UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A.M., *et al.*, *Plaintiffs*, v. JOHN B. MATTINGLY, in his official capacity as Commissioner of the New York City Administration for Children's Services, *Defendant*.	**CV 10-2181 (BMC)** **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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Plaintiffs A.M., M.M. and S.M. ("Plaintiffs") and proposed class members respectfully submit this memorandum of law in support of their motion for a preliminary injunction.

PRELIMINARY STATEMENT

This case involves children in New York City's foster care system, in the custody of the New York City Administration for Children's Services ("ACS"). ACS and its contracted foster care agencies are subjecting children in their care to prolonged, unnecessary psychiatric hospitalization – keeping children confined in acute psychiatric hospitals long after the hospitals find them ready for discharge, and in some cases, improperly bringing children to acute psychiatric hospitals for admission who do not need to be there. In effect, ACS and certain of its contract foster care agencies are improperly using acute psychiatric hospitals, which are designed for patients to stay in only until stabilized, as long-term facilities in which to house children for up to *several months*, or as *de facto* detention centers to house children whose behavior they see as difficult to control.

The named Plaintiffs in this case ("Plaintiffs") and proposed class members are all children under 18 years old who are in the New York City foster care system, which is controlled and administered by the Defendant. While ACS delegates day-to-day responsibilities for these children's care to various contracted foster care agencies, ACS retains custody of the children and is legally responsible for their care, housing, education, and other needs. Among numerous other obligations, ACS is required by New York State law to place Plaintiffs and proposed class members in the "least restrictive" and "most homelike" environment suitable to their needs, and must provide them with medical and mental health care appropriate to their needs. Similarly, under federal law, including the Americans with Disabilities Act ("ADA") and the Rehabilitation

Act, ACS is required to provide these necessary services in the "most integrated setting" appropriate to the children's needs.

ACS has repeatedly refused to comply with its duties to place children in its custody in the least restrictive setting appropriate to their needs. While in the care of ACS and its contract agencies, Plaintiffs have each been brought to an acute care psychiatric hospital and kept there for weeks or months, long after the hospitals have found them ready for discharge, and despite there being no legitimate need for some to have been hospitalized in the first place. Thus, far from placing them in the "least restrictive" environment as required by law, ACS has subjected these children, without justification, to the most restrictive environment conceivable – an acute care psychiatric hospital, not suitable for long-term living. By these actions, ACS has repeatedly violated, and continues to violate, Plaintiffs' and proposed class members' rights under the ADA, the Rehabilitation Act, the substantive due process provisions of the federal and state constitutions, and numerous provisions of the New York Social Services Law and its implementing regulations.

Immediate injunctive relief is necessary to remedy the numerous imminent and irreparable harms Plaintiffs are suffering and will suffer from their prolonged, unnecessary hospitalization, including confinement and loss of liberty, psychological harm, disruption of schooling and loss of educational opportunities, and disruption of Plaintiffs' remaining family relationships. In short, every day that it continues, Plaintiffs' extended, wrongful confinement in these hospitals is causing them irreparable damage.

The experiences of Plaintiffs and proposed class members also illustrate the urgent need for ACS to become aware of and track, for the purposes of avoiding improper institutionalization, all children in ACS custody in foster care. Although ACS has delegated the

day-to-day care of most children in foster care in ACS custody to contracted foster care provider agencies, ACS retains the legal obligation to provide safe and lawful care to those children. Plaintiffs' own experiences demonstrate that ACS itself is often unaware that children in its custody are being improperly psychiatrically hospitalized until ACS is notified, often by a child's attorney or hospital social worker, that the child is still confined in the hospital despite being declared ready for discharge.

Accordingly, this Court should grant preliminary injunctive relief: (1) prohibiting ACS from keeping Plaintiffs confined in psychiatric hospitals despite their being found ready for discharge; (2) requiring ACS to immediately place Plaintiffs into the least restrictive foster care placement suitable to their needs, as required by law; and (3) requiring ACS immediately to implement a system by which it tracks all children in ACS custody who are or will be hospitalized in acute psychiatric hospitals and provides appropriate less restrictive placements for children who are ready for discharge.

STATEMENT OF FACTS

Plaintiffs and proposed class members are New York City residents under the age of 18 who are in foster care. Their parents are deceased or otherwise unable to care for them. Plaintiffs and proposed class members are in the care of Defendant and most have been placed in the Defendant's care by judges of the New York State Family Court in New York City. (Complaint ¶ 80).

