

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. _____

ANTHONY K. HEATH, Petitioner,

v.

HELEN HANKS, Commissioner, Department of Corrections, and
JEFFERY MEYERS, Commissioner, Department of Health and Human Services,
Respondents.

PETITION FOR WRIT OF HABEAS CORPUS

PARTIES

1. Petitioner Anthony K. Heath is a natural person. He is housed at the Secure Psychiatric Unit at the New Hampshire State Prison located at 281 North State Street, Concord, New Hampshire.
2. Respondent Helen Hanks is the Commissioner of the New Hampshire Department of Corrections ("DOC"). Ms. Hanks's office is located at 105 Pleasant Street, P.O. Box 1806, Concord, New Hampshire.
3. Respondent Jeffrey Meyers is the Commissioner of the Department of Health and Human Services ("DHHS"). Mr. Meyers's office is located at 129 Pleasant Street, Concord, New Hampshire.

JURISDICTION

4. This Court has jurisdiction over this matter pursuant to RSA 534:3.
5. Mr. Heath is eligible for relief because he is imprisoned or otherwise restrained of his personal liberty by officers of the State of New Hampshire. *See* RSA 534:1.
6. Venue is proper in this Court because Mr. Heath is imprisoned at the New Hampshire State Prison which is located in Merrimack County. *See* RSA 534:3.

7. The court orders and administrative determinations under which Mr. Heath is confined are attached hereto as Exhibit 1. *See* RSA 534:4.

FACTS

Mr. Heath is found incompetent and admitted to New Hampshire Hospital.

8. On or about August 21, 2015, Mr. Heath was indicted for second degree assault and for operation of a motor vehicle after being certified as a habitual offender.

9. On or about January 15, 2016, Mr. Heath was indicted for first degree assault and first degree assault with a deadly weapon.

10. On March 3, 2016, after hearing, the Coos County Superior Court made the following findings and rulings:

- Mr. Heath was not competent to stand trial;¹
- clear and convincing evidence demonstrated that there was no reasonable likelihood that Mr. Heath could be restored to competency through appropriate treatment within 12 months;
- the indictments against Mr. Heath were dismissed without prejudice; and
- the State had met its burden of showing that Mr. Heath was dangerous to others and, therefore, would remain in custody for 90 days to be evaluated for the appropriateness of involuntary treatment.

11. Mr. Heath was represented by a public defender at the March 3, 2016, hearing.

12. On March 29, 2016, after a hearing, the First Circuit Court Probate Division in Lancaster, found that Mr. Heath was in such a mental condition as a result of mental illness as to create a potentially serious likelihood of danger to himself or to others. The Court admitted Mr. Heath to the New Hampshire Hospital (“NHH”) on an

¹ The psychologist who evaluated Mr. Heath’s competency concluded that Mr. Heath, due to his untreated thought disorder, did not have a “rational and factual understanding of the proceedings against him nor a sufficient present ability to consult with and assist his lawyer on the case with a reasonable degree of rational understanding.” *See* RSA 135:17, II(b).

involuntary basis, under RSA 135-C, for a period not to exceed five years, with a conditional discharge as soon as clinically appropriate.

13. Mr. Heath was represented by a public defender at the March 29, 2016, hearing.

14. On April 4, 2016, Mr. Heath was admitted to NHH.

15. NHH is a receiving facility in the state mental health services system. DHHS is responsible for NHH.

Mr. Heath is transferred to the Secure Psychiatric Unit.

16. On April 14, 2016, NHH signed an emergency transfer of Mr. Heath to the Secure Psychiatric Unit (“SPU”) at the New Hampshire State Prison.

17. On April 22, 2016, Mr. Heath was transferred to SPU.

18. SPU is a more restrictive environment for treatment than NHH or community-based mental health treatment.

19. Mr. Heath objected to this transfer and requested a hearing and lawyer to be appointed for him.

20. The NHH legal team asked an attorney to represent Mr. Heath at the Administrative Appeals Unit (“AAU”) hearing.

21. On April 26, 2016, the AAU held a hearing.

22. On May 5, 2016, the hearing examiner issued an order upholding Mr. Heath’s transfer to SPU. This concluded the attorney’s representation of Mr. Heath.

23. To appeal the AAU’s decision, Mr. Heath had to file a motion for reconsideration or seek court review within 30 days of the hearing examiner’s order.

