo*. *Petition of Carrier*, 165 N.H 719, 721 (2013). In conducting this review, this Court will defer to an agency's interpretation of a statute it administers unless that interpretation "clearly conflicts with the express statutory language or is plainly incorrect." *In re Town of Seabrook*, 163 N.H. at 644.

ARGUMENT

I. AN "INVOLUNTARY EMERGENCY ADMISSION" UNDER RSA 135-C:31, I, OCCURS WHEN A PATIENT IS PHYSICALLY ACCEPTED AT A "RECEIVING FACILITY" FOR MENTAL-HEALTH TREATMENT.

A. Legal standard.

In interpreting RSA 135-C:31, I, this Court "first look[s] to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning." *Petition of Carrier*, 165 N.H. at 721. The Court does "not consider words and phrases in isolation, but rather within the context of the statute as a whole." *Id.* (citation omitted). This enables the Court "to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." *Id.* (citation omitted).

B. The State Mental Health Services System.

Before considering the specific language of RSA 135-C:31, I, it is helpful to understand the statutory context in which RSA 135-C:31, I exists. RSA chapter 135-C [New Hampshire Mental Health Services System] "establishes a system of mental health facilities in New Hampshire and provides for procedures used in the admission, maintenance, and release of individuals involved in that system." *In re B.T.*, 153 N.H. 255, 258 (2006). It authorizes the Department to "directly operate and administer any program or facility which provides, or which may be established to provide, services to mentally ill . . . persons" and to "enter into a contract with any individual, partnership, association, public or private, for profit or

nonprofit, agency or corporation for the operation and administration of any such program or facility." RSA 135-C:3.

"New Hampshire hospital and any other facility approved by the commissioner shall be designated as receiving facilities for the care, custody, and treatment of persons subject to involuntary admissions." RSA 135-C:26, I. "Any community mental health program, hospital, community residence, nursing home, or other treatment or sheltered care facility may apply to the commissioner for designation." *Id.* "No designation shall occur without the express written consent of the administrator of the facility to be designated." *Id.*

The state mental health services system is, therefore, a statutorily defined system of both public treatment facilities and private treatment facilities that have voluntarily contracted to become part of the system.

C. Involuntary Emergency Admissions to Treatment Facilities in the State Mental Health Services System.

"A person may be involuntarily admitted into an approved treatment facility by either [an IEA] or nonemergency involuntary admission . . . ."" *In re B.T.*, 153 N.H. at 258. RSA 135-C:27-:33 lay out a sequential process for IEAs:

- RSA 135-C:27 contains the criteria for an IEA.
- RSA 135-C:28, I describes the paperwork to be completed—an IEA petition and certificate—before a "petitioner" may seek another's IEA.
- RSA 135-C:29 governs transport of the person "to be admitted" to the receiving facility identified in the IEA petition and certificate.

- RSA 135-C:29-a permits rescission of IEA certificates after they are completed, but before a person is taken into custody for transport to a receiving facility.
- RSA 135-C:30 governs the notice of rights a person "sought to be involuntarily admitted for involuntary emergency admission" must receive "[a]t the receiving facility."
- RSA 135-C:31, I governs the "involuntary emergency admission" hearing that occurs "[w]ithin 3 days *after* an involuntary emergency admission." (Emphasis added.)[2]
- RSA 135-C:32 governs the length of an IEA.
- RSA 135-C:33 governs discharge from an IEA.

Because the legislature has not defined the term "involuntary emergency admission" as used in this process, this Court "look[s] to its common usage, using the dictionary as guidance." *Appeal of Town of Lincoln*, 172 N.H. 244, 248 (2019) (citation and quotation marks omitted). The Court "will follow common and approved usage except where it is apparent that a technical term is used in a technical sense." *State v. Labrie*, 172 N.H. 223, 241 (2019) (citation omitted); *see also* RSA 21:2.

"Involuntary" means "not voluntary," "not done of one's own free will," and "not done by choice." Webster's Deluxe Unabridged Dictionary at 967 (2d Ed. Simon & Schuster 1979). "Emergency" means "a sudden or unexpected occurrence or combination of occurrences demanding prompt action." *Id.* at 593. "Admission" means "the act or practice of admitting, or

[2] Under RSA 135-C:31, III, a person may waive this probable cause hearing if, in doing so, the person acknowledges that "such a waiver shall result in his or her admission on an emergency basis for a period not to exceed 10 days, not including Saturdays and Sundays, except as specified in RSA 135-C:32."

allowing to enter." *Id.* at 26. In the hospital context, "admission" is technical term meaning "the act or process of accepting someone into a hospital, clinic, or other treatment facility as an inpatient." Admission, Merriam-Webster, https://www.merriam-webster.com/dictionary/admission (last visited Dec. 29, 2020).

An "involuntary emergency admission" is, therefore, the act or practice of accepting someone into a treatment facility as an inpatient against her will because of a sudden or unexpected occurrence demanding prompt action. The "receiving facility" designated in the IEA petition and certificate is the "treatment facility" "within the state mental health services system" "designated to accept for care, custody, and treatment" of the person whose IEA is being sought. RSA 135-C:2, XIV. Thus, an IEA occurs when a "receiving facility" within the "state mental health services system" accepts a patient for mental-health treatment on an inpatient basis against his or her will because of a sudden or unexpected occurrence demanding prompt action.

