UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THOMAS WILKES,	:	
BARBARA FLOOD,	:	CIVIL NO. 3:20CV594-JCH
VINCENT ARDIZZONE,	:	
GAIL LITSKY,	:	
CARSON MUELLER,	:	
On behalf of themselves and	:	
all other persons similarly	:	
situated,	:	
Plaintiffs	:	
	:	
v.	:	
	:	
NED LAMONT, Governor	:	
MIRIAM E. DELPHIN-RITTMAN,	:	
Commissioner of DMHAS,	:	
HAL SMITH, CEO of Whiting Forensic	:	
Hospital,	:	
LAKISHA HYATT, CEO Connecticut	:	
Valley Hospital,	:	
Defendants	:	June 11, 2020

MOTION TO DISMISS

The defendants respectfully move the Court pursuant to F.R.Civ.P. 12(b)(1) and 12(b)(6) to dismiss plaintiffs' claims in this matter.

In support of this motion, the defendants submit that: i) plaintiffs' claims for habeas corpus relief are barred by their failure to exhaust their state court remedies; ii) the Court should decline to entertain plaintiffs' claims pursuant to the doctrine of primary jurisdiction; and iii) the Court should abstain from ruling on plaintiffs' assessment and discharge claims.

In further support of this motion the defendants respectfully submit the accompanying memorandum of law and supporting declarations and exhibits.

DEFENDANTS

NED LAMONT, ET AL.

WILLIAM TONG
ATTORNEY GENERAL

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CERTIFICATION

I hereby certify that on June 11, 2020, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF system.

/s/ Ralph E. Urban
Ralph E. Urban
Assistant Attorney General

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Hospital,	:	
LAKISHA HYATT, CEO Connecticut	:	
Valley Hospital,	:	
In their official capacities,	:	
Defendants	:	June 11, 2020

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

The defendants respectfully submit this memorandum and accompanying declarations and exhibits in support of their motion to dismiss, filed herewith.

On April 30, 2020, plaintiffs, four patients at Whiting Forensic Hospital ("Whiting") committed to the custody of the Department of Mental Health and Addiction Services ("DMHAS") and under the auspices of State's Psychiatric Security Review Board ("PSRB") pursuant to Conn. Gen. Stat. §§ 54-56d and 17a-582, and two patients at Connecticut Valley Hospital ("CVH") civilly committed to the custody of DMHAS pursuant to Conn. Gen. Stat. §§ 17a- 495 *et seq*., alleged to be adequate representatives of a putative class of similarly situated

patients at Whiting and CVH, filed this action asserting various federal and state law claims and seeking certain immediate injunctive relief stemming from Whiting's and CVH's actions and responses to the ongoing novel Covid-19 pandemic. Thereafter, an amended complaint was filed on May 7, 2020, claiming violation of substantive due process, Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131 *et seq.* ("ADA"), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 504 ("§ 504"), invoking the Court's habeas corpus powers, and again seeking various forms of immediate injunctive relief. The amended complaint dropped plaintiffs' claim under the Connecticut Patients' Bill of Rights, Conn. Gen. Stat. §§ 17a-540 *et seq*. ("CTPBR").

For the reasons set forth more fully below, this Court should dismiss plaintiffs' habeas corpus claims for failure to exhaust State court remedies and dismiss the balance of plaintiffs' claims under the doctrine of primary jurisdiction. Plaintiffs claims regarding assessment and discharge should further be dismissed because the Court should abstain from entertaining them.

A federal action seeking habeas relief is subject to dismissal pursuant to F.R.Civ.Proc. 12(b)(1) for failure to exhaust state remedies; *Kane v. Comm'r.*, 2019 WL7037685 (D.Vt .) at *3; dismissal pursuant to the doctrine of primary jurisdiction may be raised via a motion pursuant to F.R.Civ.Proc. 12(b)(6). *Tassy v. Brunswick Hosp. Center, Inc.*, 296 F.3d 65, 66-67 (2d Cir.2002). Abstention pursuant to *Colorado River v. U.S.*¸ 424 U.S. 800 (1976) is properly raised by a motion to dismiss pursuant to F.R.Civ.P. 12(b)(1). *Pike Company, Inc. v. Universal Concrete Products, Inc.*, 284 F.Supp.3d 376, 384 (W.D.N.Y.2018) (Internal quotations and citations omitted).

I. Plaintiffs' Claims for Habeas Corpus Relief Must be Dismissed for Failure to Exhaust State Remedies

Federal law, codified at 28 U.S.C. § 2254, requires the exhaustion of federal claims in State court before those claims can be addressed by the federal courts. In pertinent part, 28 U.S.C. § 2254 provides that

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

This statute codifies a rule of comity that predates the statute and applies not just to those held in state custody as the result of criminal convictions, but all those in custody as the result of State court orders. *Baldwin v. Lewis*, 442 F.2d 29, 33 (7th Cir.1971); *Duncan v. Walker*, 533 U.S. 167, 176 (2001). This includes those confined at Whiting Forensic Hospital who have been committed to the custody of DMHAS under the auspices of the PSRB who have been found not guilty by reason of insanity. See Conn. Gen. Stat. §§ 54-56d; 17a-583; *Narcisee v. Delphin-Rittman*, 2017 WL 396137 at *1 (D.Conn.) (Challenging one's confinement at Whiting via habeas requires fully exhausting available State remedies); accord, *Buthy v. Comm'r. of Office of Mental Health*, 818 F.2d 1046, 1049 (2d Cir.1987). This requirement to exhaust state court avenues of relief before a person can assert habeas claims in federal court has long been held to apply to the mentally ill and those deemed incompetent and thus committed by state court orders into state custody. *Williams v. Dalton*, 23 F.2d 646 (6th Cir. 1956); *U.S. ex rel. Spinks v. Zeller*, 188

F.Supp. 767 (N.D.W.Va.1960); *Miller v. Director, Middletown State Hosp.*, 146 F. Supp. 6745 (E.D.N.Y.1956) aff'd. 242 F.2d 527 (2d Cir.1959).

The purpose and policy behind this now statutorily codified rule of law is grounded in the primary respect federal courts are duty bound to show to state judicial processes. *Wade v. Mayo*, 334 U.S. 672, 680 (1948); *Velez v. People of the State of New York*, 941 F. Supp. 300, 309 (E.D.N.Y.1996) The rule further protects the state courts' role in the enforcement of federal rights and prevents judicial disruption of state judicial processes. *Rose v. Lundy*, 455 U.S. 509, 518 (1982) The rule acknowledges, again under principles of comity, that state courts are co-equals of the federal courts in the responsibility to adjudicate federal constitutional issues, giving state courts the opportunity to resolve such issues. *Howard v. Sigler*, 325 F.Supp 278, 283 (D.Neb.1971) Thus the rule is not one of defining power but rather the appropriate exercise of power; if both the state and federal courts are open to persons in state custody, the state door to review should be opened first. *Clark v. Nickeson*, 321 F.Supp. 415, 419 (D.Conn.1971); in this sense, the rule is not strictly one of jurisdiction, but comity. *Hopkinson v. Shillinger*, 954 F.2d 609, 610 (10th Cir. 1991) *cert. den.* 112 S.Ct. 959 (1992); *Hammond v. Lenfest*, 398 F.2d 705, 714 (2d Cir.1968); *Snyder v. Kelly*, 769 F.Supp. 108,110 (W.D.N.Y.1991) *aff'd.* 972 F.2d 1328 (2d Cir.1992); *U.S. ex rel. Lynch v. Sandahl*, 793 F.Supp. 787,794 (N.D.Ill. 1992).

While the rule is grounded in principles of federalism and comity, it also has the salutary effect of enhancing the state courts' familiarity with federal constitutional issues, recognizing that state courts, no less than federal courts, are bound to safeguard the federal rights of those in custody. *Jones v. Keane*, 329 F.3d 290, 294 (2d Cir. 2003) *cert den.* 540 U.S. 1046 (2003). The

rule is an essential element of the federal scheme and it ensures that the states are afforded the opportunity to set their own constitutional houses in order before the power of the federal courts is invoked. *Fielding v. LeFevre*, 548 F.2d 1102,1106 (2dCir. 1977) Because the federal-state relationship is subjected to considerable stress whenever a federal court is asked to review such state court orders pertaining to custody, the rule is intended to ensure federal intrusions are confined to those instances where absolutely necessary. *U.S. ex rel. Cleveland v. Cassches*, 479 F.2d 15, 19 (2d Cir. 1973); *U.S. ex rel. Goodman v. Kehl*, 456 F.2d 863, 869 (2d Cir.1972).

