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United States District Court,
E.D. New York.

Gregory B. MONACO, etc., et ano., Plaintiffs,
v.
James STONE, etc., et alia, Defendants.

No. CV–98–3386. | Dec. 20, 2002.

Attorneys and Law Firms

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Opinion

MEMORANDUM AND ORDER

SIFTON, Senior J.

***1** Plaintiffs Gregory B. Monaco, on behalf of himself and similarly situated individuals, and the Mental Disability Law Clinic at Touro Law Center ("Law Clinic"), on behalf of itself and individuals facing civil commitment, bring this plaintiff and defendant class action for declaratory and injunctive relief against the following defendants: James Stone, in his official capacity of Commissioner of the New York State Office of Mental Health (the "OMH"); Catherine Cahill, in her official capacity of Justice of the East Hampton Town Justice Court, on behalf of herself and all other local criminal court judges in New York State; Alan Weinstock, in his official capacity of Director of the Pilgrim Psychiatric Center, on behalf of himself and directors of state operated psychiatric facilities in the Eastern District of New York; Martin Kesselman, on behalf of himself and directors or chief operating officers of state licensed and government operated in-patient psychiatric units in the Eastern District of New York; Arnold Licht, on behalf of himself and directors or chief operating officers of privately operated inpatient psychiatric units in the Eastern District of New York; Patrick A. Mahoney, in his official capacity of Sheriff of Suffolk County; and William Fraser, in his official capacity of Commissioner of the New York City Department of Corrections ("Corrections"). Plaintiff Monaco also brings this action on his own behalf for damages against defendants William Packard, S. Sarwal, B. Palma–Acquino, S. Tuzel, and R. Dave (the "Defendant PPC Physicians") in their individual capacities.

Plaintiffs allege violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution, and 42 U.S.C. § 1983, as well as negligence and false imprisonment under state law. Plaintiffs' complaint contains three major components: (1) a challenge to the constitutionality of the practices of defendants Stone, Cahill, Mahoney, and Fraser in keeping confined unnecessarily individuals found incompetent to stand trial for minor felonies and misdemeanors, (2) a challenge to the constitutionality of the procedures used by defendants Stone, Weinstock, Marcos, Kesselman, and Licht to hospitalize involuntarily individuals deemed mentally ill, and (3) constitutional claims for damages under 42 U.S.C. § 1983 asserted by plaintiff Monaco on his own behalf.

Defendants Marcos, Kesselman, and Fraser ("City Defendants") have moved to dismiss the claims asserted against them pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted, respectively. Defendant Licht has moved to dismiss the claims asserted against him pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Defendants Sarwal, Palma–Acquino, Tuzel, and Dave have moved pursuant to Rule 56 for summary judgment dismissing the claims asserted against them. Plaintiffs oppose all of these motions.

***2** Plaintiffs move pursuant to Rule 23 of the Federal Rules of Civil Procedure (1) to modify the previously certified plaintiff class and (2) to certify a defendant class of directors or chief operating officers of psychiatric hospitals or hospitals with psychiatric units located in the Eastern District of New York. Plaintiffs also move for leave to join any member of the defendant class who requests exclusion. Defendants Stone, Cahill, Weinstock, Sarwal, Palma–Acquino, Tuzel, and Dave ("State Defendants"), City Defendants, and defendant Licht write separately to oppose these motions.

Plaintiffs also move for an order granting plaintiff Law Clinic access to the psychiatric facilities operated by City Defendants and defendant Licht. Those defendants oppose the motion.

For the reasons stated below, City Defendants' motion to dismiss is granted with respect to the claims asserted by plaintiff Monaco but denied with respect to the claims asserted by plaintiff Law Clinic; defendant Licht's motion to dismiss all of the claims asserted against him is granted; and the summary judgment motions of defendants Sarwal, Palma–Acquino, Tuzel, and Dave are all granted. Plaintiffs' motion to modify the previously certified plaintiff class is granted in part and denied in part; their motion to certify another defendant class is denied; and their motion for access is granted.

BACKGROUND

Except as otherwise noted, the following facts are taken from plaintiffs' complaint and are essentially undisputed.

Mentally Ill Criminal Defendants

After a defendant in New York State has been arraigned, a court must order a psychiatric evaluation if the court believes that the defendant may be incompetent to stand trial. N.Y.Crim. Proc. Law § 730.30(1). A defendant is incompetent to stand trial if, "as a result of mental disease or defect," he "lacks capacity to understand the proceedings against him or to assist in his own defense." *Id.* The competency examination is performed by two court-appointed psychiatrists. If the defendant is in custody, the examination may be conducted at the place where the defendant is being held, or the defendant may be confined to a hospital for purposes of the examination. *Id.* § 730.40.

If a local criminal court[1] finds a defendant charged with a misdemeanor incompetent to stand trial, Section 730.40 of the New York Criminal Procedure Law (the "CPL") requires the court to issue a "final order of observation." If the defendant has been charged with a minor felony, the court may also issue such an order with the consent of the district attorney. *Id.* § 730.40(1).

A final order of observation commits, or "remands," the defendant to the custody of the Commissioner of the OMH or the Commissioner of the New York State Office of Mental Retardation and Developmental Disabilities ("OMRDD") for care and treatment in an appropriate psychiatric institution for a period not to exceed ninety days. *Id.* §§ 730.10, 730.40. When a final order of observation is issued, the court must also dismiss the charges against the defendant, and such a dismissal constitutes a bar to any further prosecution. *Id.* § 730.40(2). No provision is made in the statutory scheme for a defendant to challenge his commitment under this statute or to challenge the length of his stay in the custody of OMH or OMRDD.

***3** The local criminal court is not required to make, and the psychiatrists making a report to the court do not make, a finding that the incompetent defendant constitutes a danger of physical harm to himself or others as a condition of issuing a final order of observation.

Once a final order of observation has been issued, the local criminal court forwards a copy of the order to the Commissioner of OMH, who in turn designates the psychiatric institution in which the individual is to be placed. The local sheriff must hold the defendant in custody pending such a designation by the Commissioner and, when notified of the designation, must deliver the defendant to the superintendent of such institution. *Id.* § 730.60.

Although an individual committed to an institution under a final order of observation may be released at any time prior to the expiration of such order, CPL § 730.40 authorizes involuntary confinement for up to ninety days. The implementing regulations, which are found in the New York Codes, Rules, and Regulations ("NYCRR"), also require a hospital forensics committee to review any application for the furlough, transfer, conversion to civil status, discharge, or conditional release of any individual committed under CPL § 730.40. N.Y. Compl. Codes R. & Regs. tit. 14, § 540.3.[2]

In addition, Commissioners of OMH and OMRDD must give at least four days' written notice to certain parties before a defendant committed pursuant to CPL § 730.40 may be placed in a less restrictive setting, such as civil commitment status, a furlough, a discharge, or a conditional release. N.Y.Crim. Proc. Law § 730.60; N.Y. Mental Hyg. Law § 29.11(h); N.Y. Compl. Codes R. & Regs. tit. 14, § 540.10. The parties to be notified include the local district attorney, the superintendent of the state police, and any person who the Commissioners determine might be reasonably expected to be the victim of any assault or violent felony carried out by the committed individual. N.Y.Crim. Proc. Law § 730.60(6); N.Y. Mental Hyg. Law § 29.11(h); N.Y. Compl. Codes R. & Regs. tit. 14, § 540.10.[3]

In *Ritter v. Surles,* 144 Misc.2d 945, 545 N.Y.S.2d 962 (1988), individual plaintiffs who had been found incompetent to stand trial and committed under CPL § 730.40, sued OMH and OMRDD, alleging that the statutory scheme violated their civil rights by treating

them differently than patients who were never charged with crimes. After reviewing the statutory scheme, the New York State Supreme Court, in reliance on the decision of the United States Supreme Court in *Jackson v. Indiana,* 406 U.S. 714 (1972), held that CPL § 730.40, and concomitantly CPL § 730.60 and § 540.3 of Title 14 of the NYCRR, as applied to defendants who were found incompetent to stand trial and whose charges had been dismissed, were unconstitutional on their face and therefore invalid. Specifically, the *Ritter* court found that CPL § 730.40 "creates two classes of incompetents and permits a means of voluntarily committing an individual without the constitutional safeguards provided in the Mental Hygiene Law of proof of the need for commitment by clear and convincing evidence." *Ritter,* 545 N.Y.S.2d at 965. The court continued, "Once the criminal charges were dismissed against these individuals they should no longer have been subject to the criminal justice system. The only basis for involuntarily confining them would have to be the Mental Hygiene Law." *Id.*

***4** The *Ritter* court then made two concluding comments about the scope of its holding. First, it noted that its decision "does not require these individuals to be released," only that they "be granted the same constitutional rights afforded other mentally ill citizens." *Id.* at 966. Second, it stated that, because no motion had ever been made to certify the action as a class action, its judgment applies only to the named parties. *Id.* The decision in *Ritter* was published on November 9, 1988.

The OMH did not appeal the decision in *Ritter*. Instead, on April 23, 1990, it issued a memorandum to all OMH regional directors, facility directors, and facility forensic coordinators, establishing certain procedures to be followed in order to comply with the holding in *Ritter*. The memorandum specifically notes that these procedures are an interim response to the *Ritter* ruling.

These procedures direct a county jail, after it receives notice that a defendant has been found incompetent to stand trial and the charges dismissed, to notify OMH's Bureau of Forensic Services by telephone. On that business day or no later than twenty-four hours after receiving such notification, the Bureau of Forensic Services is to designate a state operated civil psychiatric facility to which the defendant is to be transported. It is the responsibility of the correctional facility to transport the defendant to the designated state psychiatric hospital. The state psychiatric hospital is then required to examine the defendant within seventy-two hours of his arrival to determine whether he or she meets the criteria for civil commitment. At the end of the seventy-two hour period, the hospital must either civilly commit or release the patient.

When a criminal defendant found to be incompetent is admitted to an OMH facility, the April 1990 memorandum requires that he or she be treated in the same manner as any other civil patient. While OMH is still required to notify the proper parties of any transfer to a less restrictive setting, it is no longer permitted to delay a patient's discharge in order to complete such notifications. Instead, notifications are to be made prior to or at the time of discharge.

In addition, the April 1990 memorandum states that OMH facilities are no longer required to subject patients to a formal review by a hospital forensics committee, in accordance with § 540.3 of Title 14 of the NYCRR, before the patient's release, conversion to civil status, or receipt of any privileges. Under the terms of the memorandum, facilities may elect to conduct such reviews but may not automatically perform them for all patients admitted pursuant to CPL § 730.40.

Plaintiffs in the present case allege that the actual implementation of this framework is unlawful in at least four respects. First, they allege that many defendants for whom a court has ordered a psychiatric evaluation pursuant to CPL § 730.40 remain in jail for a period of up to thirty days or longer pending a psychiatric evaluation and judicial assessment of competency. Because it takes approximately thirty minutes to conduct competency evaluations, plaintiffs allege, local criminal courts can obtain information about a defendant's capacity to stand trial in one week or less but routinely adjourn criminal proceedings for one month or more.

