

Oregon Advocacy Center et al. v. Mink et al.
Case No. 3:02-cv-00339-MO (Lead Case)
Mediation Final Term Sheet (June 2023)

Following several mediation sessions from March through June 2023, facilitated by the Honorable Stacie Beckerman with the assistance of the Court's Neutral Expert Debra Pinals, M.D., the parties (Plaintiffs Oregon Advocacy Center, Metropolitan Public Defenders, and A.J. Madison and Defendants Dolores Matteucci and David Baden) and amici (Washington County, Marion County, Washington County District Attorney, Clackamas County District Attorney, Marion County District Attorney, and Judges Matthew Donohue, Audrey Broyles, Jonathan Hill, Kathleen Proctor, and Nan Waller) agree that the state of Oregon must take all reasonable steps to regain compliance with the *Mink* order. To achieve that goal, the parties and amici agree to the following terms:¹

1. **Discharge Updates & Planning.** The state has requested an order requiring a 60-day, instead of 30-day notice for patients who are reaching the end of their restoration period under the September order. Before any discharge under the September order as it may be amended, Oregon State Hospital (OSH) will ensure that the parties in the state court proceeding are informed as to the current treatment status of the patient, either through a continuing care discharge plan or an updated clinical note as appropriate. OSH will work together with the counties and Community Mental Health Programs (CMHPs) to begin discharge planning for all patients as soon as possible in the patient's hospital stay but no later than 30 days after commitment. The amici judges will circulate guidance and provide outreach to their statewide colleagues to (a) set status hearings to i) obtain information from OSH that is not readily available in progress reports but that will further the capacity of judges to resolve the aid and assist matters before them and ii) direct or order CMHPs to actively engage in discharge planning and develop discharge plans after receiving the 60-day notice if they have not already been doing so, (b) allow OSH personnel to appear at status hearings via Videoconferencing to conserve OSH resources, and (c) work with CMHPs to find appropriate placements for individuals on the Ready to Place list. OSH will provide the committing court an updated clinical summary at the point of release for the court as part of the discharge updates to the court in which the following elements will be included:
 - Brief description of restoration services provided to the patient (built-in options will include psychotropic medication, legal skills groups, symptom management groups, , other groups if directly related to barriers to competency, 1:1 therapeutic services provided as alternatives to groups)
 - Current clinical status of patient
 - Any ongoing symptoms and likelihood of resolution
 - Adherence to psychotropic medication, if prescribed
 - Participation in groups or individual therapeutic services

¹ However, with respect to Paragraph 5, the amici state court judges stand on their prior briefing in the litigation and take no position on any motion for entry of a further remedial order.

- Overview of risk behaviors observed during hospital stay, including whether these are still occurring and what strategies have been effective to mitigate these behaviors
 - Supports and services OSH recommends for patient success in the community
2. **Additional Community Placements.** The Oregon Health Authority (“OHA”) will fund up to an additional 10 beds at the Northwest Regional Reentry Center (“NWRRC”), with the potential for additional beds pending an OHA utilization review of existing beds, costs for any needed renovations, staffing capabilities, and willingness of NWRRC.
 3. **Expedited Admission Clarity and Contact.** OSH has redrafted expedited admission criteria for civil admissions based on feedback from the former Hospital System Intervenors and Dr. Pinals to improve process and communications to ensure that civil patients whose acuity of symptoms and behavior that make them clinically suitable for civil commitment at OSH are able to be timely admitted. The former Hospital System Intervenors agreed not to initiate contempt proceedings against any OSH personnel with respect to admission decisions pending the completion of the efficacy review discussed below.
 4. **Review of September Order Efficacy.** On or before October 2, 2023, OSH, OHA, plaintiffs, and Dr. Pinals will review the efficacy of the September order with regard to achieving compliance, factoring in any unintended negative consequences. OSH will prepare a report of their findings, and Dr. Pinals will incorporate that review and her opinions about the efficacy of the order into a report to the Court on or before November 15, 2023. Amici agree also to submit their perspectives in writing to OSH, OHA, and Dr. Pinals on or before October 2, 2023.
 5. **Further Remedial Order.** Amici agree not to oppose the entry of a proposed remedial order substantively the same as described below. Said proposed remedial order shall include:
 - a. **Admission Limits.** For persons found unable to aid and assist whose most serious charge is a misdemeanor, commit to the custody of the Superintendent of OSH for restoration only those persons charged with a “person misdemeanor.” For purposes of this Order, “person misdemeanor” includes those crimes listed in OAR 213-003-0001(15), violation of an Extreme Risk Protective Order entered under ORS 166.525 et seq., and violation of any of the following in proceedings to impose punitive sanctions for contempt: 1. a Family Abuse Prevention Act Restraining Order entered under ORS 107.700 et seq.; 2. an Elderly Persons and Persons with Disabilities Abuse Prevention Act Restraining Order under ORS 124.005 et seq.; 3. a Sexual Abuse Restraining Order under ORS 163.760 et seq.; and 4. an Emergency Protection Order under ORS 133.035.