The rule requires that *all* federal claims must be raised as federal claims in state court. *Jones v.* Annucci, 124 F.Supp.3d 103, 115 (N.D.N.Y. 2015); *Finetti v. Harris*, 609 F.2d 594, 597 (2d Cir.1979), and even an obvious denial of federal rights does not itself excuse the failure to exhaust state remedies. *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981). In addition, the federal courts have clearly established that this principle applies to claims of federal civil rights violations. *Howard v. Koch*, 575 F.Supp. 1299, 1302 (E.D.N.Y. 1982); *Miller v. Rockefeller*, 327 F.Supp. 542, 548 (S.D.N.Y.1971) (42 U.S.C. §1983 cannot be used to circumvent rules of comity and § 2254's requirement to exhaust state remedies in habeas claims); *Phipps v. McGinnis*, 327 F.Supp. 1, 2 (D.C.N.Y. 1970). This includes claimed violations of the federal due process clause and constitutional claims challenging conditions of confinement. *Jiminez v. Walker*, 458 F.3d 130 (2d Cir.2006) *cert. den.* 549 U.S. 1133 (2007); *U.S. ex rel. Whiteside v. Slavin*, 309 F.2d 322 (2d Cir. 1962), *cert. den.* 372 U.S. 966 (1963); *Campbell v. State of Georgia*, 459 F.2d 1039 (5th Cir. 1972) *cert. den*. 409 U.S. 984 (1973), *rehearing den.* 412 U.S.

933 (1973). See also, *U.S. ex rel. Leeson v. Damon*, 496 F.2d 718, 719 (2d Cir.1974) *cert. den.* 419 U.S. 954 (1974); *Lage v. Chapdelaine*, 2010 WL 4688820 (D.Conn.) at *3.

To be sure, there are limited exceptions to the rule as recognized by the courts, none of which are applicable here, including where there is the *complete* absence of a state court remedy, or the circumstances establish that state policies render any state processes to address the claims wholly ineffectual. *Copeland v. Walker*, 258 F.Supp. 2d 105, 141 (E.D.N.Y.2003). Thus, to excuse the duty to exhaust state remedies, the State remedy must be inadequate or unavailable. *Preiser v. Rodriquez*, 411 U.S. 475, 477 (1973); *Young v . Ragen*, 337 U.S. 235, 238 (1949); *U.S. ex rel. Santiago v. Follette*, 298 F.Supp. 973, 974 (D.C.N.Y. 1969). The ineffectiveness of the state remedy cannot be established if no attempt has been made to obtain relief in the state courts. *Daegele v. Crouse*, 429 F.2d 503, 505 (10th Cir. 1970) *cert. den.* 400 U.S. 1010 (1971). Moreover, anticipation of an adverse state court ruling does *not* establish the insufficiency of the state remedy for purpose of excusing the failure to exhaust the state court remedy. *Graziano v. Lape*, 358 F.Supp.2d 64, 67 (N.D.N.Y.2005), *reconsideration den.* 2005 WL 1176567.

Here, the plaintiffs have not plead, nor could they, that they have exhausted their state court remedies. Moreover, the avenues of remedy in the state courts are fully open to them. As set forth in the accompanying declaration of Kathryn Stackpole (Exhibit 1 hereto), the State habeas courts and dockets have been operating since the onset of the pandemic in Connecticut with very minimal if any interruptions in service or availability to hear emergency motions and petitions related to conditions of confinement, and certainly were operating and available on April 30, 2020, the date this lawsuit was filed. See *Fay v. Noia*, 372 U.S. 391,398-99 (1963) (The issue is whether the state remedy is available as of the date of filing the federal action); accord, *Dana v. Tracy*, 360 F.2d 545, 548 (1st

Cir.1966) cert. den 385 U.S. 941 (1966). In addition, the declaration establishes that none of the named plaintiffs herein have filed habeas petitions or actions in the Superior Court; indeed, this Court may take judicial notice of that fact. *Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir.2006) (Docket sheets are public records of which a court may take judicial notice of); *Gillums v. Semple*, 2018 WL 3404145 at *5 (D.Conn.).

This Court should decline to follow Judge Arterton's decision on the habeas exhaustion issue in *McPherson et al. v. Lamont, et al.*, No. 3:20-cv-534(JBA). In *McPherson*, apparently based on the evidence available to the Court at that juncture, the Court concluded that there was "diminished capacity" in the State court system to handle habeas claims at least during those early days of the pandemic; the Court expressed concern that the State courts "may not be able to respond to a massive volume of emergency habeas petitions" that the Court anticipated would be filed. *Id*. at 13. Such a situation, the *McPherson* Court observed, could result in a "consequence of potentially catastrophic health outcomes." *Id*. at 14. As reflected in Ms. Stackpole's declaration, at the time this lawsuit was filed, the State court system was suffering *no* such "diminished capacity"; habeas petitions and motions related to conditions of confinement were getting prompt attention and being treated, as they should, as high priority matters within the State court system. Moreover, Ms. Stackpole's declaration further establishes that there has been no "massive volume of emergency habeas petitions," even though the State courts also anticipated there might be significantly increased volume. Notably, the *McPherson* matter has been settled, and so a significant increase in Covid-19 related petitions filed on behalf of state prisoners is not likely to occur. Finally, as this Court heard at the last status conference, Whiting

and CVH patients have not suffered catastrophic health outcomes as compared to those outside the hospitals, and the evidence is likely to show the situation has even improved since then.

Plaintiffs' state court habeas remedies were available to them when they filed this lawsuit, and it cannot reasonably be disputed that they failed to avail themselves of such remedies. As such, plaintiffs' habeas claims must be dismissed.

II. The Court Should Decline to Entertain Plaintiffs' Claims in Accord with the Doctrine of Primary Jurisdiction

The longstanding doctrine of primary jurisdiction applies "where a claim is originally cognizable in the courts, but enforcement of the claim requires, or is materially aided by, the resolution of threshold issues, usually of a factual nature, which are placed within the special competence of …[an] administrative body." *Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51, 58-59 (2d Cir.1994) (citing *U.S. v. Western Pc. R.R., Co.*, 352 U.S. 59, 63-64 (1956)). The doctrine "allows an agency to decide factual issues that require specialized, technical knowledge that are particularly within its area of expertise and have been legislatively committed to its judgment." *Read v. Corning*, 351 F.Supp.3d 342, 350 (W.D.N.Y.2018) (citing *Johnson v, Nyack Hosp.*, 964 F.2d 116, 122 (2d Cir.1992)). The doctrine is especially useful for dealing with "issues of fact not within the ordinary ken of judges and which required administrative expertise should be resolved preliminarily by the agency in which Congress has vested authority over the subject matter …." *Golden Hill*, 39 F.3d at 60. The primary jurisdiction doctrine "recognizes that even though Congress had not empowered an agency to pass on the *legal* issues presented by a case raising issues of federal law, the agency's expertise may, nevertheless prove helpful to the

court in resolving the *factual* issues." *U.S. v. 43.47 Acres of Land*, 45 F.Supp. 2d 184, 192 (D.Conn.1999) quoting *Johnson*, 964 F.2d at 122 (Emphases in original). As plaintiffs' recent preliminary injunction filings amply demonstrate, here, myriad threshold factual issues predominant.

While the doctrine's usefulness "decreases in proportion as legal issues predominate over factual [issues]," its application is particularly appropriate where "[t]he ultimate legal question heavily relies on the factual determination[s] which does not fall within the conventional competence of the courts." *U.S. v. 43.47 Acres*, 45 F.Supp.2d at 192-93 (Internal quotations omitted). Thus, the doctrine "serves two interests: consistency and uniformity in the regulation of an area which Congress entrusted to a federal agency; and the resolution of technical questions of fact through the agency's specialized expertise, prior to judicial consideration of the legal claims." *Golden Hill*, 39 F.3d at 59 (citing *Nader v. Allegheny Airlines*, 426 U.S. 290, 303-4 (1976)); *Goya Foods, Inc. v. Tropicana Products, Inc.*, 846 F.2d 848, 851 (2d Cir.1988). One "aim of the doctrine … is to ensure that courts and agencies with concurrent jurisdiction do not work at cross purposes." *Martin v. Shell Oil Co.*, 198 F.R.D. 580, 585 (D.Conn.2000) (Internal quotations omitted). The doctrine extends to state agencies with specialized expertise as well. *Read*, 351 F.Supp.3d at 354.

Because application of the doctrine is a discretionary and prudential determination by the courts, it is not -- despite its name, and unlike the related doctrine of failure to exhaust administrative remedies -- actually jurisdictional in nature. *Collins v. Olin Corp.*, 418 F.Supp. 2d 34, 42 (D.Conn.2006) (citing *Tassy v. Brunswick Hosp. Center, Inc.*, 296 F.3d 65, 72 (2d

Cir.2002)). Rather, in recognizing that the doctrine of primary jurisdiction applies in a given case, the court is staying its judicial hand pending reference of plaintiffs' claims to the agency for its views." *Golden Hill*, 39 F.3d at 61. While the federal court retains final authority, it is availing itself of the agency's aid in gathering facts and marshalling them into a meaningful pattern." *Id*. at 60.

In this circuit, the federal courts have cited to four factors to be considered in determining whether a court should stay its hand under the primary jurisdiction doctrine, namely: (i) whether the factual questions are within the conventional experience of judges or involves technical or policy considerations within the agency's particular field of expertise; (ii) whether the issues are particularly within the agency's discretion; (iii) whether if the doctrine is not invoked will there be a substantial danger of inconsistent rulings or guidance; and (iv) whether prior application to the agency has been made. *Martin*, 198 F.R.D, at 585; *Collins*, 418 F. Supp 2d at 43 (citing *Niehaus v. AT & T Corp.*, 218 F.Supp.2d 531, 537 (S.D.N.Y.2002); *National Communs. Assoc., Inc. v. AT & T Co.*, 46 F.3d 220, 222-23 (2d Cir.1995)).