***5** Second, plaintiffs allege that delays by the local criminal courts, OMH, and parties responsible for transport result in the unnecessary and unconstitutional confinement of incompetent defendants. The local criminal courts, they allege, do not immediately notify OMH of court orders remanding a defendant to OMH custody pursuant to CPL § 730.40. Once OMH receives notification of a court order, it may take a number of days to designate an OMH facility. Even after OMH designates a facility, the party responsible for transporting the defendant to that facility often takes a number of days to do so.

Third, plaintiffs allege that, despite the *Ritter* decision and the memorandum issued on April 23, 1990, a number of OMH facilities continue to subject all patients who are admitted pursuant to CPL § 730.40 and then considered for placement in a less restrictive setting both to the notification provisions and to either the formal hospital forensics committee review required by CPL § 730.60 or to a slightly less formal forensic review panel which is the functional equivalent of the formal forensic review.[4] Plaintiffs allege that these OMH facilities take these measures even where patients have not been charged with crimes involving any sort of physical harm or threat of physical harm. By subjecting these patients to the notification requirements and to formal or informal

forensic review, OMH delays their placement in a less restrictive status.

Fourth, plaintiffs allege that OMH will not release patients who have been remanded pursuant to CPL § 730.40 but found to be nondangerous unless it can obtain an appropriate out-patient placement.

Civil Commitment of Mentally Ill

Under the statutory scheme set forth in the Mental Hygiene Law ("MHL"), there are different procedures under which an individual may be civilly committed. A psychiatric hospital may receive and retain an allegedly mentally ill person upon the certificates of two examining physicians who certify that the person has a mental illness for which care and treatment are essential and whose judgment is so impaired that he is unable to understand the need for such care and treatment.[5] N.Y. Mental Hyg. Law §§ 9.01, 9.27(a). Alternatively, a hospital director may receive an individual where a director of community services[6] or a physician on the hospital staff[7] has determined that he or she has a mental illness for which immediate in-patient care and treatment is appropriate. N.Y. Mental Hyg. Law §§ 9.37(a), 9.39(a). Regardless of the procedure used, however, civil commitment is only permissible if it is shown by clear and convincing evidence that the individual has a mental illness likely to result in a substantial risk of physical harm to oneself or to others.[8] N.Y. Mental Hyg. Law §§ 9.37(a), 9.39(a); *Matter of Carl C.,* 126 A.D. 640, 640 (2d Dep't 1987).

Plaintiffs allege that many physicians in both public and private facilities civilly commit individuals not because they believe that these individuals are dangerous, but rather because they believe that these individuals require treatment or further evaluation. Plaintiffs allege that physicians assessing dangerousness must look at a number of well documented factors related to the potential for causing harm to oneself[9] or to others[10] but look instead at the symptoms of mental illness without attempting to determine whether or how these symptoms increase the threat of harm. Plaintiffs also allege that examinations are often conducted in as little as five or ten minutes, if not less, and without regard to the statutory criteria. They further allege that physicians use their own estimations of the value of personal liberty and take into account patients' ability to afford care and treatment.

***6** Plaintiffs also allege that OMH and the facilities it licenses and operates have not adequately trained or supervised physicians in making assessments of dangerousness. Plaintiffs contend that, as a result, OMH and service providers have failed to ensure that these assessments are sufficiently accurate and are responsible for the arbitrary certification of mentally ill individuals.

Plaintiffs also contend that OMH has formed a "comprehensive system" to meet the anticipated need for involuntary in-patient care and treatment of the mentally ill and that there exists "one unified civil commitment operation" in New York State. (4th Am. Compl. ¶ 100, 166.) This care and treatment is provided by OMH itself, by municipal governments, and by private entities.

OMH has undertaken initiatives designed to achieve increased participation by municipal and private entities in the civil commitment process.[11] Under the current system, municipal and private hospitals provide acute care, which includes nearly all civil commitments. With few exceptions, OMH assesses for civil commitment purposes only those individuals who have been accused of crimes and found incompetent to stand trial.[12] In assessing the number of beds necessary to provide acute care, OMH ascertains the number of beds available at municipal and private hospitals.

Generally, OMH alone provides intermediate and long-term care for mentally ill individuals. If a municipal hospital or a private hospital with a psychiatric unit believes that one of its involuntarily hospitalized patients requires intermediate or long-term care, the hospital will attempt to transfer the patient to an OMH-operated facility.

Plaintiff Monaco[13]

Plaintiff Monaco was born on March 8, 1977. He was a member of both the football and wrestling teams during high school. In January 1996, he made an inexpert attempt to perform a martial arts procedure and caused his 65–year–old mother, Gerri Sierp, to tear the rotator cuff in her right shoulder. He alleges that his mother was intoxicated and that the maneuver was necessary to prevent her from stabbing him with a fork.

He was arrested on four separate occasions in 1996 and 1997 for criminal mischief after he kicked in the window of a car, for obstructing governmental administration and resisting arrest after he prevented law enforcement officers from entering a bar, for aggravated unlicensed operation of a vehicle, and for failure to appear in response to numerous traffic violations.

Plaintiff Monaco experienced grief after a friend of his committed suicide in November 1996. Ms. Sierp convinced him to consult a mental health professional. In December 1996, plaintiff Monaco sought and received psychiatric treatment at Greenport Hospital.[14] The following month, he consumed potentially lethal amounts

of alcohol and anti-inflammatory pills. After he had received medical treatment for a few weeks at South Hampton Hospital, a hospital psychiatrist examined him, believed that he had attempted suicide, and transferred him to the Kings Park Psychiatric Center ("KPPC"). Plaintiff Monaco denies having attempted suicide, but he signed a voluntary admission agreement to enter KPPC. Before he was discharged on March 3, 1997, he was seen by a special release committee, whose members included defendants Tuzel and Dave, and prescribed mood-stabilizing and anti-psychotic medication. In the fall of 1997, he sought psychiatric treatment at St. Vincent's Hospital, where he remained for three weeks so that his physician could determine the appropriate level of lithium to administer, and at Yale University Hospital, where he remained for several days.

***7** In early–1998, plaintiff Monaco was taking lithium and an anti-psychotic drug and attending counseling sessions. On February 10, 1998, he was arrested for harassment after he had a verbal disagreement with Ms. Sierp and threatened to kill her. The following day, defendant Cahill issued an order of protection directing him to refrain from engaging in any criminal acts against his mother. On March 23, 1998, he was arrested and charged with harassment and criminal contempt in the second degree and, as a result, was confined in the Suffolk County jail. Upon his admission to the jail, plaintiff Monaco was prescribed lithium by a physician working at the jail.

Shortly thereafter, defendant Packard assumed responsibility for plaintiff Monaco's treatment, and the administration of lithium was discontinued. Plaintiff Monaco asked defendant Packard to resume the lithium treatment and made several requests to speak with defendant Packard for the purpose of explaining his medical needs. These requests were ignored. The failure to administer lithium seriously exacerbated plaintiff Monaco's condition.

On April 9, 1998, Justice Walker of the East Hampton Justice Court ordered two psychiatrists to evaluate plaintiff to determine whether or not he lacked the capacity to stand trial. In so doing, Justice Walker commented that plaintiff's condition had seriously deteriorated, that he failed to recognize his attorney or understand where he was, and that he spoke and sang to himself in the courtroom. On April 20 and 21, 1998, the psychiatrists concluded that plaintiff lacked capacity to stand trial. Neither psychiatrist concluded that plaintiff posed a danger to himself or others, and neither noted that plaintiff manifested characteristics associated with dangerous conduct.

On May 5, 1998, defendant Judge Cahill of the East Hampton Justice Court concluded that plaintiff lacked capacity to stand trial. The court issued a final order of observation pursuant to CPL § 730.40 remanding plaintiff to the custody of the Commissioner of OMH and ordered that plaintiff remain confined in the Suffolk County jail until the Commissioner of OMH designated the facility to which plaintiff Monaco would be sent. Pursuant to CPL § 730.40, the court also dismissed all criminal charges against plaintiff Monaco. Plaintiff Monaco then commenced this action by filing a complaint.

Plaintiff Monaco remained confined in the Suffolk County jail until May 8, 1998, when the Sheriff of Suffolk County transported him to the Pilgrim Psychiatric Center ("PPC"), an OMH facility, where he was involuntarily hospitalized pursuant to CPL § 730.40.

Upon his arrival, plaintiff Monaco was seen by defendant Sarwal, who had seventeen years of experience in examining persons for admission to psychiatric facilities and in treating the mentally ill. She noted that he had attempted suicide in the past and had "multiple legal charges." (State Defs.' Rule 56.1 Statement ¶ 69 .) However, plaintiffs allege and she does not deny that she had no knowledge of his four arrests in 1996 and 1997. He told her that he was "blaring his mother out of the house with his stereo and breaking kitchen chairs" and refused to provide defendant Sarwal with the telephone numbers of his sister and mother because he had been arguing with them about an inheritance of which he felt unfairly deprived. (*Id.* ¶ 70.)

***8** Plaintiff Monaco also told her that he was brought to PPC because his lawyers informed him that he could avoid punishment by going there. This led defendant Sarwal to conclude that he had limited awareness of his mental illness and the consequences of his actions.

Defendant Sarwal noted that he "relate[d] in a[n] incoherent and irrelevant fashion" and had "difficulty focusing on any given topic." (*Id.* ¶ 70.) She also noted that he had commented that "people don't like [him] and [he doesn't] like people because they are all rats." (*Id.* ¶ 71.) This remark led her to conclude that he was exhibiting paranoid delusions. Plaintiff Monaco alleges that he informed her not that people were rats, but that he had been "ratted out" by certain individuals. (Monaco Aff. ¶ 6.) In an affidavit submitted by plaintiffs, Ms. Sierp states that her conversations with defendant Sarwal convinced her that defendant Sarwal was under the mistaken impression that her son truly believed that people were rats.

Three days later, on May 11, 1998, defendant Sarwal examined plaintiff Monaco again and noted that he produced irrelevant speech, became easily irritated, had an inappropriate and intense affect, was preoccupied with joining the Army, and had difficulty concentrating on any given topic. She reviewed the discharge summary from plaintiff Monaco's stay at KPPC during 1997, the reports

prepared by the two court psychiatrists who determined that he was incompetent, and other court documents relating to the most recent charge of harassment. She alleges, and plaintiffs deny, that she also spoke to Ms. Sierp and was informed of plaintiff's violent tendencies.[15] Based on her assessments, she concluded that he required in-patient psychiatric care because he: (1) was angry at his siblings, his girlfriend, the police, the jail psychiatrist, and above all his mother; (2) was experiencing auditory hallucinations and had impaired judgment; and (3) was noncompliant with aftercare because he had refused an injection of an anti-psychotic drug. She submitted a written certification to this effect.

On the same day, defendant Palma–Acquino, who had been practicing psychiatry for thirteen years, examined plaintiff Monaco, reviewed the records from the Suffolk County jail, and discussed his condition with other clinicians who knew him from his prior hospitalization at KPPC. Plaintiff Monaco refused to tell her about the behavior that caused the issuance of the order of protection or to give her Ms. Sierp's telephone number. He stated that he was perfectly fine and that everything that had been said or written about him was untrue. She noted that he was anxious, had difficulty focusing his attention, and had a history of impulsive behavior and poor compliance with aftercare. Other clinicians told her that he could "really do something dangerous," can be "assaultive," "gets physically out of control," and uses drugs and alcohol "more extensive[ly]" than he admits. (State Defs.' Rule 56.1 Statement ¶ 95.) She certified that he needed further in-patient evaluation and treatment.

