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## Due Process

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The court of appeals held that the fact that the prosecuting assistant district attorney was not a licensed attorney did not result in any deprivation of the defendants' constitutional due process rights.<sup>301</sup> The court stated that the defendants had not cited any authority, nor was the court aware of any, which stood for the proposition "that a defendant has a due process right to be prosecuted by a duly admitted attorney."<sup>302</sup> Further, the court noted that defendants cited cases which dealt with a defendant's sixth amendment right to be "*represented* by a lawyer — not *prosecuted* by a lawyer."<sup>303</sup>

Judge Titone, joined by Judge Alexander, dissented, but did not address the constitutional claim raised by defendants. Rather, the dissent was based on the fact that the assistant district attorney, who was an unlicensed attorney, appeared before the grand jury in violation of New York Criminal Procedure Law section 190.25(3), which prohibits unauthorized persons from appearing before the grand jury.<sup>304</sup>

Savastano v. Nurnberg<sup>305</sup>  
(decided December 27, 1990)

Plaintiffs, three involuntarily committed mentally ill patients, alleged that section 29.11 of the Mental Hygiene Law (MHL)<sup>306</sup> and title 14, section 517.4, of the New York Code of Rules and Regulations (NYCRR)<sup>307</sup> violated their procedural due process rights under the federal<sup>308</sup> and state<sup>309</sup> constitutions. These sections authorized transfer of plaintiffs' from a municipal acute care facility to an intermediate or long term state mental health

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301. *Id.* at 107, 566 N.E.2d at 124, 564 N.Y.S.2d at 997.

302. *Id.* at 106, 566 N.E.2d at 124, 564 N.Y.S.2d at 997.

303. *Id.* at 107, 566 N.E.2d at 124, 564 N.Y.S.2d at 997 (footnote omitted) (emphasis in original).

304. *Id.* at 107-12, 566 N.E.2d at 124-28; 564 N.Y.S.2d at 997-1001 (Titone, J., dissenting).

305. 77 N.Y.2d 300, 569 N.E.2d 421, 567 N.Y.S.2d 618 (1990).

306. N.Y. MENTAL HYG. LAW § 29.11 (McKinney 1988).

307. N.Y. COMP. CODES R. & REGS. tit. 14, § 517.4 (1990).

308. U.S. CONST. amend. XIV.

309. N.Y. CONST. art. I, § 6.

institution without a prior formal judicial hearing. The court rejected plaintiffs' arguments that the due process safeguards provided within these sections were insufficient, and that a "full-scale judicial hearing" was required before a transfer could take place.<sup>310</sup>

The MHL and the NYCRR provide a procedural framework to be followed before "an objecting patient may be transferred from a municipal psychiatric facility to a State institution."<sup>311</sup> For example, the patient is given the opportunity to appeal the transfer to the clinical director of the transferring facility. This appeal may be informal "without adherence to the rules of evidence and record keeping . . . ."<sup>312</sup> The receiving hospital is also given the opportunity to examine the patient to determine whether the transfer is in the patient's best interest. Additionally, if the patient is dissatisfied with a determination to transfer, the patient may initiate another judicial proceeding and seek injunctive relief.<sup>313</sup>

In rejecting plaintiffs' arguments, the court of appeals based its due process analysis upon the balancing test enunciated in *Mathews v. Eldridge*.<sup>314</sup> The court chose not to conduct a separate analysis under the state constitution, therefore, rendering the state rule in this case identical to the federal rule.

*Mathews* articulated three factors to be considered when addressing a procedural due process question:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or

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310. *Savastano*, 77 N.Y.2d at 307, 569 N.E.2d at 424, 567 N.Y.S.2d at 621.

311. *Id.* at 306, 569 N.E.2d at 423, 567 N.Y.S.2d at 620.

312. *Id.* (quoting N.Y. COMP. CODES R. & REGS. tit. 14, § 517.4(c)(3)(i) (1990)).

313. *Id.* 77 N.Y.2d at 307, 569 N.E.2d at 423-24, 567 N.Y.S.2d at 620-21.