In an important Covid-19 related decision involving many of the same factual questions around maintaining the safety of critical facilities, the Court in *Rural Community Workers Alliance, et al. v. Smithfield Foods, Inc.*, 2020 WL 2145350 (W.D.Mo.) held it was prudentially appropriate to stay its hand pursuant to the primary jurisdiction doctrine in light of the complex technical and medical factual issues in play. The *Smithfield* Court determined that complex factual issues involving personal protective equipment, engineering controls, contact tracing methods, workplace rules and space utilization and the like militated in favor of deferring to the

specialized expertise of the Occupational Safety and Health Administration ("OSHA") and the Centers for Disease Control ("CDC"), noting that OSHA and the CDC had issued relevant joint guidance on such issues. The *Smithfield* Court, citing *Access Telecommuns. v. S.W. Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir.1998), noted that the primary jurisdiction doctrine allows a district court to refer a matter to the appropriate administrative agenc[ies] for a determination in the first instance even though the matter is initially cognizable by the district court. In invoking the primary jurisdiction doctrine, the *Smithfield* Court was particularly concerned with the risk of inconsistent regulation of this crucial area, and that the area involved a special competency that resided within the agencies. *Smithfield*, 2020 WL 2145350 at *8 (citing *Sprint Spectrum L.P. v. AT & T Corp.*, 168 F.Supp.2d 1095, 1098 (W.D.Mo.2009) in turn quoting *U.S. v. Western Pac. R.R. Co.*, 352 U.S. 59, 64) (1956)).

Applying the four factors noted above to the circumstances presented in this matter reveals three of the four factors readily apparent here. The detailed factual questions at issue here -- pertinent both inside and outside the psychiatric hospital setting -- regarding: i) medical testing regimens of patients; ii) sanitation and cleaning; iii) isolation and quarantine; iv) patient housing transfers and space deployment; v) deployment of protective equipment; vi) intake and discharge practices; vii) screening and testing of staff and visitors; viii) deployment of medical and other staff; ix) social distancing in psychiatric care and clinical settings; and x) consultation with medical and psychiatric experts and other consultants, as well as published guidances, all reflect significant, and notably rapidly evolving technical issues, knowledge and policy considerations beyond the conventional experience and ken of judges.

These complex factual and technical issues and considerations *are*, however, within the particular expertise of both the CDC and the Connecticut Department of Public Health ("DPH"). As reflected in the attached affidavit of Dr. Charles Dike, DMHAS' Medical Director (Exhibit 2 attached hereto), the CDC has issued numerous and evolving guidance documents regarding the application of appropriate medical and infection control practices during this pandemic in hospital and other such settings, and DPH has for months been providing guidance and expertise on these issues to hospitals, psychiatric hospitals, nursing homes and other congregate housing settings, to name just some of DPH's work since the onset of the pandemic. As knowledge about this particularly insidious virus and the illnesses it causes grows, these agencies are working feverishly to disseminate the best and latest information to assist and guide those operating such facilities. These issues are particularly within the ambit of these agencies' expertise and experience, and that expertise and experience is growing daily. As the declaration reflects, DMHAS professionals, in the exercise of their professional judgment, have been consulting and relying on such evolving information since the pandemic began.

A court, in ferreting through these complicated, technical and evolving factual issues, and electing to, in effect, choose winners and losers amongst the options presented for those charged with operating such facilities, plainly increases substantially the danger of inconsistent rulings and instructions for those on the front lines of care, possibly creating even greater risk for patients and staff.

As to the fourth factor -- whether prior application of these questions has been made to the relevant administrative agen[cies] -- while it appears no formal complaints have been filed

with the CDC or DPH (see Conn. Gen. Stat. § 19a-494a regarding DPH's power to issue emergency remedial orders), such a complaint could have been so filed, and notably, this factor is not in itself dispositive or mandatory for appropriate application of the primary jurisdiction doctrine, since the federal courts themselves may initiate such referrals. See *U.S. v. Western Pac. R.R. Co.*, 352 U.S. at 67-68; *Smithfield*, 2020 WL 2145350 at *9. In addition, as noted, both the CDC and DPH have already provided significant guidance referred to and employed by Whiting and CVH. Also, pursuant to Conn. Gen. Stat. § 19a-494a, the Commissioner of Public Health, if she finds that the health, safety or well-being of any patient served by an "institution," (which is defined at Conn. Gen. Stat. § 19a-490 to include Whiting, but not CVH) imperatively requires emergency action, she may issue a summary order to, among other things, compel compliance with state statutes and regulations, and even *reduce patient capacity* and services. In a similar vein, DPH's Facility Licensing & Inspection section, as an approved agent for the federal Center for Medicare and Medicaid Services, is empowered to investigate claimed unsafe hospital conditions, which would include overview of CVH, and require plans of correction. Finally, DMHAS itself has a process plaintiffs have failed to avail themselves of for the filing of grievances concerning hospital conditions and the like. See, https://portal.ct.gov/DMHA/Programs-and-Services/Advocacy/Grievance-Procedure.

This Court, in the prudential exercise of its discretion, based on the primary jurisdiction doctrine, should stay its hand until it has available to it the considered judgement of these agencies on the factual issues in play in this lawsuit.

III. The Court Should Abstain from Entertaining Plaintiffs' Assessment and Discharge Claims

While generally an action pending in state court does not bar proceedings involving the same matters in federal court, under the *Colorado River* doctrine,[1] a federal court may defer to state proceedings if certain conditions are present. This form of abstention is based on considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation. *Smulley v. Mutual of Omaha Bank*; 634 Fed. Appx. 335 (2d Cir 2016); *Burnett v. Physicians Online, Inc*., 99 F.3d 72, 76 (2d Cir.1996).

A court may abstain under the *Colorado River* doctrine if there are parallel state and federal proceedings; the court must consider and balance some six factors, namely, whether either the state or federal court has assumed jurisdiction over a *res*; the relative inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; the order in which the actions were filed; whether state or federal law provides the rule of decision; and whether the state action will protect the federal plaintiff's rights. *Smulley*, 634 Fed. Appx. at 335 ; *Burnett*, 99 F.3d at 76. Under the doctrine "[s]uits are parallel when substantially the same parties are contemporaneously litigating substantially the same issue in another forum." *Krondes v. Nationstar Mortgage, LLC,* 789 Fed. Appx. 913 (2d Cir.2020). The test is not a mechanical checklist, and the court must balance the factors in reaching its decision on abstention. *Burnett*, 99 F.3d at 77 (Internal citations and quotations omitted).

[1] *Colorado River Water Conservation District v. U.S.*¸ 424 U.S. 800 (1976).

As reflected in the pleadings in Exhibit 3 attached hereto, in *Drummer v. State of Connecticut et al.,* MMX-CV-18-5010661-S, pending in the Connecticut Superior Court for Judicial District of Middlesex, an action also brought by plaintiffs' attorneys in this matter from the Connecticut Legal Rights Project, plaintiff Drummer, a court-committed patient at Whiting, claims she is a suitable representative of a putative class of court-committed patients who have been denied appropriate discharge to community settings to which they are allegedly entitled pursuant to due process principles and the State' obligations under the ADA and § 504, which the plaintiff in *Drummer* asserts are incorporated into the CTPBR. The *Drummer* complaint was filed on or about January 25, 2018, and the matter remains pending. In *Drummer*, the plaintiff, on behalf of a putative class, expressly seeks reviews of all patients for possible prompt discharge into community settings, the creation of new and more extensive services and supports to purportedly allow for such discharges into community settings, increased "capacity for community supports and services, included supportive housing" and "the funding of such community supports and services." These legal claims and demands for relief are directly comparable to plaintiffs' claims in *this* lawsuit for population wide assessments for possible discharge into the most integrated setting where possible and the provision of all needed supports in such integrated settings, which plaintiffs herein claim they are entitled to under due process principles, the ADA and § 504. An honest assessment of the juxtaposition the two sets of claims and prayers for relief in these lawsuits legitimately raises the concern that the Covid-19 pandemic may be being exploited in the second lawsuit as a convenient basis for pursuing a deinstitutionalization agenda for these patients notwithstanding that given their mental health

challenges, placement in community settings, where control over social contacts and interactions would be much more difficult to achieve, may actually be more medically risky for them.