24. At the time, Mr. Heath had been found incompetent. At the time, he had no legal guardian; no guardian was appointed until more than 60 days later. At the time, the representation of the lawyer assigned to him for the AAU hearing had concluded.

25. No motion for reconsideration was filed with the AAU nor was court review sought. The attorney who represented Mr. Heath at the AAU hearing does not recall being asked to file a motion for reconsideration or to seek court review.

The Probate Court appoints a guardian for Mr. Heath.

26. On or about June 9, 2016, the DOC filed a petition for guardianship of an incapacitated person, Mr. Heath. The Petition asked the court to find that Mr. Heath was incapable of exercising the following rights:

- refuse to consent to medical or other professional care, counseling, treatment or service, including the right to admit or discharge the ward from any hospital or other medical institution providing such at the lawful direction of the guardian of the person;
- have access to, grant release of, withhold, deny, or refuse authorization for the guardian of the person to obtain access to and release the ward's confidential records and papers insofar as the same may be reasonably needed by the guardian of the person to ensure that the ward's emotional and physical health concerns properly addressed and treated;
- cancel, reject or oppose the authority granted to the guardian of the estate and/or person; and
- make contracts or grant power of attorney for other authorizations.

27. On July 11, 2016, the Sixth Circuit Court Probate Division in Concord appointed Nancy Heath, Mr. Heath's mother, as his guardian. The Court made the following findings:

- Mr. Heath was incapacitated;²
- guardianship was necessary to provide for his continuing care, supervision, and rehabilitation;
- no alternative resources were available that were suitable for his welfare, safety rehabilitation; and
- guardianship was appropriate as the least restrictive form of intervention.

² Incapacity is defined as a "legal, not medical, disability...measured by functional limitation." RSA 464-A:2, XI. No person determined to be incapacitated "shall be deprived of any legal rights...except upon specific findings of the court." RSA 464-A:9, IV.

28. The Court also found that Mr. Heath was incapable of exercising the following rights:

- the right to travel or decide where to live;
- right to refuse or consent to medical or other personal care, counseling, treatment or service, including the right to be admitted or discharged from any hospital or other medical institution;
- the right to have access to, grant release of, withhold, deny, or refuse authorization for the guardian to access to and release of his confidential records and papers;
- the right to cancel, reject, or oppose any duly exercised authority of the person; and
- the right to make contracts, or grant power of attorney or other authorizations.

29. Between May 5, 2016—the date of the hearing examiner’s order—and July 11, 2016—the date of Ms. Heath’s appointment as guardian, Mr. Heath lacked representation.

30. Since his admission to the NHH in April 2016, Mr. Heath has been receiving mental health services through the state mental health services system.

31. Mr. Heath has the right to receive treatment in the least restrictive environment necessary to achieve the purposes of treatment.

New Hampshire Hospital denies SPU’s request to transfer Mr. Heath to a less restrictive environment.

32. NHH has authority to accept transfers of patients from SPU who have been involuntarily admitted to the state mental health services system.

33. DOC and DHHS have a Memorandum of Understanding (“MOU”) to establish a procedure for patient transfers from SPU to NHH. Beginning in January 2017, the MOU was in effect.

34. The MOU procedure for transfers from SPU to NHH provides that:

- The SPU treatment team refers the patient to NHH.

- NHH Medical Director reviews the recommendation, and either: accepts the patient; or requests more information.
- If the NHH Medical Director does not accept the patient, then the NHH Medical Director requests more information from SPU. Under a request for more information, the MOU provides for: discussion of the patient with the SPU Medical Director, formulation of a plan of treatment by the SPU Medical Director, submission of the plan to the NHH Medical Director, and review of the plan of treatment by the NHH Medical Director.
- After these steps the MOU again provides that the NHH Medical Director either accepts the patient to NHH, or recommends an assessment by a NHH psychologist or psychiatrist.
- If the NHH Medical Director recommends an assessment, and the patient is so assessed, the MOU provides that the NHH psychologist or psychiatrist presents the assessment to the NHH Medical Director, with a recommendation either to accept the patient to NHH or to decline to accept the patient “with recommendation.”
- Only after the NHH Medical Director decides to decline the patient, and the SPU agrees with the decision to decline the patient does the MOU state that the patient will remain at SPU, and then only “until another request is made to NHH.” If the SPU disagrees with NHH’s decision to decline the patient, the MOU provides for an additional process to resolve the issue.

