UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

EDWIN T., JOSEPH S. and STEVEN W.; DISABILITY ADVOCATES, INC.; and SIDNEY HIRSCHFELD, Director, Mental Hygiene Legal Services, Second Judicial Department,	:	filed electronically
Plaintiffs,	:	No. 06-CV-1042 (BMC) (SMG)
-against-	:	
MICHAEL F. HOGAN, in his official capacity as Commissioner of the New York State Office of Mental Health; THE NEW YORK STATE OFFICE OF MENTAL HEALTH; RICHARD F. DAINES, in his official capacity as Commissioner of the New York State Department of Health; THE NEW YORK STATE DEPARTMENT OF HEALTH; and ELIOT SPITZER, in his official capacity as Governor of the State of New York,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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This Memorandum of Law respectfully is submitted on behalf of defendants, Michael F. Hogan, in his official capacity as Commissioner of the New York State Office of Mental Health, The New York State Office of Mental Health ("OMH"), Richard F. Daines, in his official capacity as Commissioner of the New York State Department of Health, the New York State Department of Health ("DOH") and Eliot Spitzer, in his official capacity as Governor of the State of New York (collectively "Defendants"), in support of their motion to dismiss the First Amended Complaint.

PRELIMINARY STATEMENT

Plaintiffs essentially challenge the propriety of the discharge of persons with mental illness from psychiatric hospitals and psychiatric units of general hospitals to nursing homes (such persons collectively are referred to herein as "Nursing Home Residents") and the care such persons receive once they are in the nursing homes. The First Amended Complaint ("Amended Complaint" or "Amend. Compl."), alleges that there are "perhaps thousands" of such Nursing Home Residents, an allegation unbounded by any time limitation. While only three Nursing Home Residents are participating as plaintiffs in this action, the relief requested would require the State to individually evaluate thousands of clinical records for an as-yet unidentified and unknown number of Nursing Home Residents, even if the State did not err in affirming the initial determination that placement in a nursing home was warranted and, presumably, even if the State received no subsequent notice that a resident was able and willing to leave. Plaintiffs' demands do not stop there. Plaintiffs also would have the Court compel Defendants to tailor individualized relief for thousands of Nursing Home Residents, including transferring such persons from a nursing home to another form of residence, even if that required the State to "expand, develop and make available sufficient community-based care and treatment

opportunities . . . .” for that entire population. Amend. Compl. at pg. 23. Quite simply, the plaintiffs want this Court to issue an order which effectively would compel the State to build thousands of new housing units.

Plaintiffs seek too much. Defendants move to dismiss plaintiffs’ claims made under the federal Nursing Home Reform Act, the Americans with Disabilities Act and the Rehabilitation Act, pursuant to Fed. R. Civ. Proc. Rule 12(b)(6), because plaintiffs failed to state a claim under any of those acts. In addition, plaintiffs do not have a private right of action pursuant to the Nursing Home Reform Act. Defendants also move to dismiss plaintiffs’ claims, pursuant to Fed. R. Civ. Proc. Rule 12(b)(1), because plaintiffs do not adequately plead standing to assert their claims and the Court thus lacks subject matter jurisdiction over those issues.

STATEMENT OF THE CASE

A. Statutory Framework

1. The Nursing Home Reform Act

The Medical Assistance program (“Medicaid”) (42 U.S.C. § 1396 et seq.) is a cooperative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals. Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 502 (1990). The Medicaid program, Title XIX of the Social Security Act, was created in 1965 and "provides a federal subsidy to states that choose to reimburse poor individuals for certain medical care." Westside Mothers v. Haveman, 289 F.3d 852, 855 (6th Cir. 2002). "Although participation in the program is voluntary, participating states must comply with certain requirements imposed by the Act and regulations promulgated by the Secretary of Health and Human Services." Wilder, 496 U.S. at 502. States participate in the program through State plans for medical assistance (“State Plan”) that are submitted to and approved by the

Secretary of Health and Human Services (the "Secretary"). 42 U.S.C. § 1396; see also 42 C.F.R. § 430.10. A state that fails to comply with its approved State Plan and certain federal requirements runs the risk of having the Secretary revoke its funding. 42 U.S.C. § 1396c.

In 1987, Congress passed the Nursing Home Reform Amendments ("NHRA") to Medicaid to prevent the inappropriate placement of mentally ill and mentally retarded individuals into nursing facilities.[1] H.R.Rep. No. 100-391, pt. 1, at 459. As set forth in 42 U.S.C. § 1396r, the NHRA requires certain "preadmission screening" and "resident review" procedures (denominated the "PASRR" process)[2] to be followed before a nursing home may accept a mentally retarded or mentally ill individual into its care. Section 1396r also requires a nursing home to follow certain protocols for mentally ill residents in its care.

a. "Preadmission Screenings" by the state mental health authority prior to a nursing home admission.

Before any mentally ill individual is admitted into a nursing home, the NHRA requires that individual to undergo a preadmission screening process ("Preadmission Screening"). See 42 U.S.C. § 1396r(b)(3)(F). The Preadmission Screening consists of a physical and mental evaluation performed by an independent person or entity other than the State mental heath authority, in New York OMH. Id. The NHRA and its implementing regulations mandate that a nursing home may not admit an individual with mental illness unless the Preadmission Screening shows that: (1) the screened individual requires "the level of services" provided by a nursing

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[1] Generally, pursuant to 42 U.S.C. § 1396(a), a "nursing facility" is an institution which primarily is engaged in providing skilled nursing care and related services for residents who require medical or nursing care or which provides health related care and services to individuals who because of their mental or physical condition requires care and services which can be made available to them only through institutional facilities.

[2] See 42 U.S.C. § 1396a(a)(28); 42 U.S.C. § 1396r(e)(7).

home; and, if so, (2) a determination is made whether the mentally ill persons requires "specialized services." 42 U.S.C. § 1396r(b)(3)(F); 42 C.F.R. § 483.118. Placement of a mentally ill person in a nursing home may be considered appropriate when his/her needs are such that they meet the minimum standards for admission and the individual's treatment needs do not exceed the level of services deliverable by the nursing home. 42 C.F.R. § 483.126.

b. Nursing homes are required to regularly perform "assessments and reviews" of residents in their care.

Once an individual is placed in a nursing home, the NHRA requires the facility - - not the State mental health authority - - to conduct resident assessments ("Resident Assessment(s)"). 42 U.S.C. § 1396r(b)(3). Resident Assessments are required under three circumstances: (1) within 14 days of the resident's admission; (2) promptly after a "significant change in the resident's physical or mental condition;" and (3) at least once per year.[3] 42 U.S.C. § 1396r(b)(3)(C)(i)(I - III). The Resident Assessment performed by the nursing home must: (1) describe the resident's capability to perform daily life functions and significant impairments in functional capacity; (2) be based on a uniform minimum data set defined by the federal government; (3) use an "instrument" which is specified by the State; and (4) include the identification of medical problems. 42 U.S.C. § 1396r(b)(3)(A)(i-iv).

If a Resident Assessment reveals that there has been a "significant change" in the physical or mental condition of a resident, the nursing home is required to inform the State mental health authority. 42 U.S.C. § 1396r(b)(3)(E).

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[3] Nursing homes are obligated to, in essence, supplement the Resident Assessments with periodic reviews, wherein the nursing home is required to "examine each resident no less frequently than once every 3 months and, as appropriate, revise the resident's assessment to assure the continuing accuracy of the assessment." 42 U.S.C. § 1396r(b)(3)(C)(ii).

c. The state mental health authority must conduct a "Resident Review" upon notification by a nursing home that there has been a "significant change" in the physical or mental condition of a resident.

When a nursing home informs the State mental health authority that there has been a significant change in a mentally ill resident's physical or mental condition, a resident review ("Resident Review") must be performed. 42 U.S.C. § 1396r(e)(7)(B)(iii). As with a Preadmission Screening, the Resident Review must be based on a physical and mental evaluation performed by a person or entity independent of the State mental health authority. Id. at § 1396r(e)(7)(B)(i). The Resident Review must determine: (1) whether the resident requires the level of services provided by a nursing home; and (2) whether or not the individual requires "specialized services." Id. at § 1396r(e)(7)(B)(i)(I - II).

If the Resident Review shows that an individual who has resided in a nursing home for at least 30 months does not need nursing home level of care but does require specialized services, the State must: (1) inform the resident of the institutional and noninstitutional alternatives covered under the State Plan; (2) offer the resident the choice of remaining in the facility or receiving covered services at an alternative institutional or noninstitutional setting; (3) clarify the effect of eligibility for services if the resident chooses to leave the facility; and (4) provide or arrange for the provision of specialized services. 42 U.S.C. § 1396r(e)(7)(C)(i).

If the Resident Review shows that an individual who has not resided in a nursing home for at least 30 months does not need nursing home level of care but does require specialized services, the State must: (1) arrange for the safe and orderly discharge of the resident; (2) prepare and orient the resident for such discharge; and (3) provide or arrange for the provision of specialized services. 42 U.S.C. § 1396r(e)(7)(C)(ii). If the Resident Review shows that an individual needs neither nursing home level of care nor specialized services, the State must: (1)

arrange for the safe and orderly discharge of the resident; and (2) prepare and orient the resident for such discharge. 42 U.S.C. § 1396r(e)(7)(C)(iii).

d. Nursing homes must prepare a resident "Plan of Care".

Pursuant to the NHRA, nursing homes are required to provide services and activities to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident in accordance with a plan of care. 42 U.S.C. § 1396r(b)(2). The plan of care is initially prepared, to the extent possible, with the participation of the resident and his/her family and by a team which includes the resident's attending physician and a registered professional nurse who has responsibility for the resident. Id. The plan of care must be reviewed and updated after each Resident Assessment is completed by the nursing home. Id.

B. The Parties, Allegations And Relief Requested In The Amended Complaint.

Plaintiffs, consisting of three mentally ill persons (the "Individual Plaintiffs") and two advocacy organizations (the "Advocate Plaintiffs"), essentially challenge: (1) the propriety of the discharge of persons with mental illness from psychiatric hospitals to nursing homes; and (2) the Defendants' alleged failure to move Nursing Home Residents who no longer require a nursing home level of care to other more "integrated" housing.

1. The Individual Plaintiffs

The Amended Complaint (See Gasior Aff. Exh. A) alleges that two of the Individual Plaintiffs[4], Edwin T. and Joseph S., formerly were patients at the State-operated Creedmoor Psychiatric Center and that they were discharged to one of two nursing homes, one in Andover,

[4] Originally there were seven named Individual Plaintiffs. Of those original seven, only two, Edwin T. and Joseph G. remain. Steven W. was added to this action in the Amended Complaint.

New Jersey and one in Queens, New York.[5] Amend. Compl., ¶¶ 11, 12. The Amended Complaint added as an Individual Plaintiff Steven W., formerly a patient in the psychiatric ward of Montefiore Hospital, an Article 28 hospital[6], who was discharged to the Brookhaven Rehabilitation and Health Care Center in New York. Amend. Comp., ¶ 13.