Foster care placements fall along a continuum from the least restrictive (the most "homelike") to the most restrictive (the least "homelike"). *See* 18 N.Y.C.R.R. § 430.11. On one end of the continuum, traditional foster boarding homes are considered the least restrictive foster care placements. Somewhat more restrictive are "therapeutic" foster boarding homes, which are

maintained by specially trained foster parents for the benefit of children needing special care or services. The next level includes "congregate care" placements such as group homes, which are structured settings housing a number of children in foster care together and are supervised by agency staff members. Still more restrictive are congregate care placements such as residential treatment centers, where children in foster care are subject to more intense supervision and treatment than in group homes. The most restrictive placements are "residential treatment facilities," which are operated by the New York State Office of Mental Health. While in foster care, some children are temporarily hospitalized for medical or mental health needs, but such hospitalizations are not foster care placements. (Compl. ¶ 81).

Before being brought to acute psychiatric hospitals, Plaintiffs and proposed class members lived in various foster boarding homes, therapeutic foster homes, group homes, and/or residential treatment centers. For example, Plaintiffs A.M. and M.M. resided in multiple foster boarding homes and therapeutic foster boarding homes. Similarly, Plaintiff S.M. resided in multiple therapeutic foster boarding homes. (Declaration of Leslie Winston ("Winston Decl.") ¶¶ 36, 54; Declaration of Clara Goetz ("Goetz Decl.") ¶ 5).

Plaintiffs and proposed class members are generally brought for application for admission to acute psychiatric hospitals by the Defendant's contracted foster care agencies. These children are generally admitted to acute psychiatric hospitals for stabilization. For example, Plaintiff A.M. was admitted to St. Vincent's and Holliswood Hospitals for reported aggressive and self-inflicted harmful behavior. (Goetz Decl. ¶¶ 8, 28). Similarly, 13-year-old M.M. was admitted to South Oaks Hospital for reportedly misbehaving and leaving his foster home. (Winston Decl. ¶ 38). S.M. was admitted to Four Winds Hospital for reported difficult behavior in his foster home. (*Id.* ¶ 55).

During Plaintiffs' and proposed class members' extended confinement in these acute psychiatric hospitals, they are subject to extreme deprivations of their liberty. Plaintiffs and proposed class members are rarely permitted to leave the hospital even temporarily. (Winston Decl. ¶ 28). They are physically restrained and regularly administered psychotropic medications. (*Id.* ¶ 29). Their daily activities are regimented in minute detail and their range of activities is seriously limited. (*Id.* ¶¶ 28, 48). Their contact with family members and visitors is severely curtailed. (*Id.* ¶¶ 28, 45; Goetz Decl. ¶¶ 32-33). They are removed from school and most are given little or no academic instruction that could lead to school credit or a diploma. (Winston Decl. ¶¶ 30, 46, 60). Plaintiffs and proposed class members who have been designated as needing special educational services do not receive those services. (Winston Decl. ¶¶ 30, 62; Goetz Decl. ¶ 13, 16).

Despite being declared ready for discharge by the acute psychiatric hospitals in which they are confined, Plaintiffs and proposed class members are forced to remain confined in the hospitals because the Defendant has not provided less restrictive foster care placements for them. For example, Holliswood Hospital determined that A.M. was ready for discharge in April 2010, but to date, A.M. has remained confined at the hospital awaiting a placement. (Goetz Decl. ¶ 31). Similarly, Four Winds Hospital determined that Plaintiff S.M. was ready for discharge April 2, 2010, but for over five weeks, S.M. has remained in the hospital awaiting a placement. (Winston Decl. ¶ 61 & Ex. B at 2). And South Oaks Hospital determined that Plaintiff M.M. was ready for discharge on January 26, 2010, yet for more than three *months*, M.M. has remained in the hospital awaiting a placement. (Winston Decl. ¶ 41).

Despite the hospitals' medical decisions that Plaintiffs are ready for discharge from confinement in psychiatric hospitals, ACS has refused to provide them with placement in a

less restrictive setting as required by law. Attorneys and social workers spend countless hours advocating for their clients who are ready to be discharged from acute psychiatric hospitals. (Winston Decl. ¶ 32). In previous incidents where other children in ACS's care have been subject to prolonged unnecessary confinement in acute psychiatric hospitals, attorneys for these children have been required to seek judicial orders compelling the release of these children from hospitals in order for ACS even to begin to seek a less restrictive setting. (*Id.*).

ACS's wrongful confinement of children in acute psychiatric hospitals for prolonged periods of time represents an illegal pattern and practice. By its own admission in March 2010, ACS does not maintain any statistical information regarding how many of the children in its care are psychiatrically hospitalized, nor does the agency record any information on treatment and services these children receive while psychiatrically hospitalized. (Declaration of Kimberly Forte ("Forte Decl.") ¶ 4, Exs. A & B ("Freedom of Information Law Request" and "FOIL Response")). ACS's most recent policy directive to its foster care agencies regarding children in acute psychiatric hospitals is more than a decade old. (Forte Decl. Ex. C (Memorandum from then-ACS Commissioner Nicholas Scoppetta)). The 1998 Memorandum largely focuses on the contracted foster care agencies' responsibilities to ACS and does not address ACS's legal responsibility for these children. Although the policy requires ACS's contract foster care agencies to inform ACS which children in its care have been psychiatrically hospitalized, the unit in ACS to which such reporting must be made, according to the policy, has been eliminated.