Use of the term "involuntary emergency admission" within the statutory scheme reinforces this construction. RSA 135-C:28-:30, which govern processes that occur before an IEA happens, use the future perfect tense to describe the admission. RSA 135-C:28, I, states that the admission "shall be to the state mental health services system," speaks of "the person to be admitted," and specifies that "[t]he admission shall be made to the [receiving] facility which can best provide the degree of security and treatment required by the person and shall be consistent with the placement principles set forth in RSA 135-C:15." RSA 135-C:29, I, speaks of the person to be delivered to the receiving facility as "the person to be

admitted." RSA 135-C:30 specifies that "[a]t the receiving facility, any person sought to be involuntarily admitted for involuntary emergency admission" shall be given oral and written notice of certain rights. These provisions contemplate that an IEA has not yet occurred, but will take place at a future time or, in the case of RSA 135-C:30, imminently. *See Everett v. Ingraham*, 186 A.2d 798, 800 (Conn. 1962) ("'Shall have been' is the future perfect tense, which represents an event as completed in future time.").

In contrast, RSA 135-C:31, the statute mandating probable cause hearings, refers to an IEA as having already occurred. It reads: "[w]ithin 3 days *after an involuntary emergency admission*, not including Sundays and holidays, and subject to the notice requirements of RSA 135-C:24, 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 (emphases added). This shift in description is noteworthy: a probable cause hearing must occur within three days *after* an "involuntary emergency admission" to the "state mental health services system"—*i.e.*, three days after a patient is arrives at, and is admitted to, a "receiving facility" for mental-health treatment on an involuntary basis.

RSA chapter 135-C also confers broad authority on the Commissioner to promulgate rules relative to eligibility to receive services within the state mental health services system and admission to that system. *See, e.g.*, RSA 135-C:4, III; RSA 135-C:5, I; RSA 135-C:13. Under that authority, the Department has promulgated regulations confirming that an IEA occurs to a receiving facility, and not within a private hospital emergency department ("ED") upon completion of an IEA certificate. "It is

well settled that the legislature may delegate to administrative agencies the power to promulgate rules necessary for the proper execution of laws." *In re Mays*, 161 N.H. at 473.

New Hampshire Administrative Rule He-M 613, which governs admissions to NHH, defines "involuntary emergency admission" as "admission *to a receiving facility* on an involuntary, emergency basis, pursuant to RSA 135-C:27-33, of an individual who is in such mental condition as a result of a mental illness as to pose a likelihood of harm to self or others." *N.H. Admin. R.*, He-M 613.02(l) (emphasis added). N.H. Admin. R. He-M 612, which governs transfers between receiving facilities, contains a similar definition. *See N.H. Admin. R.*, He-M 612.02(g). N.H. Admin. R. He-M 405 specifies that a receiving facility may "refuse *admission* of a person sent to such facility" when "no beds are available at the *time of admission*." *N.H. Admin. R.*, He-M 405.06 (emphases added). These provisions confirm that an IEA occurs under RSA 135-C:27-:33 when an individual is physically accepted at, and admitted to, a receiving facility.

This understanding of the phrase "involuntary emergency admission" has existed for decades. RSA chapter 135-C went into effect in 1986. Since that date, it has defined "state mental health services system" and "receiving facility" using language virtually identical to the current language. *See* RSA 135-C:2, XIV (1986); RSA 135-C:3 (1986); RSA 135-C:26 (1986). The IEA process set forth in the 1986 version of RSA chapter 135-C is largely identical to the current process. *See* RSA 135-C:27-:33 (1986). The 1990 version of He-M 613, and every subsequent version of that regulation, has defined an IEA as "admission of a person *to a receiving*

facility on an involuntary, emergency basis . . . .” *See* DA140 (emphasis added); *see also* DA162, 191, 219. And the understanding that an IEA means the *physical* admission of a patient to a receiving facility dates back to at least 1981, when the prior statutory regime, RSA chapter 135-B, was in effect. *See* DA111 (“Designated receiving facilities shall not refuse *admission* to said facility if appropriate committment [sic] procedures as defined in RSA 135-B:19-22 are followed. *Physical presence shall determine admission*.” (emphases added)).

Thus, the statutory language, context, and structure, and the Department’s longstanding administrative rules demonstrate that an IEA to the state mental health services system occurs when a patient is present at, accepted by, and therefore admitted to, a receiving facility. The appellee was present at, accepted by, and admitted to NHH on September 11, 2020. Within three days of that admission, excluding Sundays and holidays, she received a probable cause hearing under RSA 135-C:31, I. That hearing was timely under the statute and her IEA was accordingly lawful.

D. The trial court’s construction conflicts with this unambiguous construction.

The trial court and federal district concluded that an IEA occurs when a private actor at a private hospital executes an IEA certificate for a patient in the private hospital’s ED. Under this construction, the terms “involuntary emergency admission” and “state mental health services system” are abstract concepts, such that a person may be “admitted” to the “state mental health services system” by private persons who do not work

within that system without being physically present at a "receiving facility" and therefore without receiving mental-health treatment.

This interpretation disregards the common meaning of the term "admission" in the hospital context. It also disregards the fact that the "state mental health services system" is a system of treatment facilities that the Department regulates and controls; it is not a system controlled by private actors who do not work within the system and who can force receiving facilities to intake patients they lack the capacity and resources to treat. It further ignores that the Department has defined an IEA as an admission "to a receiving facility" pursuant to its express rulemaking authority under RSA chapter 135-C. *N.H. Admin. R.*, He-M 613.02(l).