2. The Advocate Plaintiffs

There are two Advocate Plaintiffs in this action. The first, Disability Advocates, Inc. ("DAI"), is described in the Amended Complaint as a not-for-profit corporation, authorized to practice law in New York and to act as a protection and advocacy agency under the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI"), 42 U.S.C. § 10801 et seq. Amend. Comp. ¶ 18. The second is Sidney Hirschfeld, Director, Mental Hygiene Legal Services, Second Judicial Department ("MHLS"). The Amended Complaint describes MHLS as "a duly authorized agency of the State of New York created and governed by New York Mental Hygiene Law Article 47 to provide protection and advocacy services for individuals with a mental disability." Id. at ¶ 19.

3. Plaintiffs' claims

The asserted bases for this action are that Defendants, by allowing the Individual Plaintiffs to be placed in a nursing home, violated Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., the Rehabilitation Act ("Rehabilitation Act"), 29 U.S.C. § 701 et seq., and the NHRA, 42 U.S.C. § 1396 et seq. Plaintiffs also allege that the Defendants

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[5] A copy of Defendants' answer is annexed to the Gasior Aff. as exhibit B.

[6] The definition of hospital is set forth in New York Public Health Law ("PHL") § 2801; See also New York Mental Hygiene Law ("MHL") § 31.02(a)(2) (the operation of any part of a general hospital for the purposes of providing residential or non-residential services for the mentally disabled requires an operating certificate issued by the state).

have failed to meet the standards set forth by the Supreme Court in Olmstead v. L.C., 527 U.S. 581 (1999), which, plaintiffs assert, permits a person with mental illness, like the Individual Plaintiffs, to sue the State for "failing to place him or her 'in the most integrated setting appropriate to [his or her] needs." Amend. Comp. ¶ 3.

Relief is sought by the Advocate Plaintiffs for persons other than the Individual Plaintiffs. The Amended Complaint at ¶ 20 specifically identifies the persons and reasons why the Advocate Plaintiffs brought this action:

> Plaintiffs DAI and MHLS are pursuing this action to protect and advocate for the rights and interests of individuals with mental illness unlawfully discharged to and residing in nursing homes or residing in state psychiatric hospitals or Article 28 psychiatric wards and at risk of unlawful placement in nursing homes in the discharge planning process. . . . . These individuals are DAI's and MHLS's constituents . . . .

Thus, aside from the Individual Plaintiffs, the alleged beneficiaries to the Advocate Plaintiffs' participation in this litigation -- the Advocate Plaintiffs' "Constituents" -- are divided into two large groups. First are the Nursing Home Residents, as described above.. The second group, those presently residing in psychiatric hospitals, are persons alleged to be "at risk" of unlawful placement in a nursing home.[7]

4. Defendant Department of Health And Defendant Office Of Mental Health

DOH is the New York State agency that, pursuant to the PHL, licenses, supervises and enforces the laws and regulations applicable to nursing homes in New York. PHL §§ 2801(2), (3); 2806-b. DOH is the single State agency that operates the New York State Medicaid program. N.Y. Social Services Law ("SSL") § 363-a(1). DOH licenses non-State hospitals

[7] Based on the extant pleadings, this latter group can have no claims presently "ripe" for adjudication by the Court in any sense of the word.

operating in New York pursuant to PHL article 28 ("Article 28 Hospitals"). DOH and OMH jointly license Article 28 Hospitals' with psychiatric beds that provide psychiatric services pursuant to PHL article 28 and MHL §§ 31.02, 31.04, 31.22 and 31.23. DOH is the "State Medicaid Agency"pursuant to SSL § 363-a(1). DOH administers the joint federal-state Medicaid programs in New York, including administration of NHRA programs.

OMH is charged under New York law with the responsibility for assuring the development of comprehensive plans, programs, and services in the areas of treatment, rehabilitation, education, and training of mentally ill persons. MHL §7.07(a) It is the "state mental health authority" in New York, as that term is defined in 42 U.S.C. § 201(m). It has the responsibility for seeing that mentally ill persons are provided with care and treatment. MHL § 7.07©. It also operates State psychiatric facilities, including the Creedmoor psychiatric hospital, the facility from which two of the three Individual Plaintiffs were discharged. MHL § 7.17.

ARGUMENT

POINT I
THE NURSING HOME REFORM ACT DOES NOT PROVIDE A PRIVATE RIGHT OF ACTION AGAINST DEFENDANTS

All of Plaintiffs' claims regarding the alleged deficiencies in the Defendants implementation of the NHRA, including the PASRR program, employ 42 U.S.C. § 1983 as an enforcement vehicle. See Amend. Compl. ¶ 45, Wherefore Clauses 118 through 136.

In Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) ("Gonzaga"), the Supreme Court clarified the criteria courts must consider when evaluating whether an individual may sue to enforce a statutory provision under 42 U.S.C. § 1983 or directly under a statute through an implied private right of action. The Court held that the plaintiff had no right to sue a university for damages under § 1983 to enforce provisions of the Family Educational Rights and Privacy Act

("FERPA"), 20 U.S.C. §1232g, which prohibited the Secretary of Education from granting federal funding to educational institutions that had a policy or practice of releasing individual educational records without authorization. Gonzaga, 536 U.S. at 277.

The Court granted certiorari in Gonzaga, in part, to "resolve any ambiguity" in its prior opinions concerning when federal statutory provisions may be enforced under 42 U.S.C. §1983. Id. The Court previously had identified, in Blessing v. Freestone, 520 U.S. 329 (1997), what it characterized in Gonzaga as three factors to guide judicial inquiry into whether a statute confers a right to bring suit: (1) Congress must have intended that the provision in question benefit the plaintiff; (2) the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial resources; and (3) the provision giving rise to the asserted right "must be couched in mandatory, rather than precatory, terms." Gonzaga, 536 U.S. at 282-83 (citing Blessing v. Freestone, 520 U.S. at 340-41). The Gonzaga Court noted that Blessing underlined that "only violations of rights, not laws . . . give rise to §1983 actions," but that confusing language had "led some courts to interpret Blessing as allowing plaintiffs to enforce a statute under § 1983 so long as the plaintiff falls within the general zone of interest that the statute is intended to protect." Id., 536 U.S. at 282-83. The Gonzaga Court clarified that a plaintiff must have "an unambiguously conferred right" under a statute in order to support a cause of action under § 1983, and that "it is rights, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of that section." Id.

Importantly, the Gonzaga Court noted that federal spending power legislation generally may not be individually enforced in court. Id. 536 U.S. at 280. This is appropriate because "the typical remedy" for non-compliance with conditions for federal spending legislation "is not a private cause of action for noncompliance but rather action by the Federal Government to

terminate funds to the State." Id. (quoting Maine v. Thiboutot, 448 U.S. 1, 28 (1980)). See also Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28 (1981) (typical remedy for State noncompliance with conditions imposed on federal spending legislation is not private cause of action but action by federal government to terminate funds to State). Therefore, "unless Congress 'speaks with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983." See Gonzaga 536 U.S. at 280 (quoting Thiboutot, 448 U.S. at 17, 28, n.21); See also Taylor v. Vermont Dep't of Educ., 313 F.3d 768, 785-6 (2d Cir. 2002), (even if provision specifically refers to a "right", such language is not determinative because it can be read as "modifying the terms imposed on fund-receiving institutions").

A. The Challenged Sections Of The NHRA Do Not Create Rights Which Are Privately Enforceable Against The Defendants

1. 42 U.S.C. §§ 1396r(e)(7)(A) and (b)(3)(F) do not create privately enforceable rights regarding the Preadmission Screening process.

Plaintiffs apparently challenge Defendants NHRA Preadmission Screening procedures. See Amend. Compl. ¶¶ 129-136.[8] However, like the statutes in Gonzaga and Taylor, the language embodied in 42 U.S.C. § 1396r(e)(7)(A) and (b)(3)(F) which govern the Preadmission Screening process, are not privately enforceable against the Defendants. Specifically, 42 U.S.C. § 1396r(e)(7)(A)(i) states in relevant part:

> (e) State requirements relating to nursing facility requirements. As a condition of approval of its plan under this title [42 USCS §§ 1396 et seq.], a State must provide

[8] Throughout the Amend. Compl., plaintiffs generally allege that the Defendants have violated plaintiffs' rights without first setting forth the separate and distinct responsibilities of each named defendant and without distinguishing the alleged wrongdoings committed by each named defendants. DOH and OMH have distinct statutory duties and it should not be presumed that they have joint responsibility and/or culpability for the unlawful acts alleged by plaintiffs.

> for the following: . . . .
> (7) State requirements for preadmission screening and resident review.
> (A) Preadmission screening. (i) In general. . . . . the State must have in effect a preadmission screeing program, for making determinations (using criteria developed under subsection (f)(8)) described in subsection (b)(3)(F) for mentally ill and mentally retarded individuals (as defined in subparagraph (G)) who are admitted to nursing facilities on or after January 1, 1989.

The basic requirements for a Preadmission Screening are described at 42 U.S.C. § 1396r(b)(3)(F)(i), which states that:

> (F) Requirements relating to preadmission screening for mentally ill and mentally retarded individuals. Except as provided in clauses (ii) and (iii) of subsection (e)(7)(A), a nursing facility must not admit, on or after January 1, 1989, any new resident who - -
> (i) is mentally ill . . . unless the State mental health authority has determined (based on an independent physical and mental evaluation performed by a person or entity other than the State mental health authority) prior to admission that, because of the physical and mental condition of the individual, the individual requires the level of services provided by a nursing facility, and, if the individual requires such level of services, whether the individual requires specialized services for mental illness.

This language does not manifest a unambiguous intent to confer rights on a particular individual or group. There can then be no basis for private enforcement of this statute under § 1983 against Defendants. Certainly, with respect to § 1396r(e)(7)(A)(i), the intent is to generally set forth the content of the State Plan in order to obtain federal approval. If the State Plan did not contain Preadmission Screening/Resident Review procedures, federal approval would be withheld. There is no language in § 1396r(e)(7)(A)(i) which evidences any intent, much less an unambiguous intent, to confer a right on a particular individual.[9] Th statutory terms plainly do not grant "private rights" to an "identifiable class" of beneficiaries, nor are they "phrased in

[9] In any event, plaintiffs do not seem to contend that the State Plan does not have a Preadmission Screening process as required by 42 U.S.C. 1396r(e)(7)(A)(i).

terms of the persons benefitted." Gonzaga, 536 U.S. at 282-83.