***9** Later that day, plaintiff Monaco was examined by defendant Tuzel, who had six years of psychiatric experience and knew him from his stay at KPPC. He told her that his family had "wronged him" and expressed "intense anger" toward his mother. She alleges, and plaintiffs deny, that she was aware of his history of impulsive and aggressive behavior. (*Id.* ¶ 103.) Based in part on plaintiff Monaco's violation of the order of protection, she believed that he had threatened or attempted to hurt his mother. She also believed that he lacked insight and judgment as to the need for treatment. She concluded that he was a potential danger to himself and others and confirmed the need for in-patient care and treatment.

These three reports had the effect of converting plaintiff Monaco's status to that of civil commitment pursuant to MHL § 9.27. Plaintiff Monaco contends that he did not pose a danger to anyone at that time and contends that the determinations of defendants Sarwal, Palma–Acquino, and Tuzel were made as a pretext for keeping him in custody and providing him with treatment. He alleges that these defendants never interviewed him for more than ten or fifteen minutes and seemed more interested in asking a formulaic set of questions than in hearing his answers. He further alleges that, if he were asked the appropriate questions, he would have been able to explain his statement about the Army, his concern that no one was looking out for his interests, his diligent self-administration of lithium, the anger he felt toward his family, and the fact that he would never harm anyone in his family.

On May 19, 1998, plaintiff Monaco requested a judicial hearing to determine whether he was in need of involuntary hospitalization. On May 20, 1998, his attorney, the same attorney who is representing plaintiffs in the present action, filed a writ of habeas corpus on his behalf. The following day, Juliana Kanji, a psychiatrist, examined plaintiff Monaco in the presence of plaintiff's counsel and defendants Sarwal and Tuzel. Plaintiff Monaco alleges that this examination was just as cursory as his earlier examinations.

On May 22, 1998, a hearing was held at PPC before Judge Oshrin of the New York Supreme Court for Nassau County. Plaintiff Monaco was present. At the hearing, Kanji testified that his "guarded" and "suspicious" behavior during the examination was an indication of paranoia. (*Id.* ¶ 113.) She also testified that he was unable to explain his comment that he "took the defense of bipolar disorder" because of the teacher who had been impregnated by her student. (*Id.* ¶ 115.) She stated that he had told her that his mother and sister were "against" him and would say "everything bad" about him. (*Id.* ¶ 116.) She noted that he had no recollection at all of his hospitalization at Greenport but that he admitted to attempting suicide in January 1997 after "he was told by his mother that he should have been an abortion." (*Id.* ¶ 118.) She concluded that he would pose a danger to others, particularly his mother, if he were released and that his appreciation for his illness and the need for medication had to improve before he could be discharged. On cross-examination, Kanji reaffirmed her belief that plaintiff Monaco represented a threat to his mother, citing his belief that she had mistreated him and his desire that she "disappear." (*Id.* ¶ 122.)

***10** Plaintiff Monaco himself testified and was cross-examined. At the conclusion of the hearing, Judge Oshrin ruled that additional evidence was necessary. He offered to sign a subpoena for medical and court records and appointed Richard Weidenbacher, an independent psychiatrist, to evaluate plaintiff Monaco. After an hour-long examination, Weidenbacher wrote that, due to his "history of psychological, social, and legal problems," plaintiff Monaco required further in-patient care. (*Id.* ¶ 130.) At a subsequent hearing, Weidenbacher gave testimony consistent with his report.

On June 3, 1998, Judge Oshrin issued an order authorizing the continued retention of plaintiff Monaco for the balance of the period allowed by law. Plaintiff

Monaco had an opportunity to petition for a rehearing and review of that order within thirty days, but he failed to do so. It was his understanding that he would soon be placed in a community residence.

By early-July 1998, it had become necessary for PPC to seek a further order of retention pursuant to MHL § 9.33 if it intended to keep plaintiff Monaco involuntarily committed. Plaintiff Monaco would then have had the opportunity to challenge the need for continued commitment in state court. Plaintiff Monaco alleges that his condition had improved by that point and that he no longer wished to remain at PPC.

Defendant Dave, who had practiced psychiatry at PPC and was plaintiff Monaco's treating physician at the time, believed that plaintiff needed continued hospitalization. Defendant Dave asked him to sign an agreement of voluntary commitment. Plaintiff Monaco alleges that she wanted him to sign the agreement to avoid having to seek an order. He further alleges that he signed the agreement only because defendant Dave informed him that he would otherwise be confined to a locked ward for six months and would be unable to participate in a vocational rehabilitation program.

When the PPC clinicians treating plaintiff Monaco decided, first, that they would permit him to conduct activities outside the ward and, later, that they would discharge him, a second panel of physicians was needed to approve the decisions. This approval process delayed implementation. Moreover, a policy of OMH mandated that plaintiff Monaco be discharged to a supervised setting even though he wished to live independently. As a result, his discharge was further delayed until September 9, 1998, when an opening became available at a supervised community residence.

On February 19, 1999, plaintiff Monaco sought leave from the Appellate Division of the New York Supreme Court to prosecute an appeal of Judge Oshrin's order dated June 3, 1998. By Decision and Order dated May 4, 1999, the Appellate Division denied the motion as "academic" and "dismissed" the appeal. (Brooks Aff. Ex. Q.)

Plaintiff Law Clinic[16]

Plaintiff Law Clinic is operated as part of the clinical program of the Jacob D. Fuchsberg Law Center at Touro College. It is designated as a protection and advocacy agency by the Protection and Advocacy for Mentally Ill Individuals Act of 1986 ("PAIMI"), 42 U.S.C. §§ 10801 *et seq.,* under which it is authorized to investigate incidents of abuse and neglect of individuals with mental illness and to provide legal representation to institutionalized mentally ill individuals.

***11** In New York State, the Commission on Quality of Care for the Mentally Ill (the "Commission") receives federal funding under PAIMI to maintain a statewide system of advocacy services for the mentally ill. The Commission has contracted with six organizations that serve as regional focal points. Plaintiff Law Clinic serves as the regional office for the counties of Nassau and Suffolk, but it has and exercises discretion to provide services to individuals located elsewhere.

Plaintiff Law Clinic alleges that "the class-wide practices set forth in [the] complaint [have] required [it] to devote a substantial amount of its resources" to litigation and other remedies and have consequently diminished its ability to provide services to other individuals who require assistance. (4th Am. Compl. ¶ 211.) Specifically, the practice of improperly certifying mentally ill individuals for civil commitment has caused "many individuals who believed that they have been wrongfully confined in a psychiatric facility" to seek out the services of plaintiff Law Clinic. (*Id.* ¶ 208.) It has expended considerable resources in litigating claims on behalf of these individuals. The cases it has litigated include, among others, *Rodriguez v. City of New York,* 72 F.3d 1051 (2d Cir.1995), and *Demarco v. Sadiker,* 897 F.Supp. 693 (E.D.N.Y.1995). Plaintiff Law Clinic also alleges that it presently has clients who were subjected to improper certifications. Similarly, it alleges that defendant Fraser's delay in transporting incompetent defendants to the designated facilities "has resulted in [its] having to devote resources to help rectify the problem." (*Id.* ¶ 213.)

Procedural History[17]

On May 5, 1998, plaintiff Monaco commenced this action, seeking declaratory and injunctive relief. In his initial complaint, plaintiff Monaco sought to represent a class of all individuals who have been or will be (1) charged with a minor felony or misdemeanor, (2) evaluated to determine whether or not they are competent to stand trial, and (3) found by court appointed psychiatrists to lack the capacity to stand trial, and awaiting a determination of the competency issue by the local criminal court (the "Original Plaintiff Class"). He also sought to represent a subclass of all individuals who not only meet these three criteria, but also have been or will be confined to a local jail while awaiting their determination of competency (the "Original Plaintiff Subclass"). Plaintiff also sought to certify two defendant classes: (1) a class, to be represented by defendant Cahill, of all local criminal court judges who have the authority pursuant to CPL § 730.40 to commit incompetent

defendants involuntarily (the "Defendant Judges Class") and (2) a class, to be represented by defendant Mahoney, of all sheriffs or other individuals who transport incompetent defendants from jail to OMH psychiatric institutions (the "Defendant Sheriffs Class"). Plaintiff Monaco alleged that the commitments and remands of the Original Plaintiff Class by the Defendant Judges Class, their confinement by defendant Stone absent determinations of dangerousness, and their transportation by the Defendant Sheriffs Class, violated 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments to the United States Constitution.[18]

***12** On July 1, 1998, plaintiff Monaco filed his first amended complaint further specifying the substance of his claims. By Memorandum and Order dated March 12, 1999, I certified the Original Plaintiff Class, the Original Plaintiff Subclass, and the Defendant Judges Class, but not the Defendant Sheriffs Class.

On March 19, 1999, plaintiff Monaco filed his second amended complaint, adding a claim under 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution against OMH physicians who certify nondangerous patients as dangerous. He also added individual claims for damages against: (1) defendant Packard for his deliberate and substantial departure from standard medical practice in violation of 42 U.S.C. § 1983 and the Eighth and Fourteenth Amendments;[19] (2) defendants Sarwal, Palma–Acquino, and Tuzel for improperly authorizing plaintiff Monaco's confinement in violation of 42 U.S.C. § 1983 and the Due Process Clause of the Fourteenth Amendment; and (3) defendant Dave for impermissibly inducing a waiver of plaintiff Monaco's rights in violation of 42 U.S.C. § 1983 and the Due Process Clause of the Fourteenth Amendment .[20]

On March 31, 2000, after obtaining defendants' consent, plaintiff filed his third amended complaint. The complaint added the Law Clinic as a plaintiff and sought the modification of the plaintiff class that is presently before this Court. It also named Weinstock, the executive director of PPC, as a defendant in this action and sought the certification of a defendant class consisting of the directors of psychiatric facilities that are licensed or operated by OMH and located in the Eastern District of New York. The complaint alleged that this defendant class makes clinical determinations that do not promise some degree of accuracy and authorizes the confinement of nondangerous individuals, in violation of 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution. It also asserted pendent state law claims of false imprisonment and negligence against this defendant class. Finally, the complaint asserted against defendant Kerik, in his official capacity as Commissioner of Corrections, the same claim of unlawful transportation asserted against defendant Mahoney.

On September 23, 2001, plaintiffs filed a motion for leave to amend their complaint a third time. This fourth amended complaint redefined plaintiff's request for an additional class of defendants. Specifically, it sought the certification of a defendant class of directors or chief operating officers of all OMH-licensed in-patient psychiatric facilities located in the Eastern District of New York ("Defendant Hospital Directors Class"), to be subdivided into three subclasses: (1) a subclass of directors or chief operating officers of all state-operated psychiatric centers, (2) a subclass of directors or chief operating officers of all hospitals that are operated by a governmental entity other than the state and contain psychiatric units; and (3) a subclass of directors or chief operating officers of all privately operated hospitals that contain OMH-licensed psychiatric units. The complaint named as representatives of the Defendant Hospital Directors Class: (1) defendant Weinstock; (2) defendant Kesselman, the director of the psychiatric unit at the Kings County Hospital Center ("KCHC"), a facility licensed by OMH and operated by the New York City Health and Hospitals Corporation ("HHC"); and (3) defendant Licht, the director of the Long Island College Hospital ("LICH"), a facility licensed by OMH and privately operated. Plaintiffs also named in the complaint defendant Marcos, in his official capacity as the executive director of HHC, and asserted against him the same claims asserted against the Defendant Hospital Directors Class. Finally, the complaint substituted defendant Fraser, in his official capacity as Commissioner of Corrections, for his predecessor.