- b. **Discharge Planning Extension.** Additional time at OSH for care coordination and discharge planning to promote and protect the health and safety of the public upon state court order for a maximum of 30 days beyond the September 1, 2022 court order timelines after opportunity for objection by defense will be available in limited circumstances, if, according to OSH, the individual cannot be placed immediately in an identified placement after a referral has been submitted to that placement, but reasonably expects to be placed within 30 days. The extension will be considered when OSH receives any such court order at least 5 business days prior to the expiration of the restoration time period, or within 5 business days of entry of the remedial order if less than 5 days remain until expiration of the restoration time period at the time of entry of the remedial order. Failure to coordinate discharge planning by the CMHP will not constitute justification for this extended discharge planning exception.
- c. **Competency Opinion Clarifications.** If the defendant is under a competency restoration order, at the time of subsequent statutory forensic evaluations, the forensic evaluator shall notify the court that (A) the defendant has present fitness to proceed; (B) there is no substantial probability that, in the foreseeable future, the defendant will gain or regain fitness to proceed and whether there is no substantial probability that, within the allowable commitment period for restoration at OSH, the defendant will gain or regain fitness to proceed; or (C) there is a substantial probability that, in the foreseeable future, the defendant will gain or regain fitness to proceed and whether there is a substantial probability that, within the allowable commitment period for restoration at OSH, the defendant will gain or regain fitness to proceed. If the probability exists, the superintendent or designee shall give the court an estimate of the time in which the defendant, with appropriate treatment, is expected to gain or regain fitness to proceed.
- d. **Extending Duration of Hospital Restoration for Violent Felonies.**
Upon notice from OSH that a defendant is reaching the end of their restoration period (and such notice shall be provided at least 60 days prior to the end of their restoration period), a district attorney may petition for an exception to the maximum time for inpatient restoration established by the September 1, 2022 court order. The petition shall be signed by the district attorney for the county and submitted within 30 days of receipt of the notice of discharge (or within 30 days of entry of the remedial order if less than 30 days remain until expiration of the restoration time period at the time of entry of the remedial order), and OSH must receive any order from the committing court prior to the expiration of the restoration time period (or within 30 days of the filing of the petition if less than 30 days remain until expiration of the restoration period at the time of entry of the remedial order).

The court may grant the petition if it determines the following:

- (1) The defendant is charged with a “violent felony” pursuant to ORS 135.240(5),²
- (2) By clear and convincing evidence, there is a danger of physical injury or sexual victimization to the victim or a member of the public if the defendant is discharged from the Oregon State Hospital,
- (3) The defendant meets the requirements of ORS 161.370(3), and
- (4) The court concludes that there is a substantial probability that continued commitment at OSH will lead to a determination that the defendant has gained or regained fitness to proceed within that six month extension. In making this determination, the court shall consider the following:
 - a) clinical data of progress toward restoration,
 - b) evidence that the defendant’s inability to aid and assist is not due to a condition that is unlikely to result in restoration such as a significant neurocognitive disorder (e.g., dementia or traumatic brain injury), or significant neurodevelopmental disability disorders,
 - c) evidence regarding the outcome of prior efforts at restoration, and
 - d) any other relevant information the court wishes to consider.

If the court grants a petition, the court shall conduct a review of the status of restoration efforts at intervals no greater than every 180 days in accordance with 161.371. At such reviews, the court may continue the commitment for an additional 180 days if it makes the findings outlined above. The maximum total amount of commitment time shall not exceed the time period set by ORS 161.371(5).

OSH shall track the patients who are eligible for this exception by notice from the Oregon Judicial Department and shall track those for whom such exception has been requested and those who have been found by courts to fall within this exception and shall report aggregate data at least every two weeks on their data dashboard website.

² “Violent felony” means a felony offense in which there was an actual or threatened *serious physical injury* to the victim, or a felony sexual offense. A *serious physical injury* means a physical injury which creates a substantial risk of death or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss of impairment of the function of any bodily organ. ORS 161.015(8)

- e. **Supremacy Clause Disputes.** If OSH identifies a conflict between the September order and the committing jurisdiction's order during the pendency of the September order, the parties to the criminal case and an OSH representative (and its counsel) are encouraged to participate in an expedited mediation (by video or phone, if necessary) with U.S. Magistrate Judge Stacie Beckerman, to resolve the conflict. OSH and the parties to the criminal case should meet and confer prior to the mediation in an effort to resolve any conflict between the court orders and clarify the issues subject to mediation. If any party to the criminal case refuses to participate in mediation or if mediation is unsuccessful, any *Mink/Bowman* party may petition this Court for an expedited ruling on whether the Supremacy Clause establishes that this order takes precedence over the conflicting state court order, and any responses from the parties or amici shall be filed within five business days.
 - f. **Implementation:** To the extent that aspects of the remedial order require updated forms and protocols by OHA, OSH, and amici, these updates shall be made and with the assistance of amici and the parties, and there shall be up to a 30-day period from the date of the order to implement any such changes to relevant forms and to notify stakeholders impacted by these changes.
6. **Review of impact of the modifications to the September 1, 2022 order on compliance with *Mink*.** Given the unpredictability of the frequency that the aforementioned revisions will be utilized, the parties and amici agree to data review of the remedial order. The review will occur with input from Dr. Pinals to determine if they are negatively affecting compliance, with the potential to request the court to remove or modify any provision of the order that is negatively affecting compliance. If such a request to remove or modify any provision is made, the parties and amici shall have an opportunity to provide input. Such reviews shall occur no less frequently than quarterly.
 7. **Development of Long-term Plan.** By July 26, 2023, OHA will formally recommit to the recommendations outlined in Dr. Pinals' Second Report that have been mutually determined by the parties in consultation with Dr. Pinals as having not yet been completed and remain relevance. The amici agree to work with Dr. Pinals and the parties to provide input where appropriate. The plan outlined in Dr. Pinals' recommendation must include updated timelines for implementation and timelines for expectations of when that implementation will lead to long-term compliance with the *Mink* injunction.