Sadly, Plaintiffs' experiences are not unique, as ACS has persisted in its illegal practice for years. The Legal Aid Society has represented dozens of children who have been subject to ACS's failure to adequately plan for them while they remained in acute psychiatric

hospitals ready to be discharged. The attached Declaration of Leslie Winston summarizes more than twenty of those clients' stories.

For example, a seven-year-old child in ACS's care, who was ready for discharge two weeks after his admission, spent more than two months in Bellevue Hospital awaiting a foster care placement. (Winston Decl. ¶ 5). A sixteen-year-old child in ACS's care, who was ready for discharge one month after her admission, spent nine additional months in Bronx-Lebanon Hospital due to ACS's failure to find a therapeutic foster boarding home as recommended by the hospital. Ultimately, she was discharged to a family-based treatment home with OMH because the hospital prepared all the necessary paperwork to ensure her discharge. (*Id.* ¶ 6). A nine-year-old child in ACS's care was hospitalized three times from July 2009 to the present, during which he has spent approximately eight months at South Oaks Hospital. Because his foster care agency failed to plan appropriately for his discharge, he remained in an acute psychiatric hospital setting long after he could have been discharged. As a result, his treatment primarily consists of crisis management and stabilization, not the long-term therapeutic intervention he so desperately needs. (*Id.* ¶ 9).

If a child who lives at home with family is admitted to an acute psychiatric facility, he or she is able to return home immediately once declared ready for discharge. Plaintiffs and proposed class members, by contrast, are in foster care and are dependent on ACS for a place to live. As a result, ACS's refusal to place Plaintiffs in the less restrictive settings to which they are entitled means that Plaintiffs simply have nowhere to go, and remain confined in psychiatric hospitals long after the hospitals have confirmed that there is no legitimate reason for them to be there.

ACS is capable of finding foster care placements for Plaintiffs in less restrictive settings than psychiatric hospitals, but has not done so. Indeed, Defendant fails to use a resource that is fully available to ACS to allow children to leave hospitals even when a stable foster care placement has not yet been provided. The ACS Children's Center is a facility that provides housing and medical care to children in ACS custody who lack a stable placement. (Compl. ¶ 7). ACS could easily accommodate Plaintiffs in its Children's Center for a short period of time while arranging foster care placement. Young people housed at the Children's Center can attend school in their communities and visit with family members; yet ACS has a policy and practice of refusing to permit children to be discharged from psychiatric hospitals to the Children's Center.

ARGUMENT

I. THIS COURT SHOULD GRANT PRELIMINARY INJUNCTIVE RELIEF

A party may obtain a preliminary injunction by demonstrating "a threat of irreparable injury and either (1) a probability of success on the merits or (2) sufficiently serious questions going to the merits of the claims to make them a fair ground of litigation, and a balance of hardships tipping decidedly in favor of the moving party." *Time Warner Cable of N.Y.C. v. Bloomberg, L.P.*, 118 F.3d 917, 923 (2d Cir. 1997). Where, as here, a movant seeks preliminary injunctive relief against government action in a case where "there are public interest concerns on both sides," the movant may obtain relief by satisfying either standard. *Id.* at 923-24; *see Olson v. Wing*, 281 F. Supp. 2d 476, 485 (E.D.N.Y. 2003). Evidence that the public interest favors a preliminary injunction weighs in support of the movant. *Time Warner*, 118 F.3d at 929-930.

Here, Plaintiffs have suffered and continue to suffer numerous immediate and irreparable harms from their wrongful psychiatric hospitalization by ACS. In addition to the serious deprivation of their liberty and autonomy and the psychological harm and trauma of

being hospitalized unnecessarily, these children have been denied their basic rights by ACS while hospitalized, including their rights to appropriate education and to visitation with family members. The irreparable nature of these harms is well established in case law and warrants preliminary injunctive relief.

Plaintiffs and proposed class members are substantially likely to succeed on the merits of their claims under the ADA and Rehabilitation Act, because ACS has denied them, on the basis of actual or perceived mental illness, the right to receive the services to which they are entitled in the most integrated setting suitable to their needs. Similarly, Plaintiffs and proposed class members are likely to succeed on their substantive due process claims, because ACS has arbitrarily and egregiously violated their fundamental liberty interest in being free from unnecessary psychiatric hospitalization. Finally, Plaintiffs and proposed class members are likely to demonstrate ACS's violations of their rights under New York state law to appropriate foster care placement in the least restrictive and most homelike setting.