***13** On December 13, 2001, I granted plaintiff's motion for leave to amend. On December 21, 2001, plaintiffs filed their fourth amended complaint.

Allegations and Relief Sought

On behalf of themselves and the proposed plaintiff subclass of criminal defendants found to be incompetent, plaintiffs Gregory Monaco and Law Clinic assert the following six claims:

> (1) By maintaining a system by which defendants who may lack capacity to stand trial are required to remain in jail for a period of up to thirty days or longer while a question of capacity is before the local court, the members of the Defendant Judges Class violate the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983 because the duration of the confinement does not bear a reasonable relation to its purpose;
>
> (2) By failing to notify OMH of the existence of a defendant who may well be found incompetent to stand trial at a point in time prior to the date of the

incompetency hearing that would enable OMH to designate a facility to which the defendant could be sent if he or she were found incompetent, the members of the Defendant Judges Class violate the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983 because the duration of the confinement does not bear a reasonable relation to its purpose and because such deprivation of liberty is not the least intrusive means of furthering legitimate state interests;

(3) By automatically subjecting plaintiff class members to either the requirements of CPL § 730.60, MHL § 29.11(h), and 14 NYCRR § 540 or an informal forensic review, while not automatically subjecting civilly admitted patients to the same provisions or informal process, defendant Stone denies such individuals equal protection of the laws in violation of the Fourteenth Amendment and 42 U.S.C. § 1983;

(4) By failing to designate a facility to which an incompetent defendant is to be transferred prior to the date of a hearing on the defendant's capacity, defendant Stone violates the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983 because such failure to act results in confinement of incompetent defendants the duration of which does not bear a reasonable relation to its purpose and because such deprivation of liberty is not the least intrusive means of furthering legitimate state interests;

(5) The involuntary confinement by defendant Stone of nondangerous individuals for whom no out-patient residence has been obtained violates the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983; and

(6) By failing to transfer incompetent defendants immediately upon receiving notification of an OMH designation, defendants Mahoney and Fraser violate the Fourth and Fourteenth Amendments and 42 U.S.C. § 1983 because such failure to act results in the unnecessary confinement of incompetent defendants who do not necessarily satisfy the civil commitment criteria and further results in confinement of incompetent defendants which does not bear a reasonable relation to its purpose and is not the least intrusive means of furthering legitimate state interests.

***14** On behalf of themselves and the proposed plaintiff subclass of civilly committed individuals, plaintiffs Gregory Monaco and Law Clinic assert the following nine claims:

(1) As a result of certifying individuals who have been evaluated for civil commitment purposes as dangerous because it is believed that such individuals' clinical condition warrants in-patient care and treatment, physicians under the supervision of the members of the Defendant Hospital Directors Class authorize the confinement of nondangerous, which violates the Fourteenth Amendment and 42 U.S.C. § 1983;

(2) By failing to examine and employ significant criteria related to the likelihood of causing harm when examining allegedly mentally ill individuals for civil commitment purposes, physicians under the supervision of the members of the Defendant Hospital Directors Class make clinical determinations that do not promise some degree of accuracy and result in the confinement of nondangerous individuals, which violates the Fourteenth Amendment and 42 U.S.C. § 1983;

(3) By conducting clinical evaluations that frequently do not last more than five or ten minutes when examining allegedly mentally ill individuals for civil commitment purposes, physicians under the supervision of the members of the Defendant Hospital Directors Class make clinical determinations that do not promise some degree of accuracy and result in the confinement of nondangerous individuals, which violates the Fourteenth Amendment and 42 U.S.C. § 1983;

(4) By failing to apply the statutory criteria of the provisions of the MHL pursuant to which they act, physicians under the supervision of the members of the Defendant Hospital Directors Class violate the procedural component of the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983;

(5) The failure of physicians under the supervision of the members of the Defendant Hospital Directors Class to use guidelines that inform physicians of the likelihood and magnitude of harm that must exist before a physician certifies a mentally ill person for involuntary hospitalization results in the arbitrary exercise of authority, which violates the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

(6) As a result of certifying individuals who have been evaluated for civil commitment purposes as dangerous because it is believed that such individuals' clinical condition warrants in-patient care and treatment, physicians under the supervision of the members of the Defendant Hospital Directors Class are liable for false imprisonment;

(7) By failing to examine and employ significant criteria related to the likelihood of causing harm when examining allegedly mentally ill individuals for civil commitment purposes, physicians under the supervision of the members of the Defendant Hospital Directors Class make negligent diagnoses which result in the wrongful confinement of nondangerous

individuals;

(8) By conducting clinical evaluations that frequently do not last more than five or ten minutes when examining allegedly mentally ill individuals for civil commitment purposes, physicians under the supervision of the members of the Defendant Hospital Directors Class make negligent diagnoses which result in the wrongful confinement of nondangerous individuals; and

***15** (9) By failing to apply the statutory criteria of the provisions of the MHL pursuant to which they act, physicians under the supervision of the members of the Defendant Hospital Directors Class are liable for false imprisonment.

Plaintiff Gregory Monaco asserts on his own behalf the following three claims for damages:

(1) By discontinuing a treatment regimen of lithium in the Suffolk Correctional Facility when it was the unquestioned treatment of choice for the bipolar disorder from which plaintiff suffered, defendant Packard provided medical treatment that was both deliberately indifferent to plaintiff's medical needs and constituted a substantial departure from accepted judgment, practices, and standards, in violation of the Eighth and Fourteenth Amendments and 42 U.S.C. § 1983;

(2) By authorizing the confinement of plaintiff when he did not pose a danger to himself or others, defendants Sarwal, Palma–Acquino, and Tuzel violated the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983; and

(3) By threatening to confine plaintiff indefinitely and withhold off-ward treatment unless plaintiff agreed to remain as a voluntary patient, defendant Dave impermissibly induced a waiver of plaintiff's rights to challenge his confinement under the Due Process Clause of the Fourteenth Amendment and further violated 42 U .S.C. § 1983.

Plaintiffs seek declaratory relief from this Court on each of the claims asserted on behalf of the proposed plaintiff class. Plaintiffs also seek the following injunctive relief on behalf of the proposed subclass of incompetent defendants:

(1) an order enjoining defendant Stone from subjecting incompetent defendants to the forensic review requirements of CPL § 730.60, MHL § 29.11(h), and 14 NYCRR § 540 or to an informal forensic review in place of a formal forensic review;

(2) an order directing defendant Stone to engage in appropriate training of OMH staff members to ensure that they (a) will not subject any member of the proposed plaintiff class to the forensic review requirements of CPL § 730.60, MHL § 29.11(h), and 14 NYCRR § 540 or to an informal forensic review in place of a formal forensic review and (b) fully understand how and why an incompetent defendant is not necessarily dangerous;

(3) an order directing defendant Stone, once a criminal defendant has found incompetent by a court appointed expert but before the court holds a competency hearing, to designate the OMH facility to which he or she will be remanded;

(4) an order enjoining defendant Stone from confining any CPL § 730.40 defendant who is not determined to be dangerous pursuant to the risk assessment scale outlined in paragraph (7), whether or not OMH has secured an out-patient placement that it deems appropriate; and

(5) an order directing defendants Mahoney and Fraser to transport incompetent defendants on the same day that a local criminal court has issued an order of remand;

Plaintiffs also seek the following injunctive relief on behalf of the proposed subclass of civilly committed individuals:

***16** (1) an order directing defendant Stone and the members of the Defendant Hospital Directors Class to engage in appropriate training so as to ensure that physicians under their authority will (a) examine all relevant clinical criteria when assessing an individual's dangerousness and (b) no longer label an individual dangerous because such individual's clinical condition warrants in-patient hospitalization;

(2) an order directing defendant Stone and the members of the Defendant Hospital Directors Class to prohibit the physicians under their authority from certifying a mentally ill person for hospitalization unless that person is deemed to pose a substantial risk of harm pursuant to a risk assessment scale imposed or approved by this Court that takes into account the likelihood and magnitude of possible harm;

(3) an order directing defendant Stone and the members of the Defendant Hospital Directors Class to prohibit the physicians under their authority from certifying a mentally ill person for hospitalization unless the certifying physician determines that the commitment candidate satisfies the statutory criteria pursuant to which the certification is made;

(4) an order directing defendant Stone and the members

of the Defendant Hospital Directors Class to contribute a sum of money to be determined at or after trial to the New York State Office of Court Administration that will permit it to procure the services of a psychiatric expert who will be able to (a) evaluate any member of the proposed civil commitment subclass who wishes to challenge his or her involuntary hospitalization and (b) testify within one week of such court appointment; and

(5) an order directing defendant Stone and the members of the Defendant Hospital Directors Class to videotape all psychiatric evaluations of patients conducted by physicians who are determining whether allegedly mentally ill individuals satisfy the criteria for involuntary certification pursuant to the MHL.

Present Motions[21]

City Defendants move to dismiss the claims asserted against them pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted, respectively. Defendant Licht moves to dismiss the claims asserted against him pursuant to Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Both City Defendants and defendant Licht argue that plaintiffs lack standing. Specifically, they contend (1) that neither plaintiff has standing to assert claims on its own behalf because neither has adequately alleged an injury in fact and (2) that plaintiff Law Clinic does not have standing to assert claims on behalf of anyone for whom it is statutorily authorized to assert claims because it has not identified any such individuals who would have standing to sue on their own. City Defendants also move to dismiss on the ground that the allegations made in the complaint are so vague that they fail to state a claim upon which relief may be granted. Defendant Licht also moves to dismiss the constitutional claims on the ground that he is not a state actor and the state law claims either on the merits or for lack of federal jurisdiction. Plaintiffs argue in response that they do have standing, that the complaint does state a claim, and that defendant Licht is a state actor.

***17** Defendants Sarwal, Palma–Acquino, Tuzel, and Dave move pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment dismissing the claims asserted against them on several grounds.[22] Defendants Sarwal, Palma–Acquino, and Tuzel argue that (1) the earlier judicial determination precludes plaintiff Monaco from asserting that he was improperly certified as dangerous, (2) they were exercising their professional judgment, (3) they did not proximately cause plaintiff Monaco's injuries, and (4) they are protected by qualified immunity. Plaintiff Monaco responds by arguing that he lacked an opportunity to fully and fairly litigate the issue of dangerousness in the prior proceeding because his appeal was dismissed as moot, that the professional judgment standard does not apply, that defendants did cause his injuries, and that defendants unreasonably violated his clearly established right.

Defendant Dave argues that she (1) did not coerce plaintiff Monaco or proximately cause his injuries because he consented to his continued retention at PPC, (2) was exercising her professional judgment, and (3) is protected by qualified immunity because her conduct was reasonable. Plaintiff Monaco responds by arguing that his consent was invalid, that the professional judgment standard does not apply, and that the conduct of defendant Dave was unreasonable in light of well settled law.