The trial court's and federal district court's construction also effectively nullifies other important provisions of RSA chapter 135-C. The judicial referee correctly noted that one such provision is RSA 135-C:30, which requires that a patient be provided immediate oral notice and subsequent written notice "[a]t the *receiving facility*" of certain rights, including the right to counsel and that IEAs are limited to ten business days absent extension. (Emphasis added.) To have any effect, these notices must occur *before* a patient receives a probable cause hearing under RSA 135-C:31 and before the ten-day IEA period expires.

Under the trial court's and federal district court's construction, however, many patients will receive probable cause hearings in private hospital EDs and then remain there for the entire ten-day IEA period. Because they are not "[a]t the receiving facility," these patients will not receive RSA 135-C:30 notices. The trial court's and federal district court's construction will similarly nullify numerous rights set forth in RSA 135-

C:55-:60 [Rights of Clients in Mental Health Services System], which "only apply . . . to those persons who have been admitted to receiving facilities." RSA 135-C:55. A construction that functionally reads multiple important provisions out of a statute is not reasonable. *O'Donnell v. Allstate Indem. Co.*, 173 N.H 295, 300 (2020) ("The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect." (quotation omitted)).

The trial court's and federal district court's construction also conflicts with RSA 135-C:13. Under that provision, "[a]dmission to the state mental health services system and access to treatment and other services within the system shall be contingent upon the availability of appropriations." RSA 135-C:13 further states that, "[i]f necessary services are not available, each agency responsible for the provision of such services shall notify the department of the need for them, and the department shall utilize such information for budgetary planning purposes." The Commissioner is required under RSA 135-C:13 to "adopt rules, pursuant to RSA 541-A, relative to the eligibility of severely mentally disabled persons to receive state services and the service guarantees for clients in the state system." Under the Department's current rules, a receiving facility may "refuse admission of a person sent to such facility" when "there are no beds available at the time of admission." *N.H. Amin. R.*, He-M 405.06(a).

The statutory and regulatory framework thus expressly contemplate that the state mental health services system may not always be able to accommodate every individual seeking mental-health services. The trial court and federal district court have effectively read this limitation out of

the statutory and regulatory scheme. It is not the place of the judiciary to render this policy judgment. "[C]ourts do not question the wisdom or expedience of a statute" and "[n]o rule of public policy is available to overcome [a] statutory rule." *Scheffel v. Krueger*, 146 N.H. 669, 672-73 (2001) (citation and quotation marks omitted). Rather, courts must "interpret legislative intent from the statute as written and [may] not consider what the legislature might have said or add language that the legislature did not see fit to include." *Appeal of Algonquin Gas Transmission, LLC*, 170 N.H. 763, 770 (2018).

This Court has moreover rejected the proposition that a public-benefit system must be expanded to provide immediate services to every potentially eligible person, particularly when the provision of services is contingent upon current and future legislative appropriations. In *Petition of Strandell*, this Court observed that, "[a]s a practical matter," the ability of the former Division of Mental Health and Developmental services to provide rehabilitative services under RSA 171-A:13 "may at some level be limited by the availability of resources." 132 N.H. at 115. The Court noted that "where the amount of funds appropriated by the legislature was insufficient to provide services to all beneficiaries contemplated [under the statutory scheme], it was within the director's authority to create a reasonable priority system to facilitate the distribution of both appropriated funds and of any additional funds that may be available by supplemental appropriations, although the system established might result in a particular client not immediately receiving services." *Id.* at 120. The Court emphasized that because "the Division might still find itself in the position of being unable to provide services to all eligible [persons], even if

it . . . employed all potential means of obtaining funds, including seeking, or for that matter obtaining, a supplemental appropriation from the legislature," it could establish a "priority waiting list" for applicants for those services as "a necessary and reasonable means of implementing the statutory mandate . . . to the fullest extent possible in an environment of limited resources." *Id.* at 122.

This reasoning applies with equal force to RSA chapter 135-C. That chapter gives the Department the flexibility to provide mental-health services to those who need it within the limits of the resources provided. The trial court's and federal district 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. This runs contrary the well-established proposition "that the executive branch may expend public funds to the extent, and for such purposes, as those funds may have been appropriated by the legislature." *Id.* at 115.

In resisting this conclusion, the hospitals and class plaintiffs have taken the position in the federal litigation that a person is within state custody upon completion of an IEA certificate. The hospitals thus contend that they are required under RSA chapter 135-C to hold patients subject to IEA certificates until a bed becomes available at a receiving facility.[3] While

[3] The hospitals have contended in the federal litigation that the Department directed them to hold patients on IEA certificates. The appellee relied on this contention in the proceedings below. This contention has never been proven in this case or the federal action, and the Commissioner has taken the consistent position that a patient subject to an IEA petition and certificate is not in state custody once protective custody under RSA 135-C:28,

the plaintiff class agrees with the hospitals as to the timing of an IEA, it contends that the hospitals cannot indefinitely detain patients in private hospital EDs, and that the State must therefore provide those patients with probable cause hearings while they remain there.

