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 Service, Second Judicial Department *Plaintiffs*, v. 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*.	Civ No. 06 CV 1042 (BMC) (SMG)

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

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PRELIMINARY STATEMENT

Plaintiffs Edwin T., Joseph S., Steven W., Disability Advocates, Inc., and Sidney Hirschfeld, Director, Mental Hygiene Legal Service, Second Judicial Department (collectively, "plaintiffs") have sued defendants New York State Office of Mental Health, New York State Department of Health, their respective commissioners in their official capacities, and Governor Eliot Spitzer, in his official capacity (collectively, "New York" or "defendants") for failing to administer their services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with mental illness, leading to the unnecessary institutionalization in nursing homes of hundreds of New Yorkers with mental illness who do not require nursing care in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131, 12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. See First Amended Complaint ("First Am. Compl.") ¶¶ 95-117. New York also violates the federal Nursing Home Reform Act ("NHRA"), 42 U.S.C. § 1396r, through its failure to develop a Pre-Admission Screen and Resident Review ("PA SRR") program to assure that individuals with mental illness reside in nursing homes only if they require nursing home care and to assure that individuals residing in nursing homes receive appropriate mental health treatment. See First Am. Compl. ¶¶ 118-136.

Plaintiffs state claims under the ADA, Rehabilitation Act, and NHRA. First, the ADA and Rehabilitation Act community integration mandate clearly prohibits the unnecessary institutionalization of individuals with mental illness in nursing homes. Second, plaintiffs, including individual plaintiffs Edwin T., Joseph S., and Steven W., specifically allege multiple violations of their PASRR rights under the NHRA, which are enforceable in a suit brought pursuant to 42 U.S.C. § 1983. Third, the organizational plaintiffs in this action, Disability Advocates, Inc. ("DAI") and Sidney Hirschfeld, Director, Mental Hygiene Legal Service,

Second Judicial Department ("MHLS"), and the individual plaintiffs, have standing to assert the claims in this action. Last, there is no statute of limitations bar to any of plaintiffs' claims. For these and other reasons stated herein, defendants' motion to dismiss should be denied in its entirety.

STATEMENT OF THE CASE

A. The Americans with Disabilities Act and Rehabilitation Act

Title II of the ADA, 42 U.S.C. §§ 12131, 12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, prohibit discrimination against individuals with disabilities, including those with mental illness.[1] In enacting the ADA, Congress explicitly identified unjustified segregation of persons with disabilities as a form of discrimination. See 42 U.S.C. § 12101(a)(2) ("historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem"); id. § 12101(a)(5) ("individuals with disabilities continually encounter various forms of discrimination, including ... segregation").

To prevent unjustified segregation of persons with disabilities, regulations adopted under the ADA and Rehabilitation Act require that a public entity must administer its services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities. See 28 C.F.R. § 35.130(d) (ADA); 45 C.F.R. § 84.4(b)(2) (Rehabilitation Act); see also 28 C.F.R. pt. 35, App. A, § 130 ("[T]he most integrated setting appropriate to the needs of qualified individuals with disabilities" is "a setting that enables

[1] Title II applies to public entities, see 42 U.S.C. § 12132, and Section 504 applies to recipients of federal financial assistance, see 29 U.S.C. § 794(a). Defendants admit that they are public entities covered by Title II of the ADA and are recipients of federal financial assistance. See First Am. Compl. ¶¶ 34, 39, 40, 41; Answer to First Amended Complaint ("Answer") ¶¶ 24, 27, 28, 29.

individuals with disabilities to interact with nondisabled persons to the fullest extent possible ….”). The ADA and Rehabilitation Act also require that a public entity administer its programs so as not to defeat or substantially impair accomplishment of the objectives of the program with respect to individuals with disabilities. See 28 C.F.R. § 35.130(b)(3)(ii)(ADA); 45 C.F.R. §84.4(b)(4)(ii)(Rehabilitation Act).

Defendants’ failure to administer their services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with mental illness has led to the unnecessary institutionalization in nursing homes of hundreds of New Yorkers with mental illness who do not require inpatient nursing care. See First Am. Compl. ¶¶ 95-102, 104-05. Defendants have employed methods of administration that have led to the unnecessary institutionalization of individuals with mental illness in nursing homes. See id. ¶¶ 103, 114.

Plaintiffs Edwin T., Joseph S., and Steven W. bring ADA and Rehabilitation Act claims on their own behalf. See First Am. Compl. ¶¶ 11-17, 65-71, 81-86, 87-94, 95-105, 106-117. Plaintiffs DAI and MHLS bring ADA and Rehabilitation claims on behalf of individuals with mental illness discharged or at-risk of discharge from state psychiatric hospitals operated by defendant New York State Office of Mental Health (“OMH”) and on behalf of individuals discharged or at-risk of discharge from psychiatric wards of hospitals licensed pursuant to Article 28 of the New York Public Health Law (“Article 28 psychiatric wards”). See id. ¶¶ 18-27, 49-52, 53-64, 95-105, 106-117. These individuals are collectively referred to as “constituents” of DAI and MHLS. See id. ¶ 20.

Plaintiffs bring their ADA and Rehabilitation Act claims against defendants New York State Department of Health (“DOH”) and Richard F. Daines, DOH Commissioner, because DOH is the single state agency that operates New York State’s medical assistance program

("Medicaid"), which pays for the care and treatment in nursing homes of plaintiffs Edwin T., Joseph S., and Steven W. and the vast majority of DAI and MHLS's constituents. See N.Y. Soc. Serv. Law § 363-a(1); First Am. Compl. ¶¶ 38, 44. DOH fails to operate the Medicaid program in such a manner as to ensure that individuals with mental illness in nursing homes receive care and treatment in the most integrated setting appropriate to their needs. See First Am. Compl. ¶¶ 95-105, 106-17. DOH also fails to administer the PASRR program to accomplish the program's objective of assuring that individuals with mental illness do not reside inappropriately in nursing homes and that these individuals receive necessary mental health treatment if in nursing homes. See id. ¶¶ 103-04, 114-16.

Plaintiffs bring their ADA and Rehabilitation Act claims against defendants New York State Office of Mental Health ("OMH") and Michael F. Hogan, OMH Commissioner, because OMH is responsible for the inappropriate discharge of individuals with mental illness to nursing homes from state psychiatric hospitals. See First Am. Compl. ¶ 31. Further, OMH has failed to develop sufficient community-based housing to ensure that individuals with mental illness are served in the most integrated setting appropriate to their needs. See id. ¶ 53. Last, OMH fails to administer the PASRR program to accomplish the program's objective of assuring that individuals with mental illness do not reside inappropriately in nursing homes and that these individuals receive necessary mental health treatment if in nursing homes in violation of the ADA. See id. ¶¶ 33, 103-04, 114-16.

Plaintiffs sue Governor Spitzer as the individual ultimately responsible for ensuring that New York operates its services, programs and activities in conformity with the ADA and Rehabilitation Act. See First Am. Compl. ¶ 41.

To remedy defendants' violations of the ADA and Rehabilitation Act, plaintiffs seek an order requiring defendants to (1) administer their services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with mental illness residing in nursing homes, (2) identify individuals with mental illness discharged from state psychiatric hospitals and Article 28 psychiatric wards to nursing homes, (3) determine whether such individuals could receive care and treatment in a more integrated setting, and (4) provide care and treatment in a more integrated setting to those individuals who are qualified for and not opposed to such care. See First Am. Compl. Wherefore Clause ¶ d. Plaintiffs further seek an order requiring defendants to administer their PASRR program so as not to defeat or substantially impair accomplishment of the objectives of the program with respect to individuals with disabilities. See id. Wherefore Clause ¶ f.

B. The Nursing Home Reform Act

The Nursing Home Reform Act ("NHRA"), 42 U.S.C. § 1396r, was adopted as part of the Omnibus Budget Reconciliation Act of 1987, P.L. 100-203, 101 Stat 1330 (1987), in order to "end the inappropriate placement of mentally ill or mentally retarded individuals in nursing facilities." H.R. Rep. No. 100-391, pt. 1, at 459 (1987). [2] The NHRA requires states to ensure that individuals with mental illness are not inappropriately placed in nursing homes and that they

[2] For an overview of the NHRA's preadmission screening and resident review requirements, see Department of Health and Human Services, Office of Inspector General, "Preadmission Screening and Resident Review for Younger Nursing Facility Residents With Serious Mental Illness" (OEI-05-05-00220; Jan. 2007), available at http://oig.hhs.gov/oei/reports/oei-05-05-00220.pdf (last visited Nov. 15, 2007). See also Department of Health and Human Services, Office of Inspector General, "Younger Nursing Facility Residents with Mental Illness: Preadmission Screening and Resident Review (PASRR) Implementation and Oversight" (OEI-05-99-00700; Jan. 2001), available at http://oig.hhs.gov/oei/reports/oei-05-99-00700.pdf (last visited Nov. 15, 2007); Department of Health and Human Services, Office of Inspector General, "Younger Nursing Facility Residents with Mental Illness: An Unidentified Population" (OEI-05-99-00701; Jan. 2001), available at http://oig.hhs.gov/oei/reports/oei-05-99-00701.pdf (last visited Nov. 15, 2007).

receive appropriate mental health treatment while in a nu rsing facility. See 42 U.S.C. § 1396r; see also 42 U.S.C. § 1396a(a)(28) (state Medicaid plan must provide for compliance with NHRA). Section 1396r(e)(7) of the NHRA delin eates the "State requirem ents for preadmission screening and resident review." 42 U.S.C. § 139 6r(e)(7). Regulations prom ulgated pursuant to the statute implem ent the NHRA's preadm ission screening and resident review ("PASRR") requirements. See 42 U.S.C.. § 1396r(f)(8)(A); 42 C.F.R. §§ 483.100-483.138; 57 Fed. Reg. 56450-01 (Nov. 30, 1992). These PASRR requirem ents apply to any indi vidual proposed for admission to or who resides in a Medicaid-certified nursing facility. See 42 C.F.R. § 483.102(a). For individuals receiving care outside their state of residence, the state in which the individual is a resident must pay for PASRR and make the required determinations. See 42 C.F.R. § 483.110.

Defendants have failed to im plement a PASRR program consistent with the NHRA by (1) failing to evaluate properly whether individual s with mental illness require nursing facility level of care, including whether co mmunity treatment is appropriate ; (2) f ailing to evaluate properly the level of m ental health treatment individuals with m ental illness residing in nursing homes require and to assure that such individu als receive appropriate treatment; (3) failing to assure that residen ts of nursing homes receive resident reviews upon a significant chang e in condition; and (4) failin g to assure that ind ividuals with mental illness receive a copy of their PASRR evaluation report. See First Am. Compl. ¶¶ 118-36.

Edwin T., Joseph S., and Steven W . bring NHRA claims on their own behalf. See First Am. Compl. ¶¶ 134, 135, W herefore Clause ¶¶ b, f. DAI and MHLS bring NHRA claim s on behalf of individuals with m ental illness discharged or at-risk of discharge from state psychiatric hospitals operated by defendant O MH and on beha lf of individuals disc harged or at-risk of discharge from Article 28 psychiatric wards. See id. ¶ 20.