In response to the motions of City Defendants and defendant Licht to dismiss the claims of plaintiff Law Clinic for lack of standing, plaintiff Law Clinic telephoned these defendants and requested access to their psychiatric facilities so that it could offer its services to any patient who may have been aggrieved by the practices challenged in this action.[23] City Defendants and defendant Licht denied its request. Plaintiff Law Clinic now moves for an order granting it access to both the emergency rooms and admission units of the psychiatric facilities operated by these defendants on the ground that their denial of access violates both the PAIMI and the First Amendment to the United States Constitution.

City Defendants oppose this motion on five grounds: (1) access to hospital facilities is not an authorized method of discovery under the Federal Rules of Civil Procedure; (2) plaintiff Law Clinic seeks only to conduct a fishing expedition aimed at finding an individual with standing and curing a fundamental defect in its claims; (3) the PAIMI does not authorize plaintiff Law Clinic to perform investigations of the type sought; (4) the PAIMI prohibits plaintiff Law Clinic for offering services of the type sought because they would duplicate the work already performed by the Metal Hygiene Legal Service of New York ("MHLS");[24] and (5) the First Amendment does not require that attorneys be given access to all unidentified, prospective clients or that patients in HHC hospitals receive more access to counsel than they already receive. Defendant Licht opposes the motion on the basis that plaintiff Law Clinic has not alleged a specific injury on the part of any patient at LICH.

***18** Plaintiffs move pursuant to Rule 23 of the Federal Rules of Civil Procedure (1) to modify the previously certified plaintiff class and (2) to certify a defendant class of directors or chief operating officers of psychiatric hospitals or hospitals with psychiatric units located in the Eastern District of New York. Plaintiffs also move for leave to join any member of the defendant class who requests exclusion. The State Defendants, the City

Defendants, and defendant Licht write separately to oppose these motions.

DISCUSSION

This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, which authorizes jurisdiction over civil actions arising under federal law, 28 U.S.C. § 1343(3), which authorizes jurisdiction over civil actions arising under 42 U.S.C. § 1983, and 28 U.S.C. § 1367, which authorizes supplemental jurisdiction over the state law claims.

City Defendants' 12(b)(1) Motion

The City Defendants first move to dismiss the claims asserted against them pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction on the ground that plaintiffs lack standing to assert those claims.

In considering a motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a court must generally accept as true the factual allegations stated in the complaint, *Zinermon v. Burch,* 494 U.S. 113, 118, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990), and draw all reasonable inferences in favor of the plaintiff, *Haines v. Kerner,* 404 U.S. 519, 520–21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); *Hertz Corp. v. City of New York,* 1 F.3d 121, 125 (2d Cir.1993). In addition to examining the complaint, however, a "court may resolve disputed jurisdictional fact issues by reference to evidence outside the pleadings, such as affidavits." *Antares Aircraft, L.P. v. Fed. Republic of Nigeria,* 948 F.2d 90, 96 (2d Cir.1991), *vacated for reconsideration on other grounds,* 505 U.S. 1215, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992), *reaff'd on remand,* 999 F.2d 33 (2d Cir.1993).

Article III of the United States Constitution requires that a plaintiff establish. "(1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.,* 517 U.S. 544, 551, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996); *accord St. Pierre v. Dyer,* 208 F.3d 394, 401 (2d Cir.2000). "The party invoking federal jurisdiction bears the burden of establishing the elements of standing." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Because "standing is not dispensed in gross," *Lewis v. Casey,* 518 U.S. 343, 358 n. 6, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996), each plaintiff must establish the necessary elements with respect to each claim it asserts on its own behalf or on behalf of others.

Standing

Defendants rightly argue that plaintiff Monaco has failed to allege any injury caused by defendants Marcos, Kesselman, or Fraser. Plaintiff Monaco does not dispute this. It is well settled that, in resolving issues of standing, an allegation of injury in fact is the "irreducible constitutional minimum." *Lujan,* 504 U.S. at 560. Because "he has not established an actual controversy between himself" and any of these particular defendants, he does not have standing to assert claims against them on his own behalf or on behalf of a class. *Griffin v. PaineWebber, Inc.,* No. 99 Civ. 2292, 2001 U.S. Dist. LEXIS 8937, at *7 (S.D.N.Y. Jun. 29, 2001); *accord O'Shea v. Littleton,* 414 U.S. 488, 495, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.") Accordingly, I grant the City Defendants' motion to dismiss the claims that plaintiff Monaco asserts against them.

***19** Like an individual, an organization must meet the tripartite standard of Article III in order to assert a claim on its own behalf. *See Havens Realty Corp. v. Coleman,* 455 U.S. 363, 378, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982); *Ragin v. Harry Macklowe Real Estate Co.,* 6 F.3d 898, 904 (2d Cir.1993). Plaintiff Law Clinic has successfully satisfied the elements necessary for it to establish standing to assert claims against City Defendants.

Plaintiff Law Clinic has shown injury in fact that is traceable to the challenged conduct of City Defendants. It alleges that it has brought six different actions over the past decade challenging the civil commitment practices of physicians supervised by defendants Marcos and Kesselman. Its supervising attorney states in an affidavit that he alone has spent on average in excess of 163 hours on each of these cases. Plaintiff Law Clinic alleges that it has also provided informal assistance to many individuals seeking to challenge their hospitalizations. Carrying out these activities, it contends, "has clearly hindered the ability of the Clinic to provide non-litigation services[25] and address other matters that no doubt require litigation." (Brooks Aff. 07/25/00 ¶ 44.) Specifically, it has been forced to decline invitations to educate ex-patients about their legal rights and been unable to develop peer advocacy training programs. It has not yet had the opportunity to litigate such issues as the forcible

administration of medication in non-emergency situations, the medicating of patients who are incompetent to make treatment decisions, and the problems arising out of New York's new out-patient commitment law. Similarly, plaintiff Law Clinic alleges that it has had to expend considerable resources in attempting to rectify the problem of defendant Fraser's delay in transporting individuals found incompetent to stand trial. It is currently representing one individual who remained confined to Rikers Island for five days due to defendant Fraser's delays in transporting him to an appropriate facility.[26]

City Defendants respond that an organization's expenditure of resources only constitutes an injury in fact if the expenditure represents a distraction from the primary function of the organization. As a law clinic that focuses on providing legal services to the mentally ill, they contend, plaintiff Law Clinic exists for the very purpose of offering law students hands-on experience in the conduct of such litigation.[27] They also point out that federal law permits plaintiff Law Clinic to use federal funding to conduct litigation and that plaintiff Law Clinic even described its plans to prosecute this action in last year's funding application. Because the pursuit of litigation on behalf of the mentally ill lies at the core of plaintiff Law Clinic's mission, they argue, it cannot show that it has been distracted from carrying out its primary activity.

In holding that an organization's expenditure of resources is sufficient to constitute an injury in fact, courts have often been faced with organizations that had been distracted from their primary or regular activities. *See Ragin v. Macklowe Real Estate Co.,* 6 F.3d 898, 904 (2d Cir.1993) (noting that the organization's staff members had been distracted from their "regular tasks"); *Eastern Paralyzed Veterans Ass'n, Inc. v. Lazarus–Burman Assocs.,* 133 F.Supp.2d 203, 211 (E.D.N.Y.2001) (pointing out that the activity alleged by the organization represented "a significant diversion of its resources [from its] primary mission"). Other courts, however, have specifically held that organizations can achieve standing based on their performance of precisely those activities which they normally undertake. *See Pa. Prot. & Advocacy, Inc. v. Houston,* 136 F.Supp.2d 353, 361 (E.D.Pa.2001) ("It is possible that the Defendant's alleged failings caused PP & A to spend more on advocacy than it normally would."). One court recently held that plaintiff Law Clinic had achieved standing to assert claims against defendants because it had recently brought two actions addressing the same issue—namely, OMH's assessment of charges against patients who sued it. *See Brown v. Stone,* 66 F.Supp.2d 412 (E.D.N.Y.1999). City Defendants attempt to distinguish *Brown* on the ground that it involved recent litigation aimed at the same issue. One of the prior suits in *Brown,* however, had been filed a decade earlier. The suits at issue in this case were filed in 1990, 1992, 1993, 1994, and 2000. On these facts, Brown seems to be directly on point. Moreover, plaintiff Law Clinic brought these actions to challenge the civil commitment of various individuals, conduct quite similar to that challenged in the present action.

***20** City Defendants next argue that plaintiff Law Clinic's past litigation did not result in injury in fact because it was "small when compared to its caseload," which contains approximately 40 cases in an average year, and thus could not have "detracted from other projects." (City Defs.' Reply Mem. at 6.) Plaintiff Law Clinic alleges, however, that it devoted considerable time and resources to these cases. The time sheets provided by the supervising attorney of plaintiff Law Clinic support its allegation. If this Court assumes that the one case for which time sheets are missing required approximately the same amount of time as the average case, then this attorney alone devoted close to one thousand hours litigating these cases. Especially in light of plaintiff Law Clinic's allegation that it has spent additional resources providing informal assistance to aggrieved individuals, it cannot be said that the opportunity cost of its efforts was "conjectural or hypothetical." *Lujan,* 504 U.S. at 560.

Finally, City Defendants contend that this litigation cannot provide the basis for an injury in fact because plaintiff Law Clinic cannot demonstrate that the challenged conduct was adjudicated to be unlawful. City Defendants have not cited a single case that imposes such a requirement, and this Court has not found any.

In satisfaction of the third element required to establish standing, plaintiff Law Clinic contends that its injuries would likely be redressed by the requested injunctions because mandating the use of a risk assessment scale will force clinicians to focus on legitimate criteria in assessing dangerousness and directing defendant Fraser to transport remanded individuals in a timely fashion will minimize unnecessary delays. As a result, plaintiff Law Clinic argues, it will be able to reduce the time and resources that it devotes to remedying these problems on its own. While the City Defendants characterize as unrealistic plaintiffs' hope that the injunctions sought will actually eliminate these problems, they offer no support for such an exacting approach to determinations of redressability. The allegations that the requested injunctions are effective is more than "merely speculative." *Id.* at 560.

Accordingly, I find that plaintiff Law Clinic has standing to assert claims against City Defendants on its own behalf.

City Defendants also move to dismiss for lack of standing the claims that plaintiff Law Clinic asserts on behalf of its constituents. They contend that it has failed to identify a single constituent who has standing to assert a claim for the injunctive relief sought in this action. In response, plaintiff Law Clinic has identified three clients who, it

alleges, were involuntarily hospitalized by physicians under the supervision of defendants Marcos and Kesselman without the requisite determinations. In addition, it has produced a long roster of incompetent defendants throughout New York State whose admissions to OMH facilities were delayed and has specifically identified a client who allegedly had a justiciable claim against defendant Fraser at the time plaintiffs filed their fourth amended complaint.