Examining and applying the *Colorado River* factors here reveals nearly all the factors favor abstention. Substantially the same parties are litigating in the two cases, although in this case the named plaintiffs include some who have been court ordered into the hospital(s) for either restoration of competency or because they have been found not guilty by reason of insanity for serious crimes, as opposed to just civil commitees; this however is a distinction without a meaningful difference, as all are involuntarily hospitalized as the result of court orders, and the legal claims plaintiffs in both actions pursue are not impacted by this distinction. There is no "res" at issue here, so that factor is inapplicable. As to the inconvenience of the federal forum, defendants now find themselves defending their current discharge practices in two forums at the same time, with plaintiffs effectively having "two bites at the apple," a circumstance certainly neither fair nor convenient for defendants. The state forum is certainly not inconvenient for the putative class, as indicated by their choice of the state forum first, before they had the Covid-19 pandemic as a further basis on which to argue their claims. Given that the claims in the two cases are nearly if not wholly the same, if both go forward simultaneously the danger of piecemeal litigation is readily evident. The state matter was filed first, and thus should be the vehicle for pursuit of these claims. The last two factors are closely related -- whether state or federal law will provide the basis of decision, and whether the state lawsuit will protect the plaintiffs' federal rights. Here plaintiffs themselves in their complaint in *Drummer* have answered both these questions; plaintiffs claim in *Drummer* that there is no daylight between plaintiffs' rights to

assessment and placement in such purportedly therapeutic integrated settings under Connecticut law, in particular the CTPBR, due process principles, and ADA and § 504 rights, claiming that the Connecticut law incorporates such due process, ADA and § 504 mandates and principles. Thus, plaintiffs themselves assert in *Drummer* that the rule of decision to be applied in the two matters is wholly consistent.

Accordingly, under *Colorado River* and its progeny, this Court should abstain from entertaining plaintiffs' assessment and discharge claims.

IV. Conclusion

For the reasons set forth above, the defendants respectfully urge the Court to dismiss plaintiffs' claims.

Dated at Hartford, Connecticut, this 11th day of June, 2020.

DEFENDANTS

NED LAMONT, ET AL.

WILLIAM TONG
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CERTIFICATION

I hereby certify that on June 11, 2020, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF system.

/s/ Ralph E. Urban
Ralph E. Urban
Assistant Attorney General

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THOMAS WILKES, BARBARA FLOOD, VINCENT ARDIZZONE, GAIL LITSKY, CARSON MUELLER, On behalf of themselves and all other persons similarly situated, *Plaintiffs*	:	CIVIL NO. 3:20CV594-JCH
v.	:	
NED LAMONT, Governor MIRIAM E. DELPHIN-RITTMAN, Commissioner of DMHAS, HAL SMITH, CEO of Whiting Forensic Hospital, LAKISHA HYATT, CEO Connecticut Valley Hospital, *Defendants*	:	May 29, 2020

DECLARATION OF KATHRYN STACKPOLE

The undersigned declarant, Kathryn Leger Stackpole, being duly sworn, hereby deposes and declares under the pains and penalties of perjury, pursuant to 28 USC §1746, that:

1. I work for the State of Connecticut, Judicial Branch, and I am presently an Assistant Clerk - Habeas Matters, in the Rockville Superior Court GA #19, 20 Park Street, Rockville, CT 06066.

2. On March 26, 2020, the Judicial Branch posted notice on its website that in response to the COVID-19 emergency, effective, Monday, March 30, 2020, the Rockville Courthouse GA #19, would be temporarily closed and matters from Rockville would be transferred to the Hartford Courthouse GA #14.

3. On March 30, 2020, both the Tolland JD and Rockville GA #19 Priority 1 business was absorbed by Hartford JD at GA #14.

4. From March 26, 2020 through May 13, 2020, all of the habeas mail was forwarded to GA #14.

5. On April 3, 2020, I contacted the Hartford JD Chief Clerk and arranged for GA #14 staff in Hartford to open all of the habeas mail in order to identify any emergency motions or petitions.

6. All matters deemed emergencies were sent to a habeas judge who reviewed the matter and determined how it should be handled. The judge directed that new matters be opened with a Hartford docket number. The Hon. Tejas Bhatt was assigned to handle these tasks.

7. On April 13, 2020, an emergency motion for bail filed in the matter of *Robert Day v. Commissioner of Correction*, TSR-CV17-4008971 was received in Hartford and forwarded to Judge Bhatt; a memorandum of decision was subsequently issued by Judge Bhatt.

8. The next day, an Emergency Motion for Temporary Injunction was filed in the matter of *Jeffrey Grimes v. Commissioner of Correction*, TSR-CV20-5000478, in which the petitioner sought immediate release. The respondent filed an Objection. On May 4, 2020, the Court (Bhatt, J.) promptly ruled upon the motion.

9. New habeas petitions were being scanned and forwarded to Judge Bhatt for review in furtherance of the procedure outlined in Con. Prac. Bk. § 23-24 Preliminary Consideration of Judicial Authority.

10. On April 15, 2020, I was given systems access, which allowed me to remotely process orders and code pleadings in an effort to expedite our internal procedure.

11. Mary Clark, Assistant Clerk at GA #19 was authorized, on April 24, 2020, to retrieve all of the Rockville mail held at GA #14. The habeas mail was then delivered to me. I promptly opened and reviewed all the mail to look for any emergency petitions/motions. I coded a motion for emergency release that was forwarded to Judge Bhatt who issued an order denying the motion.

12. On April 29, 2020, Judge Bhatt instructed that 3 new habeas petitions, which raised issues regarding COVID be docketed, with a Hartford docket number, and emailed to the Office of the Attorney General to expedite the filing of appearances. Orders were issued in each of the three cases for the respondents to file a response by May 13, 2020.

13. Those three petitions are: *Solomon Boyd v. Commissioner of Correction*, HHD-CV20-5063875; *Douglas Murphy v. Commissioner of Correction*, HHD-CV20-5063876 and *Malik Nunn v. Commissioner of Correction*, HHD-CV20-5063877.

14. On April 29, 2020, it was agreed that twice a week habeas staff from GA #19 would operate out of the GA #14. On Wednesday afternoons, I opened habeas mail and coded and scanned pleadings into the Judicial Branch's e-filing system. Attention was given to emergency matters. On Friday afternoons, another habeas clerk performed the same tasks. This continued until May 13, 2020.

15. On May 4, 2020, the civil courts permitted non-arguable matters to go forward on the short calendar. I sent motions that did not require hearings to Judge Bhatt and Judge Chaplin for review. Habeas staff has been working with the judges to enter orders on the motions that can be ruled on.

16. An emergency motion for bond was filed, on May 6, 2020, in the matter of *Madeline Griffin v. Commissioner of Correction*, TSR-CV17-4009012. Judge Bhatt issued an

order for a response to be filed by respondent by May 11, 2020. Representatives from the Office of the Attorney General and the State's Attorney's Office timely filed an Objection and Exhibits. A pretrial was scheduled, and conducted using Microsoft Teams, on May 11, 2020 at 2:00 p.m. On May 20, 2020, Judge Bhatt issued a memorandum of decision denying the emergency motion for bond.

17. Since the COVID pandemic began, and up through May 8, 2020, 68 new Habeas Petitions were filed. Eight petitions were returned for noncompliance with the requirements of Conn. Prac. Bk. §23-22. Ten petitions not involving medical or COVID claims are currently under review by a judge to determine if the court should decline to issue the writ pursuant to Conn. Prac. Bk. §23-24.

18. The remaining 50 petitions were docketed. Of these 50, 16 are considered conditions of confinement cases and 11 raised medical issues. The remaining 34 petitions challenge the petitioner's underlying conviction and are not COVID related. These petitions, not urgent in nature, were processed to maintain habeas operations. Since May 11, 2020, an additional 15 complying petitions were filed and docketed.

19. Only four of the new petitions, reviewed since March, have been COVID related, which we consider an emergency.

20. In addition to the three petitions that were docketed in Hartford, on May 11, 2020, a fourth petition making emergency claims related to COVID was filed. This matter was reviewed by Judge Vernon Oliver, and was opened and docketed on May 12, 2020. That case is *Jose Rivera v. Commissioner of Correction*, TSR-CV20-50000561. The respondent was notified of the new petition by email, and Judge Oliver entered a scheduling order with a responsive pleading due date

of May 19, 2020. A hearing has been scheduled on the matter before Judge Oliver on May 27, 2020.

21. Judge Vernon Oliver sitting in Middletown, on May 13, 2020, held the first conditions hearing that had been previously continued due to the shutdown. It was conducted remotely and utilized the Cisco Meeting video-conferencing platform. Only Judge Oliver, the court monitor, and the courtroom clerk appeared from the courthouse. The AG, the Petitioner and witnesses participated via videoconferencing. The hearing was successfully completed, and the matter was withdrawn.

22. The Habeas Caseflow Coordinator compiled a list, on May 13, 2020, of pending medical cases that had been continued due to the shutdown for review and triage for the Habeas docket.

23. On May 13, 2020, the Rockville Courthouse, GA #19, was opened for limited staff only to prepare for the imminent opening of the courthouse to the public.

24. On May 14, 2020, the three petitions originally docketed in Hartford, specifically *Solomon Boyd v. Commissioner of Correction*, TSR-CV20-5000611, *Douglas Murphy v. Commissioner of Correction*, TSR-CV20-5000610 and *Malik Nunn v. Commissioner of Correction*, TSR-CV20-5000609, were transferred back to GA #19 and assigned Rockville docket numbers.

25. On May 14, 2020, GA #19 mail, including habeas mail, started being delivered to the Rockville Courthouse. Habeas mail is currently being opened and reviewed by habeas staff.

26. On May 14, 2020, an emergency motion to admit petitioner to bail was filed in *Ray Boyd v. Commissioner of Correction*, TSR-CV18-4009318. A hearing has been scheduled on the motion before Judge Oliver on May 27, 2020.