These arguments are legally erroneous. RSA chapter 135-C is precise about when and under what circumstances a patient is within state custody. Under RSA 135-C:28, III, a law enforcement officer may place a person in protective custody when there is "reasonable suspicion to believe that the person may be suffering from a mental illness and probable cause to believe that unless the person is placed in protective custody the person poses an immediate danger of bodily injury to himself or others . . . ." This period of protective custody occurs *before* an IEA is ordered and lasts, at most, for six hours. *See* RSA 135-C:28, III. A patient is not placed within state custody again until a law enforcement officer takes that patient into custody for delivery to a receiving facility. *See* RSA 135-C:29, I-II; RSA 135-C:62. No provision of RSA chapter 135-C contemplates that the completion of an IEA certificate alone places a patient within state custody, much less authorizes or requires a private hospital to detain a person subject to an IEA certificate, such that other procedural requirements are triggered.

The recent decision by the Massachusetts Supreme Judicial Court ("SJC") in *Massachusetts General Hospital v. C.R.* is instructive. *See* 142 N.E.3d 545 (Mass. 2020). In that case, the SJC construed Massachusetts General Laws ("MGL") chapter 123, Massachusetts' counterpart to RSA

III expires until law enforcement takes the patient into custody for transport to a receiving facility pursuant to RSA 135-C:29, I. Rather, the patient remains within the care, custody, and control of the private hospital.

chapter 135-C. *See id.* at 547-48. Like RSA chapter 135-C, MGL chapter 123 contemplates that persons in need of mental-health treatment can be admitted to one of a system of public and private "facilities," which are "heavily regulated" by the Massachusetts Department of Mental Health. *See Mass. Gen. Hosp.*, 142 N.E.3d at 550-51 (citing MGL ch. 123, §§ 1, 12; 104 Code Mass. Regs. § 27.02 (2019)).

Under MGL 123, § 12(a), a qualified mental-health professional or, in limited circumstances, a law enforcement officer who "believes that failure to hospitalize a person would create a likelihood of serious harm by reason of mental illness" may restrain or authorize the restraint of that person and "apply for the hospitalization of such person for a 3-day period at a public facility or at a private facility authorized for such purposes by the department [of mental health]." Section 12(b) "provides for a more thorough evaluation of the patient that must be conducted within three days." *Mass. Gen. Hosp.*, 142 N.E.3d at 547. At issue was "whether the three-day window under . . . § 12(b), begins running when the patient is initially restrained under . . . § 12(a)," or "whether that three-day period only begins when a patient is admitted to a facility for purposes of § 12(b)." *Id.*

The SJC held that the three-day period under § 12(b) did not begin to run until a patient was admitted to a "facility" within the Massachusetts mental health system. *Id.* The SJC concluded that "[a] comprehensive reading of [§§] 12(a) and (b) . . . demonstrates that these subsections describe different tasks by different evaluators applying different standards," and that these "distinct phases . . . should not be collapsed into one." *Id.* at 553. The SJC acknowledged "some disconnect between the

intent of the Legislature to provide for a short period of restraint, preliminary evaluation, and application to an appropriate facility pursuant to § 12(a), and the reality medical professionals face when trying to find a placement for psychiatric patients, particularly the most vulnerable ones." *Id.* at 554. The SJC noted, however, that certain factors had "unexpectedly extended the period of time necessary to apply to a facility for admission," including "the difficulty of placing patients with high behavioral acuity or significant comorbidities," "a shortage of beds or single-occupancy rooms," and "a shortage of psychiatrists or other physicians who staff inpatient facilities with resources for these types of patients." *Id.*

The SJC emphasized that the legislature "has been made aware of ED boarding times and the actions [the department of mental health] has taken to address them," but had not yet "impose[d] a specific time period on § 12(a) as it further evaluates the complex problem of ED boarding." *Id.* at 556. The SJC observed that, "absent constitutional violations, [it would] not impose a specific time deadline into a statute where no such deadline has been included." *Id.* at 557. The SJC concluded that the patient's constitutional rights had not been violated because there was "no indication in the record that the period of restraint was any longer than was necessary to find the patient an appropriate facility for evaluation." *Id.* at 559.[4]

Like the Massachusetts statutes, RSA 135-C:27-:33 contemplate that the act of filling out an IEA petition and certificate is separate and distinct from an IEA to a receiving facility within the state mental health services

[4] The SJC otherwise declined to "decide constitutional questions unnecessarily or prematurely." *Mass. Gen. Hosp.*, 142 N.E.3d at 558.

system. *Compare* RSA 135-C:28 *with* RSA 135-C:30-:31. Only physical arrival at and admission to a receiving facility triggers a notice of rights under RSA 135-C:30, a probable cause hearing under RSA 135-C:31, the ten-day limitation on IEAs under RSA 135-C:32, and the rights specified in RSA 135-C:55-:60. This Court, like the SJC, should decline to import timeframes applicable only *after* a person is physically admitted to a "receiving facility" into processes that take place before an IEA has occurred.

Indeed, doing so would arguably *create* unnecessary constitutional problems. Unlike RSA chapter 135-C, MGL 123, § 12(a) specifically authorizes private hospitals to restrain patients indefinitely while awaiting an open bed. The SJC suggested that the lack of an expiration for the restraint authorized in § 12(a) raised potential constitutional questions. *Mass. Gen. Hosp.*, 142 N.E.3d at 557-60. No similar questions exist under RSA chapter 135-C. RSA 135-C:28, III contemplates protective custody for up to six hours. If, at that point, law enforcement cannot take a patient into custody for transport or if a patient is not actually admitted to a receiving facility, state custody ends.