***21** Congress has authorized PAIMI organizations, such as plaintiff Law Clinic, to bring suit on behalf of their constituents if they can meet the traditional test of associational standing. *See, e.g., Doe v. Stincer,* 175 F.3d 879, 886 (11th Cir.1999) (holding that, because a PAIMI organization "represents the State's [individuals with mental illness] and provides the means by which they express their collective views and protect their collective interests," it "may sue on behalf of its constituents like a more traditional association may sue on behalf of its members"); *Aiken v. Nixon,* No. 01–CV–73, 2002 U.S. Dist. LEXIS 21738, at *21 (N.D.N .Y. Sept. 30, 2002). Specifically, a PAIMI organization must show that: (1) its constituents "would otherwise have standing to sue in their own right," (2) "the interests it seeks to protect are germane to [its] purpose," and (3) neither the claim asserted nor the relief requested requires the participation of individual [constituents] in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

Plaintiff Law Clinic has alleged the requisite factors as to its claims against defendant Fraser. It has satisfied the first requirement because it has identified at least one constituent, John Rosado, who has been harmed by the failure of defendant Fraser to transport incompetent criminal defendants promptly and had standing to assert his claim at the time that the fourth amended complaint was filed.

City Defendants argue that plaintiff Law Clinic has not met the requirements for associational standing because Rosado lacked standing at the time this action was initially commenced, but they fail to cite any authority for the proposition that plaintiff Law Clinic must make such a showing. *See, e.g., Fetto v. Sergi,* 181 F.Supp.2d 53, 66 (D.Conn.2001) (noting that the standing requirements were "satisfied as of the time of the amended complaint"). Next, City Defendants argue that the claims are moot. Plaintiff Law Clinic concedes that Rosado is no longer incarcerated. However, while he and, by implication, plaintiff Law Clinic no longer have a live case or controversy, mootness will not preclude a prospective class representative from asserting claims on behalf of the class where those claims are inherently transitory. *See County of Riverside v. McLaughlin,* 500 U.S. 44, 52, 111 S.Ct. 1661, 114 L.Ed.2d 49 (2001). The roster provided by plaintiffs makes clear that, in spite of the alleged delays, incompetent defendants typically wait no more than a few weeks to be transported to an OMH facility. Their claims are therefore inherently transitory. *See Comer v. Cisneros,* 37 F.3d 775 (2d Cir.1994) (holding the claims of plaintiffs on waiting lists for public housing to be inherently transitory even though some of the plaintiffs remained on lists for years). Finally, City Defendants argue that plaintiff Law Clinic has not proven that he was injured by defendant Fraser. They speculate that the delay could conceivably have been the result of "factors beyond the City's control." (Reply Mem. L. Supp. Mot. Dismiss at 16.) Whether or not plaintiff Law Clinic can produce evidence to establish the liability of defendant Fraser is the "very heart of the matter in [this] case and does not implicate standing." *Pederson v. La. State Univ.,* 213 F.3d 858, 870 (5th Cir.2000). As the Fifth Circuit recently explained, "[s]tanding requires alleged misconduct, not proven misconduct[, and it] is inappropriate for the court to focus on the merits of the case when considering the issue of standing." *Id.* at 870 (citation omitted).

***22** City Defendants do not dispute that plaintiff Law Clinic has satisfied the second and third elements of associational standing. It has alleged that the claims against defendant Fraser are germane to its goal of providing services to mentally ill individuals confined in jail. *See* 42 U.S.C. 10802(3). Moreover, it has shown that Rosado's direct participation is unnecessary. *See Hunt,* 432 U.S. at 344 (holding that a "request for declaratory and injunctive relief" was "properly resolved in a group context"); *Warth,* 422 U.S. at 515 ("If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.").

Accordingly, I find that plaintiff Law Clinic has standing to assert claims against defendant Fraser on behalf of its constituents.

As City Defendants rightly argue, however, plaintiff Law Clinic has failed to show that any one of the three individuals who were allegedly injured by defendants Marcos and Kesselman would have standing to sue in their own right. For instance, while it alleges that these individuals "faced a 'real and immediate' threat of involuntary hospitalization at the time they were confined in the HHC emergency room," (Pls.' Mem. L. Opp. Mots. Dismiss & Mot. Summ. J. at 24), it never alleges that they are likely to suffer future injury. It is well settled that an individual lacks standing to seek injunctive relief unless he or she can demonstrate a substantial likelihood of future injury as a result of the challenged conduct. *See City of Los Angeles v. Lyons,* 461 U.S. 95, 111, 103 S.Ct.

1660, 75 L.Ed.2d 675 (1983) (holding that a plaintiff has no standing to seek injunctive relief "where there is no showing of any real or immediate threat that the plaintiff will be wronged again").

Implicitly acknowledging its inability to make the requisite showing on the facts currently in the record, plaintiff Law Clinic argues that, as a non-traditional plaintiff, it should be relieved of the burden of having to show that one of its constituents has a justiciable case or controversy because it can demonstrate by other means its ability to provide precisely what Article III is meant to ensure—vigorous advocacy. Plaintiff Law Clinic rightly points out that the contours of the justiciability doctrine must be shaped with "reference to the purpose of the case-or-controversy requirements," *United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 402, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980), but it proceeds to argue its position by offering a limited view of that purpose. More than simply a means of assuring vigorous advocacy, the justiciability requirements are also designed to circumscribe the "role assigned to the judiciary," *Flast v. Cohen,* 392 U.S. 83, 95, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), to conserve judicial resources, *see* Erwin Chemerinsky, Federal Jurisdiction § 2.1 (3d ed.1999), and to promote fairness by limiting courts' ability to adjudicate the rights of those who are not parties to an action, *id.* None of these objectives is served by carving out a special exception for plaintiff Law Clinic.

***23** Nor does plaintiff Law Clinic's statutory mandate affect the outcome. While Congress may abrogate prudential limits on standing, the requirements of Article III remain. *See Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Sierra Club v. SCM Corp.,* 747 F.2d 99, 103 (2d Cir.1984). Plaintiff Law Clinic cites two cases, *Trautz v. Weisman,* 846 F.Supp. 1160, 1162–63 (S.D.N.Y.1994), and *Rubenstein v. Benedictine Hospital,* 790 F.Supp. 396, 409 (N.D.N.Y.1992), which, it contends, are evidence of "a *sub silentio* recognition of the assurance of vigorous advocacy under the PAIMI Act that has led some courts to find PAIMI standing based solely on the PAIMI Act without any additional requirements." (Pls.' Mem. L. Opp. Mots. Dismiss & Mot. Summ. J. at 25.) Neither of these cases addressed the issue of associational standing under Article III, however, and one of them explicitly stated that it did not reach the issue. *See Rubenstein,* 790 F.Supp. at 409 n. 10.

The evidence required by plaintiff Law Clinic to identify constituents with standing lies within the control of City Defendants. Accordingly, I will permit plaintiff Law Clinic to conduct such discovery as will permit this Court to determine whether it has standing to assert claims against defendants Marcos and Kesselman. *See, e.g., Inv. Props. Int'l, Ltd. v. IOS, Ltd.,* 459 F.2d 705, 708 (2d Cir.1972) (directing district court "to allow such limited discovery as will permit the trial court to determine whether it has jurisdiction and whether plaintiffs have standing to prosecute this action"); *NAACP v. Acusport Corp.,* Nos. CV 99–7037 & CV 99–3999, 2001 U.S. Dist. LEXIS 4370, at *7 (E.D .N.Y. Apr. 2, 2001) (holding that a decision on a dismissal motion "require[d] further discovery by the parties respecting the independent standing and harm to the named plaintiffs"). City Defendants' motion to dismiss the claims that plaintiff Law Clinic asserts against them on behalf of its constituents is denied without prejudice to its renewal after an opportunity for further discovery.

Defendants' 12(b)(6) Motion

City Defendants also move pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for dismissal of plaintiffs' claims on the ground that they are conclusory and therefore fail to state a claim upon which relief can be granted. Because I have dismissed plaintiff Monaco's claims against City Defendants for lack of standing, I address only so much of the motion as is directed at plaintiff Law Clinic.

In considering a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a "court must accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor." *Patel v. Contemporary Classics of Beverly Hills,* 259 F.3d 123, 126 (2001). A court will not dismiss a claim under Rule 12(b)(6) "unless it is satisfied that the complaint cannot state any set of facts that would entitle [plaintiff] to relief." *Id.*

***24** While it is certainly true that conclusory allegations "will not suffice to prevent a motion to dismiss," *Smith v. Local 819 I.B.T. Pension Plan,* 291 F.3d 236, 240 (2d Cir.2002), plaintiff Law Clinic's allegations are not conclusory. The complaint describes in detail the manner in which the physicians working under the supervision of defendants Marcos and Kesselman allegedly ignore the relevant criteria in deciding whether to carry out civil commitments. Similarly, the complaint describes the nature, duration, and effect of delays in transporting incompetent defendants who are in the custody of officers supervised by defendant Fraser. While the complaint fails to identify specific instances of abuse on the part of these physicians and officers, its contention that these practices are pervasive, in the context of an action challenging allegedly systemic conduct, is sufficient under the Federal Rules of Civil Procedure. *See, e.g., Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (explaining that Rule 8(a)(2) requires only that a complaint "give the defendant[s] fair notice of what the plaintiff's claim is and the ground upon which it

rests"); *Advanced Marine Techs. v. Burnham Secs., Inc.,* 16 F.Supp.2d 375, 385 (S.D.N.Y.1998) (describing the "liberal standards applicable to the constructing of pleadings for Rule 12(b)(6) purposes"). Accordingly, I deny City Defendants' motion to dismiss plaintiff Law Clinic's claims under Rule 12(b)(6).

Defendant Licht's Motion to Dismiss

Plaintiffs allege that the LICH physicians who examine and certify individuals for civil commitment purposes under defendant Licht's supervision violate the Fourteenth Amendment and 42 U.S.C. § 1983 because they (1) certify individuals as dangerous as a pretext for treating them, (2) fail to employ the appropriate criteria in assessing dangerousness, (3) conduct cursory evaluations, (4) deprive plaintiffs of procedural due process by failing to apply the requisite statutory criteria, and (5) fail to use appropriate guidelines. Plaintiffs also allege that these physicians (1) falsely imprison individuals by certifying them as dangerous as a pretext for treating them, (2) falsely imprison individuals by failing to apply the requisite statutory criteria, (3) make negligent diagnoses that result in the wrongful confinement of nondangerous individuals by failing to employ appropriate criteria, and (4) make negligent diagnoses that result in the wrongful confinement of nondangerous individuals by conducting cursory evaluations.

Defendant Licht moves pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss these claims on three separate grounds for failure to state a claim upon which relief can be granted.

First, he contends that plaintiffs lack standing because neither plaintiff has alleged a direct injury that he has caused and that the nine constituents identified by plaintiff Law Clinic as having been improperly hospitalized at LIHC cannot confer associational standing on it because: (1) they have not been named as plaintiffs, (2) they are located outside its catchment area, (3) the evidence of their injuries is contained in documents that were not included in the fourth amended complaint, and (4) they are not alleged to have been treated directly by defendant Licht.[28]

***25** Second, he moves to dismiss the constitutional claims asserted under Section 1983 and the Fourteenth Amendment on the ground that he is not a state actor. Plaintiffs offer two arguments in response: (1) that New York's health care system involves such extensive interaction between public and private entities that the conduct of those private entities may fairly be attributed to the state, and (2) that the State of New York must not be permitted to avoid its constitutional obligations.

Finally, defendant Licht moves to dismiss the state law claims on the merits or, in the alternative, for lack of jurisdiction. Plaintiffs argue that they have succeeded in stating a claim sufficient to satisfy the notice-pleading requirements of the Federal Rules of Civil Procedure.