Plaintiffs bring their NHRA claims against defendants DOH and Daines because DOH, as the State Medicaid agency, is responsible for assuring that New York's PASRR program operates in conformity with federal law. See First Am. Compl. ¶38; 42 U.S.C. § 1396a(a)(28); 57 Fed. Reg. 56450-01, 56452.

Plaintiffs bring their NHRA claims against defendants OMH and Hogan because OMH, as the "State mental health authority" in New York State, is responsible under the NHRA for determining whether an individual with mental illness requires nursing facility level care and determining what level of mental health treatment such individual requires. See 42 U.S.C. § 1396r(e)(7)(B)(i); First Am. Compl. ¶¶ 30, 33, Answer ¶ 21.

Plaintiffs sue Governor Spitzer as the individual ultimately responsible for ensuring that New York operates its PASRR program in conformity with the NHRA. See First Am. Compl. ¶ 41.

To remedy defendants' violation of the NHRA, plaintiffs seek an order directing defendants to implement a PASRR program that complies with the NHRA, to evaluate individuals with mental illness residing in nursing homes under such a program, to make appropriate community-based treatment available for those determined eligible for community placement, and to ensure that individuals with mental illness determined to require nursing home care receive appropriate mental health treatment. See First Am. Compl. Wherefore Clause ¶¶ d, f.

1. Defendants' Failure to Evaluate Whether Individuals Require Nursing Facility Level of Care

For individuals with mental illness proposed for admission to a nursing facility, the NHRA requires that "the State must have in effect a preadmission screening program," 42 U.S.C. § 1396r(e)(7)(A)(i), to determine "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," 42 U.S.C. § 1396r(b)(3)(F)(i). The NHRA further provides that "in the case of each resident of a nursing facility who is mentally ill, the State mental health authority must review and determine . . . whether or not the resident, because of the resident's physical and mental condition, requires the level of services provided by a nursing facility." 42 U.S.C. § 1396r(e)(7)(B)(i). For both the preadmission screen and the resident review, the "State mental health authority" makes the determination as to whether an individual meets nursing facility level of care based upon "an independent physical and mental evaluation performed by a person or entity other than the State mental health authority." 42 U.S.C. § 1396r(b)(3)(F)(i); 42 U.S.C. § 1396r (e)(7)(B)(i).

To determine whether an individual meets nursing facility level of care, the independent evaluator must assess whether "[t]he individual's total needs are such that his or her needs can be met in an appropriate community setting." 42 C.F.R. § 483.132(a)(1). The evaluator examines "the level of support that would be needed to assist the individual to perform these activities while living in the community," and "determine[s] whether this level of support can be provided to the individual in an alternative community setting or whether the level of support needed is such that NF [Nursing Facility] placement is required." 42 C.F.R. § 483.134(b)(5). If the individual's needs cannot be met in a community setting, the assessor determines if "[t]he individual's total needs are such that they can be met only on an inpatient basis, which may include the option of placement in a home and community-based services waiver program." Id. § 483.132(a)(2); see 57 Fed. Reg. 56450-01, 56496 ("NF [Nursing Facility] placement would be

selected only after less restrictive settings had been rejected be cause the individual's care needs are so extensive that the individual requires institutional care").[3]

The PASRR system in New York fails to evaluate whether the needs of individuals with mental illness proposed for nur sing home admission or residing in nursing hom e are such that they can be m et in an appropriate comm unity setting, including community-based care funded under a home and community-based se rvices waiver program. See First Am. Compl. ¶¶ 129-30, 133. As a result, ind ividuals with m ental illness whose n eeds can b e met in an appropriate community setting are n evertheless determined eligible for nursing home care. Thus, whenever OMH authorizes and approves nursing hom e care for a person with a mental illness, it does so in violation of the NHRA. Because its p rocedures are un lawful, every individu al with m ental illness in a nursing home has been denied the right to a preadmission screen.

2. Defendants' Failure to Evaluate Appropriate Level of Men tal Health Treatment

For individuals who require th e level of serv ices provided by a nursing facility, the PASRR evaluation m ust evaluate the level of mental health treatment such individual requires. 42 U.S.C. § 1396r(b)(3)(F)(i); id. § 1396r(e)(7)(B)(i)(II). If the evaluation indicates that the individual requires specialized se rvices for m ental illness, the NHRA provides th at the "State must . . . provide for (or arrange for the provisi on of) such specialized se rvices for the m ental illness." 42 U.S.C. § 1396r(e)(7)(C)(i)(IV), (ii)(III); s ee 42 C.F.R. §§ 483.116(b)(2); 483.118(c)(1)(iv). If the individual requires servi ces of a lesser intensit y, the nursing facility

[3] If inpatient care is "appropriate and desired," the evaluator must further assess whether "the NF [Nursing Facility] is an appropriate institutional setting for meeting [the individual's] needs." 42 C.F.R. § 483.132(a)(3). If the Nu rsing Facility is not an appropr iate setting, the evaluator then assesses other institutional settings "such as a n ICF/MR [intermediate care f acility for the mentally retarded] (including small, community-based facilities), an IM D [institute for mental disease] providing services to ind ividuals aged 65 or older, or a psyc hiatric hospital." Id. § 483.132(a)(4).

must provide such services as determined by the evaluation report. See 42 C.F.R. § 483.120(c). Whether specialized services or services or a lesser intensity are recommended, the evaluation report must identify "the specific … mental health services required to meet the evaluated individual's needs." 42 C.F.R. § 483.128(i)(4), (5).

Defendants fail to evaluate properly the level of mental health treatment an individual with mental illness proposed for admission to nursing homes or residing in a nursing home requires. See First Am. Compl. ¶¶ 132, 134. As a result, individuals with mental illness residing in nursing homes do not receive needed mental health treatment.

3. Defendants' Failure to Perform Resident Reviews Upon Significant Change in Condition

The State must conduct a resident review "promptly after a nursing facility has notified the State mental health authority … that there has been a significant change in the resident's physical or mental condition." 42 U.S.C. § 1396r(e)(7)(B)(iii).[4] This review determines both whether the individual requires the level of services provided by a nursing facility, including whether the individual could be served in the community, see 42 U.S.C. § 1396r(e)(7)(B)(i)(I), 42 C.F.R. § 483.132(a)(1),(2), and the level of mental health treatment such individual requires. See 42 U.S.C. § 1396r(e)(7)(B)(i)(II).

Defendants fail to conduct proper resident reviews when individuals with mental illness residing in nursing homes experience a significant change of condition. See First Am. Compl. ¶¶ 130-35. As a result, some individuals with mental illness continue to reside unnecessarily in nursing homes despite improvement in their condition which would make them eligible for

[4] As originally adopted, the NHRA required the state mental health authority to perform this resident review on an annual basis. P.L. 100-203, § 4211(e)(7)(B). The requirement of annual resident review was amended in 1996 in favor of a resident review where "there has been a significant change in the resident's physical or mental condition." P.L. 104-315, 110 Stat. 3824 (1996).

community placement. Others do not have their mental health treatment needs identified and therefore do not receive necessary treatment.

4. Defendants' Failure to Provide Notice to Evaluated Individuals

The NHRA requires that individuals with mental illness who are evaluated as part of the PASRR process receive a copy of the independent evaluation report and have the results explained to them. See First Am. Compl. ¶ 125; 42 C.F.R. § 483.128(l)(1) (evaluation report must be provided to the individual); 42 C.F.R. § 483.128(k) (independent evaluator must interpret and explain the evaluation results to the individual); 42 C.F.R. § 483.128(i) (describing contents of evaluation report); see also 57 Fed. Reg. 56450-01, 56489 ("[W]e believe it is essential that the person being screened … receive a layman's explanation and a copy of the full evaluation report for several reasons. These are sensitive issues for the person being screened and the results of the screening may have great impact on the individual's options for future care. These are disabled populations for whom extra care must be given to allow them to exercise their rights. Since PASARR Level II determinations are appealable, they must understand the basis on which the determinations were made in order to assess whether they should submit an appeal.").

Defendants fail to provide a copy of the evaluation report to individuals with mental illness who undergo preadmission screening or resident review. See First Am. Compl. ¶ 131. As a result, plaintiffs have not received notice that defendants have failed to evaluate them in a manner consistent with the NHRA and are not apprised of a basis for appeal.

5. Plaintiffs' Requests for Relief

The NHRA defines the actions a state must take in response to the PASRR and resident review determinations. See 42 U.S.C. § 1396r(e)(7)(C). Since no nursing home resident with mental illness has received a proper PASRR evaluation, plaintiffs seek an order that each individual with mental illness discharged from an OMH psychiatric hospital or Article 28

psychiatric ward to a nursing home receive a proper PASRR evaluation and be entitled to the relief that results from such evaluation. See First Am. Compl. Wherefore Clause ¶¶ d, f.

If the PASRR evaluation indicates that the needs of an individual with mental illness can be met in a community setting, plaintiffs seek an order requiring New York to offer that individual an appropriate community setting. See 42 U.S.C. § 1396r(e)(7)(C)(i)(II), 42 U.S.C. § 1396r(e)(7)(C)(ii)(I),(II); 42 C.F.R. §§ 483.118, 483.130(m)(5), (6); see also 57 Fed. Reg. 56450-01, 56469 (Nov. 30, 1992) ("The State . . . has statutory responsibility for making available the appropriate alternative settings to which residents can move. To deal with these residents, New York must have a master plan which, based on assessed needs, provides for the expansion or creation of the placement options, in the right numbers and types …."); First Am. Compl. Wherefore Clause ¶¶ d, f.[5] If the PASRR evaluation indicates that the nursing facility is an appropriate placement, plaintiffs seek an order requiring New York to ensure that the individual receives appropriate mental health treatment. See 42 U.S.C. § 1396r(e)(7)(C)(i)(IV); id. § 1396r(e)(7)(C)(ii)(IV); First Am. Compl. Wherefore Clause ¶¶ d, f.

C. The Parties

1. The Individual Plaintiffs

Plaintiffs Edwin T., Joseph S. and Steven W. bring claims on their own behalf against all defendants for violation of the ADA, Rehabilitation Act, and NHRA. Edwin T. is a New York resident discharged from Creedmoor Psychiatric Center to Andover Subacute and Rehabilitation

[5] Nursing home residents with mental illness who have resided in the nursing facility for at least 30 months before the date of the resident review have the choice of remaining in the nursing home or accepting a community placement. See 42 U.S.C. § 1396r(e)(7)(C)(i); 42 C.F.R. § 483.130(m)(4).

II nursing home in May 2004. See First Am. Compl. ¶¶ 11, 14-17, 65-71.[6] Joseph S. is a New York resident, discharged from Creedmoor Psychiatric Center to Meadow Park Nursing Home in September 2003 and currently resides at the Far Rockaway Nursing Home in Queens, New York. See id. ¶¶ 12, 14-17, 81-86. Steven W. is a New York resident, discharged from the psychiatric ward of Montefiore Medical Center to Brookhaven Rehabilitation and Health Care Center in June 2004, where he currently resides. See id. ¶¶ 13, 14-17, 87-94.