27. On May 15, 2020, the Hon. Judge Hunchu Kwak conducted a hearing in the matter of *Malik Nunn v. Commissioner of Correction*, TSR-CV20-5000609. The parties were afforded an opportunity to be heard, present witnesses, and submit documentation to the court. The hearing concluded with the Petitioner being provided additional time to respond to the Respondent's Objection.

28. On May 18, 2020, the Hon. Judge Hunchu Kwak conducted a hearing in the matter of *Solomon Boyd v. Commissioner of Correction*, TSR-CV20-5000611. At the petitioner's request, he was provided additional time to respond to the respondent's motion to dismiss the petition and the matter was continued to June 1, 2020. On the same day, the Hon. Judge Vernon Oliver conducted an evidentiary hearing in the matter of *Douglas Murphy v. Commissioner of Correction*, TSR-CV20-5000610. At the completion of the hearing, the petitioner was ordered to file a response to the respondent's objection by May 29, 2020 and the respondent was ordered to file a reply or notice that no reply would be filed by June 3, 2020.

29. On May 19, 2020, a motion for immediate release was filed in the matter of *Pedro Gonzalez v. Commissioner of Correction*; TSR-CV17-4008690. A hearing has been scheduled before Judge Oliver on May 29, 2020.

30. Emergency matters that involve COVID claims will be addressed expeditiously in Middletown. Habeas staff will be present along with a Temporary Assistant Clerk (TAC) from Middletown.

31. Going forward habeas judges and staff have triaged the docket to continuously review and prioritize petitions that were scheduled for hearing or trial but continued as a result of the COVID crisis.

32. Of the cases scheduled and continued, conditions of confinement cases where the Petitioner asserted underlying medical claims as the basis for the petition, are culled out and prioritized for scheduling.

33. The habeas court staff will continue to identify and prioritize petitions with underlying conditions of confinement claims.

34. A review of judicial records reveals that Thomas Wilkes, Barbara Flood, Vincent Ardizzone, Gail Litsky and Carson Mueller have not filed state court habeas petitions challenging conditions of confinement based on COVID.

DECLARATION

Pursuant to Conn. Gen. Stat. §§1-24a, 53a-157b, and 28 U.S.C. §1746, I declare under the pains and penalties of perjury that the foregoing statements are true and accurate to the best of my knowledge and belief.

Dated this 29th day of May, 2020.

Kathryn Leger Stackpole, Esq.
Assistant Clerk - Habeas Matters
Rockville Superior Court

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

THOMAS WILKES, BARBARA FLOOD, VINCENT ARDIZZONE, GAIL LITSKY, CARSON MUELLER, On behalf of themselves and all other persons similarly situated, *Plaintiffs*	:	CIVIL NO. 3:20CV594-JCH
v.	:	
NED LAMONT, Governor MIRIAM E. DELPHIN-RITTMAN, Commissioner of DMHAS, HAL SMITH, CEO of Whiting Forensic Hospital, LAKISHA HYATT, CEO Connecticut Valley Hospital, *Defendants*	:	June 11, 2020

DECLARATION OF CHARLES DIKE

The undersigned declarant, Charles Dike, being duly sworn, hereby deposes and declares under the pains and penalties of perjury, pursuant to 28 USC §1746, that:

1. I am the Medical Director of the Connecticut Department of Mental Health and Addiction Services ("DMHAS"), which operates both Whiting Forensic Hospital ("Whiting") and Connecticut Valley Hospital ("CVH"). I have held this position for four years. Prior to becoming Medical Director for the agency, I was Assistant Medical Director of DMHAS (2014-2016), Division Director, Whiting Forensic Division ("WFD") of CVH from 2012-2014, Medical Director WFD of CVH (2006-2012), and Principal Psychiatrist at WFD of CVH (2002-2006). In addition, I have been Associate Program Director, Law and Psychiatry Fellowship Program, Yale University School of Medicine since 2012.

2. I am a psychiatrist licensed in Connecticut.

3. My medical and psychiatric training, degrees and qualifications include: MD; Master's in public health; Distinguished Fellow, American Psychiatric Association; Fellow Royal College of Psychiatrists of England; Fellow, American College of Healthcare Executives; Diplomate in Clinical Psychiatry, Royal College of Physicians and Surgeons of Ireland; Associate Professor of Psychiatry, Yale University School of Medicine; and Associate Program Director, Law and Psychiatry Fellowship Program, Yale University School of Medicine.

4. In my capacity as Medical Director for the agency, I have played a central role in devising and coordinating Whiting's and CVH's response to the Covid-19 pandemic. In particular, I have coordinated and overseen the development of the continuously evolving protocols put in place to address the need to ensure that patients and staff at Whiting and CVH remain as safe as possible while still providing for the medical and clinical needs of Whiting's and CVH's patients. Critical to this mission is recognizing that new information on effective methods and protocols related to Covid-19 are being developed and shared by medical personnel around the nation and the world daily.

5. In developing the protocols, I, in consultation with my colleagues, have relied on numerous guidances and articles from reputable sources including the U.S. Centers for Disease Control & Prevention ("CDC"), the National Institutes of Health ("NIH") and others. To date these have included but are not limited to:

- https://www.cdc.gov/coronavirus/2019-ncov/hcp/infection-control-faq.html
- https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html
- https://www.cdc.gov/coronavirus/2019-nCoV/hcp/clinical-criteria.html
- https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/testing.html
- https://www.cdc.gov/coronavirus/2019-ncov/hcp/return-to-work.html
- https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-

19.pdf?sfvrsn=5ae25bc7_4#:~:text=The%20incubation%20period%20for%20COVID,occur%20before%20symptom%20onset.

- https://www.cdc.gov/coronavirus/2019-ncov/lab/serology-testing.html
- https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-risk-assesment-hcp.html
- https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/care-for-someone.html
- https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html
- https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/face-masks.html
- file:///C:/Users/cd244/Downloads/NH%20testing%20and%20cohorting%20guide%20May11%20(2).pdf
- https://www.cdc.gov/coronavirus/2019-ncov/hcp/respirators-strategy/index.html
- https://www.cdc.gov/coronavirus/2019-ncov/community/strategy-discontinue-isolation.html
- https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html
- file:///C:/Users/cd244/Downloads/FEMA_FactSheet_COVID19_Best_PracticesPPEPreservation_20200412_EA_cleared.pdf
- https://www.cdc.gov/coronavirus/2019-ncov/hcp/ppe-strategy/decontamination-reuse-respirators.html
- https://www.nih.gov/news-events/news-releases/nih-study-validates-decontamination-methods-re-use-n95-respirators
- https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html
- https://portal.ct.gov/-/media/Coronavirus/Fact-Sheets/COVID19-High-Risk-Fact-Sheet.pdf
- https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Ftransmission.html
- https://www.cdc.gov/coronavirus/2019-ncov/hcp/direct-service-providers.html
- https://www.cdc.gov/coronavirus/2019-ncov/community/group-homes.html
- https://www.cdc.gov/coronavirus/2019-ncov/hcp/developmental-behavioral-disorders.html
- https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-developmental-behavioral-disabilities.html
- "Hospitals: CMS [Centers for Medicare & Medicaid Services] Flexibility to Fight COVD-19"; 4/29/20
- "CMS Recommendations on Reopening Facilities to Provide Non-Emergent Non-COVID-19 Healthcare: Phase I";
- "Medicare and Medicaid Programs; Policy and Regulatory Revisions in Response to COVID-19 Public Health Emergency"; 3/24/20
- "CMS Guidance for Infection Control and Preservation of Coronavirus Disease in Hospitals, Psychiatric Hospitals and Critical Care Access Hospitals: FAQs, Considerations for Patient Triage, Placement, Limits to Visitation and Availability of 1135 Waivers"; 3/30/20
- "Prospect Medical: Observation Status of Patients Who Are COVID-19 or Under Investigation (Policy Exception Recommendations)- COVID-19 Pandemic"; 3/18/20
- FEMA Fact Sheet: Coronavirus (COVID-19) Pandemic: Personal Protective Equipment Preservation Best Practices" 4/12/20
- "CMS Nursing Home Reopening Recommendations for State and Local Officials"; 5/18/20

In addition, I have reviewed all Connecticut DPH guidance regarding COVID-19.

6. In addition to review and application of information from the above guidances and documents, DMHAS has received consultation services and advice from the following persons with specialized expertise related to the evolving practices around Covid-19 precautions and protocols in relevant hospital settings: (i) Lynn Sosa, M.D., Deputy State Epidemiologist; ii) Ellen Neuhaus, M.D., retired DPH Epidemiologist; iii) Vivian Leung, M.D., Healthcare Associated Infections and Antimicrobial Resistance Program Director; iv) Kenneth Tucker, CONN-OSHA Director; v) DPH Nurses Cynthia Hale, Robin Bazzini and Denise Soja; and vi) Middlesex Hospital, including frequent consultations with Dr. Alina Filozov, infectious disease specialist and epidemiologist.

DECLARATION

Pursuant to Conn. Gen. Stat. §§1-24a, 53a-157b, and 28 U.S.C. §1746, I declare under the pains and penalties of perjury that the foregoing statements are true and accurate to the best of my knowledge and belief.