Nor does the language mandating a Preadmission Screening at 42 U.S.C. § 1396r(b)(3)(F)(i) create a private right of action against the Defendants in this action. This section neither expressly nor implicitly indicates that Congress intended to create a private right of action. Rather, the statutory language mandates that a nursing home must not admit a mentally ill person unless, prior to admission, an evaluation performed by an entity other than the State mental health authority has determined: (1) whether that person requires nursing home level of services, and, if such services are required; (2) whether the individual requires specialized services for mental illness. 42 U.S.C. § 1396r(b)(3)(F)(i). Nothing in this section places a mandatory obligation on Defendants to act on behalf of any individual beneficiary. Any obligation Defendants may have is far too removed from plaintiffs to show congressional intent to create a new right conferring an individual entitlement enforceable against Defendants.

Furthermore, as specifically set forth at 42 U.S.C. § 1396r(e)(7)(D)(i), the remedy for State failure to conduct a Preadmission Screening is for the federal government to withhold payment for any nursing homes services received by the resident:

> (D) Denial of Payment.
>
> (i) For failure to conduct preadmission screening or review. No payment may be made under section 1903(a) [42 USCS § 1396b(a)] with respect to nursing facility services furnished to an individual for whom a determination is required under subsection (b)(3)(F) or subparagraph (B) but for whom the determination is not made.

Clearly, this language is focused on the entities being regulated, i.e., the State and nursing homes, and does not create a right for individual nursing home residents to receive a Preadmission Screening and/or Resident Review which is enforceable against the Defendants. The remedy for Defendants' alleged non-compliance with these federal spending conditions "is

not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." Gonzaga, 536 U.S. at 280; see also Pennhurst State Sch. & Hosp., 451 U.S. at 28. This specific conclusion was contemplated in the comments accompanying the final PASRR rules:

> Failure by a State to implement a PASARR program in accordance with the proposed requirements would lead to compliance actions against the State under section 1904 of the [Social Security] Act. The failure to implement the clear statutory mandates, such as subjecting all categories of individuals (Medicaid, Medicare, and private pay) with MI or MR to PASARR and requiring that [nursing facilities] not admit unscreened individuals, would be viewed as a failure to meet Medicaid State plan requirements. Compliance proceedings could result in loss of FFP in the State's Medicaid nursing home program until compliance is achieved. Even in the absence of a compliance action, HCFA could disallow FFP in [nursing facility] services provided to individuals required to be subject to PASARR review but not, in fact, reviewed.

See 57 Fed. Reg. 56450. Clearly, there is no mention of an intent to create a private right of action. In fact, the rules specifically contemplate other compliance actions against the State rather than a private right of action brought by a nursing home resident.

2. 42 U.S.C. § 1396r(e)(7)(C) does not create a privately enforceable right to a Resident Review against Defendants.

Plaintiffs also seem to mount a general challenge to Defendants' practices undertaken pursuant to 42 U.S.C. § 1396r(e)(7)(C), i.e., the Defendants' response to a Preadmission Screening or to a Resident Review. See Amend. Compl. ¶¶ 126, 127, 129-136. Section 1396r(e)(7)(C) sets forth steps the State must follow in response to a Resident Review where it is determined that the resident does not require the level of services provided by a nursing home but who either: (i) requires specialized services for mental illness and has continuously resided in a nursing home for at least 30 months before the date of the determination; (ii) requires

specialized services; or (iii) does not require specialized services. [10]

Pursuant to 42 U.S.C. § 1396r(e)(7)(D)(ii), if the State fails to adhere to the requirements set forth in § 1396r(e)(7)(C), payment would be withheld for services provided to those individuals that do not require nursing home level of services (except if the individual needed specialized services and resided in the nursing home for at least 30 months before the date of termination). 42 U.S.C. § 1396r(e)(7)(D)(ii) specifically states that:

> (D) Denial of Payment . . . .
> (ii) For certain residents not requiring nursing facility level of services. No payment may be made under section 1903(a) [42 USCS § 1396b(a)] with respect nursing facility services furnished to an individual (other than an individual described in subparagraph (C)(i)) who does not require the level of services provided by a nursing facility.

Again, these sections of the NHRA are clearly phrased in terms of the entity being regulated, i.e., the State and/or nursing homes. The remedy for a State's non-compliance with the conditions imposed in this federal spending legislation "is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." Gonzaga, 536 U.S. at 280; see also Pennhurst State Sch. & Hosp., 451 U.S. at 28. Therefore, even if these provision can be read as referring to a patient's "right" to certain procedures following a State Preadmission Screening or Resident Review, this language is not determinative of the issue of whether the resident has a private right of action. This statutory language can only be read as "modifying the terms imposed on fund-receiving institutions." Taylor, 313 F.3d at

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[10] As stated previously (see Statement of the Case § A(1)(c) supra), the State is obligated to conduct a Resident Review pursuant to § 1396r(e)(7)(B)(i) only after a nursing homes notifies the State of a significant change in a resident's physical or mental condition. See 42 U.S.C. § 1396r(e)(7)(B)(iii). Moreover, the State's obligation to respond to the Resident Review, as set forth in § 1396r(e)(7)(C)(i),(ii) or (iii), commences only if the Resident Review determines that the resident does not require the level of services provided by a nursing home.

785. This is true even if a resident reaps a specific benefit, e.g., a PASSR review, from the State's enumerated responsibilities. See Blessing, 520 U.S. at 344-45.[11]

3. The existence of an enforcement scheme under the NHRA negates a finding of a private right of action.

Not only does a Medicaid recipient have a general right to seek administrative review of any change in the level of care afforded, the NHRA requires the States to set up an appeals procedure for individuals who allege that they have been adversely affected by determinations which are made as a consequence of the Preadmission Screening or Resident Review process. See 42 U.S.C. § 1396r(e)(7)(F); 42 CFR 431.220.[12] In addition, the NHRA specifically charges the federal government with the responsibility to assure that the requirements which govern the provision of care in nursing homes, and the enforcement of those requirements, are adequate to protect the health, safety, welfare and rights of residents and to promote the effective use of

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[11] Although the First Circuit in Rolland v. Romney, 318 F.3d 42 (1st Cir. 2003), did find that certain nursing home residents had a private right of action to seek specialized services found to be necessary by a Preadmission Screening or Resident Review, the circuit court failed to fully consider the analysis undertaken by the Court in Gonzaga regarding the limitations federal spending legislation places on finding a private right of action. See also Taylor. Nor did the Rolland court specifically address the question of whether an individual has a private right of action to challenge generally a State's Resident Review procedures. For example, plaintiffs here, without more, allege generally that the State's Resident Review procedures are defective. Contrary to the facts in Rolland, plaintiffs here do not seek, for example, specialized services which a State Resident Review determined to be necessary. In fact, none of the Individual Plaintiffs allege specifically that they received a Resident Review or, if they did, what findings were made. Nor did Rolland consider if the State had an adequate administrative enforcement scheme, which, if extant, would negate a private right of action. See Gonzaga, 536 U.S. at 280-81 (Congress left no doubt of intent for private enforcement because provision required States to pay an "objective" monetary entitlement to individual health care providers, with no sufficient administrative means of enforcing the requirement against States that failed to comply).

[12] Plaintiffs fail to allege that they took advantage of the available appeals process and sought review of the result of the Preadmission Screening process which initially found them eligible for nursing home level of care or any Resident Review which determined that they were still qualified for nursing home level of services.

public funds. See 42 U.S.C. § 1396r(f).

Moreover, in order to ensure State and nursing home compliance with NHRA requirements, the NHRA sets forth an elaborate scheme of required survey and certification processes that must be followed by both the State and the federal government. See 42 U.S.C. § 1396r(g). The standard annual surveys include, for example, an audit of Preadmission Screenings pursuant to 42 U.S.C. § 1396r(b)(3) in order to determine the accuracy of such assessments and the adequacy of the plan of care. See 42 U.S.C. § 1396r(g)(2)(A)(ii). If the standard survey reveals deficiencies in the quality of care provided by nursing homes, the State then must conduct an extended survey of a sample larger than that used in the standard survey and review facility staffing, service training and contracts with consultants. See 42 U.S.C. § 1396r(g)(2)(B). In addition to the surveys completed by the State, the federal government itself conducts regular surveys of nursing homes. See 42 U.S.C. § 1396r(g)(3)(A). If the federal government determines that, contrary to the finding of a State's survey, a nursing home does not meet NHRA requirements, the federal determination is binding and supercedes that of the State. See 42 U.S.C. § 1396r(g)(3). The federal government may also conduct special surveys if it has reason to question the compliance of the nursing homes with the requirements of, for example, the patient assessments. See 42 U.S.C. § 1396r(g)(3)(D).

In addition to the above survey process, the State is required to establish procedures to investigate complaints of violations by nursing homes, including any violations of the resident assessment requirements of 42 U.S.C. § 1396r(g)(3)(D), which includes the Preadmission Screening requirement. See 42 U.S.C. § 1396r(g)(4).

The existence of such an elaborate enforcement scheme, with provision for administrative appeals, precludes finding a private right of action against the Defendants. See Gonzaga, 536

U.S. at 280 -81 ("Congress left no doubt of its intent for private enforcement . . . because the provision required States to pay an 'objective' monetary entitlement to individual health care providers, with no sufficient administrative means of enforcing the requirement against States that failed to comply"); Carelli v. Howser, 923 F.2d 1208, 1214-16 (6th Cir. 1991)(Congress intended to foreclose a private right of action based on the elaborate auditing system which ensured compliance and that any relief the court might order would merely address the shortcomings determined by the federal government's audit).

B. The Regulations Upon Which Plaintiffs Rely Do Not Give Rise To A Privately Enforceable Federal Right

In support of their contentions, plaintiffs principally rely on 42 C.F.R. §§ 483.100-483.138. See Amend. Compl. ¶ 120. Plaintiffs' reliance on these regulations is misplaced because they do not confer a federal right enforceable under § 1983.

The issue of whether a regulation, standing alone, is privately enforceable in a section 1983 action apparently remains open in this circuit. See D.D. ex rel V.D. v. New York City Bd. of Educ., 465 F.3d 503, 513 (2d Cir. 2006) ("DD"); See also King v. Town of Hempstead, 161 F.3d 112, 114 (2d Cir. 1998). However, the majority of circuits have determined that where a regulation's enforcing statute confers no federal right, the regulation alone cannot create a right enforceable under section 1983. D.D., 465 F.3d at 513. It has been held that:

> if the regulation defines the content of a statutory provision that creates no federal right under the three-prong test, or if the regulation goes beyond explicating the specific content of the statutory provision and imposes distinct obligations in order to further the broad objectives underlying the statutory provision ... , the regulation is too far removed from Congressional intent to constitute a "federal right" enforceable under § 1983.

Harris v. James, 127 F.3d 993, 1009 (11th Cir. 1997). Also, as aptly stated,

> Not every rule creates a right. Upon analysis, this Court concludes that § 1983 does not authorize indiscriminate private enforcement of the vast universe of federal regulations but extends such enforcement only to those regulations that further define the substance of a statutory (or constitutional) provision that itself creates an enforceable right. In this Court's view, no other result is consonant with the separation of powers, for if Congress intended that only certain specific provisions give rise to private enforcement actions under § 1983, it cannot have intended that private actions be predicated on administrative regulations not closely connected to these statutory sources of private power.