Standing

Plaintiff Monaco has failed to allege any injury caused by defendant Licht. He does not dispute this. For the same reasons set forth above, I grant defendant Licht's motion to dismiss for lack of standing plaintiff Monaco's claims against him.

Plaintiff Law Clinic's explicit concession that it "has yet to address resources to assist constituents at Long Island College Hospital" is fatal to its attempt to assert standing for its claim against defendant Licht. (Pls.' Mem. L. Opp. M. Dismiss & M. Summ. J. at 31.) Plaintiffs invite the Court to view their complaint as "challenging practices of the psychiatric profession as a whole, and not separate practices at individual hospitals." (*Id.*) It presents no authority to justify an impressionistic approach of this sort, and the well settled principle that a court must satisfy itself that injury is traceable to the conduct of a particular defendant rather than dispense standing in gross precludes this Court from adopting such an approach. *Lewis,* 518 U.S. at 358 n. 6; *Griffin,* 2001 U.S. Dist. LEXIS 8937, at *7. Accordingly, I grant defendant Licht's motion to dismiss for lack of standing the claims that plaintiff Law Clinic asserts against him on its own behalf.

Plaintiff Law Clinic does have standing, however, to assert claims against defendant Licht on behalf of its constituents. Defendant Licht does not dispute that these constituents would have standing to assert claims on their own behalf or that the interests plaintiff Law Clinic seeks to protect are germane to its purpose.

Rather, he argues that the test for associational standing has not been satisfied because these constituents have not been named as plaintiffs. It is not uncommon, however, for courts to exercise jurisdiction over organizations' claims for injunctive and declaratory relief without requiring that the constituents be named as plaintiffs. *See, e.g., Hunt,* 432 U.S. at 344; *Warth,* 422 U.S. at 515. Defendant Licht fails to explain why it is necessary for any constituents to be named as plaintiffs in this action or to cite any case law to suggest that it is.

Defendant Licht also argues that these individuals are not constituents because they are located in Kings County rather than Nassau or Suffolk.[29] In seeming uniformity, courts have held that advocacy organizations like plaintiff

Law Clinic have standing to sue on behalf of the individuals whom they are authorized to represent. *See, e.g., Pennsylvania Prot. & Advocacy, Inc. v. Houston,* 136 F.Supp.2d 353, 365 (E.D.Pa.2001); *Risinger v. Concannon,* 117 F.Supp.2d 61, 71 (D.Me.2001) (listing cases). Because plaintiff Law Clinic has and exercises discretion to provide services to individuals located outside of Nassau and Suffolk, its constituency is not limited to those counties.

***26** Defendant Licht next argues that plaintiff Law Clinic's evidence of its constituents' alleged injuries cannot be considered in connection with this motion because it is not contained in the pleadings. This argument has no merit. Even where a motion to dismiss for lack of standing is made under Rule 12(b)(6), "it is within the [district] court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing." *Thompson v. County of Franklin,* 15 F.3d 245, 249 (2d Cir.1994); *see also First Capital Asset Mgmt. v. Brickellbush, Inc.,* 218 F.Supp.2d 369, 378 (S.D.N.Y.2002) ("[E]ven when a standing motion is considered under Rule 12(b)(6), the district court is authorized to consider matters outside the pleadings and to make findings of fact when necessary.").

Defendant Licht's final argument is that he himself is not alleged to have civilly committed the constituents identified by plaintiff Law Clinic. He offers neither case law nor explanation to support his argument that this fact shields him from liability. Plaintiff Law Clinic alleges that defendant Licht, as the director of LICH, has failed to give proper training and supervision to the physicians under his control. This allegation is sufficient to defeat a dismissal motion at this stage in the litigation. Accordingly, I deny defendant Licht's motion to dismiss for lack of standing the claims that plaintiff Law Clinic asserts against him on behalf of its constituents.

Constitutional and § 1983 Claims

Under Section 1983, any person who, acting under color of state law, deprives another of a right, privilege, or immunity secured by federal law, will be liable to that individual for civil damages. *See Day v. Morgenthau,* 909 F.2d 75, 77 (2d Cir.1990). Section 1983 itself creates no substantive rights; it provides only a procedure for securing redress for the deprivation of rights established elsewhere. *See City of Oklahoma City v. Tuttle,* 471 U.S. 808, 816, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985).

In order to state a claim under Section 1983, "a plaintiff must allege that he was injured by either a state actor or a private party acting under color of state law." *Ciambriello v. County of Nassau,* 292 F.3d 307, 323 (2d Cir.2002) (citation omitted). Whether a party is a "state actor" and whether it acts "under color of state law" involve precisely "the same" inquiry. *Okunieff v. Rosenberg,* 996 F.Supp. 343, 348 (S.D.N.Y.1998), *aff'd,* 166 F.3d 507 (2d Cir.1999) ("Section 1983's 'under color of law' requirement is treated as the same thing as the 'state action' requirement under the Constitution."); *see also Rendell–Baker v. Kohn,* 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982) ("The ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights 'fairly attributable to the State?' ').

***27** In their fourth amended complaint, plaintiffs contend that OMH has formed a "comprehensive system" for the treatment of New York State's mentally ill which includes "one unified civil commitment operation." Specifically, they allege: (1) municipal and private hospitals perform nearly all of the civil commitments in New York City; (2) OMH licenses these hospitals on the condition that they agree to service a specific catchment area; (3) OMH has undertaken initiatives, such as changing payment methods, designed to increase their participation; (4) OMH takes their services into account in determining whether the need for mental health services will be satisfied; and (5) OMH has created "working arrangements" with these hospitals under which they transfer to OMH hospitals any civilly committed patients who require intermediate or long-term care.[30]

As defendant correctly argues, these allegations are insufficient as a matter of law to support a finding of state action. In a recent decision affirmed by the Second Circuit, the court in *Okunieff v. Rosenberg* dismissed the § 1983 claims asserted against a private hospital and private physicians because their commitment of the plaintiff pursuant to the MHL did not constitute state action. *Okunieff,* 996 F.Supp. 343. After applying the three relevant tests for state action—state compulsion, close nexus, and public function—the court concluded that the MHL "provides a licensing provision" that "enabl[es] the private hospital to receive mental patients" without turning that receipt into state action. *Id.* at 356. In so doing, the *Okunieff* court joined the many courts that have held that involuntary hospitalizations by private parties pursuant to state statutes do not constitute state action. *Id.* at 349 (listing cases).

Plaintiffs argue that *Okunieff* and this entire line of cases have "little persuasive value" because they did not consider "a state action theory based upon the existence of a complex set of interactions." (Pls.' Mem. L. at 40.) Even if plaintiffs' allegations regarding the relationship between OMH and private facilities are accepted as true, however, there is simply no basis for a finding of state action.

The fact that municipal and private hospitals perform nearly all of the civil commitments in New York City does not transform those commitments into the actions of the state. *See Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 351–52, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974) (noting that activities carried out under a state-granted monopoly are not attributable to the state). Nor do OMH's alleged efforts to ensure this result by conditioning their licensure[31] on their agreement to service a specific catchment area or by giving them incentives to increase their participation. *See, e.g., Jackson,* 419 U.S. at 348 (holding that the privately owned utility's "enjoying at least a partial monopoly in the providing of electrical service within its territory" was insufficient to make its "conduct attributable to the State for purposes of the Fourteenth Amendment"); *Lefcourt v. Legal Aid Society,* 445 F.2d 1150 (2d Cir.1971) (concluding that the Legal Aid Society was not a state actor even though it had been designated by the city to provide legal services to indigent persons accused of criminal activity). OMH's inclusion of private facilities in its tallies of available providers does not transform those facilities into public entities. *See, e.g., Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 176, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972) (holding that a private club was not a state actor even though its license was "counted in the maximum number of licenses that [could] be issued in [that] municipality" to meet the local demand for liquor consumption). Lastly, OMH's alleged practice of arranging to have private hospitals transfer any civilly committed patients who might require extended care to its own hospitals does not alter the simple fact that those facilities are separate. *Cf. Blum v. Yaretsky,* 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) (the state's indirect involvement in the transfers of patients out of private nursing homes was not even enough to render the transfers themselves state action); *Jackson,* 419 U.S. at 350 (holding that even "extensive and detailed" regulation of an entity does not "convert its action into that of the State for purposes of the Fourteenth Amendment.").

***28** In order to satisfy the nexus test for state action, the plaintiffs must show that "there is a sufficiently close nexus between the State and the challenged action of [defendant Licht] so that the action of the latter may be fairly treated as that of the State itself." *Jackson,* 419 U.S. at 351. "The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum,* 457 U .S. 1004. It is well settled that determinations do not constitute state action if they "ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State," *id.* at 1008, and that "[t]he actual decision of whether commitment is warranted [under the MHL] is left entirely to the sound medical judgment of physicians." *Okunieff,* 996 F.Supp. at 352.

In the decision that plaintiffs rely on to support their position, the Ninth Circuit held that the state's involvement in a particular decision to hospitalize a patient was so extensive as to "override[ ] the 'purely medical judgment' rationale of *Blum." Jensen v. Lane County,* 222 F.3d 570, 575 (9th Cir.2000). In that case, the state and the defendant physician had "undertaken a complex and deeply intertwined process of evaluating and detaining" candidates for involuntarily hospitalization, in which the state initiated the evaluation process, there was significant consultation among the various mental health professionals, and the physician helped develop and maintain the policies of the state hospital. *Id* . None of these factors is present here. Plaintiffs do not allege that any public entity makes the initial evaluations of individuals who are ultimately treated by LICH.[32] *Cf. id.* at 573 (noting that a state specialist "brought the [plaintiff's] case to the attention" of defendant). Nor do plaintiffs allege that LICH's physicians consult with health care professionals employed by the state in making individual certifications. *Cf. id.* (emphasizing that, on two occasions, defendant "relied heavily" on police reports and information obtained from the state specialist). Plaintiffs also fail to allege that defendant Licht has shaped the policies of public entities.

Plaintiffs' reliance on *Brentwood Academy v. Tennessee Secondary School Athletic Association,* 531 U.S. 288, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001), and *Tewksbury v. Dowling,* 169 F.Supp.2d 103 (E.D.N.Y.2001), is similarly misplaced. In *Brentwood,* the Supreme Court held that a statewide association of public schools that acted through its member schools, drew its officers from their ranks, relied on their funding, and served "in lieu of" a public entity was a state actor when it ruled against one of its member schools. *Brentwood,* 531 U.S. at 290–91. Plaintiffs make no effort to draw an analogy between these facts and the facts of this case, and none may fairly be drawn. The *Tewksbury* court found state action where a private physician had never examined plaintiff and committed her solely on the basis of an examination by the state physician. *Tewksbury,* 169 F.Supp.2d at 109. Moreover, the court specifically noted that, "if the decision to commit Tewksbury was based purely on their own independent medical judgment, Defendants would be correct that they are not state actors." *Id.*

***29** Plaintiffs' final argument is that the state is attempting to deprive its citizens of their constitutional rights by utilizing the services of private parties to engage in activities in which it would otherwise have to become involved. They support this contention with language taken from *West v. Atkins,* 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1987), an inapposite case which involved a physician who was actually employed by the state and was treating a state prisoner. The Court held that the State of North Carolina had violated the Constitution through

the conduct of defendant physician only because the State "bore an affirmative obligation" under the Eighth Amendment "to provide adequate medical treatment to those in its custody." *Id.* at 56. "Here, the State bears no duty to commit individuals involuntarily." *Okunieff,* 996 F.Supp. at 355 (distinguishing *West*). The *West* Court specifically acknowledged that "the provision of medical services is a function traditionally performed by private individuals," but it held that the particular context in which the defendant in that case provided his services "distinguishes" his relationship with the plaintiff "from the ordinary physician-patient relationship." *West,* 487 U.S. at 56 n. 15.