In addition, the balance of hardships tips decidedly in the Plaintiffs' and proposed class members' favor. ACS will suffer little if any prejudice from simply complying with its legal duty to place Plaintiffs and proposed class members in the least restrictive foster care setting suitable to their needs, while Plaintiffs and proposed class members suffer and will suffer renewed irreparable harm every day that their unnecessary confinement continues. Finally, the public interest favors a preliminary injunction, because the public interest is eminently served by protecting children in foster care from violations of their constitutional and statutory rights.

A. Plaintiffs Will Suffer Irreparable Harm in the Absence of a Preliminary Injunction

Preliminary injunctive relief is appropriate where, as here, the movants are subject to irreparable harm. *Phillip v. Fairfield Univ.*, 118 F.3d 131, 133-34 (2d Cir. 1997); *LIH ex rel.*

LH v. New York City Bd. Of Educ., 103 F. Supp. 2d 658, 666-65 (E.D.N.Y. 2000). In this case, the numerous irreparable harms to which Plaintiffs and proposed class members are and will be subjected from their prolonged, unnecessary psychiatric hospitalization include extreme deprivation of liberty and autonomy, isolation, stigma, psychological deterioration, deprivation of education, and fracturing of family relationships. The harms suffered by the Plaintiffs and proposed class members intensify with each passing day they remain hospitalized unnecessarily, and "[i]njunctive relief is therefore warranted to prevent a worsening of the harms demonstrated by Plaintiffs." *Morel v. Giuliani*, 927 F. Supp. 622, 639 (S.D.N.Y. 1995); *see Martin v. Wing*, 1996 WL 191974, at *3 (N.D.N.Y. 1996) (granting preliminary injunction ordering at-home care for disabled child, citing irreparable physical and mental harms of prolonged hospitalization).

The irreparable harms that Plaintiffs and proposed class members will suffer without an injunction are numerous. *First*, psychiatric hospitalization is a "massive curtailment of liberty" with stigmatizing consequences that implicate substantive due process. *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980). Plaintiffs and proposed class members are and will be physically confined in the psychiatric hospitals and rarely can leave the grounds even temporarily. Indeed, some are not even allowed to go outdoors. (Winston Decl. ¶ 28). Plaintiffs' and proposed class members' lives in these psychiatric facilities are regimented in minute detail from morning until night. Life in this setting is devoid of choice and personal autonomy. Because continued wrongful confinement in psychiatric hospitals violates Plaintiffs' and proposed class members' fundamental liberty interest in freedom from unnecessary institutionalization, it presents a strong showing of irreparable harm. *See Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) (threatened deprivation of constitutional rights supports finding of

irreparable harm); *see also Doe ex rel Doe v. Mattingly*, 2006 WL 3498564, at *3 (E.D.N.Y. Nov. 6, 2006) (same).

Second, Plaintiffs' and proposed class members' unnecessary confinement in psychiatric hospitals is irreparably damaging their mental health. Case law confirms that psychological and physical harm from unnecessary hospitalization constitutes irreparable harm, which in turn justifies a preliminary injunction. In *Martin v. Wing*, the court granted a preliminary injunction ordering the New York State Department of Social Services to provide a disabled child with in-home care due largely to the irreparable harms the child suffered while hospitalized. 1996 WL 191974 at *2-5. The court observed that the child's continued hospitalization caused a deterioration in the child's mental health and exposed him to hospital-acquired infections he otherwise would not have contracted. *Id.* at *3. Likewise, in *Community Services, Inc. v. Heidelberg Twp.*, 439 F. Supp. 2d 380 (M.D. Pa. 2006), the court preliminarily enjoined a township's efforts to prohibit the establishment of a "long term structured residence" for mentally challenged individuals, emphasizing the harms suffered by those individuals in a closed hospital setting. *Id.* at 394, 399 (reasoning that "it is extremely urgent that the prospective residents be placed outside of the closed hospital" and that "their therapy is adversely affected each day that they are not in a least restrictive environment").

Third, psychiatric hospitalization disrupts Plaintiffs' and proposed class members' formal education, which courts have repeatedly regarded as *in itself* an irreparable harm justifying preliminary injunctive relief. "[A] deprivation of one's education inflicts harm that cannot be remedied by money damages." *Brown v. Board of Educ. of Rochester City School Dist.* 2005 WL 17838 at *1 (W.D.N.Y. 2005); *see Martin*, 1996 WL 191974 at *2 (finding irreparable harm and granting injunction against prolonged hospitalization where it prevented

child from attending school); *LIH ex rel. LH*, 103 F. Supp. 2d at 665 (granting preliminary injunction where students with disabilities could be erroneously excluded from summer school, stating that "[n]o level of monetary damages could possibly compensate these students for the educational opportunities they will lose"). Here, Plaintiffs and proposed class members have been removed from regular schooling in the community and placed in an environment where they receive sporadic, minimal schooling which is often inconsistent with their academic level; in some hospitals school attendance is not even mandatory. (Winston Decl. ¶¶ 30, 46, 60, 62; Goetz Decl. ¶¶ 13, 16).