Graus v. Kaladjian, 2 F. Supp. 2d 540, 543 (S.D.N.Y. 1998)(citations omitted). Neither the NHRA nor applicable regulations cited by plaintiffs create an enforceable right.

POINT II
PLAINTIFFS FAIL TO STATE A CLAIM AGAINST DEFENDANTS

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that complaints must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. Rule 8(a)(2). When considering a motion to dismiss under Fed. R. Civ. P. Rule 12(b)(6), "all factual allegations of the complaint must be accepted as true . . . and all reasonable inferences must be made in plaintiffs' favor." Reade-Alvarez v. Eltman, Eltman & Cooper, P.C., 369 F. Supp.2d 353, 358 (E.D.N.Y. 2005). However, "although the complaint need not provide detailed factual allegations, it must amplify a claim with some factual allegations to render the claim plausible." Fitzpatrick v. Sony BMG Music Entertainment, 07 Civ. 2933 (SAS), 2007 U.S. Dist. LEXIS 60238 (S.D.N.Y. Aug. 15, 2007) (citations omitted) (Gasior Aff. Exh. C). "The complaint must provide the grounds upon which the plaintiff's claim rests through factual allegations sufficient to raise a right to relief above the speculative level." Id. (citations omitted). "Bald assertions and conclusions of law will not suffice." Id. (citations omitted).

The Supreme Court's decision in Bell Atlantic Corporation v. Twombly, 127 S. Ct. 1955

(2007), recently altered the legal standards applicable to Rule 12(b)(6) motions. In Twombly, the Court abandoned the familiar standard from Conley v. Gibson, 255 U.S. 41 (1957), that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Twombly, 127 S. Ct. at 1968 (quoting Conley, 255 U.S. at 45-46). In its place the Court held that Rule 8(a) requires complaints to allege "enough facts to state a claim to relief that is plausible on its face," id. at 1974, or, put otherwise, to "possess enough heft to 'show that the pleader is entitled to relief,'" Id. at 1966. Twombly has been cited by the Second Circuit as establishing a rule of general applicability. E.g., Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007). In Iqbal, the Second Circuit concluded that Twombly creates "a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." Id. at 157-58 (emphasis in original). Plaintiffs' claims herein do not possess enough "heft" to survive dismissal.

A. Plaintiffs Fail To State A Claim Against Defendants Under the American With Disabilities Act or The Rehabilitation Act

1. Plaintiffs fail to set forth a prima facie case of discrimination by Defendants.

Both Title II of the ADA and § 504 of the Rehabilitation Act provide that no qualified individual with a disability shall, by reason of such disability be denied the benefits of the services or programs of a public entity or be subject to discrimination by such entity. 42 U.S.C. § 12132; 29 U.S.C. § 794(a).[13] Title II governs only the activities of public entities which are

[13] See Weixel v. Bd. of Educ., 287 F.3d 138 (2d Cir. 2002) (holding that a complaint brought under the ADA and Rehabilitation Act is sufficient to withstand dismissal if it alleges that: (1) plaintiff has a disability for purposes of Section 504/ADA; (2) plaintiff is otherwise qualified for the benefit that was denied; and (3) plaintiff has been denied the benefit by reason

defined as, inter alia, any State or local government, any department, agency, special purpose district, or other instrumentality of a State or States or local government. 42 U.S.C. 12131(1). However, the applicable regulation provides that "programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part." 28 C.F.R. § 35.130(b)(6).

These anti-discrimination statutes do not require a defendant to provide substantively different services to the disabled, no matter how great their need for the services, but only to make reasonable accommodations to enable meaningful access to such services as may be provided, whether such services are adequate or not. Wright v. Giuliani, 230 F.3d 543, 548 (2d Cir. 2000). In reaching this conclusion, the Second Circuit in Wright relied on the holdings reached in: (1) Rodriguez v. City of New York, 197 F.3d 611, 618 (2d Cir. 1999) (rejecting ADA challenge based on New York City's failure to provide safety monitoring devices to a subset of individuals with disabilities because the "ADA requires only that a particular service provided to some not be denied to disabled people"); (2) Doe v. Pfrommer, 148 F.3d 73, 83 (2d Cir. 1998) (rejecting Rehabilitation Act claim by disabled individual who sought, inter alia, a "job coach," because "what [plaintiff] seeks to challenge is not illegal discrimination against the disabled, but the substance of the services provided to him"); and (3) Lincoln CERCPAC v. Health & Hospitals Corp., 147 F.3d 165, 168 (2d Cir. 1998) (affirming dismissal of Rehabilitation Act and ADA claims brought by disabled children who were transferred from one rehabilitation center to another with fewer services because "the disabilities statutes do not guarantee any particular level of medical care for disabled person, nor [do they] assure maintenance of service previously

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of the disability).

provided"). Wright, 230 F.3d at 548.

Here, plaintiffs appear to claim that "defendants" have violated the Individual Plaintiffs' rights (and the Advocate Plaintiffs' "constituents'" rights) under the ADA and the Rehabilitation Act because they were discharged to nursing homes from State psychiatric hospitals and Article 28 hospital psychiatric wards. Amend. Compl. ¶¶ 1-6. Specifically, plaintiffs make the conclusory allegation that plaintiffs have been and are being discharged to nursing homes despite the fact that they do not need nursing home care (Id. ¶¶ 5 and 6) and more integrated settings than nursing homes are available to them. Id. ¶¶ 8-10. Plaintiffs contend that the discharge to nursing homes unnecessarily segregates them in violation of their fundamental rights. Id. ¶ 51.

Plaintiffs primarily rely on the holding in Olmstead v. L.C., 527 U.S. 581 (1999) ("Olmstead") to support their claims that Defendants violated their rights under the ADA and the Rehabilitation Act. See Amend. Compl., ¶¶ 1-10 and 49. Olmstead analyzed the circumstances under which a qualified individual with a disability must be offered, pursuant to the ADA, a more integrated setting than institutionalization. In Olmstead, the plaintiffs, patients in a State hospital, who were determined by the State's own medical professionals to no longer need institutionalization, challenged the State's failure to discharge them into community-based treatment. There, the Court held that "States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities." Olmstead, 527 U.S. at 607 (emphasis added).

Plaintiffs' reliance on Olmstead for the contention that the Defendant's placements into nursing homes violate the ADA and the Rehabilitation Act is misplaced for several reasons.

First, none of the Individual Plaintiffs have alleged that, at the time of their discharge to a nursing home, they had been determined by the State's treatment professionals to no longer need institutionalization or that placement into community-based treatment, as opposed to a nursing home, would be more appropriate.[14] Therefore, unlike the plaintiffs in Olmstead, plaintiffs here have not even minimally established that the Defendants continue to "segregate" them contrary to their medical needs.[15]

Furthermore, since there was no determination at the time of their discharge to a nursing home that a setting more integrated than a nursing home was appropriate and available to meet plaintiffs' needs, it was not required under Olmstead, that they be offered a different or more integrated setting. See Olmstead, 527 U.S. at 601-02 (holding that nothing in the ADA or its implementing regulations condones the termination of institutional settings for persons unable to handle or benefit from community settings and that, according to 28 C.F.R. § 35.130(d), the services and programs must be administered in the most integrated setting appropriate to the needs of the individual). The Court cannot assume that a nursing home placement is, in all instances, not the appropriate alternative for the Nursing Home Residents. See Olmstead, 527 U.S. at 605 (for some individuals most integrated setting may be an institution).

Second, plaintiffs' reliance on Olmstead is misplaced because there, in contrast to the

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[14] As the Court in Olmstead noted, "the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual meets the essential eligibility requirements for habilitation in a community-based program. Absent such qualification, it would be inappropriate to remove a patient from the more restrictive setting." Olmstead, 527 U.S. at 602 (internal quotations omitted).

[15] Similarly, this case is distinguishable from the facts in Helen L. v. DiDario, 46 F.3d 325 (3d Cir. 1995), where a nursing home resident found by the State to be eligible to reside at home and receive services through the State's attendant care program was nonetheless not discharged from the nursing home.

facts here at hand, persons continued to be confined (contrary to doctor's orders) in State psychiatric hospitals, a very restrictive setting. Here, Nursing Home Residents are alleged to have been discharged from a more restrictive setting - - a psychiatric hospital - - to a less restrictive setting - - a nursing home. As noted by the Court in Olmstead, Defendants are not required to provide a specific level of benefits to individuals, as long as the Defendants adhere, as they do here, to the ADA's non-discrimination requirements. See Olmstead, 527 U.S. at 603, n.14. Notably, unlike Olmstead, the Amended Complaint fails to allege what other, less restrictive or more integrated setting had been found by a qualified professional to be appropriate to meet the needs of the Individual Plaintiffs.[16] The Individual Plaintiffs certainly could have provided this level of factual information in the Amended Complaint.

Courts in the Second Circuit consistently have refused to give Olmstead the expansive reading plaintiffs advocate here. For example, in Leocata v. Wilson-Coker, 343 F. Supp. 2d 144 (D. Conn. 2004), aff'd, 148 Fed. Appx. 64 (2d Cir. 2005), a post-Olmstead decision, the plaintiff resided in an assisted living facility. Because the plaintiff's personal resources were being depleted and Medicaid would not pay for her continued stay at the assisted living facility, the plaintiff was going to be moved to a more restrictive, Medicaid-covered, nursing home. Plaintiff argued that the threatened move violated her ADA rights because a nursing home was not the most integrated setting appropriate to her needs. Granting the defendants' motion to dismiss the ADA claim, the court reasoned that the plaintiff failed to establish that defendants denied her

[16] Moreover, pursuant to 42 C.F.R. § 483.132, a PASRR evaluator is required to consider all levels of treatment possibilities in assessing the level of care required for an individual, beginning with community programs up through in-patient institutional care, including nursing home level of care. See McNiece v. Jindal, No. Civ. A. 97-2421, 1998 WL 175899 (E.D. La. Apr. 14, 1998)(finding that a PASRR conclusion that nursing home level of care is required means that lesser levels of care were considered and rejected) (Gasior Aff. Exh. D).

Medicaid benefits due to her disability or that defendants had any discriminatory animus against persons with her particular disability. Leocata, 343 F. Supp 2d at 156. Similarly here, Defendants' motion to dismiss should be granted because plaintiffs have failed to plead such an ADA violation. There is no allegation that the factors utilized to send mentally ill persons to a nursing home are different from the factors employed to send other persons to nursing homes, or to send other State psychiatric patients to other settings. See also Henrietta D. v. Bloomberg, 331 F.3d 261, 276 (2d Cir. 2003)(a valid ADA Title II claim requires that there must be something different about the way the plaintiff is treated by reason of his/her disability); see also Doe v. Pfrommer, 148 F.3d 73 (2d Cir. 1998) (pre-Olmstead decision which dismissed plaintiff's ADA claims because what he sought to challenge was not illegal discrimination against the disabled but the substance of the services provided).