Edwin T., Joseph S. and Steven W. each have a significant mental impairment, but no need for nursing home care. See First Am. Compl. ¶¶ 14, 17, 68, 84, 91, 96, 107. They are able to, qualified for and wish to live and receive treatment in a more integrated setting than the nursing home in which they currently reside. See id. ¶¶ 84, 86, 91, 94, 109. They each were admitted to a nursing home under a PASRR program which failed to evaluate them in compliance with the NHRA. See id. ¶¶ 118-36.

2. The Organizational Plaintiffs

Disability Advocates, Inc. ("DAI") is a not-for-profit protection and advocacy organization authorized under the federal Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI"), 42 U.S.C. § 10801 et seq., to pursue legal, administrative and other appropriate remedies on behalf of individuals with mental illness. See First Am. Compl. ¶ 18. Sidney Hirschfeld is Director of Mental Hygiene Legal Service, Second Judicial Department

[6] Although Edwin T. was discharged from Andover in July 2007, his claims are not moot, as they are capable of repetition yet evading review. In Olmstead v. L.C., the Supreme Court found a live controversy where the plaintiffs, after commencing litigation, obtained a community placement: "[Plaintiffs] L.C. and E.W. are currently receiving treatment in community-based programs. Nevertheless, the case is not moot .... [I]n view of the multiple institutional placements L.C. and E.W. have experienced, the controversy they brought to court is 'capable of repetition, yet evading review.'" 527 U.S. 581, 594 n.6 (1999). Like the Olmstead plaintiffs, Edwin T. has had multiple psychiatric institutionalizations and, so long as defendants continue their policy of discharging individuals from psychiatric facilities to nursing homes, Edwin T. faces a substantial risk of unnecessary placement in a nursing facility.

("MHLS"), an agency of the State of New York authorized, pursuant to Article 47 of the Mental Hygiene Law to initiate and take any legal action necessary to protect the legal rights of individuals with a mental disability. See First Am. Compl. ¶ 19; N.Y. Mental Hyg. Law § 47.03(e).

DAI and MHLS bring claims on behalf of individuals discharged or at-risk of discharge to nursing homes directly from state psychiatric hospitals operated by defendant OMH and others discharged or at-risk of discharge to nursing homes from Article 28 psychiatric wards. See First Am. Compl. ¶¶ 20, 95-136. These individuals are collectively referred to as "constituents" of DAI and MHLS. Id. ¶ 20. These constituents are qualified to receive treatment in a more integrated setting than the nursing homes in which they currently reside. See id. ¶ 93. The constituents were discharged or are at-risk of discharge to a nursing home under a PASRR program which failed or will fail to evaluate them in compliance with the NHRA. See id. ¶¶ 118-36.

3. New York State Office of Mental Health

Defendant New York State Office of Mental Health ("OMH") operates state psychiatric centers; licenses and funds community-based housing for persons with mental illness; and licenses, supervises, and enforces the laws and regulations applicable to Article 28 psychiatric wards. See First Am. Compl. ¶¶ 30-34. OMH is the "State mental health authority" in New York State, with responsibility under the NHRA for making a final PASRR determination. See id. ¶ 30, Answer ¶ 21. Defendant Michael F. Hogan, sued in his official capacity, is the Commissioner of OMH. See First Am. Compl. ¶ 29.

4. New York State Department of Health

Defendant New York State Department of Health ("DOH") is the single state agency that operates New York State's Medicaid program , which pays for the care and treatment in nursing homes of plaintiffs Edwin T., Joseph S., and St even W. and the vast majority of DAI and MHLS's constituents. See First Am. Compl. ¶¶ 38, 44; N.Y. Soc. Serv. Law § 363-a. As the State Medicaid agency, DOH is responsible for assuring that New York's PASRR program operates in conformity with federal law. See First Am. Compl. ¶ 38; 42 U.S.C. § 1396a(a)(28); 57 Fed. Reg. 56450-01, 56452 (Nov. 30, 1992). DOH also li censes, supervises and enforces the laws and regulations applicable to nursing hom es, see First Am. Compl. ¶ 36; N.Y Pub. Health Law §§ 2801(2), (3); 2806-b, and licenses, supervis es and enforces the laws and regulations applicable to Article 28 hospitals, see First Am. Compl. ¶ 37; N.Y. Pub. Health Law §§ 2801(1); 2803(1); 2805; 2806. Defendant Richard F. Daines , sued in his official capacity, is the Commissioner of DOH. See First Am. Compl. ¶ 35.

5. Governor Eliot Spitzer

Eliot Spitzer, sued in his official capacity, is the Governor of the State of New York. See First Am. Compl. ¶ 40.

ARGUMENT

I. PLAINTIFFS STATE A CLAIM UNDER THE ADA AND REHABILITATION ACT

The Federal Rules of Civil Procedure require a plaintiff to provi de a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); see Erickson v. Pardus, __ U.S. __, 127 S. Ct. 2197, 2200 (2007); Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002) (rejecting heightened pleading standard in case alleging national origin and age discrimination); Gregory v. Daly , 243 F.3d 687, 691 (2d Cir. 2001) (court "'must accept as

true all of the factual allegations set out in plaintiff's complaint, draw inferences from those allegations in the light most favorable to plaintiff, and construe the complaint liberally'") (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).[7] Under the liberal pleading standards of the Federal Rules, plaintiffs state claims for relief under the ADA and Rehabilitation Act.

A. Unnecessary Institutionalization in Nursing Homes Violates the ADA and Rehabilitation Act

The ADA and Rehabilitation Act require the State of New York to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (ADA); see 45 C.F.R. § 84.4(b)(2) (Rehabilitation Act); First. Am. Compl. ¶¶ 2, 102, 115. In Olmstead v. L.C., 527 U.S. 581 (1999), the Supreme Court examined the case of two individuals with mental illness residing in a state psychiatric hospital who were qualified for community-based treatment. Id. at 583, 603. Despite their ability and desire to reside in the community, Georgia's mental health system failed to make community-based treatment available. Id. at 583. The Supreme Court held that the failure to make community-based treatment available violated the ADA and Rehabilitation Act's requirement that Georgia administer its services, programs, and activities in the most integrated setting. Id. at 606.

Four federal circuit courts have applied the community integration mandate examined in Olmstead to cases where the state's services, programs, or activities unnecessarily segregated individuals with disabilities in nursing homes. See Radaszewski v. Maram, 383 F.3d 599, 615

[7] Defendants argue that Bell Atlantic Corp. v. Twombly, __ U.S. __, 127 S. Ct. 1955 (2007) "altered the legal standards applicable to Rule 12(b)(6) motions." Defs' Br. at 19-20. Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007) held that Bell Atlantic did not establish a "heightened pleading rule," based in part on the Supreme Court's rejection of a heightened pleading standard in Erickson, 127 S. Ct. at 2200, decided two weeks after Bell Atlantic. See Iqbal, 490 F.3d at 158.

(7th Cir. 2004) (failure to fund private nursing care to prevent nursing home placement violates ADA and Rehabilitation Act integration mandate); Townsend v. Quasim, 328 F.3d 511, 520 (9th Cir. 2003) (state's decision to fund nursing services for certain Medicaid recipients only in a nursing home setting would violate ADA unless state could demonstrate that funding home and community-based nursing services for these individuals would fundamentally alter the state's Medicaid program); Fisher v. Okla. Health Care Auth., 335 F.3d 1175, 1182-84 (10th Cir. 2003) (state's decision to fund more prescription drugs in Medicaid-covered nursing homes than in its Medicaid home and community-based waiver program violates ADA unless state can demonstrate that funding unlimited prescription drug coverage in the waiver would fundamentally alter state's Medicaid program); Helen L. v. DiDario, 46 F.3d 325, 339 (3d Cir. 1995) (pre-Olmstead case finding ADA and Rehabilitation Act's integration mandate violated by unnecessary institutionalization of individuals with disabilities in nursing homes); see also Rolland v. Cellucci, 52 F. Supp. 2d 231, 237 (D. Mass. 1999) (applying ADA integration mandate to private nursing facilities). The Justice Department also has recognized that Olmstead applies to state service systems for people with disabilities that segregate individuals with disabilities in nursing homes. See Findings of Department of Justice concerning Laguna Honda Hospital and Rehabilitation Center (Aug. 3, 2004) at 2-3, available at http://www.usdoj.gov/crt/split/documents/laguna_honda_findlet_aug3.pdf (last visited November 15, 2007).

As these cases make clear, the community integration mandate is not limited to individuals in psychiatric hospitals, see Defs' Br. at 23-24, but extends to any individual with a disability who resides in a setting that is not the most integrated for that individual. This is consistent with the plain language of the community integration mandate, which requires New

York to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (emphasis added); see also 28 C.F.R. pt. 35, App. A § 130 ("[T]he most integrated setting appropriate to the needs of qualified individuals with disabilities" is "a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.") (emphasis added).

Defendants mistakenly argue that the state's own treatment professionals must determine whether an individual is qualified for community-based treatment in order for that individual to bring a claim for violation of the community integration mandate. Defs' Br. at 22-23. To support their argument, defendants misconstrue the statement in Olmstead 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." Olmstead, 527 U.S. at 607. In Olmstead, there was "no genuine dispute concerning the status of L.C. and E.W. as individuals 'qualified' for noninstitutional care: The State's own professionals determined that community-based treatment would be appropriate for L.C. and E.W., and neither woman opposed such treatment." Id. at 602-03. Thus, the Court did not consider a situation, like the

one here, where the state systematically fails to evaluate individuals with mental illness for community placement. See First Am. Compl. ¶¶ 5-6, 8, 21, 56, 72-73, 104, 116, 129, 130, 134.[8]

To be entitled to relief under the community integration mandate, plaintiffs must allege, as they do, that they are qualified for the community programs to which they seek access. See First Am. Compl. ¶¶ 16, 51, 70, 86, 94, 98, 109; Olmstead, 527 U.S. at 602 (to state claim for violation of community integration mandate, plaintiffs must "meet[] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity'") (quoting 42 U.S.C. § 12131(2)); Henrietta D. v. Bloomberg, 331 F.3d 261, 272 (2d Cir. 2003) (to allege a violation of the ADA and Rehabilitation Act, plaintiffs must be "'qualified individuals'" with a disability). The determination of a state treatment professional that plaintiffs are qualified for community placement is not necessary to afford them the relief they seek. See Helen L., 46 F.3d at 329, 339 (granting relief under the community integration mandate where a private service agency, not the state, "determined that [plaintiff] was eligible for attendant care services" in the community); Radaszewski, 383 F.3d at 608 (upholding community integration claim brought by individual residing at home; no allegation that state professional determined the individual to be qualified to reside there).

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[8] If defendants come forward in discovery with community placement evaluations from the state's own professionals, there will be a question of fact as to whether those evaluations are entitled to deference. See Olmstead, 527 U.S. at 602-03. This Court cannot presume on a motion to dismiss that the state performed such evaluations and that they are entitled to deference. See, e.g., Chosen Int'l, Inc. v. Chrisha Creations, 413 F.3d 324, 327 (2d Cir. 2005) (a court takes the facts as alleged in the complaint to be true, and must draw all reasonable inferences from those facts in favor of the plaintiff). This Court also cannot presume that such community placement evaluations have taken place merely because the NHRA requires the state to review community placement as part of the PASRR process. See Defs' Br. at 24 n.16, (citing McNiece v. Jindal, No. Civ. A. 97-2421, 1998 WL 175899 (E.D. La. Apr. 14, 1998)); Defs' Br. at 25. Plaintiffs allege that defendants have failed to implement community evaluation as part of their PASRR program. See First Am. Compl. ¶¶ 67, 83, 90, 130. Taking these allegations as true, there are no community placement evaluations to which this Court could defer.