Dated this 11th day of June 2020.

Charles Dike, MD, MPH, FRCPsych

STATE OF CONNECTICUT

Docket No.: MMX-CV18-5010661-S	**: Superior Court**
	:
Gloria Drummer,	**:**
	:
Plaintiff, Individually and on behalf	**:**
of all persons similarly situated,	**: Judicial District of**
	: Middlesex
v.	**: at Middletown**
	:
State of Connecticut, *et al.*,	**:**
	:
Defendants.	**: June 29, 2018**

AMENDED MOTION FOR CLASS CERTIFICATION

Gloria Drummer moves the Court for class certification pursuant to Connecticut General Statutes § 51-105 and Practice Book §§ 9-7 and 9-8(2). In support of her motion she states as follows:

Factual Context

Gloria Drummer is a 60 year-old woman who was involuntarily civilly committed to Connecticut Valley Hospital, Whiting Forensic Division, on October 14, 2016. She was declared discharge ready on August 2, 2017. At her annual review judicial hearing held by Judge Joseph D. Marino, Probate Court Judge, on October 13, 2017, the case was continued because the evidence was uncontested that Ms. Drummer did not meet commitment standards. The case was continued because there was no

appropriate place for her discharge, resulting in discriminatory, unconstitutional and illegal segregation and unnecessary institutionalization.

Standing

Ms Drummer has been aggrieved and has suffered injury to her person because she was denied a periodic review as soon as she had stabilized and was no longer a danger to self or others or gravely disabled. Her treatment team declared her ready for discharge on August 2, 2017. Moreover, Ms. Drummer was unnecessarily institutionalized from at least September 2, 2017 until March 14, 2018, six months. Ms. Drummer was discharged on March 14, 2018 to Lotus House, a residential services group home with full-time staff.

Ms. Drummer's claims are not moot because they are capable of repetition and likely to recur due to her long history of psychiatric conditions and psychiatric treatment.

Class Certification

Ms. Drummer brings this action on her own behalf and on behalf of two classes defined as follows:

Periodic Review Class

All psychiatric inpatients involuntarily civilly committed to a state-operated psychiatric facility who are likely to no longer meet commitment standards before their annual or biennial review, and who have not had a probate court periodic review requested by the facility.

Community Integration to Most Integrated Setting Class

All psychiatric inpatients involuntarily civilly committed to a state-operated psychiatric facility, who have been declared discharge ready by their treatment teams or not meeting commitment standards by the probate court, but who remain in the facility unnecessarily institutionalized and segregated for an unreasonable period of time because of a lack of appropriate placements, supports and services in the community.

The plaintiff classes are so numerous that joinder is impracticable. Inpatient units in state-operated facilities usually hold 15-20 patients at any given time. Connecticut Valley Hospital has eleven general psychiatry inpatient units. Greater Bridgeport Community Mental Health Center has three inpatient units. Connecticut Mental Health Center in New Haven has two inpatient units. Whiting Forensic Hospital has civil patients integrated

into its five inpatient units. Capitol Region Mental Health Center has one inpatient unit. In 2017, at Connecticut Valley Hospital alone, there were 84 new civil commitments filed, 107 annual reviews, and 48 periodic reviews.

There are questions of law and fact common to the proposed classes, including:

Fasulo Class Common Questions of Law and Fact

1. Is Conn. Gen. Stat. § 17a-498(g) unconstitutional?
2. Does the Connecticut constitution and *Fasulo v. Arafeh* require state psychiatric facilities to request a probate court hearing as soon as their patient is stabilized and likely not to meet the legal commitment standard?
3. Were Ms. Drummer and all Fasulo Class members denied their constitutional due process probate court hearing to determine whether their present mental status met the legal standard for commitment?

Olmstead Class Common Questions of Law and Fact

1. Does the Connecticut Patients' Bill of Rights incorporate the federal civil right from the Americans with Disabilities Act, the Rehabilitation Act and *Olmstead v. L.C.*, 527 U.S. 581 (1999) to receive services in the community in the most integrated setting?

2. Does the Connecticut mental health community services and supports system have adequate capacity to ensure that all patients who no longer meet commitment standards are discharged to the most integrated setting within a reasonable time?
3. Does the Connecticut Patients' Bill of Rights, integration mandate and the Commissioner's Policy require that state inpatient psychiatric facilities presume that supportive housing is the most integrated setting?

Are the Olmstead class members being discharged to the most integrated setting within a reasonable time after their Fasulo hearing determines that the person no longer meets commitment standards?

Ms. Drummer's claims are typical of the claims of the plaintiff proposed classes:

A. The named plaintiff and the members of the proposed classes are all civilly committed to a state-operated inpatient psychiatric facility;

B. The facility did not request a periodic review by a probate court;

C. The members of the proposed plaintiff classes are or will be discharge ready or not meet commitment standards;

D. The members of the proposed plaintiff classes will be unnecessarily institutionalized and segregated because of the failure of the state to have an Integration Plan for psychiatric inpatients;

E. The members of the proposed classes are all people for whom the state has failed to measure and respond to the need for residential services and supports in the community resulting in their continued confinement as patients who are ready for discharge or do not meet commitment standards and who the state has failed to discharge to the most integrated setting within a reasonable time.

The named plaintiff will fairly and adequately protect the interests of the proposed plaintiff classes.

Plaintiff's counsel are experienced litigators and have the resources to adequately represent the interests of the proposed plaintiff classes. Counsel are attorneys with the Connecticut Legal Rights Project (CLRP), the legal services organization created by federal consent decree to represent patients at all state-operated inpatient psychiatric facilities.

Counsel have spent many years developing the class claims in this case regarding the constitutional and civil rights provided in the Connecticut Patients' Bill of Rights, including the right to liberty when patients do not meet commitment standards, the right to periodic review of commitment, and the right to discharge to the most integrated setting with adequate supports and services in the community. CLRP will devote the attorney time and expenses necessary to prosecute the case. Counsel have not previously represented a certified class.

Plaintiff's claims satisfy the requirements of Practice Book § 9-8(2) in that the defendant has acted on grounds generally applicable to the proposed plaintiff classes, thereby making appropriate final injunctive and declaratory relief with respect to the proposed classes as a whole.

Wherefore, plaintiff requests that two classes be certified and that matter proceed as a class action.

Respectfully submitted,

s/Kirk W. Lowry
Kirk W. Lowry, Juris No. 429577
Legal Director
Kathleen M. Flaherty, Juris No. 413221
Executive Director
Sally Zanger, Juris No. 069554
Karyl Lee Hall, Juris No. 405577
Senior Staff Attorneys
Virginia Teixeira, Juris No. 433079
Staff Attorney

Connecticut Legal Rights Project
Beers Hall 2nd Floor
P.O. Box 351 Silver Street
Middletown, CT 06457
(860) 262-5017
Fax (860) 262-5035
klowry@clrp.org

Certification

I hereby certify that all the parties have consented to accept papers served electronically and that a copy of the foregoing was sent via electronic mail on June 29, 2018 to:

Walter Menjivar
Walter.menjivar@ct.gov

Jacqueline Hoell
Jacqueline.hoell@ct.gov

s/Kirk W. Lowry
Kirk W. Lowry

STATE OF CONNECTICUT

Docket No.: CV18-	**: Superior Court**
	:
Gloria Drummer,	**:**
	:
Plaintiff, Individually and on behalf of all persons similarly situated,	**:**
	: Judicial District of Middlesex
v.	**: at Middletown**
	:
State of Connecticut, Department of Mental Health and Addiction Services, Connecticut Valley Hospital, Whiting Forensic Hospital, Greater Bridgeport Community Mental Health Center, Connecticut Mental Health Center, And Capitol Region Community Mental Health Center, Defendants.	**: January 25, 2018**

COMPLAINT

Introductory Statement

1. This action is brought pursuant to the Connecticut Patients' Bill of Rights, Conn. Gen. Stat. §§ 17a-540 *et seq.*

2. The named plaintiff, Gloria Drummer, and all others similarly situated are individuals who:

A. have been indefinitely civilly committed pursuant to Conn. Gen. Stat. § 17a-498(c);

B. have not been given a periodic review required by *Fasulo v. Arafeh*, 173 Conn. 473 (1977) [hereinafter "*Fasulo*"];

C. no longer meet commitment standards; and

D. are unnecessarily institutionalized in a state-operated inpatient psychiatric facility because of a lack of community supports and services, including supportive housing.

3. Plaintiff brings this action on behalf of herself and all others similarly situated to:

A. challenge the constitutionality of the state's periodic review statute, Conn. Gen. Stat. § 17a-498(g);

B. to enforce the substantive constitutional right established in *Fasulo* to liberty as soon as the person does not meet commitment standards;

C. to establish policies and procedures in state-operated inpatient psychiatric facilities to ensure a timely periodic review;

D. to require the State to measure the need and create capacity for residential supports and services in the community so that a person shall be discharged to the most integrated setting appropriate with their needs within a reasonable time of not meeting state standards for civil commitment.