314. 424 U.S. 319 (1976).

substitute procedural requirements would entail.<sup>315</sup>

In applying this three part test, the New York Court of Appeals acknowledged that the patient's interest in the outcome of the hearing is substantial. However, the court concluded that a "full-scale" judicial hearing, requiring adherence to rules of evidence and cross examination, would be of little value.<sup>316</sup> In arriving at its conclusion, the court noted that the determination of whether a transfer is in a patient's best interest is a medical judgment.<sup>317</sup> The court of appeals, quoting *Parham v. J.R.*,<sup>318</sup> reasoned that "shifting the decision from a trained specialist using the traditional tools of medical science to an untrained judge or administrative hearing officer after a judicial-type hearing"<sup>319</sup> would not "decrease the risk of erroneous deprivation."<sup>320</sup>

Finally, the court acknowledged that financial resources are presently scarce and requiring such judicial hearings would further strain the state's fiscal burden without providing much benefit. Therefore, the court held that section 29.11 of the MHL and title 14, section 517.4, of the NYCRR did not deprive plaintiffs of their federal or state constitutional due process rights.<sup>321</sup>

On the federal level, in *Rennie v. Klein*<sup>322</sup> the court held that when providing a hearing for a mentally ill patient to determine whether medication should be forcibly administered, it is consti-

315. *Id.* at 335 (citation omitted). Before the *Mathews* factors are considered in determining what process is due, a liberty interest must first be implicated. Accordingly, Judge Bellacosa, in the *Savastano* concurrence, would not even apply *Mathews* because he believed that "no constitutionally cognizable liberty interest is implicated by the statutory and regulatory scheme at issue." *Savastano*, 77 N.Y.2d at 310, 569 N.E.2d at 426, 567 N.Y.S.2d at 623 (Bellacosa, J., concurring).

316. *Savastano*, 77 N.Y.2d at 308-09, 569 N.E.2d at 424-25, 567 N.Y.S.2d at 621-22.

317. *Id.* at 308, 569 N.E.2d at 424, 567 N.Y.S.2d at 621 (citing N.Y. COMP. CODES R. & REGS. tit. 14, § 517.4(d)(1) (1990)).

318. 442 U.S. 584 (1979).

319. *Savastano*, 77 N.Y.2d at 308, 569 N.E.2d at 424-25, 567 N.Y.S.2d at 621-22 (quoting *Parham*, 442 U.S. at 312).

320. *Id.* at 309, 569 N.E.2d at 425, 567 N.Y.S.2d at 622.

321. *Id.* at 310, 569 N.E.2d at 425, 567 N.Y.S.2d at 622.

322. 476 F. Supp. 1294 (D.N.J. 1979).

tutionally adequate for a psychiatrist to preside at the proceeding.<sup>323</sup> The court held that a full blown hearing presided over by a judge, with adherence to rules of evidence, is not needed to meet federal due process standards.<sup>324</sup> Therefore, the patient's federal due process rights will be met whether a judge, an administrative hearing officer, or a psychiatrist acts as the independent decision-maker. On the other hand, the court held that a patient's due process rights are violated if the medical director of a facility presides at the hearing. The court reasoned that a medical director is subject to institutional pressures and cannot remove himself completely from the demands of the hospital staff. "[I]nstitutional pressures -- similar to the pressures that have created the unfortunate legacy of overdrugging in state mental hospitals -- make it impossible for anyone in the medical director's position to have sufficient independence, much less the appearance of fairness which due process requires."<sup>325</sup>

More recently, the United States Court of Appeals for the Second Circuit held that title 14, sections 27.8 and 27.9 of the NYCRR, which articulate procedures to determine whether an involuntarily committed mentally ill patient can be forcibly medicated, satisfied federal due process standards despite the fact that the statute does not require formal judicial hearings.<sup>326</sup>

323. *Id.* at 1310.

324. *Id.* New York State, however, does require a judicial hearing to determine whether a patient may be medicated over his or her objection. *See Rivers v. Katz*, 67 N.Y.2d 485, 497, 495 N.E.2d 337, 344, 504 N.Y.S.2d 74, 81 (1986). In *Rivers*, the court of appeals held that a judicial determination must be made concerning whether an involuntarily committed mentally ill patient has the capacity to make a reasoned decision regarding treatment *after* the administrative review provided by title 14, section 27.8 of the NYCRR has been exhausted. *Id.* (emphasis added). This is because such administrative review does not meet state constitutional due process rights. *Id.*

325. *Rennie*, 476 F. Supp at 1310.