To remedy defendants' violations of the ADA and Rehabilitation Act, plaintiffs seek an order granting them reasonable access to the community-based treatment defendant OMH already provides to other individuals with mental illness. Thus, unlike the plaintiffs in Wright v. Giuliani, 230 F.3d 543 (2d Cir. 2000) (cited in Defs' Br. at 21-22), plaintiffs do not seek substantively different services for the disabled from the services that now exist, but rather a reasonable accommodation to allow them to access existing community-based services. See Wright, 230 F.3d at 548 (people with disabilities may seek "'reasonable accommodations' to enable 'meaningful access' to such services as may be provided," but may not seek "that substantively different services be provided to the disabled") (citations omitted). Rodriguez v. City of New York, 197 F.3d 611 (2d Cir. 1999), Doe v. Pfrommer, 148 F.3d 73 (2d Cir. 1998), and Leocata v. Wilson-Coker, 343 F.Supp.2d 144 (D. Conn. 2004) (cited in Defs' Br. at 21, 24), each concerned claims for a new service, which the courts held were not required under the ADA and Rehabilitation Act. See Rodriguez, 197 F.3d at 618 (home safety monitoring services); Pfrommer, 148 F.3d at 77, 84 (job coach); Leocata, 343 F. Supp. 2d at 156 (Medicaid payment for assisted living facility care).[9] Indeed, Rodriguez specifically distinguished between an impermissible ADA claim seeking a new service and the type of claim asserted in Olmstead, and here, where "the parties disputed only—and the Court addressed only—where [the state] should provide treatment, not whether it must provide it." Rodriguez, 197 F.3d at 619 (citing Olmstead) (emphasis in original); see Townsend, 328 F.3d at 517 (rejecting the defendants' reliance on Rodriguez in nursing home Olmstead case).

[9] Lincoln Cercpac v. Health & Hospitals Corp., 147 F.3d 165, 168 (2d Cir.1998) (Defs' Br. at 21) held that individuals required to seek service from a different hospital when a hospital closed did not state a claim for disability discrimination under the ADA or Rehabilitation Act. This case has no bearing on plaintiffs' community integration claims in this case.

B. Whether Relief In This Action Would Require a Fundamental Alteration Cannot Be Resolved on a Motion to Dismiss

Defendants cannot establish on a motion to dismiss that relief in this action would require a fundamental alteration of defendants' services, programs, or activities. Defs' Br. at 26. In opposing a claim for reasonable accommodation under the community integration mandate, defendants bear the burden of showing that the requested accommodation would constitute a fundamental alteration. Olmstead, 527 U.S. at 605-06 (state has burden of establishing fundamental alteration defense); Frederick L. v. Dep't of Pub. Welfare of Pa., 422 F.3d 151, 157 (3d Cir. 2005) (state cannot meet its burden of establishing fundamental alteration defense unless it "adequately demonstrates a reasonably specific and measurable commitment to deinstitutionalization for which [it] may be held accountable"); 28 C.F.R. §§ 35.130(b)(7), 41.53, 42.511(c); 45 C.F.R § 84.12(c). Clearly, defendants cannot establish their fundamental alteration defense on a motion to dismiss. See, e.g., Radaszewski, 383 F.3d at 614 (fundamental alteration defense "not an assessment that can be made on the pleadings"); cf. Townsend, 328 F.3d at 520 (remanding summary judgment motion to district court for factual findings on fundamental alteration defense).

II. PLAINTIFFS STATE A CLAIM UNDER THE NURSING HOME REFORM ACT

A. Plaintiffs Allege Multiple Violations of Their Rights Under the NHRA

Plaintiffs allege that the NHRA imposes specific duties on defendants to implement a PASRR program and describes those duties in great detail. See First Am. Compl. ¶¶ 120, 122-28. Plaintiffs further allege the specific ways that defendants have failed to comply with these duties, see id. ¶¶, 129-133, 136, including by failing to implement a PASRR program sufficient to evaluate whether an individual with mental illness requires nursing facility level of care or could receive treatment in the community, see id. ¶¶ 129, 130; to evaluate the level of mental

health treatment required by individuals with mental illness in nursing homes, see id. ¶ 132; to conduct a resident review of an individual with mental illness in a nursing home when such individual experiences a significant change in condition, see id. ¶ 133; and to assure that a copy of the evaluation report is sent to the individual or resident and his or her legal representative, see id. ¶ 131.

Plaintiffs Edwin T., Joseph S., and Steven W. make specific allegations with respect to defendants' noncompliance with the NHRA. They each allege that they were discharged to a nursing home without an appropriate evaluation as to whether their physical and mental condition requires nursing facility services, without evaluation as to whether they could receive community-based treatment, and without appropriate evaluation as to the level of mental health treatment they require. See First Am. Compl. ¶ 134. They further allege that they do not receive appropriate mental health treatment. See id. ¶ 135.

Defendants nevertheless assert that plaintiffs make only "conclusory" allegations with respect to defendants' failure to administer their PASRR program in compliance with federal law. Defs' Br. at 29. The Federal Rules of Civil Procedure require a plaintiff to provide a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); see Erickson, 127 S. Ct. at 2200; Swierkiewicz, 534 U.S. at 515. Plaintiffs' detailed allegations concerning defendants' violations of the NHRA more than meet this standard.

Defendants further assert that the NHRA provides for an appeals process and that none of the plaintiffs have alleged that they appealed their PASRR determination. See Defs' Br. at 28 & n.17, 30. Defendants' legal argument is unclear as the only case they cite, McNiece, 1998 WL 175899 at *6, upheld a challenge under the NHRA brought by an individual who was denied nursing home placement. In any case, plaintiffs need not allege they appealed their PASRR

determinations. First, there is no exhaustion of administrative remedies required for claims, such as plaintiffs' NHRA claims, brought under 42 U.S.C. § 1983. See Patsy v. Bd. of Regents of Fla., 457 U.S. 496, 516 (1982) (plaintiffs pursuing civil rights claims under § 1983 need not exhaust administrative remedies before filing suit in court); Roach v. Morse, 440 F.3d 53, 58 (2d Cir. 2006) (Medicaid applicant not required to exhaust state administrative remedies prior to bringing § 1983 action challenging state's denial of Medicaid benefits); Pfromm er, 148 F.3d at 78 (no exhaustion of remedies required for action brought under § 1983 alleging violations of Title I of the Rehabilitation Act).

Second, defendants' failure to provide a copy of the PASRR evaluation report, see First Am. Compl ¶ 131, deprived plaintiffs of an opportunity to appeal their PASRR determination. See Goldberg v. Kelly, 397 U.S. 254, 267 (1970) (due process requires "timely and adequate notice detailing the reasons"); see also 57 Fed. Reg. 56450-01, 56489 ("[W]e believe it is essential that the person being screened … receive a layman's explanation and a copy of the full evaluation report …. Since PASARR Level II determinations are appealable, they must understand the basis on which the determinations were made in order to assess whether they should submit an appeal.").

Last, defendants do not assert that they have established a PASRR appeals process sufficient to meet the requirements of federal law, relying instead on a citation to the federal statute that mandates they implement such a process. See Defs' Br. at 28 (citing 42 U.S.C. § 1396r(e)(7)(F)). Thus, even if plaintiffs were required to exhaust state procedures before filing their NHRA claims, which they are not, defendants would need to establish that they have implemented a PASRR appeals process sufficient to meet the requirements of federal law.

B. Plaintiffs Can Enforce Their NHRA Rights Through 42 U.S.C. § 1983

Defendants incorrectly argue that plaintiffs cannot enforce their rights under the NHRA through a lawsuit brought under 42 U.S.C. § 1983. Defs' Br. at 9-19. The courts to have considered the issue have rejected defendants' argument, correctly concluding that the NHRA's PASRR provisions confer rights on nursing home residents which are enforceable through § 1983. See Rolland v. Romney, 318 F.3d 42, 56 (1st Cir. 2003) (NHRA requirement to screen for and provide specialized services enforceable through § 1983 in lawsuit brought by nursing home residents); Martin v. Voinovich, 840 F. Supp. 1175, 1202 (S.D. Ohio 1993) (NHRA PASRR provisions enforceable through § 1983 in lawsuit brought by nursing home residents); see also Ottis v. Shalala, 862 F. Supp. 182, 1887 (W.D. Mich. 1994) (holding 42 U.S.C. § 1396r(h)(2) enforceable through § 1983 in suit under NHRA to compel state to implement enforcement procedures). This Court should follow the unanimous case law and hold that the NHRA provisions at issue in this case are enforceable through § 1983 in a lawsuit brought by nursing home residents and those at-risk of discharge to nursing homes.

In Rolland v. Romney, supra, the plaintiffs brought suit under § 1983 to compel the Commonwealth of Massachusetts to provide specialized services to persons found to require both nursing facility care and specialized services for mental illness or mental retardation as required under the NHRA. The First Circuit affirmed the district court's opinion that nursing home residents could enforce the entitlement to specialized services through § 1983. Rolland v. Romney, 318 F.3d at 56. In finding the NHRA provisions enforceable, the First Circuit noted that "rights-creating" language is prevalent in the NHRA" and that "[t]he NHRA speaks largely in terms of the persons intended to be benefitted, nursing home residents." Id. at 52, 53. The court then examined the specific statutory entitlement to specialized services and held that it was

intended to benefit nursing home residents, that it was neither vague nor amorphous, and that it unambiguously bound the states. Id. at 53-56.

In finding the NHRA enforceable, the First Circuit applied the framework set out by the Supreme Court in Blessing v. Freestone, 520 U.S. 329 (1997) and reaffirmed in Gonzaga Univ. v. Doe, 536 U.S. 273 (2002). See Rolland v. Romney, 318 F.3d at 51-52 & 51 n.8. [10] To determine whether a federal law is enforceable through section 1983, a court should examine "whether or not Congress intended to confer individual rights upon a class of beneficiaries." Gonzaga, 536 U.S. at 285; id. at 284 (statute's "text must be 'phrased in terms of the persons benefited.'") (quoting Cannon v. Univ. of Chicago, 441 U.S. 677, 692, n.13 (1979)). To make this determination, courts apply the three-part test first set out in Blessing under which a plaintiff must show: (1) "Congress must have intended that the provision in question benefit the plaintiff," (2) "the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence," and (3) "the statute … unambiguously impose[s] a binding obligation on the States." Blessing, 520 U.S. at 340-41; see Gonzaga, 536 U.S. at 282 (citing Blessing test); Rolland v. Romney, 318 F.3d at 52; see also Rabin v. Wilson-Coker, 362 F.3d 190, 201-02 (2d Cir. 2004) (applying Gonzaga in holding right to transitional Medicaid enforceable through § 1983); M.K.B. v. Eggleston, 445 F. Supp. 2d 400, 428 (S.D.N.Y. 2006) (applying Gonzaga in holding Medicaid reasonable promptness requirement enforceable through § 1983); Reynolds v. Giuliani, No. 98 Civ.8877(WHP); 2005 WL 342106, at *15-16 (S.D.N.Y. Feb. 14, 2005) (same).