Plaintiffs make the general and unsupported statement that they now are "able to, qualified for, and would like to reside in a more integrated setting" than the nursing homes in which they now reside. See Amend. Compl., ¶¶ 70, 86 and 94. Even if these allegations are true, plaintiffs fail to set forth a claim that Defendants have violated their rights pursuant to the ADA and Rehabilitation Act. The three Individual Plaintiffs currently reside in nursing homes. Id., ¶¶ 66, 82, and 88. They do not allege that, at the time of their discharge from the hospital, a Preadmission Screening was completed which reached an incorrect determination. The plaintiffs do not allege that Defendants operate nursing homes, administer the medical care provided to the Individual Plaintiffs or make discharge determinations for Nursing Home Residents.

In addition, plaintiffs do not allege that Defendants have made the determination that Nursing Home Residents continue to need, or no longer need, nursing home level of care. Defendant OMH is required to do an NHRA mandated Resident Review only when a nursing

home provides notice of a significant change in a resident's physical or mental condition. 42 U.S.C. § 1396r(e)(7)(B)(iii). As explained in Point I(B), plaintiffs have failed to minimally establish or even allege that a Resident Review was required and completed and that, as a consequence of such a review, it was determined that any of the Individual Plaintiffs no longer needed nursing home level of care. Therefore, plaintiffs cannot establish, based upon the allegations in the Amended Complaint, that Defendants have violated plaintiffs' rights under the ADA or Rehabilitation Act due to their continued placement in a nursing homes. See Blum v. Yaretsky, 457 U.S. 991 (1982)(a nursing home's decision to discharge patients turns on medical judgments made by private parties and does not constitute State action).

2. Even if plaintiffs established a prima facie case of discrimination against Defendants, the relief sought would require a fundamental alteration of a service, program or activity provided by Defendants.

Even assuming, arguendo, that plaintiffs have established a prima facie case of discrimination pursuant to the ADA or the Rehabilitation Act, Defendants are required only to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination . . .," but Defendants need not do so if they "can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity." 28 C.F.R. § 35.130(b)(7). Among other things, plaintiffs request that the Court compel Defendants to move Nursing Home Residents out of nursing homes and into another form of residence, even if that required the State to "expand, develop and make available sufficient community-based care and treatment opportunities . . . ." Amend. Compl., ¶ 23. Such relief would clearly require the Defendants to fundamentally alter the nature of their services, programs or activities which is not required. See Olmstead, 527 U.S. at 597.

3. Claims against individual defendants should be dismissed.

The ADA and Rehabilitation claims made against Michael Hogan, Richard Daines and Eliot Spitzer, named as defendants in their official capacities, should be dismissed. In Winokur v. Office of Court Admin., 190 F. Supp. 2d 444, 450-51 (E.D.N.Y. 2002), the district court held that an individual defendant could not be held liable in his personal or official capacity under the ADA. See also, Fox v. State Univ. of New York, No. 05 CV 2350 (ADS)(ETB) 2007 WL 2193925, *4 (E.D.N.Y. July 23, 2007) (because State is real party in interest for plaintiff's claims against individual defendants in their official capacities, it would be redundant to permit claims to proceed when plaintiff already has cause of action against the State)(Gasior Aff. Exh. Q); Hallett v. New York State Dep't of Corr. Servs., 109 F. Supp. 2d 190, 199 (S.D.N.Y. 2000)(Chin, J.)(holding individual defendants may not be held liable under either the ADA or the Rehabilitation Act in either their official or individual capacities); Candelaria v. Cunningham, 98 CIV. 6273 (LAP) 2000 U.S. Dist. LEXIS 8669, * 8 (S.D.N.Y. June 20, 2000)(Preska, J.)(rejecting individual liability under the ADA and the Rehabilitation Act in either official or individual capacity) (Gasior Aff. Exh. E).

B. Plaintiffs Fail to State a Claim Against Defendants Under the Nursing Reform Act

Plaintiffs make the general claim that Defendants have violated plaintiffs' rights under the NHRA. See Amend. Compl., ¶¶ 129-136. Assuming, arguendo, that this Court does find that there is a private right of action under the applicable sections of the NHRA (See Point I supra), the plaintiffs fail to state a claim against Defendants under the NHRA.

The NHRA was enacted to reduce the use of nursing homes for the care of individuals who are not in need of such level of services. As a result, as discussed above, the NHRA

provides for a Preadmission Screening process. See 42 U.S.C. 1396r(e)(7)(A). The PASRR process is used to determine if an individual requires nursing home level of care and if the individual requires specialized services. Id. An individual who does not need nursing home level of services may not be admitted to a nursing home and further screening is not required. Moreover, pursuant to 42 C.F.R. § 483.126, an individual with a mental illness is appropriately placed in a nursing home if that individual meets the minimum standards for admission and the individual's need for treatment does not exceed the level of services which can be delivered in the nursing home.

In addition, and importantly, a Preadmission Screening determination, which determines an individual's need for nursing home services, made by an entity other than the State mental health authority, is binding and the State Medicaid Agency may not countermand that determination. See 42 C.F.R. § 483.108; see also McNiece, 1998 WL 175899 at *6 (holding that the PASRR evaluation is binding with respect to an applicant's needed level of care).

> Significantly, under 42 CFR § 483.132 the PASARR evaluator is to consider all levels of treatment possibilities in assessing the required level of service for the particular applicant, beginning with the community programs up through in-patient institutional care, including, specifically, a nursing home. The regulation was intended to assure that "the (nursing home) placement would be selected only after less restrictive settings had been rejected because the individual's care needs are so extensive that the individual requires institutional care."

Id. at *4 (citing 57 Fed. Reg. 56450, 56496)(emphasis added). However, there is an appeals process in place if an individual believes that he or she has been adversely affected by either a Preadmission Screening or a Resident Review determination. See 42 U.S.C. § 1396r(e)(7)(F).[17]

[17] None of the plaintiffs allege that they took advantage of this appeals process.

Without any specificity or support, plaintiffs make only conclusory allegations that the New York's PASRR process (1) permits the unlawful admission to nursing homes of individuals with mental illness whose physical and mental conditions do not require the level of services provided by a nursing home (Amend. Compl. ¶ 129); (2) is not sufficient to evaluate whether an individual with mental illness proposed for admission to a nursing home could receive community based-treatment (Id. ¶ 130); (3) does not provide for a copy of the evaluation report to be sent to the individual or resident and his or her legal representative (Id. ¶ 131); (4) does not assure that individuals with mental illness placed in a nursing home receive specialized services or services of a lesser intensity to permit those individuals to rehabilitate, recover and progress towards a more integrated setting (Id. ¶ 132); and (5) is not sufficient to conduct a Resident Review of an individual with mental illness who resides in a nursing home and has a significant change in condition. Id. ¶ 133.

Moreover, the only allegations which specifically reference the Individual Plaintiffs, Edwin T., Joseph S., and Steven W., also are conclusory and unsupported by any factual allegations. For example, plaintiffs contend that persons: (1) have been discharged, or is at risk of being discharged, to a nursing home without an appropriate evaluation as to whether his/her physical and mental condition requires nursing home services, without evaluation as to whether they could receive community-based treatment, and without evaluation as to whether they require specialized services or services of a lesser intensity (Id. ¶ 134); and (2) do not receive required specialized services for treatment of mental illness and do not receive a Resident Review upon a significant change in condition. Id. ¶ 135. In the body of the Amended Complaint, however, none of the Individual Plaintiffs alleges any facts which support these legal claims. See Amend. Compl. ¶¶ 65-71; 81-86; 87-94.

In addition, none of the Individual Plaintiffs alleged that they have appealed the determination to discharge them to a nursing home pursuant to a PASSR Preadmission Screening. Even assuming that the few facts which are alleged by the Individual Plaintiffs are true, they fail to state a claim against the Defendants pursuant to NHRA. None of the Individual Plaintiffs allege, for example, that a nursing home admitted them before the State mental health authority determined that they required nursing home level of services and/or specialized services for mental illness pursuant to 42 U.S.C. § 1396r(b)(3)(F)(i). Nor do they contend that, once in the nursing home, they had a significant change in their physical or mental condition, that the nursing homes informed the Defendants of that change in condition and the Defendants then failed to conduct a Resident Review as required by 42 U.S.C. § 1396r(e)(7)(B)(iii). Moreover, other than in a general statement in the Third Claim For Relief (Amend. Compl. ¶ 135), nowhere in the Amended Complaint do the Individual Plaintiffs allege or demonstrate in any manner whatsoever that they require specialized services (as defined in 42 C.F.R. § 483.120(a)) for mental illness or that they have failed to receive them pursuant to 42 C.F.R. § 483.120(b).

Rather, the Individual Plaintiffs simply allege that they were not offered a more integrated setting than a nursing home when they were discharged from the hospital. Amend. Compl. ¶¶ 67, 83, 90 and 93. (The Preadmission Screening may have found that the Individual Plaintiffs were not ready to move to a setting other than their current nursing home residence.) In any event, this contention is without merit. First, nowhere in the NHRA, or applicable regulations, is it stated that an individual upon discharge from a hospital to a nursing home must be offered a more integrated setting than a nursing home, if nursing home care is appropriate .[18] Second, the

[18] See McNiece, 1998 WL 175899 at *6 (finding that a PASSR conclusion that a nursing home level of care is required means that lesser levels of care were considered and rejected).

NHRA section relied on by plaintiffs (42 U.S.C. §§ 1396r(e)(7)(C)(ii)-(iii); Amend. Compl. ¶ 126) applies to a nursing home resident who has been determined, after the completion of a Resident Review, not to need nursing home level of service. That section requires: (1) the arrangement for the safe and orderly discharge for the resident from the nursing home; (2) that the nursing home resident is prepared and oriented for such discharge; and (3) that if needed, specialized services for mental illness are either provided or arranged to be provided. See 42 U.S.C. §§ 1396r(e)(7)(C)(ii) & (iii). Thus, the section does not apply to the Individual Plaintiffs.

Even assuming, arguendo, that 42 U.S.C. 1396r(e)(7)(C)(ii) or (iii) applies to the Individual Plaintiffs and that those sections impose an affirmative obligation upon Defendants, conspicuously absent from the allegations is any contention that Defendants completed a Resident Review which determined that any of the Individual Plaintiffs did not need a nursing home level of services, that Defendants are not making (or attempting to make) arrangements for the safe and orderly discharge from the nursing home, that Defendants are not preparing and orienting them for such discharge, or that if needed, Defendants are not providing or arranging to provide needed specialized services for their mental illness.[19] Moreover, contrary to their unsupported legal conclusions (Amend. Compl. ¶ 135), the Individual Plaintiffs fail to set forth any allegation whatsoever that Defendants were informed that these plaintiffs have experienced a significant change in their mental or physical change in condition which would require Defendants to perform a Resident Review pursuant to 42 U.S.C. § 1396r(e)(7)(B)(iii).