4. Plaintiff seeks the following declaratory and injunctive relief:

A. declaring Conn. Gen. Stat. § 17a-498(g) unconstitutional;

B. ordering policies and procedures for timely periodic review;

C. ordering the state to review the need and create capacity for community supports and services, including supportive housing, so as to ensure that plaintiffs are discharged to the most integrated setting appropriate with their needs within a reasonable time of no longer meeting state standards for civil commitment;

D. ordering the state to establish an integration plan;

E. ordering the state to determine the budget necessary to support that plan;

F. ordering the state to adequately fund community supports and services pursuant to that plan; and

G. ordering the state to provide those services and supports.

5. The Connecticut Patients' Bill of Rights provides for a private right of action against the State of Connecticut, the Department of Mental Health and Addiction Services and the state-operated inpatient psychiatric facilities named as defendants. The statute operates as a waiver of the state's sovereign immunity. Conn. Gen. Stat. § 17a-550; *Mahoney v. Lensink*, 213 Conn. 548, 562 (1990).

Parties

6. Plaintiff Gloria Drummer is involuntarily committed to Connecticut Valley Hospital in Middletown, Connecticut by order of Judge Joseph Marino on October 14, 2016. Ms. Drummer currently resides at Dutcher Hall, Whiting Forensic Hospital. Whiting Forensic Hospital was part of Connecticut Valley Hospital until Executive Order 63 was issued by Governor Malloy on January 2, 2018. Executive Order 63 is inconsistent with the existing statutes which combined Whiting Forensic Division into Connecticut Valley Hospital in 1995. Conn. Gen. Stat. §§ 17a-560 *et seq.*

7. The Defendant State of Connecticut funds and operates the Department of Mental Health and Addiction Services which operates the defendants Connecticut Valley Hospital, Whiting Forensic Hospital, Greater Bridgeport Community Mental Health Center, Connecticut Mental Health Center, and Capital Region Mental Health Center. Defendants are facilities as defined in Conn. Gen. Stat. § 17a-540(1).

Class Action Allegations

8. Ms. Drummer is a patient in a state-operated inpatient psychiatric facility who is ready for discharge and is being held in the hospital, unnecessarily institutionalized and segregated in violation of her state constitutional substantive due process rights to liberty, her state

constitutional procedural due process rights to a hearing initiated by the state, and her state statutory civil right to receive services in the most integrated setting.

9. Ms. Drummer brings this action on her own behalf and on behalf of two classes defined as follows:

Periodic Review Class

All psychiatric inpatients involuntarily civilly committed to a state-operated psychiatric facility who, within a reasonable degree of medical certainty, are likely to not meet commitment standards before their annual or biennial review, and who have not had a probate court periodic review requested by the facility.

Community Integration to Most Integrated Setting Class

All psychiatric inpatients involuntarily civilly committed to a state-operated psychiatric facility, who have been declared discharge ready by their treatment teams or not meeting commitment standards by the probate court, but who remain in the facility unnecessarily institutionalized and segregated for an unreasonable period of time because of a lack of appropriate placements, supports and services in the community.

10. The plaintiff classes are so numerous that joinder is impracticable. Inpatient units in state-operated facilities usually hold 15-20 patients at any given time. Connecticut Valley Hospital has eleven general psychiatry inpatient units. Greater Bridgeport Community Mental Health Center has three inpatient units. Connecticut Mental Health Center in New Haven has two inpatient units. Whiting Forensic Hospital has civil patients integrated into its five inpatient units. Capitol Region Mental Health Center has one inpatient unit. In 2017, at Connecticut Valley Hospital alone, there were 84 new civil commitments filed, 107 annual reviews, and 48 periodic reviews.

11. There are questions of law and fact common to the proposed classes, including: How to determine the constitutional right to liberty possessed by persons civilly committed to a state-operated psychiatric facility; How to determine and implement the procedural due process constitutional right to a timely periodic review of one's commitment; How to implement the right to be discharged to the most integrated setting within a reasonable period of time after not meeting commitment standards or being designated as ready for discharge by the treatment team; Whether the facility must schedule a person for periodic review; Whether the facility must request a periodic review for each person at their commitment

hearing if the patient will likely stabilize and not meet commitment standards prior to one year; What is the most integrated setting appropriate for the named plaintiff and the proposed plaintiff integration class; How soon the state must discharge a patient after the patient does not meet commitment standards or is declared discharge ready; Whether the unnecessary institutionalization and segregation of the plaintiff and the proposed integration class constitutes discrimination by the state mental health system; And, whether the DMHAS Commissioner's Policy 6.41 requires that the defendants must presume that supportive housing is the most integrated setting.

12. Ms. Drummer's claims are typical of the claims of the plaintiff proposed classes:

A. The named plaintiff and the members of the proposed classes are all civilly committed to a state-operated inpatient psychiatric facility;

B. The facility did not request a periodic review by a probate court;

C. The members of the proposed plaintiff classes are or will be discharge ready or not meet commitment standards;

D. The members of the proposed plaintiff classes will be unnecessarily institutionalized and segregated because of the failure of the state to have an Integration Plan for psychiatric inpatients;

E. The state has failed to measure and respond to the need for residential services and supports in the community resulting in continued confinement of patients who are ready for discharge or do not meet commitment standards and the failure of the state to discharge them within a reasonable time to the most integrated setting.

13. The named plaintiff will fairly and adequately protect the interests of the proposed plaintiff classes.

14. Plaintiff's counsel are experienced litigators and have the resources to adequately represent the interests of the proposed plaintiff classes. Counsel are attorneys with the Connecticut Legal Rights Project (CLRP), the legal services organization created by federal consent decree to represent patients at all state-operated inpatient psychiatric facilities. Counsel have spent many years developing the class claims in this case regarding the constitutional and civil rights provided in the Connecticut Patients' Bill of Rights, including the right to liberty when patients do not

meet commitment standards, the right to periodic review of commitment, and the right to discharge to the most integrated setting with adequate supports and services in the community. CLRP will devote the attorney time and expenses necessary to prosecute the case. Counsel have not previously represented a certified class.

15. Plaintiff's claims satisfy the requirements of Practice Book § 9-8(2) in that the defendant has acted on grounds generally applicable to the proposed plaintiff classes, thereby making appropriate final injunctive and declaratory relief with respect to the proposed classes as a whole.

Statutory and Procedural Background

16. Prior to the first involuntary civil commitment statute in 1889, treatment for people with psychiatric disabilities was a matter for families and their physicians or the first selectman of the town. Due process of law was not a concern and many cases were resolved by reference to the common law defenses to battery. *Porter v. Ritch*, 70 Conn. 235 (1898)

17. The first involuntary civil commitment statute for adults with psychiatric disabilities was enacted in 1889: Public Acts 1889, Chapter 162, § 2. That statute provided that "any judge of a probate court within his probate district shall have power to commit any insane person residing in said district to an asylum in this state in the manner herein provided." The

standard for commitment, which continued until 1976, was that "such person is insane and a fit subject to be confined in an asylum." *Porter v. Ritch*, 70 Conn. 235, 252 (1898).

18. In 1975, the United States Supreme Court held that people with psychiatric disabilities had a fundamental liberty interest under the Fourteenth Amendment not to be committed unless they had psychiatric disabilities and were a danger to self or others. Mental illness alone was insufficient for the state to restrict a person's liberty. *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

19. After the United States Supreme Court ruled in *O'Connor v. Donaldson*, the Connecticut Supreme Court held that the Connecticut Constitution's due process clause in Article First, Section 8 protects the fundamental substantive due process right of individual liberty for persons with mental illness not to remain committed unless the state proved by clear and convincing evidence that the person is a danger to self or others or gravely disabled. *Fasulo at* 483.

20. The Connecticut Supreme Court held that the fundamental right to liberty includes the procedural due process right to a judicial due process hearing in probate court to test the legal standard for commitment. That

right includes the right to periodic review of one's involuntary civil commitment. *Fasulo* at 483.

21. "Freedom from involuntary confinement for those who have committed no crime is the natural state of individuals in this country." *Fasulo* at 481. "The authority of the state to confine an individual is contingent upon the individual's present mental status, which must be one of mental illness amounting to a need for confinement for the individual's own welfare or the welfare of others or the community." *Id.* at 476. "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which an individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). "To satisfy due process, the procedure for releasing a civilly committed patient must be adequate to assure release of those who may no longer constitutionally be confined." *Fasulo* at 477.

22. After stating the principle of liberty, the Connecticut Supreme Court articulated the substantive requirements of the required hearing. Any procedure to allow the release of involuntarily confined civilly committed individuals must:

A. take account of the controlled and often isolated environment of the mental hospital from which the confined individuals will seek release;

B. calculate the possible incompetence of those confined, and their limited knowledge of release procedures;

C. take account of the cost of pursuing review and the amount of effort necessary to pursue review;

D. be adapted to the possible effect of drugs or other treatment on the patient's capacity; and

E. be formulated with consideration of institutional pressures to rely on the medical judgments of the hospital staff rather than to pursue extra-institutional legal remedies.

Fasulo at 478.

23. Finally, the *Fasulo* Court clearly stated that a court must decide the constitutional liberty issue of release. "The state's power to confine terminates when the patient's condition no longer meets the legal standard for commitment. Since the state's power to confine is measured by a legal standard, the expiration of the state's power can only be determined in a judicial proceeding which tests the patient's present mental status against the legal standard for confinement. That adjudication cannot be made by

medical personnel unguided by the procedural safeguards which cushion the individual from an overzealous exercise of state power when the individual is first threatened with the deprivation of his liberty." *Fasulo* at 479.