Fourth, psychiatric hospitalization irreparably disrupts and will disrupt Plaintiffs' and proposed class members' relationships with their families – particularly crucial relationships for children in foster care, who have already experienced severe familial disruption. Many Plaintiffs maintain contact with biological parents, siblings, or other relatives, and ACS is legally required to facilitate such contact and visitation for these children. *See* 18 N.Y.C.R.R. § 428.6(a)(2) (requiring ACS family assessment and service plan for child to include "a visiting plan for the child with his or her parents(s), guardian, siblings, half-siblings and other significant family members, potential permanency resources and/or any other person of significance to the child."); § 430.11(c)(1)(i) ("Whenever possible, a child shall be placed in a foster care setting which permits the child to retain contact with the persons, groups and institutions with which the child was involved while living with his or her parents...."); § 430.12(d)(1) (requiring at least biweekly visitation between child and parents or caretakers to whom child is to be discharged); § 431.10(e) (requiring ACS facilitation of regular biweekly sibling visitation); § 431.14 (limiting ACS's ability to terminate or limit visitation). Because several of the psychiatric hospitals in which Plaintiffs and proposed class members are and will be confined are far removed

geographically from Plaintiffs' families in New York City, and because the hospitals strictly limit the length and nature of visitation and the individuals who may visit, Plaintiffs are often deprived of their only contact with family and the outside world.

Since being hospitalized, the Plaintiffs have been able to receive only sporadic family visits, or no family visits at all. For example, Plaintiff M.M. was seeing his mother almost daily, but after being hospitalized at South Oaks Hospital in Suffolk County, his visits with his mother have been severly curtailed. (Winston Decl. ¶ 45). Similarly, prior to being hospitalized at Holliswood Hospital, Plaintiff A.M. had regular visitation with her mother and siblings while in foster care. However, even though hospital policy permits visits with siblings as young as two years-old, ACS has made no arrangements for A.M.'s brothers to visit her while she is confined in the hospital. (Goetz Decl. ¶ 32). Such fracturing of family ties, isolating children from their family members for prolonged periods of time, constitutes irreparable harm justifying a preliminary injunction. *See, e.g.*, *Doe ex rel. Doe*, 2006 WL 3498564 at *2-3 (interference with family relationship amounted to irreparable harm).

Unnecessary psychiatric hospitalization causes nearly complete loss of personal autonomy and freedom, deterioration of mental health, disruption of education, and fracturing of family ties. All of these harms are irreparable, and they are compounded each day that Plaintiffs' and proposed class members' unlawful confinement continues. For all of these reasons, Plaintiffs and proposed class members will suffer irreparable harm absent a preliminary injunction.

B. Plaintiffs Are Likely to Succeed On the Merits of Their Claims

Plaintiffs and proposed class members are likely to succeed on their claims because ACS has deprived them of their right to be free from unnecessary institutionalization

and their right to receive the services to which they are entitled in the least restrictive and most integrated setting appropriate to their needs. ACS has failed to place Plaintiffs and proposed class members in the most integrated, least restrictive settings appropriate and has instead kept them confined in psychiatric hospitals, in violation of: (1) Title II of the Americans with Disabilities Act and the Rehabilitation Act; (2) the due process requirements of both the United States and New York Constitutions; and (3) applicable New York statutory law.

1. The Americans With Disabilities Act and Rehabilitation Act

Plaintiffs and proposed class members are likely to succeed on the merits of their ADA and Rehabilitation Act claims.[1] To establish a violation of Title II of the ADA, a plaintiff must prove that: (1) he or she is a qualified individual with a disability; (2) the defendants are subject to the ADA; and (3) he or she was denied the opportunity to participate in or benefit from the defendants' services, programs or activities, or was discriminated against by defendants, by reason of his or her disability. 42 U.S.C. § 12132; *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 190 (E.D.N.Y. 2009). These elements are satisfied here.

First, Plaintiffs and proposed class members have been placed in foster care in the care of ACS and, accordingly, each is qualified to receive the services that ACS provides. Because Plaintiffs and proposed class members "mee[t] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by [ACS]," they are "qualified individuals" under the ADA. 42 U.S.C. § 12131(2).