35. On April 7, 2017, the Administrator of SPU wrote to NHH to formally request an evaluation for Mr. Heath’s transfer to NHH as a less restrictive alternative to the SPU.

36. On September 20, 2017, the Chief Medical Officer at NHH denied SPU’s request. The stated reason was Mr. Heath’s issues with taking his medication. Upon information and belief, NHH did not follow the MOU in denying this transfer request.

37. On or about March 13, 2018, SPU moved for appointment of a successor guardian.

38. On January 17, 2019, after a hearing, the probate court removed Ms. Heath as guardian and appointed the Office of Public Guardian.³

39. Mr. Heath remains in the care and custody of DOC. At SPU, he is housed with persons convicted of state crimes and subject to the same rules, restrictions and limitations as persons convicted of crimes.

CLAIMS

Count I – Violation of Due Process (Heath v. DOC)

40. Mr. Heath incorporates the preceding allegations in this Amended Petition as if stated fully herein.

41. The Fifth Amendment to the United States Constitution provides that “[n]o person . . . shall be deprived of life, liberty, or property, without due process of law.” The Fifth Amendment applies to the State of New Hampshire through the Fourteenth Amendment.

42. Mr. Heath has a liberty interest in receiving mental health treatment in the least restrictive environment necessary to achieve the purposes of treatment.

43. DOC failed to ensure that DHHS followed the procedure to evaluate SPU’s request to transfer Mr. Heath to NHH.

44. DOC erroneously deprived Mr. Heath of liberty interest in receiving mental health treatment in the least restrictive environment necessary to achieve the purposes of treatment.

Count II – Violation of Due Process (Heath v. DHHS)

45. Mr. Heath incorporates the preceding allegations in this Amended Petition as if stated fully herein.

46. The Fifth Amendment to the United States Constitution provides that “[n]o person . . . shall be deprived of life, liberty, or property, without due process of law.” The

³ Recently, at OPG’s request, the Probate Court restored Mr. Heath’s right to initiate, defend and settle lawsuits.

Fifth Amendment applies to the State of New Hampshire through the Fourteenth Amendment.

47. Mr. Heath has a liberty interest in receiving mental health treatment in the least restrictive environment necessary to achieve the purposes of treatment.

48. DHHS failed to follow the procedure to evaluate SPU's request to transfer Mr. Heath to NHH.

49. DHHS erroneously deprived Mr. Heath of his liberty interest in receiving mental health treatment in the least restrictive environment necessary to achieve the purposes of treatment.

Count III – Violation of Due Process
(Heath v. DOC and DHHS)

50. Mr. Heath incorporates the preceding allegations in this Amended Petition as if stated fully herein.

51. The Fifth Amendment to the United States Constitution provides that “[n]o person . . . shall be deprived of life, liberty, or property, without due process of law.” The Fifth Amendment applies to the State of New Hampshire through the Fourteenth Amendment.

52. Mr. Heath has a liberty interest in receiving mental health treatment in the least restrictive environment necessary to achieve the purposes of treatment.

53. The MOU between DHHS and DOC establishes the agencies' procedure to transfer a patient from the SPU to NHH.

54. DHHS and DOC erroneously deprived Mr. Heath of his liberty interest in receiving mental health treatment in the least restrictive environment necessary to achieve the purposes of treatment when the agencies failed to establish a procedure for him to request a transfer to a less restrictive environment.

55. DHHS and DOC erroneously deprived Mr. Heath of his liberty interest in receiving mental health treatment in the least restrictive environment necessary to achieve the purposes of treatment when the agencies failed to establish a procedure for Mr. Heath to appeal NHH's decision to deny his transfer to NHH.

PRAYER FOR RELIEF

WHEREFORE, Mr. Heath requests that this Court order his release from the Secure Psychiatric Unit, so that he may receive treatment in the least restrictive environment necessary to achieve the purposes of treatment either at the New Hampshire Hospital or, alternatively, or from community-based mental health services.

Respectfully submitted,

ANTHONY K. HEATH
By his Attorneys,

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Dated: November 4, 2019

By: 
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