24. The Connecticut Supreme Court held "that the due process clause of the Connecticut constitution mandates that involuntarily confined civilly committed individuals be granted periodic judicial reviews of the propriety of their continued confinement." *Fasulo* at 479. "The state, therefore, must bear the burden of initiating recommitment proceedings." *Id.* at 480.

25. In 1977 and 1979, Connecticut amended the civil commitment statutes including the periodic review section, what is now Conn. Gen. Stat. § 17a-498(g). The amendments do not meet the minimum due process requirements laid out in *Fasulo*.

26. Connecticut is one of the very few states that provides for commitments of indefinite duration. Conn. Gen. Stat. § 17a-498(c). Many other states authorize commitment orders of limited duration, such as 30, 60 or 90 days. Those states place the burden of recommitment on the state, not the patient. In contrast, current Connecticut state law provides that a probate court commitment order is "for the period of the duration of

such psychiatric disabilities, or until he or she is discharged or converted to voluntary status. . ." Conn. Gen. Stat. § 17a-498(c)(3).

27. Connecticut's periodic review statute, Conn. Gen. Stat. § 17a-498(g), is unconstitutional because it violates the constitutional requirements laid out in *Fasulo* that the state-operated facility request a full judicial due process review of the person's current mental status to ensure that the patient continues to meet commitment standards. *Fasulo* mandates that the state: (a) make a determination of when the patient is likely to stabilize and not present as a danger to self or others or gravely disabled or could be reasonably placed in a less restrictive setting, and (b) request a review by the probate court to determine whether the person continues to meet commitment standards.

28. Connecticut's periodic review statute, Conn. Gen. Stat. § 17a-498(g), violates the state constitution because it only requires a full judicial due process hearing once every two years instead of requiring an individualized assessment of each patient's present mental status and a state-initiated full judicial due process hearing that will minimize any period of unnecessary institutionalization.

29. Connecticut's periodic review statute, Conn. Gen. Stat. § 17a-498(g), violates the state constitution because the vast majority of patients

committed to state-operated inpatient psychiatric facilities stabilize and no longer meet commitment standards long before the mandatory two-year review, resulting in significant numbers of patients being unnecessarily institutionalized and segregated.

30. There has been no constitutional challenge to Conn. Gen. Stat. § 17a-498(g) because of the isolation and segregation of psychiatric inpatients who are unaware of their right timely to be reviewed and the fragmented nature of court-appointed counsel from the private bar.

31. Patients in state-operated inpatient psychiatric facilities have a constitutional right to be discharged as soon as they no longer meet commitment standards and a right to a full judicial due process hearing in probate court. *Fasulo* at 473.

32. Since 1999, patients in psychiatric inpatient facilities have had a right to receive services in the most integrated setting. *Olmstead v. L.C.*, 527 U.S. 581, 587 (1999). The United States Supreme Court held that unnecessary institutionalization is discrimination in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132. *Id.* at 600.

33. Patients in state-operated inpatient psychiatric facilities have a right to be discharged as soon as their present mental status indicates that they are not a danger to self or others or gravely disabled. Such patients

have a right to receive services in the least restrictive setting under state law and the Americans with Disabilities Act, which provides for the right to receive residential supports and services in the community in the most integrated setting. Both the state statutory and constitutional rights to receive services in the least restrictive setting and the ADA right to the most integrated setting are incorporated into the Connecticut Patients' Bill of Rights in Conn. Gen. Stat. §§ 17a-541 and 17a-542. "Because the patients' bill of rights is remedial in nature, its provisions should be liberally construed in favor of the class sought to be benefited." *Mahoney v. Lensink*, 213 Conn 548, 556 (1990).

34. General Statutes § 17a-541 provides in part that, "No patient hospitalized or treated in any public or private facility for the treatment of persons with psychiatric disabilities shall be deprived of any personal, property or civil rights. . ." The constitutional and civil right to discharge within a reasonable time after no longer meeting commitment standards to the most integrated setting is a civil right protected by Conn. Gen. Stat. § 17a-541.

35. General Statutes § 17a-542 provides that each patient shall have an individualized treatment plan and that "[S]uch treatment plan shall include a discharge plan which shall include, but not be limited to, (1)

reasonable notice to the patient of his impending discharge, (2) active participation by the patient in planning for his discharge, and (3) planning for appropriate aftercare to the patient upon his discharge." The right to discharge to the most integrated setting within a reasonable period of time after a patient no longer meets commitment standards should be incorporated into Conn. Gen. Stat. § 17a-542.

36. The State of Connecticut has failed to create a mental health system of community supports and services so that committed patients can be discharged to the most integrated setting within a reasonable period of time after patients no longer meet commitment standards.

Class Representative's Facts

37. Gloria Drummer is a patient civilly committed to a state-operated facility, Whiting Forensic Hospital.

38. Ms. Drummer is a patient with a psychiatric disability in a facility as described in the Connecticut Patients' Bill of Rights, Conn. Gen. Stat. § 17a-540(1 – 3).

39. Ms. Drummer was civilly committed by Judge Joseph Marino, Middletown Probate Court, on October 14, 2016, after being found not competent to stand trial and not restorable for certain criminal charges in the Superior Court.

40. On August 2, 2017, the Connecticut Valley Hospital treatment team on Dutcher South 3 [hereinafter DS3], designated Ms. Drummer as ready for discharge.

41. Connecticut Valley Hospital failed to request a hearing with the Middletown Probate Court as soon as Ms. Drummer's present mental status indicated that she no longer met commitment standards.

42. On October 13, 2017, Ms. Drummer had an annual review, pursuant to C.G.S. § 17a-498(g), before Judge Marino in Middletown Probate Court. Both the independent psychiatrist, Dr. Nelkin, and the attending psychiatrist, Dr. Mitra, testified that Ms. Drummer did not meet the standard for commitment because she was not a danger to herself, not a danger to others and was not gravely disabled. Ms. Drummer's social worker on DS3 testified that there was no supportive housing or other residential placement available and that Ms. Drummer was on waiting lists with no known or estimated date of availability.

43. Ms. Drummer has been ready for discharge since August 2, 2017 and has been unnecessarily institutionalized and segregated in a state inpatient psychiatric hospital in violation of the Connecticut Patients' Bill of Rights.

Request for Relief

Wherefore, the plaintiff respectfully requests that this Court:

1. Certify this action as a class action pursuant to Practice Book §§ 9-7 and 9-8(2) with respect to the proposed classes indentified herein;

2. Enter a declaratory judgment that Conn. Gen. Stat. § 17a-498(g), periodic review, violates the Connecticut Constitution;

3. Enter a declaratory judgment that the state's failure to establish and maintain a mental health system that provides adequate community supports and services so that patients in state-operated inpatient psychiatric facilities may be discharged within a reasonable time of no longer meeting commitment standards violates the Connecticut Patients' Bill of Rights.

4. Order that defendants discharge Ms. Drummer to the most integrated setting, presuming that supportive housing is the most integrated setting, and provide adequate supports and services to Ms. Drummer in her supportive housing.

5. Enter permanent injunctive relief ordering the state to provide periodic review of patients who are involuntarily civilly committed as follows:

A. At each involuntary civil commitment hearing, the treating psychiatrist will testify within a reasonable degree of medical certainty when it is likely that the patient will stabilize and no longer be a danger to self or others or gravely disabled or be able to receive community supports and services in a less restrictive setting.

B. At each monthly treatment team meeting, the attending psychiatrist will assess the present mental status of the patient and determine within a reasonable degree of medical certainty whether the patient no longer meets commitment standards. If the patient likely does not meet commitment standards, the unit director or social worker shall immediately request a periodic review of the patient's commitment with the probate court having jurisdiction of the matter.

C. The treatment team shall designate and document in the patient's chart that each patient is ready for discharge as soon as the patient is likely to no longer be a danger to self or others or gravely disabled or is able adequately to receive services in a less restrictive setting. The fact that the state does not have a less restrictive setting readily available shall not be a factor in

the determination of whether the patient meets commitment standards.

D. The state and the treatment team shall presume that supportive housing, community housing with services wrapped around the individual based on the individual's preferences and needs, is the most integrated setting. The team may rebut the presumption of supportive housing only with documented facts and evidence-based evaluations and tests.

E. As soon as a patient is declared ready for discharge, the state and the facility shall discharge the patient to the most integrated setting within a reasonable period of time. The state shall establish and maintain a mental health system that has the capacity at all levels of care, with a priority for supportive housing, so that institutionalized patients in state-operated psychiatric facilities may be discharged within a reasonable period of time.

F. The state shall enact laws that authorize the probate court to order discharge to the most integrated setting, subject to contempt proceedings, if patients are not discharged within a reasonable period of time.

G. Appoint a court monitor, paid for by the defendant, to ensure that the state is in compliance with this Court's orders for injunctive relief.

6. Award Plaintiff her costs and reasonable attorneys' fees.

7. Order such other relief as the Court may deem just and proper.

Date: January 25, 2018

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