[10] Defendants' contention that this court should depart from the Rolland v. Romney decision because the First Circuit did not apply Gonzaga is misplaced. Defs' Br. at 16 n.11. Rolland v. Romney cites and quotes the Gonzaga decision. See Rolland v. Romney, 318 F.3d at 51 n.8.

The First Circuit's decision in Rolland v. Romney is consistent with the district court opinion in Martin v. Voinovich, supra. See Rolland v. Romney, 318 F.3d at 54 (citing Martin, 840 F. Supp. at 1200). In Martin, the district court held that the NHRA's PASRR requirements were enforceable through § 1983 in a suit brought by individuals with mental retardation and development disabilities who alleged they were unnecessarily institutionalized in nursing homes in violation of the NHRA. See Martin, 840 F. Supp. at 1200. The court held that the PASRR provisions were intended to benefit the plaintiffs, that the rights were neither vague nor amorphous, and that the provisions impose binding obligations on the state. Id. The court further held that Congress did not intend to foreclose enforcement through § 1983. Id. at 1201-02; see also Ottis, 862 F. Supp. at 187.

This Court should follow Rolland v. Romney and Martin and find that the PASRR provisions of the NHRA at issue in this case are enforceable through § 1983. The NHRA is replete with rights-creating language. See Rolland v. Romney, 318 F.3d at 53 ("The NHRA speaks largely in terms of the persons intended to be benefitted, nursing home residents . . . . The statute contains a laundry list of rights to be afforded residents and commands certain state and nursing home activities in order to ensure that residents receive necessary services. In short, after clearly identifying those it seeks to protect, the statute goes on to endow them with particular rights, utilizing 'rights-creating' language.").

Further, application of three-part Blessing test requires a finding that the specific PASRR provisions of the NHRA at issue in this case are enforceable through § 1983. First, PASRR is clearly intended to benefit individuals proposed for admission to nursing homes and nursing

home residents. See Rolland v. Romney, 318 F.3d at 53; Martin, 840 F. Supp. at 1200. [11] The PASRR statute and regulations speak repeatedly of the individual proposed for admission to the nursing home and nursing home residents. See, e.g., 42 U.S.C. § 1396r(b)(3)(F)(i) (preadmission screen must determine whether "individual requires the level of services provided by a nursing facility" and "whether individual requires specialized services for mental illness."); 42 U.S.C. § 1396r(e)(7)(B)(i)(I), (II) (resident review must determine "whether or not the resident … requires the level of services provided by a nursing facility" and "whether or not the resident requires specialized services for mental illness."); 42 U.S.C. § 1396r(e)(C)(i)(IV) (state must provide or arrange for provision of specialized services to individual or resident); 42 C.F.R. § 483.128(l)(1) (evaluation report must be provided to the individual); 42 C.F.R. § 483.128(k) (evaluation must be interpreted and explained to the individual).[12]

Second, the PASRR provisions are not so vague and amorphous as to be beyond the competence of the judiciary to enforce. See Rolland v. Romney, 318 F.3d at 53-54; Martin, 840 F. Supp. at 1200. As described in Martin, PASRR requires "that the State must have a

[11] The Second Circuit's opinion in Concourse Rehabilitation & Nursing Center Inc. v. Whalen, 249 F.3d 136, 143-44 (2d Cir. 2001), strongly suggests that the Second Circuit would find that the PASRR provisions at issue in this case are enforceable in a lawsuit brought by nursing home residents. Concourse Rehabilitation held that the provisions of 42 U.S.C. § 1396r(b)(4)(A) mandating that nursing facilities provide certain services and activities were not enforceable in a lawsuit brought by a health care provider seeking an enhanced Medicaid rate in order to provide these services. The Second Circuit wrote "It is clear from the plain language of this provision that it was not intended to benefit the putative Plaintiffs—here the health care providers. Rather, the provision is obviously intended to benefit Medicaid beneficiaries." 249 F.3d at 143-44 (internal citation omitted) (emphasis added).

[12] Taylor v. Vermont Department of Education, 313 F.3d 768, 785-86 (2d Cir. 2002) (cited in Defs' Br. at 11, 16) does not require a different conclusion. In Taylor, the Second Circuit held that the Family Educational Rights and Privacy Act's (FERPA) record-access provisions, 20 U.S.C. § 1232g(a)(1), did not create rights enforceable through a § 1983 action. Taylor, 313 F.3d at 785-86. Unlike the NHRA, FERPA's record access provisions "speak directly to the Secretary of Education," and "focus[] on the prohibition of federal funding." Taylor, 313 F.3d at 785. By contrast, the PASRR provisions of the NHRA manifest a clear Congressional intent to confer individual rights.

preadmission screening program in effect. Section 1396r(e)(7)(B)(i) and (iii)(I) provide, inter alia, that the State must conduct annual reviews [13] to determine whether a resident requires the services of a nursing facility or an intermediate care facility, and whether the resident requires specialized services for mental retardation." Martin, 840 F. Supp. at 1200. Further, "[t]he implementing PASARR regulations contain numerous requirements and give detailed guidance and definitions about how, when and by whom the required PASARR determinations are to be made." Id.

Third, the PASRR provisions of the NHRA cited above are clearly a binding obligation on New York, rather than merely a congressional preference for a certain kind of conduct. The word "must" and "required" appears repeatedly throughout the statute and regulations. See Rolland v. Romney, 318 F.3d at 55 ("The statutory requirements for states … are clearly mandatory rather than advisory. The word 'must' is repeated frequently."); Martin, 840 F. Supp. at 1200; see also Ottis, 862 F. Supp. at 186-87.

Based on the foregoing, this Court should hold that the NHRA's PASRR provisions confer individual rights and that these rights are therefore presumptively enforceable through § 1983. See Gonzaga, 536 U.S. at 284.

C. Defendants Cannot Overcome the Presumption of Enforceability

Defendants cannot overcome the presumption that plaintiffs' PASRR rights are enforceable through § 1983. Defs' Br. at 16-18; see Gonzaga, 536 U.S. at 284 n.4 (defendant may overcome presumption of enforceability only by showing that Congress "shut the door to private enforcement, either expressly, through specific evidence from the statute itself ... or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual

[13] As noted, supra, n. 4, the requirement for annual resident review was eliminated in 1996.

enforcement under § 1983") (citations and internal quotation marks omitted); Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 107 (1989) (a court should not "lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy" for deprivation of a conferred right).

Without citation to caselaw, defendants argue that Congress impliedly foreclosed enforceability through § 1983 by establishing an appeals process for individuals adversely affected by a PASRR determination. See Defs' Br. at 16 (citing 42 U.S.C. § 1396r(e)(7)(F); 42 C.F.R. § 431.220). The courts have repeatedly rejected the argument that an appeals process standing alone manifests a Congressional intent to foreclose enforceability through § 1983. See Harris v. Olszewski, 442 F.3d 456, 463 (6th Cir. 2006) (Medicaid Act fair hearing process does not foreclose enforceability through § 1983); Sabree v. Richman, 367 F.3d 180, 193 (3d Cir. 2004) (same); Williston v. Eggleston, 379 F. Supp. 2d 561, 577-78 (S.D.N.Y. 2005) (food stamps fair hearing process does not foreclose enforceability through § 1983).

The courts have likewise rejected defendants' argument that federal and state survey procedures manifest a Congressional intent to foreclose a remedy through § 1983. See Defs' Br. at 17-18. In Wright v. City of Roanoke Redevelopment & Housing Authority, 479 U.S. 418 (1987), the Supreme Court held that "HUD's authority to audit, enforce annual contributions contracts, and cut off federal funds" under the Housing Act "are insufficient to indicate a congressional intention to foreclose § 1983 remedies." 479 U.S. at 428. In Wilder v. Virginia Hospital Association, 496 U.S. 498 (1990), the Supreme Court applied Wright to the Medicaid Act, holding that the Secretary of Health and Human Services' "limited oversight is insufficient to demonstrate an intent to foreclose relief altogether in the courts under § 1983." Wilder, 496 U.S. at 521-22; see Gonzaga, 536 U.S. at 280-81 (citing Wilder); Martin, 840 F. Supp. at 1201-

02 (rejecting the defendants' argument that federal audit procedures manifested Congressional intent to foreclose enforcement of PASRR through § 1983).[14]

Defendants also suggest that the federal government's authority to withdraw Medicaid funding for a state's noncompliance with the NHRA manifests an intent to foreclose a remedy through § 1983. See Defs' Br. at 13-14. This argument has likewise been definitively rejected by the Supreme Court. See Blessing, 520 U.S. at 348 (power of the Secretary of Health and Human Services to cut federal funding of grant to state does not foreclose a § 1983 remedy); Wilder, 496 U.S. at 521-22 (holding that although the Medicaid Act "authorizes the Secretary to ... curtail federal funds to States whose plans are not in compliance with the Act, ... [t]his administrative scheme cannot be considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983"); see also Harris, 442 F.3d at 463 (the fact "[t]hat the Federal Government may withhold federal funds to non-complying States is not inconsistent with private enforcement") (citing Wilder, 496 U.S. at 521-22).

Defendants' further argument that plaintiffs cannot enforce the PASRR regulations standing alone, Defs' Br. at 18-19, misunderstands the nature of plaintiffs' claims. As shown above, plaintiffs do not seek to enforce the PASRR regulations independent of the NHRA, but

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[14] Martin specifically distinguished Carelli v. Howser, 923 F.2d 1208, 1214-16 (6th Cir. 1991), upon which defendants rely. See Martin, 840 F. Supp. at 1201-02; Defs' Br. at 18 (citing Carelli). In Carelli, the Secretary of Health and Human Services audited the State of Ohio, found them to be out of compliance with federal family support and child support law, and ordered Ohio to take corrective action. 923 F.2d at 1215. The plaintiffs then brought suit to compel Ohio to enact these changes at a faster pace than the federal government had ordered. See id. The Sixth Circuit dismissed the case, issuing a decision "akin to an abstention order" delaying the action pending the enforcement proceedings already undertaken. See id. at 1216. As the Martin court recognized, "Carelli bears little resemblance to the instant case." Martin, 840 F. Supp. at 1201. As in Martin, here "there is no indication that the Secretary has recently performed a comprehensive audit or that any order by this Court would simply mirror an earlier order by the Secretary. Furthermore, there is no apparent 'comprehensive' system of enforcement present in the instant case." Id. at 1201-02.

rather seek to enforce the statuto ry mandate that New York operate a PAS RR system to determine whether an individual with mental illness proposed for admission or residing in a nursing home requires nursing facility level of care and to determine the mental health treatment the individual requires. The PASRR regulations adopted pursu ant to specific Congressional mandate, see 42 U.S.C. § 1396r(f)(8)(A), merely define the methods and criteria by which a state must make these deter minations required by the NHRA. See 42 C.F.R. §§ 483.100-483.138. These regulations are enforceable in a lawsuit brought und er § 1983. See Rolland v. Rom ney, 318 F.3d at 54 (PASRR regulations enforceable through § 1983); Martin , 840 F.Supp. at 1200 (same); see also D.D. v. New York City Bd. of Educ. , 465 F.3d 503, 513 (2d Cir. 2006) (Individuals with Disab ilities Education Act regulations enforceable through § 19 83), opinion amended on denial of reh'g by , 480 F.3d 138 (2nd Cir. 2007); Harris , 127 F.3d at 1009 ("[S]o long as the statute itself confers a specific right upon the plaintiff, and a valid regulation merely further defines or fleshes out the content of that right, then the statu te—in conjunction with the regulation—may create a federal ri ght as further defined by the regulation.") (internal quotation marks omitted).