Thus, RSA chapter 135-C, by its plain terms, does not implicate the larger constitutional questions the SJC suggested might arise under MGL chapter 123. The atextual construction adopted by the trial court and federal district court, on the other hand, directly raises those concerns. Under that construction, RSA chapter 135-C authorizes private hospitals to detain patients subject to IEA certificates and hold them in state custody indefinitely on the strength of the certificate alone. One would think that if the legislature intended such a significant curtailment of individual liberty,

it would have done so expressly. After all, the legislature "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Assoc'ns*, 532 U.S. 457, 468 (2001). Moreover, numerous courts have held that statutes involving a deprivation of liberty—including civil commitment statutes—must be strictly construed. *See, e.g.*, *Covington v. Harris*, 419 F.2d 617, 623 (D.C. Cir. 1969); *In re Detention of Hawkins*, 238 P.3d 1175, 1177 (Wash. 2010); *Commonwealth v. Gillis*, 861 N.E.2d 422, 425 (Mass. 2007). Similarly, this Court, "whenever reasonably possible, . . . construe[s] a statute so as to avoid bringing it into conflict with the constitution." *State v. Paul*, 167 N.H. 39, 44-45 (2014).

The trial court's and federal district court's interpretation of RSA chapter 135-C is not a strict construction of that chapter. Rather, the trial court and federal district court have read into RSA chapter 135-C a massive curtailment of individual liberty that does not exist in the express language of the statutory scheme. In doing so, they have created potential constitutional problems not implicated by the language of the statute itself. Not only is it "reasonably possible" to construe RSA chapter 135-C to avoid those constitutional problems, but the express statutory language requires it.

E. The trial court's and federal district court's construction of RSA 135-C:27-:33 is unworkable and leads to absurd, unjust results.

The trial court's and federal district's construction of RSA 135-C:27-:33 is also unworkable in practice and will lead to absurd and unjust

results. *Appeal of Algonquin Gas Transmission, LLC*, 170 N.H at 770 (a court must "construe all parts of the statute together to effectuate its overall purpose and avoid an absurd or unjust result"). While that construction appears to require that the Department provide probable cause hearings to patients in private EDs, it says nothing about how this will be done. RSA chapter 135-C does not allow the Department to regulate private healthcare providers absent their consent. *See* RSA 135-C:5, I (allowing the Department to regulate mental-health services "provided under contract with the department"); RSA 135-C:26, I (conditioning designation as a receiving facility upon "the express written consent of the administrator of the facility to be designated"). The Department cannot mandate that private hospitals accommodate probable cause hearings, much less in a particular way, or require that a hospital transport a patient to or from a probable cause hearing. Nor can the Department dictate how the circuit court system facilities probable cause hearings.

A finding of probable cause would only compound these problems. If no bed were available at a receiving facility when the circuit made such a finding, then a patient would have to remain in a private hospital ED. These environments do not typically provide services for those with severe mental-health concerns in need of involuntary admission. Thus, a patient could spend the entire ten-day IEA period in a private ED without receiving such treatment. A patient in a private hospital ED will also not receive the

notice of rights RSA 135-C:30 requires and will not be afforded the rights contained in RSA 135-C:55-:60.[5]

Perhaps cognizant of this fact, the hospitals have contended in the federal litigation that the Department must immediately remove a patient from a private hospital ED upon completion of an IEA certificate. They have taken this position fully aware that the state mental health services system lacks capacity and that there will often be nowhere to transport a patient at the time the IEA certificate is completed. In doing so, the hospitals have ignored that local law enforcement, not the Department, is responsible for taking patients into custody and transporting them to receiving facilities. RSA 135-C:29, I; RSA 135-C:62; RSA 135-C:63. They have ignored that, under RSA 135-C:13 and this Court's precedents, the Department has permissibly regulated admission to the state mental health services system in light of limited resources and capacity. *See Petition of Strandell*, 132 N.H at 120-22. And, more fundamentally, they have ignored that their atextual construction is at least arguably *more* harmful to the individuals RSA chapter 135-C is intended to serve than the Department's construction, under which a private hospital is under no state-imposed obligation to detain a patient subject to an IEA certificate when a bed is unavailable at a receiving facility. For these additional reasons, the hospitals' construction is absurd and unjust. *See Appeal of Algonquin Gas Transmission, LLC*, 170 N.H at 770.

[5] This result will undoubtedly face attack through habeas corpus actions on the basis that RSA 135-C:27-:33 does not contemplate involuntary ten-day detention in a private facility that does not provide mental-health services.

F. The trial court's construction undermines RSA chapter 135-C's purpose and policy objectives.

The purpose of RSA chapter 135-C is "to enable the department of health and human services to: (a) [e]stablish, maintain, and coordinate a comprehensive, effective, and efficient system of services for persons with mental illness; (b) [r]educe the occurrence, severity and duration of mental, emotional, and behavioral disabilities; [and] (c) [p]revent mentally ill persons from harming themselves or others." RSA 135-C:1, I. The trial court's and federal district court's interpretation undermines each of these purposes.