326. *See Project Release v. Prevost*, 722 F.2d 960 (2d Cir. 1983); *but see Rivers v. Katz*, 67 N.Y.2d 485, 498, 495 N.E.2d 337, 344, 504 N.Y.S.2d 74, 81 (1986) ("The administrative review procedures of title 14, section 27.8, of the NYCRR 27.8 do not sufficiently protect the due process rights of involuntarily committed patients guaranteed by article I, section 6 of the New York State Constitution."). The *Rivers* court concluded that the administrative procedures provided by title 14, section 27.8 of the NYCRR lacked standards

Therefore, hearings other than the formal judicial type have been held not to violate due process in the area of involuntary civil commitment.

Likewise, the United States Court of Appeals for the Sixth Circuit has held that commitment proceedings for mentally retarded adults need not be judicial in nature.<sup>327</sup> The court stated that:

Although, as a matter of policy, precommitment review by a judicial officer would ensure the most vigorous protection of the mentally retarded, and thus, might be preferable, it has been noted in a variety of situations that due process does not require that the neutral trier of fact be legally trained or a judicial or administrative officer.<sup>328</sup>

The majority wrote that although the decision to commit a person is a medical decision, due process requirements must be met. However, the court concluded that a non-judicial hearing would satisfy the requirements of due process.

These decisions indicate that although an independent decision-maker is needed to meet state and federal constitutional due process standards, a full blown judicial hearing is not always necessary on either the state or federal level. Due process requirements may be met when an involuntarily committed mentally ill patient is provided with an opportunity for an informal hearing presided over by an independent decision-maker when the hearing concerns a transfer of a patient between institutions,<sup>329</sup> or in forced medication proceedings.<sup>330</sup>

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to guide the decision maker throughout the administrative process. In fact, title 14, section 27.8 of the NYCRR provides no standards to measure the need for treatment, the degree of intrusiveness of a particular drug, or the duration of its use. *Rivers*, 67 N.Y.2d at 498, 495 N.E.2d at 344, 504 N.Y.S.2d at 81.

327. *See Doe v. Austin*, 848 F.2d 1386 (6th Cir. 1988).

328. *Id.* at 1393 (citations omitted).

329. *See Savastano v. Nurnberg*, 77 N.Y.2d 300, 569 N.E.2d 421, 567 N.Y.S.2d 618 (1990).

330. *See Rennie v. Klein*, 476 F. Supp 1294 (D.N.J. 1979).

*SECOND DEPARTMENT*

Long Island Lighting Co. v. Assessor of Brookhaven<sup>331</sup>  
(decided March 2, 1990)

See the discussion of this case under EQUAL PROTECTION.<sup>332</sup> The court held that the statute violated Long Island Lighting Co.'s (LILCO) substantive state and federal due process rights because the statute arbitrarily restricted LILCO's right to judicial review.<sup>333</sup>

*THIRD DEPARTMENT*

Sisario v. Amsterdam Memorial Hospital<sup>334</sup>  
(decided March 22, 1990)

See the discussion of this case analysis under EQUAL PROTECTION.<sup>335</sup> The court denied plaintiff's claim that CPLR 3012-a violated state and federal due process rights by restricting access to the courts. The court recognized the state's right to condition access to the courts unless a right has been "recognized as [being] entitled to special protection."<sup>336</sup> The court held that there was a rational relationship between the restrictions imposed and the objective of the statute and, therefore, no denial of plaintiff's procedural due process rights.

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331. 154 A.D.2d 188, 552 N.Y.S.2d 336 (2d Dep't 1990).

332. See *infra* notes 553-66 and accompanying text.

333. *Long Island Lighting Co.*, 154 A.D.2d at 195-96, 552 N.Y.S.2d at 341.

334. 159 A.D.2d 843, 552 N.Y.S.2d 989 (3d Dep't), *appeal dismissed*, 76 N.Y.2d 844, 559 N.E.2d 1287, 560 N.Y.S.2d 128 (1990).

335. See *infra* notes 533-66 and accompanying text.

336. *Sisario*, 159 A.D.2d at 845, 552 N.Y.S.2d at 991.