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[19] Although Edwin T. alleges he has been "approved by Andover for discharge" (Amend. Compl., ¶ 71), he fails to allege that a Resident Review determined he did not need nursing home level of care. He also fails to allege the date he was "approved by Andover for discharge." Thus, even if the statutory section is applicable to Plaintiff Edwin T., the alleged facts are insufficient to demonstrate a Resident Review found he did not need nursing home level of care or that Defendants are not making appropriate and timely arrangements for his discharge.

Therefore, the Individual Plaintiffs' allegations do not meet the bare minimum to overcome a motion to dismiss. Their contentions fail to set forth a statement of facts which render their contentions plausible and raise a right to relief above the level of speculation. Fitzpatrick v. Sony BMG Music Entertainment, 07 DIV. 2933 (SAS) 2007 U.S. Dist. LEXIS 60238 (S.D.N.Y. Aug. 15, 2007). Accordingly, their claims should be dismissed.

POINT III
PLAINTIFFS DAI AND HIRSCHFELD LACK ASSOCIATIONAL STANDING TO BRING THE ASSERTED CLAIMS AGAINST DEFENDANTS

The Advocate Plaintiffs assert that they have standing to represent the alleged thousands of persons discharged from both State hospitals and Article 28 psychiatric units to a nursing home, persons dubbed as the Advocate Plaintiffs' "constituents". Amend. Compl. ¶ 20. While only three of the Advocate Plaintiffs' "constituents" have been named as plaintiffs, the Amended Complaint makes the sweeping allegation that all of such persons "have each suffered injuries that would allow them to bring suit against Defendants in their own right", that the "interests DAI and MHLS seek to protect in this action are germane to DAI's and MHLS's purposes" and that "[n]either the claims asserted nor the relief requested in this action requires the participation of individual constituents . . . ." Amend. Compl. ¶¶ 26-28. These allegations, appearing for the first time in the Amended Complaint, track the standard for associational standing articulated by the Supreme Court in Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977) ("Hunt").

The Advocate Plaintiffs fail, however, to meet the Hunt standard because they seek individualized relief for each member of the entire "constituent" group, an amorphous body allegedly numbering in the thousands. Amend. Compl. ¶ 20. Although the Advocate Plaintiffs have a statutory charter to represent persons with mental illness, they still must demonstrate

"associational" standing when they bring claims as expansive in nature as those in this action. Monaco v. Stone, No. CV-98-3386, 2002 WL 32984617, *21 (E.D.N.Y. Dec. 20, 2002) ("Monaco") (Gasior Aff. Exh. F). (Congress authorized PAIMI organizations to bring suit for their constituents if they meet "traditional" associational standing test). Specifically, as with any organization seeking associational standing, the Advocate Plaintiffs must meet the three-prong test specified by the Supreme Court in Hunt. That means they must show that:

(1) Their constituents would otherwise have standing to sue in their own right;
(2) The interests they seek to protect are germane to their purpose; and
(3) Neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt 432 U.S. at 343. The Hunt test has been applied to advocacy organizations like the Advocate Plaintiffs in this case. See Aiken v. Nixon, 236 F. Supp. 2d 211, 224 (N.D.N.Y. 2002) (PAIMI statute 42 U.S.C. § 10805 authorizes organization to bring suit on behalf of members if it meets traditional associational standing test); Prye v. Carnahan, No. 04-4248-CV-C-ODS, 2006 WL 1888639, *3 (W.D. Mo. July 17, 2006) (Hunt factors for associational standing apply to PAIMI organization) (Gasior Aff. Exh. G).

Defendants assume, arguendo, for purposes of the present motion, that the first two prongs of the Hunt test are satisfied, i.e., the unidentified Advocacy Plaintiff constituents would themselves have standing to assert some, but perhaps not all, of the claims in the Amended Complaint and the interests the Advocacy Plaintiffs seek to protect are germane to their purpose.[20] The Advocate Plaintiffs have not, however, satisfied the third prong of the Hunt test, for all claims asserted in the Amended Complaint. It frequently is noted that "the third prong of

[20] However, as noted in Point IV infra, the Individual Plaintiffs fail to adequately plead some causes of action. Therefore, the first prong of the Hunt test arguably also has not been met.

the Hunt test can be broken down into two parts - the 'claim asserted' and the 'relief requested' elements". Nat' Ass'n of Coll. Bookstores, Inc. v. Cambridge Univ. Press, 990 F. Supp. 245, 248 (S.D.N.Y. 1997)("Nat'l Ass'n."). See also Arbor Hill Concerned Citizens Neighborhood Ass'n v. City of Albany, 250 F. Supp. 2d 48, 58 (N.D.N.Y. 2003) ("Arbor Hill"); Hunt, 432 U.S. at 343. As will be explained, the Advocate Plaintiffs' bid for associational standing founders on Hunt's third prong.

As a general proposition, where an association seeks a declaratory judgment, injunction, or some form of prospective relief, standing is presumed, though not guaranteed, because "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." Sherwin-Williams Co. v. Spitzer, No. 1:04CV185 (DNH/RFT), 2005 WL 2128938, *8 (N.D.N.Y. Aug. 24, 2005) (citing Warth v. Seldin, 422 U.S. 490, 515 (1975)) (Gasior Aff. Exh. H). The relief sought is, however, only half the story. Even when an association seeks an injunction, the claim it asserts may be such that it cannot be resolved on an association-wide basis. Nat'l Ass'n, 990 F. Supp. at 248-49. An organization will not be granted standing to assert claims of injunctive relief on behalf of its members where the "fact and extent" of the injury that gives rise to the claims for injunctive relief would require individualized proof. Access 4 All, Inc. v. Wellington Hotel Co., No. 03 CIV. 5027 (RLC), 2005 WL 3211598, *2 (S.D.N.Y. July 12, 2005) (Gasior Aff. Exh. I).

Several claims identified in the Amended Complaint plainly seek relief where the "fact and extent" of the injury giving rise to the claim would require individualized proof, precluding associational standing for the Advocate Plaintiffs. For example, the Amended Complaint on page 22 at "Wherefore" paragraph d ("Relief Request D"), requests the following relief:

> An Order requiring Defendants to:

i. Identify all individuals discharged to nursing homes from State psychiatric hospitals;
ii. Identify all individuals discharged to nursing homes from Article 28 psychiatric wards;
iii. Determine whether such individuals require care in a nursing home;
iv. Determine whether such individuals can receive necessary care and treatment in a more integrated setting;
v. Offer all individuals who either do not require care in a nursing home or could receive care and treatment in a more integrated setting without regard to whether they require nursing home level of care an opportunity to receive care and treatment in the most integrated appropriate setting;
vi Promptly provide such care and treatment in the most integrated setting to those individuals who do not oppose it; and
vii. Promptly identify, expand, develop and make available sufficient community-based care and treatment opportunities to ensure that the most-integrated care and treatment is provided without undue delay to those who desire it.

It is difficult to conceive of relief that could be more particularized. Furthermore, this relief is linked to allegations in paragraphs 109 and 110 of the Amended Complaint, which also speak to individualized relief, stating that all of the Advocate Plaintiffs' constituents are qualified to participate in more integrated settings "appropriate to their needs" and that Defendants can accommodate those needs. While there is absolutely no factual support for such a blanket assertion in the Amended Complaint for the thousands of constituents the Advocate Plaintiffs claim to represent, the allegation "appropriate to their needs" must be read to refer to individuals with wholly unique combinations of mental and/or physical illness, not an undifferentiated, homogenous group with a single condition that is susceptible to one form of treatment.

Before the District Court could grant relief appropriate to the particular needs of each Nursing Home Resident, it would be necessary to make some preliminary determinations for each person. First, the Court would need to determine if the individual had been improperly

discharged from a psychiatric hospital to a nursing home. The Court simply cannot presume that all of the Advocate Plaintiffs' constituents were improperly placed in a nursing home. Second, it would be necessary to determine which of the Nursing Home Residents are, in fact, not receiving proper care, or being improperly screened for participation in other housing. The Court also would need to determine whether such persons want to move out of the nursing home. The Advocate Plaintiffs cannot reasonably assert that every one of their nursing home constituents wants to and can leave nursing home care. These are only preliminary considerations.

The Court then would need to decide what is "appropriate to the needs" for each of the Nursing Home Residents. It assuredly cannot be presumed that all of the Advocacy Plaintiffs' nursing home constituents share the same degree of mental illness, age and infirmity, and in some instances, physical illness and that the "most integrated setting" for one person will be the same for any other. Each person would require an individualized evaluation to assure that the State took "steps necessary" to "assure" that they are moved to the appropriate setting.

It is evident that Relief Request D is precisely the type of claim where individual participation of each claimant is required, precluding associational standing. Relief Request D is fundamentally different from what is presumed to be the essential purpose of this lawsuit - to compel the State to change procedures found by the Court to violate federal law.[21] It focuses more on individual injuries that may have been suffered by the Advocacy Plaintiffs' individual

[21] For example, the Amended Complaint's Wherefore paragraph "a" merely seeks a declaration that Defendants have violated the ADA and the Rehabilitation Act. Similarly, Wherefore paragraph "b" seeks a declaration that Defendants have violated the NHRA by failing to develop and implement specific PASRR requirements. A declaration that, for example, Defendants were in violation of certain PASRR requirements and must make institutional corrections to those program deficiencies would not appear to require the participation of any of the Advocate Plaintiffs' constituents.

constituents, and rectification of particular alleged injuries, not systemic relief.

This is precisely the type of relief which Arbor Hill found to preclude associational standing. In Arbor Hill, the municipal defendants were responsible for the inspection, assessment, and abatement of lead hazards in selected housing. Plaintiff, a citizens' neighborhood association, claimed that its members were harmed by the defendants' failure to comply with federal law and regulations designed to protect public health from the risks associated with lead-based paint. Arbor Hill, 250 F. Supp. 2d at 54. The first claim for relief sought to "[p]ermanently enjoin [d]efendants from directing, administering, and operating the City of Albany Lead Paint Abatement Program, except in accordance with TSCA and other applicable regulatory requirements." Id. at 58. As purely injunctive relief, that claim did not require the participation of individual association members and, had plaintiff stopped there, the court's inquiry would have been at an end and associational standing achieved. Id. at 59.