D. Defendants' Methods of Administering the PASRR Program Independently Violate the ADA and Rehabilitation Act

Defendants' methods of adm inistering the PASRR program independently violate the ADA and R ehabilitation Act. See First Am . Compl. ¶¶ 103, 118-136. Under the ADA and Rehabilitation Act, "[a] public entity … may not, directly or through contractual or other arrangements, utilize criteria or methods of administration . . . [t]hat have the purpose or effect of defeating or substan tially impairing accomplishment of the objectives of the public entity' s program with respect to indivi duals with disabilitie s." 28 C.F.R. § 35.130(b)(3); 45 C.F.R. § 84.4(b)(4); see First Am. Com pl. ¶¶ 103, 114; P a. Prot. & Advocacy, In c. v. Pa. Dep't of Pub.

Welfare, 402 F.3d 374, 382 (3d Cir. 2005); Kathleen S. v. Dep't of Pub. Welfare of Com. of Pa., 10 F. Supp. 2d 460, 466 (E.D. Pa. 1998). The purpose of the PASRR program is to end the inappropriate placement of mentally ill individuals in nursing facilities and to assure that individuals with mental illness in nursing homes receive appropriate mental health treatment. See, e.g., H.R. Rep. No.100-391, pt. 1, at 459. By failing to administer the PASRR program to assure that individuals with mental illness receive community-based treatment and appropriate mental health care in nursing homes, defendants utilize methods of administration that defeat the objectives of the PASRR program, thereby violating the ADA and Rehabilitation Act.

III. DAI AND MHLS HAVE STANDING TO BRING CLAIMS ON BEHALF OF INDIVIDUALS WITH MENTAL ILLNESS WHO RESIDE IN OR ARE AT RISK OF DISCHARGE TO NURSING HOMES

DAI and MHLS have statutory authority to bring claims on behalf of individuals with mental illness, including those residing in nursing homes and at-risk of discharge to nursing homes.[15] See First Am. Compl. ¶¶ 18-19; 42 U.S.C. § 10805(a)(1) (DAI); N.Y. Mental Hyg. Law § 47.03(e) (MHLS). DAI's and MHLS's authority to bring such actions has been upheld by courts within this Circuit. DAI: See Aiken v. Nixon, 236 F. Supp. 2d 211, 224 (N.D.N.Y. 2002); Brown v. Stone, 66 F. Supp. 2d 412, 423-27 (E.D.N.Y. 1999); Trautz v. Weisman, 846 F.

[15] Without citation, defendants assert that individuals in state psychiatric hospitals and Article 28 psychiatric ward at risk of unlawful placement in nursing homes do not have justiciable claims. Defs' Br. at 8 n.7. The First Amended Complaint alleges that individuals with mental illness are at-risk of inappropriate discharge to nursing homes, First Am. Compl. ¶¶ 20, 134, that the risk of inappropriate discharge is attributable to the failure of the defendants to operate their services, programs, and activities in conformity with the ADA, Rehabilitation Act, and NHRA, id.. ¶¶ 95-117, and that a federal court decision will be likely to redress this injury by providing these individuals with appropriate, community-based treatment, rather than inappropriate nursing home treatment, id. ¶ 10, Wherefore clause ¶¶ c, e-f. Thus, individuals at risk of inappropriate discharge have adequately alleged their standing to assert claims in this action. See Deshawn E. v. Safir, 156 F.3d 340, 344 (2d Cir. 1998) (describing requirements for standing to seek injunctive and declaratory relief); Roe v. City of New York, 151 F. Supp. 2d 495, 502-06 (S.D.N.Y. 2001).

Supp. 1160, 1163 (S.D.N.Y. 1994); Rubinstein v. Benedictine Hosp. , 790 F. Supp. 396, 408-09 (N.D.N.Y. 1992). MHLS: See Bernstein v. Pataki, 233 Fed. Appx. 21, 24 (2d Cir. Apr. 3, 2007) (Summary Order).

Defendants do not challenge DAI's and MHLS's statutory authority. Defs' Br. at 33. Instead, they assert that DAI and MHLS should not be permitted to assert claims on behalf of their constituents because relief in this lawsuit would require this Court to perform an individualized assessment of each individual with mental illness residing in a nursing home to determine whether that individual could more appropriately reside in the community. Defs' Br. at 32-40. Defendants' argument misstates the applicable law and the relief plaintiffs seek in this action.

A. DAI's and MHLS's Statutory Mandates Override Prudential Limitations on Associational Standing

Organizations seeking to bring claims on behalf of individuals must satisfy the three-part test for associational standing set forth in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977). The Hunt test provides that an organization has associational standing if:

> (a) its members, or any one of them has standing to sue on their own,
> (b) the interests it seeks to protect are germane to the organization's purpose, and
> (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt, 432 U.S. at 343. The third prong of the Hunt associational standing test is prudential and not constitutionally-required. See United Food & Commercial Workers Union v. Brown Group, Inc., 517 U.S. 544, 557 (1996) ("[T]he third prong of the associational standing test is best seen as focusing on . . . matters of administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution.").

Defendants do not challenge DAI's and MHLS's standing with respect to the first and second Hunt prongs. Defs' Br. at 33. [16] Their challenge to the third prong contravenes the case law that organizations such as DAI and MHLS with specific statutory mandates to bring claims on behalf of individuals with disabilities do not need to satisfy the prudential prong of the Hunt analysis. See Oregon Advocacy Ctr. v. Mink, 322 F.3d 1101, 1113 (9th Cir. 2003) ("in light of the role Congress assigned by statute to advocacy organizations such as OAC, Congress abrogated the third prong of the Hunt test"), Univ. Legal Servs., Inc. v. St. Elizabeth's Hosp., No. Civ. 105CV00585TFH, 2005 WL 3275915, at *4-*5 (D.D.C. July 22, 2005) ("PAIMI has freed Plaintiffs from the third requirement of standing under Hunt"); Unzueta v. Schalansky, No. 99-4162-RD, 2002 WL 1334854, at *3 (D. Kan. May 23, 2002); Risinger v. Concannon, 117 F. Supp. 2d. 61, 68-70 (D. Me. 2000); see also N.J. Prot. & Advocacy, Inc. v. Davy, No. Civ. 05-1784(SRC), 2005 WL 2416962, at *2 (D.N.J. Sept. 30, 2005); Bernstein, 233 Fed. Appx. at 24 (Summary Order).[17] This court should follow this case law and hold that DAI and MHLS do not need to satisfy the third Hunt prong in order to assert associational standing in this case.

[16] In any event, DAI and MHLS satisfy the first and second Hunt prongs. First, as set forth infra Point IV, named plaintiffs Edwin T., Joseph S., and Steven W., all of whom are DAI and MHLS constituents, have standing to assert their ADA, Rehabilitation Act, and NHRA claims. Second, the interests DAI and MHLS seek to protect— the rights of mentally ill nursing home residents—are germane to the organizations' purposes as laid out in their statutory mandates. See PAIMI Act, 42 U.S.C. § 10801, et seq., (DAI's mandate); N.Y. Mental Hyg. Law § 47.03 (MHLS's mandate).

[17] Aiken, 236 F. Supp. 2d at 224, and Prye v. Carnahan, No. 04-4248-CV-C-ODS, 2006 WL 1888639 at *3 (W.D. Mo. July 17, 2006) (cited in Defs' Br. at 33) are not to the contrary. Aiken reiterated the three prong Hunt test and held that plaintiff DAI had associational standing without discussion of the third prong. Prye merely found all three Hunt prongs met without considering whether the PAIMI statute overrides Hunt's prudential prong.

B. This Action Will Not Require This Court to Make Individualized Placement Decisions

Even if DAI and MHLS must satisfy the third Hunt prong, the relief plaintiffs seek in this action does not defeat their associational standing. As part of the relief in this action, plaintiffs seek an order requiring defendants to identify individuals with mental illness residing in nursing homes, determine whether such individuals require care in a nursing home, determine whether they could receive care in a more integrated setting, and provide such care to those individuals who do not oppose it. See First Am. Compl. Wherefore Clause ¶ d. Defendants misrepresent this request for relief as asking this Court to identify, assess and determine appropriate care for each individual with mental illness residing in a nursing home. Defs' Br. at 34-36. To the contrary, plaintiffs seek an order requiring defendants to perform these activities. Thus, this case will not require this Court to perform individualized evaluations and there is no basis to defeat DAI's and MHLS's organizational standing under the third Hunt prong.

The Supreme Court rejected defendants' argument in this case in UAW v. Brock, 477 U.S. 274 (1986). In Brock, plaintiff UAW sought an order that would require state authorities to perform a review of individual union members' eligibility for certain benefits and award those benefits where appropriate. Id. at 287-88. Brock rejected the defendant's argument that the need for the state authorities to conduct individualized assessments as part of the relief violates Hunt's third prong. Id. The Court stated:

> [T]hough the unique facts of each UAW member's claim will have to be considered by the proper state authorities before any member will be able to receive the benefits allegedly due him, the UAW can litigate this case without the participation of those individual claimants and still ensure that "the remedy, if granted, will inure to the benefit of those members of the association actually injured."

Id. at 288 (quoting Warth v. Seldin, 422 U.S. 490, 515 (1975)). As in Brock, paragraph d of plaintiffs' prayer for relief does not call upon this Court to evaluate each individual's

appropriateness for community placement or their desire for such placement. Rather, this Court would order defendants to make these and other individualized assessments.

Defendants nevertheless argue that in order to obtain the relief DAI and MHLS seek, plaintiffs will need to present evidence regarding each and every nursing home resident. Defs' Br. at 35-38. The district court in Rolland v. Cellucci, 52 F. Supp. 2d 231, 242 (D. Mass. 1999) rejected this argument in a similar lawsuit brought under the ADA and NHRA. In Rolland v. Cellucci, the plaintiffs, including two organizational plaintiffs, brought suit under the ADA and NHRA challenging the unnecessary institutionalization of individuals with mental retardation in nursing homes and the failure to provide specialized services for such individuals. The court held that although such nursing home residents "may require an individual needs assessment were relief granted, this is not a claim which requires individualized proof as to the claimed violations or compliance with the various statutes at issue." Rolland v. Cellucci, 52 F. Supp. 2d at 242.