First, as discussed, the trial court's and federal district court's interpretation divests the Department of control over the state mental health system and admission to that system. Instead, admission to the system is unlimited and can occur based solely on the private act of a private employee at a private hospital. This runs contrary to the statutory and regulatory language and will ultimately harm patients in need of mental-health treatment. The hospitals' argument that they may force the Department to take a patient into custody and transport that patient even when no bed is currently available at a receiving facility, if accepted by this Court, would only exacerbate this harm.

Second, the trial court's and federal district court's interpretation risks *increasing* "the occurrence, severity and duration of mental, emotional, and behavioral disabilities." RSA 135-C:1, I(b). It will either result in the circuit court holding probable cause hearings in private hospital EDs, after which many patients will remain detained without treatment, or in courts ordering patients released from private hospital EDs

when such hearings do not occur. This case highlights both possibilities, neither of which is likely to reduce the "occurrence, severity and risk of mental, emotional, and behavioral disabilities."

Third, the trial court's and federal district court's interpretation is likely to increase the risk that mentally ill persons will harm themselves or others. If probable cause hearings cannot be provided in private hospitals in a timely manner, persons who are a danger to themselves or others may be released from private hospital EDs by the court system without treatment. Private hospitals, which are governed by other federal and state laws, may otherwise be required to provide those patients treatment. Rather than allowing private physicians to exercise their medical judgment on a case-by-case basis, this construction effectively immunizes hospitals by permitting the detention of patients in private hospital EDs following probable cause hearings without mental-health treatment for the duration of their IEA.

RSA chapter 135-C also seeks "to provide to persons who are severely mentally disabled adequate and humane care which, to the extent possible while meeting the purposes of habilitation and treatment, is: (a) [w]ithin each person's own community; (b) [l]east restrictive of the person's freedom of movement and ability to function normally in society while being appropriate to the person's individual capacity; [and] (c) [d]irected toward eliminating the need for services and promoting the person's independence." RSA 135-C:1, II. Under RSA chapter 135-C, "mental illness in and of itself is insufficient to involuntarily admit any person into the mental health services system." RSA 135-C:1, III. The trial

court's and federal district court's interpretation undermines these policy objectives in several ways.

First, it effectively forces statewide centralization of emergency mental health treatment, which will result in patients being transported outside of their communities to receive necessary care. Second, it restricts a patient's freedom of movement and ability to function normally in society without concurrently providing that patient with the mental-health treatment and services necessary to relax those restrictions, eliminate the need for services, and work toward independence. Third, it diminishes a receiving facility's power to independently review an IEA petition and certificate to determine whether the criteria in RSA 135-C:27 and :28 are met. *See, e.g.*, *N.H. Admin. R.*, He-M 613.04. This eliminates a crucial check from the current system that helps ensure "mental illness in and of itself" is not a basis for an IEA.

In contrast, the Department's interpretation permits the agency to operate the state mental health services system in a comprehensive, efficient, and effective manner, consistent with the statutory and regulatory language and within available resources. It allows the Department to dedicate those resources toward "[r]educ[ing] the occurrence, severity and duration of mental, emotional, and behavior disabilities" of those patients within its care, custody and control, and to prevent those patients "from harming themselves or others." RSA 135-C:1, I. It helps ensure that patients receive treatment in clinically appropriate environments within their communities so as to eliminate the need for services and promote patient independence. RSA 135-C:1, II. It also incentivizes private facilities, which the legislature viewed as integral to ensuring that the state

mental health services system functions effectively, *see* RSA 135-C:3; RSA 135-C:26, to apply to become receiving facilities or to increase the number of receiving facility beds. This in turn helps ensure that mental illness is not in and of itself the basis for seeking an involuntary emergency admission. RSA 135-C:1, III. The Department's interpretation thus promotes the Department's ability to "establish, maintain, implement, and coordinate" the state mental health services system, RSA 135-C:3, "in an environment of limited resources," *Petition of Strandell*, 132 N.H. at 122.

II. IF THE COURT BELIEVES THE TERM "INVOLUNTARY EMERGENCY ADMISSION" IN RSA 135-C:31, I, IS AMBIGUOUS, IT SHOULD DEFER TO THE DEPARTMENT'S DECADES-LONG INTERPRETATION.

A. The Department's construction of RSA chapter 135-C is entitled to "substantial deference."

Even if this court views the trial court's construction to be reasonable, it should still defer to the Department's longstanding interpretation. The deference entitled to an agency's construction of a statute it is charged with administering is "well established in [this Court's] case law." *See In re Town of Seabrook*, 163 N.H. at 644 (collecting cases). While this Court "review[s] an agency's interpretation of a statute *de novo*," it will defer to that interpretation unless it "clearly conflicts with the express statutory language or is plainly incorrect." *Id.* (internal citations omitted).

As discussed above, the Department has defined an "involuntary emergency admission" as an "admission *to a receiving facility*" since at least 1990. DA140. Since at least 1981, the Department's administrative rules have reflected an understanding that an "involuntary emergency admission" occurs upon physical presence at a designated receiving facility. DA111 ("Designated receiving facilities shall not refuse *admission* to said facility if appropriate committment [sic] procedures as defined in RSA 135-B:19-22 are followed. *Physical presence shall determine admission*." (emphases added)). This construction is consistent with how the term "involuntary emergency admission" is used throughout RSA chapter 135-C, reflects the common understanding of that term, and is the most

reasonable interpretation of the statutory scheme as a whole. It is therefore entitled to "substantial deference." *See In re Town of Seabrook*, 163 N.H. at 644 (collecting cases).