But the plaintiff did not stop there. The association also sought an order to have the defendants take other actions to remedy or mitigate the harm caused by the alleged violations, including: (1) ensuring that all dwellings that were improperly abated were safe for human habitation; and (2) conducting medical monitoring of those residents who may have been exposed to the health risks of lead poisoning. Id. The addition of this request for relief was fatal to plaintiff's quest for associational standing, and the Court's reasoning on that point resonates herein with respect to plaintiffs' Relief Request D and other non-declaratory relief:

> At trial, each and every person whose home was allegedly abated improperly would not only have to testify as to the background material that their homes had work performed, which is permissible but certainly not necessary . . . such persons would also have to testify to their current medical condition. . . . In addition, the scope of medical monitoring will not be uniform. Each person may have been subject to different levels of exposure, and may require different types

> of monitoring, varying in degree and quantity. It is this type of heterogenous relief, requiring extensive individual participation, that is sought to be curtailed by the third prong of the Hunt test.

Id. at 59. See also Bano v. Union Carbide Corp., 361 F.3d 696, 715-16 (2d Cir. 2004) ("Bano") (associational standing denied because participation by individual property owners needed to permit identification of contaminated properties with individual assessments required as to nature, breadth, severity of contamination and determination as to which specific remediation methods would be appropriate). The need for individualized relief is fatal to associational standing. It is fatal to associational standing by the Advocate Plaintiffs, at a minimum with respect to the relief sought in Relief Request D.

Furthermore, the fact that a complaint may speak facially only to injunctive relief does not end the Court's associational standing inquiry. In Rent Stabilization Ass'n v. Dinkins, 5 F.3d 591 (2d Cir. 1993), the Second Circuit considered an association of New York City landowners' claim that certain provisions of the city's rent regulations effected an unconstitutional taking of its members' property. Though the association sought only injunctive relief, the Second Circuit's analysis went deeper. A takings claim, the court noted, requires a property owner to show that he has been denied an "economically viable use" of, or a "just and reasonable return" on, the property in question, and that this injury was caused by the challenged regulation. Id. at 596. The Court found that the question of whether such a burden is met cannot be answered without a particularized analysis of each person's circumstances and held that the association did not have standing under Hunt. Similar analysis is found in Univ. Legal Servs., Inc. v. St. Elizabeths Hosp., No. Civ. 105CV00585TFH, 2005 WL 3275915, *5 (D.D.C. July 22, 2005) (Gasior Aff. Exh. J), where the court implied that a PAIMI organization's associational standing probably would be denied if it was necessary to rely on the individualized participation of its constituents,

in the form of testimony and affidavits, to prove its claims as opposed to purely injunctive remedies that would bring institution-wide relief for its constituents.

Simlarly, in Protection & Advocacy, Inc. v. Murphy, No. 90 C 569, 1992 WL 59100 (N.D. ILL. Mar. 16, 1992) (Gasior Aff Exh. K), a case involving a PAIMI organization's standing, the court considered the requirement that there be "particularized"allegations of demonstrable injury to obtain associational standing. Without such particularization, "there can be no confidence of 'a real need to exercise the power of judicial review' or that relief can be framed 'no [broader] than required by the precise facts to which the court's ruling would be applied.'" Id. at * 11 (citing Warth v. Selden, 422 U.S. 490, 508 (1975)). An organization's assertion of standing cannot be different from the standing of the members it represents. Id. at *12. Accordingly, when an association's members' claims are "general, conclusory, and . . . inferential allegation[s] of unspecified injuries"-- like those asserted in Relief Request D -- associational standing is not warranted. Id.

There is no question that the Advocate Plaintiffs' demand that Defendants identify all of their constituents discharged to nursing homes from every psychiatric hospital or psychiatric unit in the State, without any time limitation, and then determine the constituents' needs and provide for those needs is the type of heterogenous relief which, under the Hunt test's third prong, is not properly asserted by an organization claiming associational standing.[22] The Advocate Plaintiffs stand on firmer ground when they represent particular identifiable persons, such as the three

[22] Compounding the need for individual participation in this case, as opposed to cases involving, for example, landlords, is the fact that the Advocate Plaintiffs' constituents are mentally ill. As noted by the court in A Helping Hand, LLC v. Baltimore County, Maryland., 295 F. Supp. 2d 585, 592 (D. Md. 2003), the Supreme Court has held that disability status ordinarily requires an "individualized assessment."

Individual Plaintiffs in this case. But associational standing carves only a narrow exception from the ordinary rule that a litigant must assert its own legal rights and interests and cannot rest its claim to relief on the legal rights or interests of third parties. See Bano, 361 F.3d at 715. As the Second Circuit stated in Bano,

> If the involvement of individual members of an association is necessary, either because the substantive nature of the claim or the form of the relief sought requires their participation, we see no sound reason to allow the organization standing to press their claims, even where it seeks to do so as a putative class representative.

Id. at 715. Accordingly, where the Advocate Plaintiffs seek to obtain individualized relief for unidentified persons, they should be denied associational standing and that cause of action, in this case Relief Request D, dismissed.

POINT IV
PLAINTIFFS EDWIN T., JOSEPH S. AND STEVEN W. LACK STANDING TO BRING THE ASSERTED CLAIMS AGAINST DEFENDANTS

The Individual Plaintiffs' claims against Defendants should be dismissed because the Amended Complaint fails to contain allegations that their alleged injuries are fairly traceable to the Defendants' policies regarding the NHRA, a fact which deprives these plaintiffs of standing to assert such claims. A three-pronged test is applied to determine whether plaintiffs have standing in federal courts:

> First, plaintiffs must show that they have suffered an injury in fact that is both concrete in nature and particularized to them. . . . Second, the injury must be fairly traceable to defendants' conduct. . . . Third, the injury must be redressable by removal of defendants' conduct. . . . The second and third prongs - traceability and redressability - often dovetail; essentially, both seek a causal nexus between the plaintiff's injury and the defendant's assertedly unlawful act. To establish standing, a plaintiff must plead all three elements.

In re U.S. Catholic Conference (USCC), 885 F.2d 1020, 1023 -24 (2d Cir. 1989).

The Amended Complaint makes general allegations regarding deficiencies in Defendants'

implementation of the PASRR - - see amend. compl. ¶ 134 - - and generalized allegations of violations of the ADA and the Rehabilitation Act. Amend. Compl. ¶¶ 5, 6. Noticeably missing from the Amended Complaint, however, is any specific allegation that the Defendants failed to provide the Individual Plaintiffs with either a Preadmission Screening (§ 1396r((e)(7)(A)) before they entered nursing home care or a Resident Review (§ 1396r((e)(7)(B)) following a significant change in circumstances. Allegations are made that the Individual Plaintiffs are now able and qualified for and wish to receive treatment and live in a more integrated setting than a nursing home. Amend. Compl. ¶¶ 16, 70, 86, 94. But the closest any of the individual plaintiffs come to asserting that they did not actually receive a PASRR review is the allegation by Edwin T. that he "has been approved by Andover [nursing home] for discharge . . . ." Id. at ¶ 71. This pleading does not implicate any failure by Defendants to conduct a PASRR review and thus precludes the Individual Plaintiffs standing to assert such claims. "[W]hen a plaintiff lacks standing to bring suit, a court has no subject matter jurisdiction over the case." Catholic Conference, 885 F.2d at 1023. See also Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 117 (2d Cir. 1991) (standing is a threshold jurisdictional issue under Article III in all cases since putative plaintiffs lacking standing are not entitled to have their claims litigated in federal court). Accordingly, the Individual Plaintiffs' claims regarding the NHRA should be dismissed because the Individual Plaintiffs' lack of standing robs this Court of subject matter jurisdiction.[23]

POINT V
PLAINTIFFS FAIL TO NAME NECESSARY PARTIES

"[A] person subject to service of process whose joinder will not deprive the court of

[23] Even assuming, arguendo, that this Court determines that the plaintiffs do have standing to bring this litigation against Defendants, given these pleading deficiencies, the Court should rule that the Individual Plaintiffs fail to state a claim upon which relief can be granted.

jurisdiction must be joined in an action when 'in the person's absence complete relief cannot be accorded among those already parties . . . .'" Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 179 F.R.D. 417, 419 (S.D.N.Y.1998) (quoting Fed.R.Civ.P. 19(a) and referring to the persons described as "necessary" parties). Am. Stock Exch., LLC v. Towergate Consultants Ltd., 2003 WL 21692814, *3 (S.D.N.Y. 2003) (Gasior Aff. Exh. L).

A. The Nursing Homes Are Necessary Parties To This Litigation

Pursuant to 42 C.F.R. § 483.116, "[i]f the State mental health authority determines that a resident or applicant for admission to a nursing facility requires nursing facility level of services, the nursing facility may admit or retain the individual." Id. (emphasis added). Therefore, if the nursing home disagrees with the Preadmission Screening determination made by the State mental health authority, the nursing home is not obligated to admit an individual. In addition, as noted in section A(1)(b) of the Statement of the Case above, once an individual is placed in a nursing home, the NHRA requires that the nursing home, not the State mental health authority, conduct Resident Assessments. See 42 U.S.C. § 1396r(b)(3)(C). If the nursing home's Resident Assessment reveals that there has been a "significant change" in the physical or mental condition of a resident, the nursing home is required to inform the State mental health authority. 42 U.S.C. § 1396r(b)(3)(E). Only then is the State required to perform a Resident Review. Id.

Here, plaintiffs' primary contention is that individuals who do not need nursing home level of care are nonetheless being admitted into nursing homes. Amend. Compl. ¶ 129. In addition, plaintiffs allege that the Defendants are failing to perform Resident Reviews. Id. ¶ 133. However, as explained above, nursing homes are required to provide a primary and indispensable role in providing notice to the State when there has been a significant change in a resident's condition triggering the need for the State mental health authority to perform a Resident

Review.[24] Accordingly, nursing facilities housing Nursing Home Residents are necessary parties to this litigation pursuant to Fed. R. Civ. P. Rule 19(a)(2)(i) and they should either be added as parties or the plaintiffs' claims dismissed.