Defendants operate their services, programs, and activities in violation of the ADA and Rehabilitation Act's community integration mandate and fail to operate a PASRR program consistent with the NHRA. To prove this at trial, plaintiffs intend to introduce expert testimony regarding a sample of individuals with mental illness residing in nursing homes, New York's own data regarding individuals with mental illness in nursing homes, New York's documents reflecting their polices and procedures, and testimony from New York's witnesses regarding

such policies and procedures. Plaintiffs also may use some illustrative resident testimony.[18] Plaintiffs do not need to introduce the testimony of each resident in order to prevail at trial. As a result, there is no basis to defeat associational standing under the third Hunt prong. See University Legal Services, 2005 WL 3275915 at *5 (institution-wide relief for constituents can be provided through the use of medical records, audits, depositions of Defendants, expert and fact witness testimony, and other relevant documents and written discovery).

Defendants incorrectly rely on dicta in Arbor Hill Concerned Citizens Neighborhood Association v. City of Albany, 250 F. Supp. 2d 48, 57-59 (N.D.N.Y. 2003)(Defs' Br. at 37-38). In Arbor Hill, the district court held that the organizational plaintiff failed to allege that a single member had suffered an injury and, therefore, the organizational plaintiff could not establish standing under the first Hunt prong. Arbor Hill, 250 F. Supp. 2d at 55-57.[19] Arbor Hill's analysis of the third Hunt prong is dicta. See id. at 57-59. In any event, Arbor Hill's analysis of the type of individualized proof required to prove that the City of Albany's failed to administer its lead abatement program properly has no bearing on the type of proof plaintiffs intend to offer in this case.

Bano v. Union Carbide Corp., 361 F.3d 696, 715-16 (2d Cir. 2004) and Rent Stabilization Association v. Dinkins, 5 F.3d 591, 596 (2d Cir. 1993) (Defs' Br. at 38) also do not help

[18] The use of illustrative resident testimony does not defeat associational standing. That some "individuated proof may be necessary does not in itself preclude associational standing." Nat'l Ass'n of Coll. Bookstores v. Cambridge Univ. Press, 990 F. Supp. 245, 250 (S.D.N.Y. 1997). Indeed, courts in this Circuit routinely permit associational standing where some individualized proof is anticipated. See N.Y. State Nat'l Org. of Women v. Terry, 886 F.2d 1339, 1349 (2d Cir. 1989); Employees Committee for Justice v. Eastman Kodak Company, 407 F. Supp. 2d 423 (W.D.N.Y. 2005); Small v. Gen. Nutrition Cos., 388 F. Supp. 2d 83, 99 (E.D.N.Y. 2005); M.O.C.H.A. Soc., Inc. v. City of Buffalo, 199 F. Supp. 2d 40, 49 (W.D.N.Y. 2002).

[19] The Second Circuit called into question Arbor Hill's analysis of the first Hunt prong in Building & Construction Trades Council of Buffalo, N.Y. & Vicinity v. Downtown Development, Inc., 448 F.3d 138, 145 n.2 (2d Cir. 2006).

defendants. Bano rejected associational standing for claims for individual property remediation filed by an organization representing individuals harmed by the chemical disaster in Bhopal, India. Bano, 361 F.3d at 715-16. Rent Stabilization held similarly with respect to a challenge to New York City's rent control law brought by an association of landlords who alleged that individual landlords had suffered a regulatory taking. Rent Stabilization, 5 F.3d at 596. These cases have no bearing on the claims in this case in which plaintiffs allege that defendants operate their services, programs, and activities in violation of the ADA and Rehabilitation Act's community integration mandate and fail to operate a PASRR program consistent with the NHRA. As shown above, such claims do not require the individualized participation of each individual harmed.[20]

IV. EDWIN T., JOSEPH S., AND STEVEN W. HAVE STANDING TO PURSUE THEIR CLAIMS

Edwin T., Joseph S., and Steven W. have standing to assert their NHRA claims. Defs' Br. at 40-41. They each allege that defendants have failed to implement a PASRR program consistent with the NHRA, that they have been injured by this failure, and that this injury is redressable through the relief sought in this action. See First Am. Compl. ¶ 134 ("Plaintiffs Edwin T., Joseph S., and Steven W. . . . have been discharged . . . to a nursing home without an appropriate evaluation as to whether their physical and mental condition requires nursing facility services, without evaluation as to whether they could receive community-based treatment, and without appropriate evaluation as to whether they require specialized services or services of a lesser intensity."); id. ¶ 135 ("Plaintiffs Edwin T., Joseph S., and Steven W. . . . do not receive required specialized services for treatment of mental illness and do not receive a resident review

[20] Protection & Advocacy Inc. v. Murphy, No. 90 C 569, 1992 WL 59100, at *13 (N.D. Ill. Mar. 16, 1992) (Defs' Br. at 39) held that the organizational plaintiff failed to allege concrete injury and therefore could not establish standing.

upon a significant change in condition."); id. Wherefore Clause ¶¶ b, f (seeking declaratory and injunctive relief to require defendants to establish a PASRR system in compliance with federal law, to assess plaintiffs under such system, and to take the required actions following such assessment). These allegations establish Edwin T.'s, Joseph S.'s, and Steven W.'s standing. See Friends of the Earth, Inc. v. Laidlaw, Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000) ("[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."); see Building & Const. Trades, 448 F.3d at 145 ("There is no heightened pleading requirement for allegations of standing.").[21]

V. PLAINTIFFS HAVE NOT FAILED TO NAME NECESSARY PARTIES

A. The Nursing Homes Are Not Necessary Parties

The nursing homes in which the plaintiffs and constituents reside are not necessary parties to this litigation. "A party is necessary under Rule 19(a)(1) only if in that party's absence "complete relief cannot be accorded among those already parties." Mastercard Int'l. Inc. v. Visa Int'l. Serv. Ass'n, Inc., 471 F.3d 377, 385 (2d Cir. 2006) (quoting Fed. R. Civ. P. 19(a)(1)) (emphasis in original).

Defendants do not assert that the nursing homes are necessary parties for plaintiffs' ADA and Rehabilitation Act claims. Defs' Br. at 42-43. They are not necessary parties for plaintiffs' NHRA claims because complete relief can be accorded through an order directing defendants to screen and review individuals with mental illness, to provide community-based care to those who

[21] Defendants' assertion that Edwin T., Joseph S. and Steven W. fail to state a claim under the NHRA, Defs' Br. at 41 n.23, is addressed supra, at 21-22.

are willing and able to receive such care, and to assure appropriate mental health treatment for those individuals with mental illness who remain in nursing homes. See Rolland v. Romney, 318 F.3d at 58 (affirming district court's order that state comply with NHRA by implementing a policy to assure that individuals with mental retardation in nursing homes receive appropriate treatment; nursing homes were not parties); 57 Fed. Reg. 56450-01, 56469 ("The State . . . has statutory responsibility for making available the appropriate alternative settings to which residents can move. To deal with these residents, the State must have a master plan which, based on assessed needs, provides for the expansion or creation of the placement options, in the right numbers and types.").

The nursing homes' role in notifying New York of a significant change of condition does not alter this conclusion. See Defs' Br. at 42 (citing 42 U.S.C. § 1396r(b)(3)(E)). Although nursing homes must notify New York of a significant change in condition, New York must ensure that nursing homes provide this notification and New York must conduct a proper resident review upon receipt of such notification. See First Am. Compl. ¶ 133. Complete relief in this action can be accorded by an order requiring New York to implement a resident review process consistent with the NHRA.

B. The Article 28 Hospitals Are Not Necessary Parties

The conclusion that nursing homes are not necessary parties for plaintiffs' NHRA claims applies equally to Article 28 hospitals. Full relief may be obtained through an appropriate order directing defendants to comply with their duties under the NHRA claims.

Article 28 hospitals are also not necessary parties for plaintiffs' ADA and Rehabilitation Act claims because full relief may be obtained through an order requiring defendants to (1) administer their services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with mental illness residing in nursing homes, (2) identify

individuals with mental illness discharged from state psychiatric hospitals and Article 28 psychiatric wards to nursing homes, (3) determine whether such individuals could receive care and treatment in a more integrated setting, and (4) provide care and treatment in a more integrated setting to those individuals who are qualified for and not opposed to such care. See First Am. Compl. Wherefore Clause ¶ d.

The cases defendants cite concerning whether a private entity can be sued under § 1983 have no relevance to whether the Article 28 hospitals are necessary parties in this action. See Defs' Br. at 43-44 (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974); Blum v. Yaretsky, 457 U.S. 991, 1004 (1982); O'kunieff v. Rosenberg, 996 F. Supp. 343, 352 (S.D.N.Y. 1998)). In each of those cases, the plaintiffs sought to sue a private entity under § 1983 on the grounds that the private entity's actions constituted state action. Plaintiffs in this case sue public entities under the ADA, Rehabilitation Act, and NHRA and therefore defendants' cases are not on point.

VI. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS

A. All of Plaintiffs' Claims Accrued Within Three Years of the Filing of this Action

Although courts in this Circuit apply a three-year statute of limitations to claims under the ADA, Rehabilitation Act, and the NHRA, see, e.g., Pearl v City of Long Beach, 296 F.3d 76, 79-80 (2d Cir. 2002), each of plaintiffs' claims for violation of the ADA, Rehabilitation Act, and NHRA accrued within three years of the filing of this action.

Federal law governs when a cause of action accrues under the ADA and Rehabilitation Act. See Pearl, 296 F.3d at 80; Connolly v. McCall, 254 F.3d 36, 41 (2d Cir. 2001). The ADA and Rehabilitation Act require New York to administer its services, programs, and activities so that individuals with mental illness can receive care and treatment in the most integrated setting

appropriate to their needs. A new cause of action accrues each day that the state fails to administer its services, programs, and activities in such a manner. See Martin, 840 F. Supp. at 1189 ("Each time a position becomes available in the community and a plaintiff or member of the plaintiff class is denied that position on the basis of disability, there is an alleged violation."). Thus, any individual with mental illness unnecessarily residing in a nursing home within three years of the filing of this action can properly seek relief, regardless of when the individual was initially admitted to the nursing home.

None of the cases cited by defendants address the application of a statute of limitations to a claim arising under the ADA and Rehabilitation Act's community integration mandate and none stand for the proposition, advanced by defendants, that individuals with mental illness unnecessarily institutionalized for more than three years lose their right to challenge their institutionalization by virtue of their lengthy institutionalization. Defs' Br. at 45-46. To the contrary, courts have recognized that claims brought by persons with disabilities under the community integration mandate may be asserted by individuals notwithstanding their lengthy institutionalization. See Pa. Prot. & Advocacy, Inc., 402 F.3d at 378 (applying community integration mandate to residents of geriatric mental "institutionalized for decades in state-operated facilities" of which "approximately 40 residents . . . have been institutionalized for more than 50 years"); Frederick L. v. Dep't of Pub. Welfare, 364 F.3d 487, 489 (3d Cir. 2004) (Olmstead claims on behalf of individuals with persistent mental disabilities institutionalized for more than 12 years).