So too is the Department's construction of RSA chapter 135-C to limit admissions to the state mental health services system based on bed availability. The Department's rules formally reflect that a receiving facility may "refuse admission of a person sent to such facility" when "no beds are available at the time of admission." *N.H. Admin. R.*, He-M 405.06. This rule is consistent with the express language of RSA 135-C:13, which states that "[a]dmission to the state mental health services system and access to treatment and other services within the system shall be contingent upon the availability of appropriations." This Court made clear in *Petition of Strandell* that an administrative agency's decision to regulate access to a public benefits system is "a valid exercise of [the agency's] authority to provide a reasonable and necessary means of implementing the statutory mandate . . . to the fullest extent possible in an environment of limited resources." 132 N.H. at 122. The Department's decision to limit admission to the "state mental health services system" due to lack of available beds is therefore also entitled "substantial deference." *See In re Town of Seabrook*, 163 N.H. at 644 (collecting cases). It is also the most reasonable and sensible construction when considering RSA chapter 135-C as a whole.

B. The legislative history supports the Department's construction of RSA chapter 135-C.

The legislative history also supports the Department's construction of when an "involuntary emergency admission" occurs. *See Hogan v. Pat's*

Peak Skiing, LLC, 168 N.H. 71, 73 (2015) (noting that when the Court finds a statute to be ambiguous, it may "resolve that ambiguity by determining the legislature's intent in light of legislative history" (citation and quotation marks omitted)). RSA chapter 135-C went into effect in 1986 and has been amended several times since that date. If the trial court's construction of RSA chapter 135-C were correct, then one might expect some evidence in the legislative record that the legislature intended to use the word "admission" in the context of an IEA in a manner contrary to its ordinary meaning. In fact, the opposite is true.

The legislative history consistently reflects an understanding that an IEA occurs *to* a particular facility. For example, the 1997 amendment to RSA 135-C:27 was introduced as an act "relative to involuntary admission *to the* state hospital on an emergency basis." DA297-298 (emphasis added). Similarly, the fiscal note on the 2000 amendment to RSA 135-C:29 made reference to children who "are admitted *to mental health facilities* through involuntary admission." DA302 (emphasis added). The minutes of a January 22, 2002 public hearing on a bill that amended RSA 135-C:31-a and :33 indicate that Representative J.P. Manning understood that a person subject to an IEA is "held at a *state facility* for three days" and that "[o]n the third day, a hearing must be held to determine at the time the petition was signed, the person met the qualifications to be IEA'd." DA305 (emphasis added). Both the statement of intent and amendment to that 2002 bill, which passed the House Committee on the Judiciary 12-0, likewise contemplate that an IEA occurs "when a person *is taken to a facility that provides psychiatric services* against their will because a member of the

community believes that the individual is in [im]minent danger of harming themselves or others." DA304-305 (emphasis added).

The legislative record in relation to a 2010 bill that changed the 10-day period under RSA 135-C:30 to business days reflects this same understanding. The minutes of the oral testimony to the House Judiciary Committee during a January 10, 2010 public hearing reflect that Dr. Alexander de Nesnara, then-Associate Medical Director of New Hampshire Hospital, and Claire Ebel, then-Director of the New Hampshire Civil Liberties Union, both understood an IEA to be *to* a particular facility. DA310-311. The written testimony submitted by Dr. de Nesnara reflects this same understanding, DA314-315, as does the statement of intent in the House Judiciary Committee's report on that bill, which passed out of committee 13-1, DA316-317.

Dr. de Nesnara offered similar oral and written testimony to the Senate Judiciary Committee during a May 4, 2010 hearing. DA322-323, 326-327. At that hearing, Jennifer Decker, who had been subject to an IEA, likewise testified that such admissions occur "to New Hampshire Hospital." DA323-324, 328. And the testimony of Attorney Michael Skibbie on behalf of the Disabilities Rights Center similarly reflects an understanding that an IEA is an admission *to* a state facility. DA327-328.

More recent amendments to RSA chapter 135-C reflect this same understanding. For example, the minutes of an April 9, 2018 work session of the House Committee on Finance reveal that Raymond Perry, appearing on behalf of the Department, testified that a "commitment" does not occur when a patient is in an ED, but rather at a receiving facility. DA338. The minutes of a February 8, 2018 hearing before the Senate Health and Human

Services Committee similarly reflect that Kenneth Norton testified on behalf of NAMI-NH that an IEA occurs "to a designated receiving facility." DA347. Mr. Norton's written testimony echoes this same understanding. DA357-359. And a February 8, 2018 report by the Governor's Work Group on Mental Health Crisis and ER Boarding Subgroup on Regulatory Barriers and Solutions recommended that the legislature clarify that the "initial 10 day period begins upon admission to a [receiving facility]." DA353.

It is also clear from the legislative history that, contrary to the view of the trial court and the federal district court, the "state mental health services system" has always been understood to be an identifiable system of *facilities* over which the Department can exercise regulatory control. A central debate in the lead up to RSA chapter 135-C's passage in 1986 was the extent to which the Department could regulate private hospitals and other facilities. *See* DA247-294. The New Hampshire Hospital Association took the position in written testimony that the Department's ability under RSA 135-C:5, I, to regulate mental-health services provided by private facilities under contract with the Department, beyond the cost and quality of those services, went "too far" by "intruding in the internal business affairs of contractors." DA279.[6] Other organizations and entities expressed similar concerns. *See, e.g*, DA277-278, 280.