Because each Plaintiff and proposed class member is either actually disabled by virtue of mental illness or "regarded as" disabled by ACS, they are individuals with disabilities

[1] Claims under the ADA and the Rehabilitation Act "are treated identically unless…one of the 'subtle differences' in the two statutes is pertinent to a claim." *Disability Advocates, Inc. v. Paterson*, 653 F. Supp. 2d 184, 190 (E.D.N.Y. 2009) (citing *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d. Cir. 2003)).

protected by the ADA. "An individual with a 'disability' is defined as any person who (1) has a physical or mental impairment that 'substantially limits' one or more 'major life activities'; (2) has a 'record of such impairment'; or (3) is 'regarded as' having such an impairment." *Levine v. Smithtown Cent. School Dist.*, 565 F. Supp. 2d 407, 421-22 (E.D.N.Y. 2008) (citing 42 U.S.C. § 12102(2)); *see* 42 U.S.C. § 12102(3)(A) (ADA protects persons "subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment"). While certain Plaintiffs and proposed class members are "disabled" under the ADA due to a substantially limiting mental illness, 42 U.S.C. § 12102(2)(A), all Plaintiffs and proposed class members are undisputedly at least "regarded as having…an impairment" by ACS, because, whether or not they actually suffer from mental illness, ACS has brought them to psychiatric hospitals for admission purportedly on that basis.

Second, it is clear that ACS is subject to the ADA. *See, e.g.*, *LaBella v. New York City Admin. for Children's Services*, 2005 WL 2077192, at *10 (E.D.N.Y. Mar. 28, 2005) ("There is no dispute that . . . defendant is a covered entity subject to the ADA.").

Third, Plaintiffs and proposed class members have been and will likely be denied the opportunity to participate in or benefit from ACS services by reason of their actual or perceived disabilities. Under the "integration mandate" in the U.S. Department of Justice regulations interpreting Title II of the ADA,

> ***a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.***

28 C.F.R. § 35.130(d) (emphasis added). Similarly, the Department of Justice regulations interpreting Section 504 of the Rehabilitation Act require recipients of federal funds to "administer programs and activities in the most integrated setting appropriate to the needs of

qualified handicapped persons." 28 C.F.R. § 41.51(d). The regulations also provide that "***the most integrated setting appropriate to the needs of qualified individuals with disabilities***" is "***a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible***." 28 C.F.R. pt. 35, App. A, p. 450 (emphasis added).

Interpreting the ADA in light of these regulations, the Supreme Court recognized in *Olmstead v. L.C.*, 527 U.S. 581 (1999), that "undue institutionalization qualifies as discrimination 'by reason of...disability.'" *Id.* at 597-98 (quoting 42 U.S.C. § 12132). The *Olmstead* Court noted that the text of the ADA identified "segregation" as a form of discrimination. *Id.* at 599-600 (citing 42 U.S.C. § 12101(a)(2) & (a)(5)). The Court held that unjustified confinement of an individual to a psychiatric institution is discrimination based on disability, because the improperly confined person must relinquish participation in community life she would otherwise enjoy in order to receive the services to which she is entitled. *Id.* at 598-601 (noting Congress's "comprehensive view of the concept of discrimination advanced in the ADA"). Following *Olmstead*, this Court recently held in *Disability Advocates* that New York State violated the ADA by segregating individuals with disabilities in "adult homes," thereby denying them the opportunity to receive services in the most integrated setting appropriate to their needs. 653 F. Supp. 2d at 267.

Thus, the law as clearly expressed in the Department of Justice regulations, and in *Olmstead* and its progeny, requires ACS to "administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." *Disability Advocates*, 653 F. Supp. 2d at 191 (quoting 28 C.F.R. § 35.130(d)). There can be no dispute that Plaintiffs' and proposed class members' prolonged psychiatric hospitalization fails to provide them the most integrated setting appropriate to their needs, because Plaintiffs and

proposed class members have been kept in psychiatric hospitals long after having been cleared by the hospitals for discharge to a less restrictive setting. (Winston Decl. ¶¶ 41, 61; Goetz Decl. ¶ 31). There is no legitimate medical reason for any Plaintiff or proposed class member who is ready for discharge to be in an acute psychiatric hospital, the most restrictive environment conceivable.

In plain violation of *Olmstead* and the "integration mandate" of Title II of the ADA and the Rehabilitation Act, ACS is unjustifiably isolating Plaintiffs and proposed class members in psychiatric hospitals when there is no medical basis for them to be there. The psychiatric hospital setting is even more isolating than the "adult homes" at issue in *Disability Advocates*, because Plaintiffs' daily lives take place *exclusively* inside the hospitals, while adult home residents at least have some opportunities to leave. *See Disability Advocates*, 653 F. Supp. 2d at 201. Prolonged wrongful hospitalization also isolates Plaintiffs and proposed class members from family and from normal social development; it "prevents [Plaintiffs] from attending school and conducting [their] usual activities of daily living." *Martin*, 1996 WL 191974 at *2.