Plaintiffs' NHRA claims likewise accrue within three years of the filing of this action. The Second Circuit held in Pinaud v. County of Suffolk, 52 F.3d 1139, 1156 (2d Cir. 1995) that when an actionable claim under § 1983 against a county or municipality depends on a harm

stemming from a county's policy or custom, "a cause of action against the municipality does not necessarily accrue upon the occurrence of a harmful act, but only later when it is clear, or should be clear, that the harmful act is the consequence of a county 'policy or custom.'" Pinaud, 52 F.3d at 1156 (citation omitted); see BD v. DeBuono, 130 F. Supp. 2d 401, 424 (S.D.N.Y. 2000) (applying Pinaud to Individuals with Disabilities Education Act claim brought pursuant to § 1983).

The same rule applies to state policies or customs such as defendants' failure to implement a PASRR program consistent with federal law. Although plaintiffs discharged to a nursing home were aware of the discharge, they could not know that their discharge to a nursing home was due to New York's failure to evaluate them for community placement as required under the NHRA. For plaintiffs to have been aware of such a policy or custom would have required them to be familiar with the NHRA statute and regulations, to understand that the NHRA required a community placement and mental health services evaluation, to compare the requirements of the NHRA against New York's implementation of the NHRA, to conclude from such a comparison that New York was violating the NHRA, and to perform this analysis even though New York failed to provide a copy of the evaluation report to them, making it impossible for plaintiffs to perform this analysis. Clearly, plaintiffs were not aware when they entered the nursing home that their injuries stemmed from a state policy or custom, nor could they have been expected to know. Their claims asserted in this action are therefore not barred by a statute of limitations.

B. Plaintiffs' Claims Constitute Continuing Violations

Defendants' ongoing violations of the ADA, Rehabilitation Act, and NHRA also constitute continuing violations for which there is no statute of limitations bar. "[A] continuing violation may be found where there is proof of specific ongoing discriminatory policies or

practices, or where specific and related instances of discrimination are permitted ... to continue unremedied for so long as to amount to a discriminatory policy or practice." Cornwell v. Robinson, 23 F.3d 694, 704 (2d Cir. 1994); see Havens Realty Corp. v. Coleman, 455 U.S. 363, 380-81 (1982) ("[W]here a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely"); United States v. Yonkers Bd. of Ed., 992 F. Supp. 672, 675 (S.D.N.Y. 1998) ("In a situation of ongoing wrong, it is as if the continuing policy of discrimination or violation repeatedly triggers and retriggers the statute of limitations clock."); see Eastern Paralyzed Veterans Ass'n v. Lazarus-Burman Assocs., 133 F. Supp. 2d 203, 212-213 (E.D.N.Y. 2001).[22]

Plaintiffs allege an ongoing policy and practice of unnecessarily institutionalizing individuals with mental illness in nursing homes in violation of the ADA and Rehabilitation Act. See First Am. Compl. ¶¶ 95-117. They further allege an ongoing failure to maintain a PASRR program in compliance with the NHRA. See id. ¶¶ 118-136. There is no statute of limitations bar to these continuing violations of law. See Martin, 840 F. Supp. at 1188-89 (applying continuing violation theory to plaintiffs' community integration and NHRA claims).

C. Any Statute of Limitations Applicable to Plaintiffs' ADA, Rehabilitation Act, and NHRA Claims Is Tolled By Mental Illness

The statute of limitations on all of plaintiffs' claims is also tolled by mental illness. See N.Y. C.P.L.R. § 208; Court of Claims Act § 10(5); Muller v. New York, 686 N.Y.S.2d 652,

[22] The continuous violation theory is not impaired by the Supreme Court's recent decision in Ledbetter v. Goodyear Tire & Rubber Co., __ U.S. __, 127 S. Ct. 2162 (2007). In Ledbetter, the plaintiff failed to allege any discriminatory act within the applicable statute of limitations, which the Court held to bar recovery. 127 S. Ct. at 2169. By contrast, in this case, plaintiffs have alleged numerous violations of federal law within the three years prior to the filing of the complaint.

657 (N.Y. Ct. Cl. 1999), unanimously aff'd, 719 N.Y.S.2d 916 (4th Dept. 2001), leave to appeal denied, 754 N.E.2d 202 (N.Y. 2001). [23] Muller held that the statute of limitations on a patient's claim against the State was tolled solely because she was an inpatient in a psychiatric hospital.[24] Although in New York even involuntary psychiatric hospitalization creates no presumption of incapacity, Rivers v. Katz, 495 N.E.2d 337, 341-42 (N.Y. 1986), New York courts treat psychiatric hospitalization as a per se toll. Significantly, Muller did not discuss or consider Muller's mental functioning, whether she had the ability to commence litigation, or whether she was a voluntary patient or an involuntary patient. Thus, under New York law, institutionalization for mental illness is a per se toll.

While the New York courts have not specifically addressed the question of whether confinement in a nursing home for the purpose of treatment of mental illness tolls the statute of limitations, the facts alleged show that these nursing homes are the equivalent of psychiatric hospitals, and therefore New York courts would apply a per se toll. Plaintiffs were all patients in psychiatric hospitals who were directly transferred to nursing homes. Because of their mental illness, they are confined on locked wards or on wards where their departure sets off alarms. See First Am. Compl. ¶¶ 58, 69, 76, 85, 92. Discharge from the psychiatric hospital does not automatically end the toll of the statute of limitations. Gomillion v. New York, 274 N.Y.S.2d 381, 383-84 (N.Y. Ct. Cl. 1966). When a patient in a psychiatric hospital is transferred directly

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[23] The federal courts follow state law on tolling statutes of limitations. See Williams v. Walsh, 558 F.2d 667, 674 (2d Cir. 1977), citing Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 463-67 (1975).

[24] Muller held that psychiatric hospitalization tolled the statute of limitations and notice of claim requirements under Court of Claims Act § 10(5). 686 N.Y.S.2d at 657. The standards for tolling under Court of Claims Act § 10(5) are identical to the standards for tolling under N.Y. C.P.L.R. § 208, which is applicable to all other civil actions in New York. See Bowles v. New York, 617 N.Y.S.2d 712, 714-15 (N.Y. App. Div. 1st Dept. 1994); Kelly v. New York, 57 A.D.2d 320, 325-326, 395 N.Y.S.2d 311, 315 (N.Y. App. Div. 4th Dept. 1977).

to a facility that similarly restricts their freedom because they are mentally ill, it must be presumed that the tolling continues. Moreover, these nursing home admissions were for the purpose of psychiatric treatment and rehabilitation,[25] leaving no doubt that these facilities are the equivalent of psychiatric hospitals for the purposes of tolling.

Defendants are estopped from asserting the statute of limitations. The plaintiffs were transferred from psychiatric hospitals to these restrictive nursing institutions with the required authorization and approval of the State of New York. Such approval can only be lawfully given on the premise they cannot live in the community. See the discussion of the requirements of the NHRA infra at 7-9. When the State has authorized and approved the transfer from psychiatric hospitals to restrictive institutional settings on the premise that plaintiffs cannot live in the community, the state is estopped from asserting the statute of limitations. Compare Bowles, 617 N.Y.S.2d at 714-15 (when the state has repeatedly asserted that the claimant is in need of inpatient care and treatment for mental illness pursuant to the Criminal Procedure Law, it is estopped from asserting the statute of limitations). Therefore, under New York law, the statute of limitations is tolled until three years after plaintiffs are discharged from the nursing homes.[26]

D. Any Applicable Statute of Limitations on the NHRA Claims Is Tolled In Light of Defendants' Failure to Provide Notice

Defendants' failure to provide individuals evaluated in the PASRR process with a copy of the evaluation report, including failing to provide them with a statement of the reasons for denial of community placement and for the determination of mental health needs, also tolls any applicable statute of limitations on plaintiffs' NHRA claims. See Veltri v Bldg. Serv. 32B-J

[25] This can be inferred from the allegations in the First Amended Complaint. If the court deems this to be insufficiently alleged, the plaintiffs seek leave to amend the complaint to add such an allegation.

[26] Relying on Ohio law, the court in Martin, 840 F. Supp. at 1189 (S.D. Ohio 1993), tolled similar ADA, Rehabilitation Act and NHRA claims on the basis of mental retardation.

Pension Fund, 393 F.3d 318, 324-325 (2d Cir. 2004) (defendants' failure to provide notice equitably tolls statute of limitations); Burke v. Kodak Ret. Income Plan, 336 F.3d 103, 107 (2d Cir. 2003) (same); see also Goldberg, 397 U.S. at 267 (due process requires "timely and adequate notice detailing the reasons"); 42 C.F.R. § 483.128 (k), (l) (individual must be provided copy of PASRR evaluation report and have results interpreted and explained); 42 C.F.R. § 483.128(i) (describing required contents of PASRR evaluation report); 57 Fed. Reg. 56450-01, 56489.

VII. DEFENDANTS HOGAN, DAINES, AND SPITZER ARE APPROPRIATE OFFICIAL CAPACITY DEFENDANTS

The Second Circuit held in Henrietta D., 331 F.3d 261 (2d Cir. 2003), that a public official sued in his or her official capacity is a "public entity" subject to liability under the ADA. 331 F.3d at 288; see Browdy v. Lantz, No. 3:03CV1981, 2006 WL 2711753, at *6 (D. Conn. Sept. 21, 2006). The same holds true for official capacity suits under the Rehabilitation Act. See Doe v. Goord, No. 04 CV 0570, 2004 WL 2829876, at *18 (S.D.N.Y. Dec. 10, 2004). Defendants' motion to dismiss Hogan, Daines, and Spitzer as official capacity defendants in plaintiffs' ADA and Rehabilitation Act claims relies on pre-Henrietta D. case law and is therefore incorrect. See Defs' Br. at 27 (citing Hallett v. N.Y. State Dep't of Corr. Servs., 109 F. Supp. 2d 190, 199-200 (S.D.N.Y. 2000) and Candelaria v. Cunningham, No. 98 CIV. 6273(LAP), 2000 WL 798636, at *3 (S.D.N.Y. June 20, 2000)).[27]

Defendants ask that Governor Spitzer be dismissed from this litigation because "Governor Spitzer's presence in this litigation is not necessary to afford plaintiffs the full relief they seek." Defs.' Br. at 59. Governor Spitzer is "responsible for ensuring that New York

[27] Fox v. State University of New York, No. 05 CV 2350, 2007 WL 2193925, at *3-4 (E.D.N.Y. July 23, 2007) (cited in Defs' Br. at 27), likewise relies on pre-Henrietta D. case law and should therefore be disregarded.

operates its services, programs and activities in conformity with the Americans with Disabilities Act, the Rehabilitation Act, and the NHRA," see First Am. Compl, ¶ 40, and is therefore an appropriate defendant See, e.g., N.Y. Const. Art. V, § 4 (governor appoints agency heads); N.Y. Exec. Law §§ 702-03 (governor appoints members to and receives reports from state most integrated setting coordinating council). Thus, Governor Spitzer is an appropriate defendant in this action. Should this Court nevertheless enter an order dismissing the Governor from this action, it should require the defendants, including Governor Spitzer, to stipulate that the remaining defendants have the power to provide the full relief that the plaintiffs seek. See Fed. R. Civ. P. 21 (dismissal "on such terms as are just").

CONCLUSION

For the foregoing reasons, this Court should deny defendants' motion to dismiss.

Dated: Albany, New York
November 16, 2007

DISABILITY ADVOCATES, INC.

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