In response, Department officials made clear that the entire state mental health services system needed to be within the Department's

[6] Notably, the New Hampshire Hospital Association now takes the position in the pending federal-court action that a person is admitted to the state mental health services system upon the completion of an involuntary emergency admission certificate in a *private* hospital ED.

regulatory authority or else that system would not function. During an April 16, 1986 hearing before the Senate Committee on Public Institutions and Health and Human Services, John Wallace testified on behalf of the Division of Mental Health that the right of those within the state mental health services system to "effective treatment" was "the heart of [the] system" and that if the Department "cannot regulate that system and assure that those services are run properly then [New Hampshire] will not have a mental health system." DA268. Mr. Wallace emphasized that the ability to regulate the state mental health services system helped ensure that "the system will function and that the state money that goes into it will be properly spent," a "critical element of [RSA chapter 135-C]." DA268.

Donald L. Shumway, Director of the Division of Mental Health and Developmental Services, offered oral testimony that similarly distinguished between private providers, which were not subject to state regulation, and the state mental health services system, which was. DA249-250. In written testimony, Director Shumway emphasized that RSA chapter 135-C reflected a recognition that "there needs to be a unified mental health system with clear authority and responsibility within the Division Director's office." DA271-272. He noted that under RSA chapter 135-C, the Department's "authority to prescribe the standards and conditions for the community services portion of the state mental health system is clearly stated," allowing the Department "to assure that mentally ill individuals are receiving adequate and appropriate treatment and that the taxpayers' funds are properly expended." DA272. In Director Shumway's view, these aspects of RSA chapter 135-C, among others, reflected a "major step

toward further development of an effective system of mental health services for the citizens of this state." DA272.

Finally, the legislative history also reflects a clear understanding that the provision of services under RSA chapter 135-C would be contingent upon available resources. At the April 16, 1986 hearing, Michael Fuerst, on behalf of New Hampshire Legal Assistance and several mentally-ill clients, proposed an amendment to RSA chapter 135-C requiring mental-health services providers that contracted with the Department to bring "individual unmet needs to the attention of the [Department]" so that the Department could "come to the legislature to attempt to receive appropriations for those unmet and unnecessary needs." DA258-259. A version of this amendment was included in the final bill, *see* RSA 135-C:13 (1986), and remains as part of the law today, *see* RSA 135-C:13. Mr. Fuerst emphasized, however, that this language "d[id] not require any appropriation to be made [and] just means that both the legislature and the [Department] become aware of the chronic needs that may be in the community . . . ." DA259. Notably, no legislator or other individual or entity challenged this view. Nor is there any suggestion elsewhere in the legislative record that RSA chapter 135-C was ever understood to empower a private actor to require the State to immediately intake a patient into the mental health services system and provide mental-health services to that patient without regard to whether sufficient resources exist to do so and without any ability to meaningfully limit admissions. This is unsurprising, as is not difficult to envision how such a system would rapidly degrade all of the services the state mental health services system provides and lead to a breakdown of the system itself.

It is thus clear from the legislative history that an "involuntary emergency admission" to the "state mental health services system" has always been understood to be an actual admission to a facility within the Department's regulatory authority. It is also clear from the legislative history that the Department has the authority to regulate access to the state mental health service system based on the availability of resources. Absent this level of control, the system cannot function. Accordingly, even if the statutory and regulatory text is ambiguous on these points, this Court should resolve that ambiguity in favor of the Department's construction. *See Hogan*, 168 N.H. at 73.

CONCLUSION

The trial court's interpretation of the term "involuntary emergency admission" in RSA 135-C:3, I is erroneous. It conflicts with the plain and ordinary meaning of the term, conflicts with how the Department has defined the term since at least 1981, conflicts with the structure of the statutory chapter and how other statutes within the chapter use the term "involuntary emergency admission," effectively nullifies other provisions of RSA chapter 135-C, undermines the purpose and policy objectives of RSA chapter 135-C, and finds no support in the legislative history.

This Court should therefore reverse the trial court's decision and adopt the Department's longstanding interpretation that an "involuntary emergency admission" as used in RSA 135-C:27-:33 occurs when a person is at, and has been accepted by, a receiving facility as an inpatient for mental-health treatment on an involuntary, emergent basis and that the appellee received a timely probable cause hearing under RSA 135-C:31, I within three days, excluding Sundays and holidays, of that admission.

The Commissioner certifies that the appealed decision is in writing and is appended to this brief.

The Commissioner requests a fifteen-minute oral argument.

Respectfully Submitted,

LORI SHIBINETTE, COMMISSIONER
NEW HAMPSHIRE DEPARTMENT OF
HEALTH AND HUMAN SERVICES

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December 30, 2020

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CERTIFICATE OF COMPLIANCE

I, Anthony J. Galdieri, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,497 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

December 30, 2020 /s/ *Anthony J. Galdieri*
Anthony J. Galdieri

CERTIFICATE OF SERVICE

I, Anthony J. Galdieri, hereby certify that a copy of the State's brief shall be served on Gary Apfel, Esquire, counsel for Jane Doe, through the New Hampshire Supreme Court's electronic filing system.

December 30, 2020 /s/ *Anthony J. Galdieri*
Anthony J. Galdieri

ADDENDUM TABLE OF CONTENTS

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