ACS's isolation of Plaintiffs and proposed class members in psychiatric hospitals is unjustified because Plaintiffs and proposed class members have been maintained in psychiatric hospitals for weeks or months after they are ready for discharge. (Winston Decl. ¶¶ 41, 61; Goetz Decl. ¶ 31). This practice is directly contrary to federal and New York law. *See* 28 C.F.R. § 35.130(d); 18 N.Y.C.R.R. § 430.11(d)(1) (***"The most appropriate level of placement for each child will always be considered to be the least restrictive and most homelike setting in which the child can be maintained safely and receive all services specified in his or her service plan."***); § 441.15 (***"Psychiatric, psychological and other essential services shall be made***

available appropriate to the needs of the children in care.") (emphases added). Indeed, ACS's utter failure to plan for the discharge of Plaintiffs and proposed class members to less restrictive settings, causing "extended hospital stays beyond the period required for acute impatient care," is in violation of ACS's own internal policy. (Forte Decl. Ex. C ("Agencies must work with the hospital towards a discharge plan and accept the child back into care once the child is stabilized and medically cleared for hospital discharge.")). There is no justification for ACS's disregard of its duties under federal and state law.

Consequently, Plaintiffs and proposed class members are likely to succeed on the merits of their claims under Title II of the ADA and the Rehabilitation Act.

2. Due Process

Plaintiffs and proposed class members are also likely to succeed on their claim that, by keeping them confined in psychiatric hospitals long after they have been declared ready for discharge, ACS has violated their substantive due process rights. The Due Process Clause of the Fourteenth Amendment provides that "no State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. Const. Amend. XIV. The Due Process Clause's "substantive component...forbids the government to infringe certain 'fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993) (emphasis in original).[2] To establish a substantive due process claim, the plaintiff must (1) identify the constitutional right at stake; and (2) show that the depriving state action was arbitrary in a

[2] Similarly, Art. I, § 6 of the New York State Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." The Due Process clause of the New York State Constitution also has a substantive component, and while New York courts generally rely on federal substantive due process decisions in interpreting it, *see, e.g.*, *Anonymous v. City of Rochester*, 13 N.Y.3d 35, 50 (2009), the New York Due Process clause may provide "even more protection than may be secured

constitutional sense. *Bryant v. City of New York*, 2003 WL 22861926, at *8 (S.D.N.Y. Dec. 2, 2003), *aff'd*, 404 F.3d 128 (2d Cir. 2005) (*citing Lowrance v. Achtyl*, 20 F.3d 529, 537 (2d Cir. 1984)).

Here, the constitutionally-protected liberty interest that has been compromised by ACS's state action is Plaintiffs' and proposed class members' fundamental and well-established interest in "not being confined unnecessarily for medical treatment." *Parham v. J.R.*., 442 U.S. 584, 600 (1979); *see Vitek v. Jones*, 445 U.S. 480, 487 (1980) (involuntary transfer of prisoner to mental hospital implicates liberty interest protected by Due Process Clause); *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) (calling compulsory psychiatric treatment a "massive curtailment of liberty"); *Soc'y for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1246 (2d Cir. 1984) ("[R]esidents are entitled to safe conditions and freedom from undue bodily restraint whether they are voluntary or involuntary residents.").

Plaintiffs and proposed class members are likely to show that their prolonged, wrongful confinement by ACS in psychiatric hospitals constitutes arbitrary, unconstitutional state action. For state action to violate substantive due process, it must be "arbitrary, conscience-shocking, or oppressive in the constitutional sense, not merely incorrect or ill-advised." *Ferran v. Town of Nassau*, 471 F.3d 363, 370 (2d Cir. 2006) (citation omitted); s*ee County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). ACS's failure to reintegrate Plaintiffs and proposed class members into the community, causing them to remain confined for unnecessary medical treatment, is sufficiently "outrageous and egregious" and "truly brutal and offensive to human dignity" to violate due process. *See Lombardi v. Whitman*, 485 F.3d 73, 81 (2d Cir. 2007). This is especially true in light of the fact that Plaintiffs and proposed class members are

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under the United States Constitution." *Sharrock v. Dell Buick-Cadillac, Inc.*, 379 N.E.2d 1169, 1173

children in government custody – entirely dependent on ACS to care for their every need – and are thus uniquely vulnerable to oppressive state action. *See Doe v. N.Y. City Dep't of Soc. Servs.*, 649 F.2d 134, 141 (2d Cir. 1981) ("When individuals are placed in custody or under the care of the government, their governmental custodians are sometimes charged with affirmative duties, the nonfeasance of which may violate the constitution.").

In blatant disregard of its clear duties under federal and state law to provide Plaintiffs and proposed class members with the least restrictive, most homelike, and most integrated setting, ACS has kept Plaintiffs and proposed class members confined in psychiatric hospitals for weeks and even *months* after they should be discharged. ACS has made the Plaintiffs and proposed class members languish in these institutions, confined indoors without the ability to leave even temporarily, their every activity watched and regimented in minute detail, physically restrained and regularly medicated with psychotropic drugs, with little to no schooling or family visitation. This is precisely the type of arbitrary, conscience-shocking action that violates Plaintiffs' rights to substantive due process.