B. The Article 28 Hospitals Are Necessary Parties To This Litigation

To the extent that plaintiffs allege that the various psychiatric wards of non-state operated hospitals (the Article 28 hospitals) are unlawfully discharging individuals to nursing facilities, the Article 28 hospitals are necessary parties. While the State does regulate both Article 28 Hospitals and nursing homes, that function does not make the State responsible for discharge planning done by Article 28 hospitals or for the subsequent care of those persons once they reside in a nursing home. Cf. Amend. Compl. at ¶¶ 5, 6, 20, 21. As noted in Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974), the fact that an otherwise private actor is regulated or licensed by a state agency does not make that actor's conduct a state action. Rather, the complaining party must show that "there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." Blum v. Yaretsky, 457 U.S. 991, 1004 (1982). The district court in Okunieff v. Rosenberg, 996 F. Supp. 343 (S.D.N.Y. 1998), considered whether the State could be held responsible for a private hospital's decision to involuntarily commit and confine the

[24] Mere licensure or regulation will not suffice to make the State liable for errors made by a nursing home, for example, a defective Resident Assessment. This was explained in some depth by the Supreme Court in Blum v. Yaretsky, 457 U.S. 991, 1005 (1982). Furthermore, State regulations at 10 N.Y.C.R.R. § 415.11 make it clear that, once a patient is transferred to a nursing home, responsibility for comprehensive case management, service planning, and related services is transferred to the nursing home. These State regulations, including discharge planning, specifically require nursing homes to assess their residents in a great number of areas, including their mental and psychosocial status. Id. at 18 N.Y.C.R.R. § 415.11(a)(2)(viii). Regulations at 18 N.Y.C.R.R. § 505.20 similarly demonstrate that the nursing home, not the State, is responsible for discharge planning for nursing home residents who receive Medicaid.

plaintiff and determined that New York's MHL did not create a sufficiently close nexus between the State and the hospital defendants to mandate their classification as state actors, which is what plaintiffs herein attempt to do. Id. at 352. Extensive regulation and the receipt of federal funds, without more, do not establish that the actions of a non-state hospital are attributable to the state regulator. Id. The State's regulatory function regarding Article 28 Hospitals does not, therefore, make the State responsible for any (alleged) failure on the part of such hospitals to properly plan and implement the discharge of a psychiatric patient to a nursing home.

Therefore, the Article 28 hospitals are necessary parties to this litigation and, pursuant to Fed. R. Civ. P. Rule 19(a)(2)(i), they should either be added as parties to this action or, if that is not possible, plaintiffs' action should be dismissed.[25]

POINT VI
A THREE YEAR STATUTE OF LIMITATIONS GOVERNS ALL OF PLAINTIFFS' CLAIMS AND BARS RELIEF FOR ANY CLAIMS BASED ON ACTS OUTSIDE THE LIMITATION PERIOD

The Amended Complaint unquestionably seeks particularized relief for individuals other than the three Individual Plaintiffs, i.e., relief for the Advocate Plaintiffs' "constituents." Relief Request D seeks an order requiring Defendants to identify all individuals discharged to nursing homes from State and Article 28 psychiatric wards, determine whether such individuals require nursing home care and move them if they do not. Thousands of persons are implicated. Amend. Compl., ¶ 21. While the Amended Complaint asserts that "neither the claims asserted nor the relief requested in this action requires the participation of individual constituents in this lawsuit"

[25] If plaintiffs continue to assert that the discharge planning by Article 28 hospitals is irrelevant and that, therefore, Article 28 hospitals are not necessary parties to this litigation, then it necessarily follows that the discharge planning by State psychiatric hospitals also is irrelevant in this action.

(Id. at ¶ 28), the fact that particularized relief is sought for "all" nursing home residents demonstrates otherwise, as shown in Point III , supra. Any person seeking such specific relief from the Court is required to demonstrate that the allegedly unlawful State action -- whether it is the failure to perform a Preadmission Screening for the patient before he/she enters the nursing home, or the failure to perform a Resident Review after a significant change in a resident's condition -- occurred within the applicable statute of limitations.

All of the statutes upon which plaintiffs base their claims - the ADA, the Rehabilitation Act and the NHRA - are subject to a three-year statute of limitations. See section A infra. Given that plaintiffs filed this action on March 8, 2006, claims based on acts occurring before March 8, 2003 would be barred. Therefore, there is a very strong probability that many of the Advocate Plaintiffs' constituents' claims are time-barred, in whole or in part. The Advocate Plaintiffs cannot evade application of the statute of limitations to "Constituents" by artfully failing to include in their pleadings any reference to the date upon which an alleged wrongful act occurred.

A. Courts In This Circuit Uniformly Apply A Three-Year Statute Of Limitations For Claims Like Those Asserted By Plaintiffs

The district court in Gardner v. Wansart, No. 05 Civ. 3351 (SHS), 2006 WL 2742043, *3 (S.D.N.Y. Sept. 26, 2006) (Gasior Aff. Exh. M), explained why New York's federal courts employ a three-year statute of limitations in cases asserting claims like those made by plaintiffs. Essentially, when a federal law, like the ADA, does not contain a statute of limitations, courts look to analogous State law to determine the appropriate limitation period. Id. at *3. In New York, federal courts apply New York's three-year statute of limitations for personal injury claims to Title II and Title III ADA claims, as well as to claims brought pursuant to section 504 of the Rehabilitation Act, which statute also lacks reference to a specific statute of limitations. Id. The

Gardner court also noted that section 1981 claims in New York are subject to a three-year statute of limitations. Id. (citing Patterson v. County of Oneida, 375 F.3d 206, 225 (2d Cir. 2004). See also, Solomon v. New York City Bd. of Educ., No. CV-95-1878, 1996 WL 118541 *4 (E.D.N.Y. Mar. 6, 1996) (3-year State statute of limitations that applies to personal injury actions applies to discrimination claims brought under Section 504 of the Rehabilitation Act) (Gasior Aff. Exh. N); Scaggs v. New York Dept. of Educ., No. 06-DV-0799 (JFB)(VVP), 2007 WL 1456221, *9 (E.D.N.Y. May 16, 2007) (applying New York's three-year statute of limitations to ADA claim) (Gasior Aff. Exh. O); Fiesel v. Bd. of Educ., 490 F. Supp. 363, 365 (E.D.N.Y. 1980) (applying 3-year statute of limitation to claim brought under Rehabilitation Act, 29 U.S.C. §794); Morse v. Univ. of Vermont, 973 F.2d 122, 127 (2d Cir. 1992) (actions under § 504 of the Rehabilitation Act are governed by the State statute of limitations applicable to personal injury actions). It also has been held that § 1983 actions are governed by New York's three-year statute of limitations, as set out in N.Y. C.P.L.R. § 214. Warren v. Altieri, 59 Fed. Appx. 426 (2d Cir. 2003).

Defendants have not found any cases that explicitly applied a three-year limitations period to NHRA claims like those advanced by plaintiffs. Like the ADA, however, the NHRA does not contain a specific limitations period. Section 1396r of NHRA is, however, part of the Medicaid Act (see In re NYAHSA Litig., 318 F. Supp. 2d 30, 32 (N.D.N.Y. 2004)), and the Second Circuit has held that a three-year statute of limitations properly is applied to claims based on Medicaid violations. Hollander v. Brezenoff, 787 F.2d 834, 839 (2d Cir. 1986).

When the alleged claims resulting from a psychiatric hospital discharge accrued (or those of any potential hospital discharge), so as to start the three-year limitations period, is determined by federal law and, in the Second Circuit, "a cause of action accrues 'when the plaintiff knows or has reason to know of the injury that is the basis of the action.'" BD v. DeBuono, 130 F. Supp.

2d 401, 424 (S.D.N.Y. 2000). Although Defendants deny that any discharges from psychiatric hospitals violated the NHRA, the ADA or the NHRA, Defendants assert that, with respect to hospital discharges, the relevant event constituting the accrual date upon which the three-year statute of limitations would begin to run should be the date the person was actually discharged from the hospital.[26] Respecting discharges then, the claims of many nursing home residents will likely be barred by the three-year statute of limitations. Accordingly, with respect to a cause of action based on the discharge from a psychiatric hospital, the Court should bar relief unless plaintiffs can demonstrate that a particular Nursing Home Resident was discharged from a psychiatric hospital within three years of the filing of the initial complaint in this action (March 8, 2006).[27]

Similarly, unless a "Constituent"/Nursing Home Resident can demonstrate that, while he/she was a resident of a nursing home, the Defendants violated a provision of the NHRA, the ADA or the NHRA within the three-year statute of limitations, a claim based on such a violation should be barred.

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[26] If the Court determines that the Amended Complaint fails to state a cause of action, it will be unnecessary for it to consider Defendants' statute of limitations arguments. But if, for example, the Court finds that Relief Request D states a viable cause of action for Nursing Home Residents, then any such relief should be circumscribed by the three-year statute of limitations.

[27] The Advocate Plaintiffs cannot by their status as advocates enlarge the statute of limitations. Their standing is coextensive with their "constituents" standing. As noted in Small v. Gen. Nutrition Cos., 388 F. Supp. 2d 83, 97-98 (E.D.N.Y. 2005), "associational standing exists only insofar as organization members have standing, associational standing may not be broader or more extensive than the standing of the organization's members." If a "constituent's" claim is time barred in this litigation, it also is barred to the Advocate Plaintiffs.

POINT VII
GOVERNOR SPITZER SHOULD BE DISMISSED AS A PARTY TO THIS LITIGATION

A. Governor Spitzer is not a Proper Party to this Litigation

Even assuming, arguendo, that this Court finds that this matter should not be dismissed as against DOH and OMH, it should certainly be dismissed as against Governor Spitzer. Plaintiffs do not make any specific claim, even if the allegations of the Amended Complaint are assumed to be true, that would involve a justiciable action against Governor Spitzer. Plaintiffs cannot name the Governor as a party to this litigation under the general theory that he has a duty to take care that the laws are faithfully executed. See Warden v. Pataki, 35 F. Supp. 2d 354, 359 (S.D.N.Y. 1999), aff'd sub nom., Chan v. Pataki, 201 F.3d 430 (2d Cir. 1999)(holding Governor not proper party to litigation based upon "duty under New York Constitution to take care that the laws are faithfully executed."); see also Wang v. Pataki, 164 F. Supp. 2d 406, 410 (S.D.N.Y. 2001)(finding that "where the legislative enactment provides that entities other than the executive branch of the State are responsible for implementation of the statute no claim against the Governor lies"). Since the Amended Complaint fails to demonstrate that Governor Spitzer has any connection with the implementation or enforcement of any relevant statute implicated in this litigation, he is immune from suit. See United States v. New York, No. 5:04-CV-00428 (NAM/DEP), 2007 U.S. Dist. LEXIS 21722 (N.D.N.Y. Mar. 27, 2007) (Gasior Aff. Exh. P).

B. Rule 21 of the Federal Rules of Civil Procedure Requires that Governor Spitzer Should be Dismissed from this Litigation

Moreover, and in any event, this matter should be dismissed as against Eliot Spitzer, as Governor of the State of New York pursuant to Fed. R. Civ. P. Rule 21. Rule 21 provides in relevant part: "Parties may be dropped or added by order of the court on motion of any party or of

its own initiative at any stage of the action and on such terms as are just." Fed. R. Civ. P. Rule 21. Even assuming, arguendo, that plaintiffs were to prevail in this matter, Governor Spitzer's presence in this litigation is not necessary to afford plaintiffs the full relief they seek. In the interest of justice he therefore should be dropped from this litigation. See Comm. for Pub. Educ. & Religious Liberty v. Rockefeller, 322 F. Supp. 678, 686 (S.D.N.Y. 1971) (Governor dropped from the litigation because full relief could be afforded by the other named defendants).

CONCLUSION

For the reasons set forth above, the Court should grant Defendants' motion to dismiss the Amended Complaint and grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
September 18, 2007

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