3. New York Social Services Law

Plaintiffs and proposed class members are also likely to prevail on their claims that ACS has violated numerous provisions of New York State law by wrongfully confining Plaintiffs in psychiatric hospitals. New York law imposes on ACS duties regarding the treatment of children in its care, which ACS has repeatedly and egregiously violated in its handling of psychiatric hospitalizations.

For a foster care placement to be "considered appropriate" under New York law, it must be the "***least restrictive and most homelike setting in which the child can be maintained***

(N.Y. 1978).

safely and receive all services specified in his or her service plan." 18 N.Y.C.R.R. § 430.11 (emphasis added). To that end, every time a child enters foster care or is moved from one placement to another, the child's service plan must be updated to include "documentation that the placement has been assessed to be one that can safely provide for the individual needs of the foster child; ***and the reasons for selecting the placement if it is not the least restrictive environment***." 18 N.Y.C.R.R. § 428.6(a)(2)(iv) (emphasis added). New York law further requires that "***[p]sychiatric, psychological and other essential services shall be made available appropriate to the needs of the children in care***." 18 N.Y.C.R.R. § 441.15 (emphasis added).

In violation of these provisions, ACS and its contracted foster care agencies are keeping Plaintiffs and proposed class members confined in psychiatric hospitals long after they have been declared ready for discharge by hospital staff, leaving them in overly restrictive and therefore inappropriate settings. Because Plaintiffs and proposed class members are thus likely to succeed on the merits of these state law claims, preliminary injunctive relief is appropriate.

C. The Balance of Hardships Tips Decidedly in Favor of Plaintiffs

The balance of hardships in this case tips overwhelmingly in favor of Plaintiffs and proposed class members. In the absence of an injunction, Plaintiffs and proposed class members will suffer a daily worsening of the numerous irreparable harms of unnecessary psychiatric hospitalization. *See Morel*, 927 F. Supp. at 639 ("Injunctive relief is therefore warranted to prevent a worsening of the harms demonstrated by Plaintiffs."). By contrast, if a preliminary injunction is issued and ACS must place Plaintiffs and proposed class members in the least restrictive settings appropriate to their needs during the pendency of this litigation, ACS will merely be compelled to fulfill the duties it already has under federal and state law to place children in the least restrictive, most homelike, most integrated settings appropriate to their

needs. *See LIH ex rel. LH*, 103 F. Supp. 2d at 668 ("[I]t is axiomatic that an agency is legally bound to respect its own regulations and commits procedural error if it fails to abide by them.").

In the event that Plaintiffs and proposed class members are ordered released from psychiatric hospitals yet still need mental health services, these services can be provided in less restrictive settings. *See* 18 N.Y.C.R.R. § 441.15 ("Psychiatric, psychological and other essential services shall be made available appropriate to the needs of the children in care."). Indeed, according to the professional judgment of the psychiatric hospitals where Plaintiffs and proposed class members are currently confined, there is no medical reason for Plaintiffs to be hospitalized, since whatever needs they might have can adequately be addressed in a community setting. In sum, there is no possible prejudice ACS could suffer from a preliminary injunction that compares to the irreparable harm Plaintiffs and proposed class members will suffer absent preliminary injunctive relief.

D. The Public Interest Favors Preliminary Injunctive Relief

A court should also consider the public interest in determining whether to grant a preliminary injunction. *Time Warner*, 118 F.3d at 929-930. In this case, Plaintiffs and proposed class members have been placed in the care of ACS, a government agency. Therefore the protection of Plaintiffs' and proposed class members' interests is the affirmative duty of the government. *See Doe*, 649 F.2d at 142. Furthermore, protecting Plaintiffs' and proposed class members' substantive due process right to be free from unnecessary institutionalization is in the public interest. *Buck v. Stankovic*, 485 F. Supp. 2d 576, 586-87 (M.D. Pa. 2007) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."). Therefore, the public interest favors granting a preliminary injunction to release Plaintiffs and proposed class members from their wrongful confinement in psychiatric hospitals by ACS.

CONCLUSION

For all of the foregoing reasons, this Court should enter a preliminary injunction (1) prohibiting ACS from keeping Plaintiffs confined in psychiatric hospitals despite their being found ready for discharge, (2) requiring ACS to place Plaintiffs immediately into the least restrictive foster care placement suitable to their needs, as required by law, and (3) requiring ACS to implement a system of identifying and tracking all children in ACS's custody who are or will be hospitalized in acute psychiatric hospitals, and (4) requiring ACS to provide, immediately, appropriate less restrictive foster care placements for those children who are and will become ready for discharge.

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