State Law Claims

As I have already dismissed plaintiff Monaco's claims and the claims asserted by plaintiff Law Clinic on its own behalf, I consider defendant Licht's motion to dismiss the state law claims only in connection with the claims asserted by plaintiff Law Clinic on behalf of its constituents. Defendant Licht urges this Court to "retain supplemental jurisdiction over plaintiff's state claims for the sole purpose of dismissing them" on the merits or, alternatively, to dismiss them for "lack of jurisdiction." (Licht's Mem. L. at 13–14.)

"In general, where the federal claims are dismissed before trial, the state claims should be dismissed as well." *See Purgess v. Sharrock,* 33 F.3d 134, 138 (2d Cir.1994). None of the three cases cited by defendant Licht support a departure from this general rule in the present case. In two of these cases, *Seabrook v. Jacobson,* 153 F.3d 70 (2d Cir.199), and *Robison v. Via,* 821 F.2d 913 (2d Cir.1987), the Second Circuit specifically held that the district court should not have exercised supplemental jurisdiction over state law claims after dismissing the related federal claims. In *Marcus v. AT & T Corp.,* 138 F.3d 46 (2d Cir.1998), the Second Circuit "[could] not say that the district court's exercise of supplemental jurisdiction ... was an abuse of its discretion" only "because the remaining state law claims implicate the doctrine of preemption." *Id.* at 57. Defendant Licht makes no such argument here, and his reliance on *Marcus* is misplaced. "Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). If this Court were to adjudicate these claims, "New York courts might never have the opportunity to decide [them], as the persons interested in the question may be either directly or collaterally estopped by our decision from relitigating the issue in the state court." *Seabrook,* 153 F.3d at 73. Accordingly, I dismiss plaintiff Law Clinic's claims without prejudice for lack of jurisdiction.

Defendants' Summary Judgment Motions

***30** Plaintiff Monaco asserts claims for damages based on alleged violations of the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983. Specifically, he contends that defendants Sarwal, Palma–Acquino, and Tuzel authorized his confinement when he did not pose a danger to himself or others and that defendant Dave impermissibly induced a waiver of his rights to challenge that confinement.

Defendants Sarwal, Palma–Acquino, Tuzel, and Dave move pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment dismissing the claims asserted against them on several grounds. Defendants Sarwal, Palma–Acquino, and Tuzel argue that: (1) the earlier judicial determination precludes plaintiff Monaco from asserting that he was improperly certified as dangerous, (2) they were exercising their professional judgment, (3) they did not proximately cause plaintiff Monaco's injuries, and (4) they are protected by qualified immunity. Plaintiff Monaco responds by arguing that he lacked an opportunity to fully and fairly litigate the issue of dangerousness in the prior proceeding because his appeal was dismissed as moot, that the professional judgment standard does not apply, that defendants did cause his injuries, and that defendants unreasonably violated his clearly established right.

Defendant Dave argues that she (1) did not coerce plaintiff Monaco or proximately cause his injuries because he consented to his continued retention at PPC, (2) was exercising her professional judgment, and (3) is protected by qualified immune because her conduct was reasonable. Plaintiff Monaco responds by arguing that his consent was invalid, that the professional judgment standard does not apply, and that the conduct of defendant Dave was unreasonable in light of well settled law.

A court must grant a motion for summary judgment if the movant shows that "there is no genuine issue as to any material fact" and that "the moving party is entitled to a judgment as a matter of law ." Fed.R.Civ.P. 56(c). Summary judgment is appropriate "[w]hen the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "The trial court's function in deciding such a motion is not to weigh the evidence or resolve issues of fact, but to decide instead whether, after resolving all ambiguities and drawing all inferences in favor of the non-moving party, a rational juror could find in favor of that party." *Pinto v. Allstate*

Ins. Co., 221 F.3d 394, 398 (2d Cir.2000).

Defendants Sarwal, Palma–Acquino, and Tuzel

Defendants Sarwal, Palma–Acquino, and Tuzel urge this Court to grant summary judgment on four different grounds. "The court will first address the defendants' collateral estoppel argument, because if they are successful on that argument, then obviously there will be no need to consider the other arguments raised by defendants in support of their summary judgment motion." *Burks v. Jakubowski,* 837 F.Supp. 48, 52 (N.D.N.Y.1992) (considering collateral-estoppel issue prior to considering the defendants' contentions that they were qualifiedly immune and did not violate the plaintiff's constitutional right). Defendants Sarwal, Palma–Acquino, and Tuzel are correct that the earlier determination by the New York Supreme Court precludes plaintiff Monaco from relitigating in this action the issue of whether he posed a danger at the time of his civil commitment.

***31** This Court must give any state court judgment the same preclusive effect as it would have under the laws of the state in which it was rendered. *See* 28 U.S.C. § 1738 ("judicial proceedings ... shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken"); *Allen v. McCurry,* 449 U.S. 90, 103–04, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980) (holding that § 1738 applies in cases involving § 1983 claims). Under New York law, "[t]here are but two necessary requirements for the invocation of the doctrine of collateral estoppel." *Schwartz v. Public Adm'r,* 24 N.Y.2d 65, 71, 298 N.Y.S.2d 955, 246 N.E.2d 725 (1969). First, "[t]here must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling." *Id.*

The burden of showing that the issues are identical and were necessarily decided in the prior action rests with defendants, those seeking to apply issue preclusion. *Id.* at 73, 298 N.Y.S.2d 955, 246 N.E.2d 725. In contrast, the burden of showing that the prior action did not afford a full and fair opportunity to litigate the issues rests with plaintiff Monaco, the party opposing the application of issue preclusion. *Id.*

Defendants contend, and plaintiff Monaco does not deny, that the first element is satisfied here. In the habeas corpus proceeding, Judge Oshrin considered whether plaintiff's confinement was wrongful because he was not "mentally ill" or "in need of involuntary care and treatment" as required by § 9.27 of the MHL. The testimony of Kanji and Weidenbacher confirms that evidence on these issues was presented. In denying the writ, the court necessarily found that plaintiff Monaco met these statutory conditions. As the case law makes clear, a person is "in need of involuntary care and treatment" under § 9.27 only if he poses a substantial risk of harm to himself or others. *See Project Release,* 722 F.2d at 971 (2d Cir.1983); *Scopes v. Shah,* 59 A.D.2d 203, 205–06, 398 N.Y.S.2d 911 (3d Dep't 1977). Thus, Judge Oshrin necessarily made the additional finding that plaintiff Monaco was dangerous. Because plaintiff Monaco's claims in this case hinge on his allegation that he was not dangerous, they involve the same question that was posed and answered in the state court proceeding.

Issue preclusion would not bar plaintiff Monaco from relitigating this question if he could show that he did not have a full and fair opportunity to litigate it in the prior proceeding. He has failed, however, to carry his burden.

New York courts look to several factors in determining whether a party seeking to avoid preclusive effect has met its burden:

> the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law and foreseeability of future litigation.

***32** *Schwartz,* 24 N.Y.2d at 72, 298 N.Y.S.2d 955, 246 N.E.2d 725. Plaintiff Monaco sought nothing short of his release from the facility at which he was being held against his will. In cross-examining witnesses and in testifying himself, he vigorously pursued this end. Represented by the same seasoned and diligent attorney who represents him and an entire class of plaintiffs in the present action, he sought relief from New York's trial court of general jurisdiction. He enjoyed the benefit of additional evidence at the court's insistence. The record cannot be read to support a finding that Judge Oshrin's determination was compromised or that the evidence or law has changed appreciably. As plaintiff Monaco had already commenced the present action, he can hardly contend that it was unforeseeable.

Plaintiff Monaco argues only that he was deprived of a full and fair opportunity to litigate in the first instance because his motion for leave to appeal was denied for mootness. He presents no authority, however, to buttress his argument. Nor can this Court discern a principled

basis on which to rest the rule of law that he proposes. While the Second Circuit often vacates lower court judgments to avoid the harsh result of allowing preclusive effect to attach to a judgment from which any appeal would be moot, it does so only where the circumstances lie "beyond an appellant's control," *Penguin Books USA Inc. v. Walsh,* 929 F.2d 69, 73 (2d Cir.1991). Plaintiff Monaco chose to forego his option of filing a petition for a rehearing and review of Judge Oshrin's order within thirty days. Instead, he waited ten months from the time of the order and five months from the time of his release to file a notice of appeal. Having balanced the factors suggested by the New York Court of Appeals, I find that the habeas corpus proceeding, coupled with the available avenues for review, represented a full and fair opportunity for plaintiff Monaco to challenge his dangerousness. *See Kulak v. City of New York,* 88 F.3d 63, 71–73 (2d Cir.1996) (holding that a similar state habeas corpus proceeding offered a patient who had been civilly committed a full and fair opportunity to litigate his mental illness and his dangerousness).

Accordingly, I grant the motions of defendants Sarwal, Palma–Acquino, and Tuzel to dismiss the claims asserted against them. As a result, I do not reach the issue of whether their exercise of professional judgment or their assertion of qualified immunity protects them from liability.

Defendant Dave

Defendant Dave moves for summary judgment on the grounds that plaintiff Monaco consented to his retention, that she was exercising her professional judgment, and that she is qualifiedly immune because it was reasonable for her to believe that her conduct was lawful. In a series of cases, the Supreme Court has stated that it is "[n]ormally" the "better approach" for a court to determine, first, whether the plaintiff has alleged the violation of a constitutional right and, second, whether a defendant is entitled to qualified immunity. *County of Sacramento v. Lewis,* 523 U.S. 833, 841 n. 5, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998); *see also Wilson v. Layne,* 526 U.S. 603, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999); *Conn v. Gabert,* 526 U.S. 286, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999). The Second Circuit has clarified that this approach is most appropriate where "the challenged conduct occurs spontaneously and inflicts harm on the victim without warning" because such conduct is difficult to prevent in an action for injunctive relief, in which qualified immunity is no defense, and "[o]fficial conduct in such cases might thus indefinitely escape judicial appraisal if the courts addressed only the issue of immunity." *Horne v. Coughlin,* 191 F.3d 244, 246 (2d Cir.1999). Defendant Dave's alleged threats came without warning and without an opportunity for plaintiff Monaco to seek an injunction. Even if plaintiff Monaco had subsequently requested that he be released, neither a grant of his request nor an application for a court order of commitment on the part of PPC officials would have afforded him an opportunity to raise the claim he now asserts. Faced with such a situation, a court should address the underlying constitutional claim before considering the defense of qualified immunity. *See Charles W. v. Maul,* 214 F.3d 350, 358 (2d Cir.2000). This sequence is especially appropriate, moreover, where the court's "evaluation of the constitutional claim will be a holding supporting a judgment of dismissal." *Horne,* 191 F.3d at 249 n. 5. Accordingly, because I find that plaintiff Monaco has failed to allege adequately the violation of his constitutional right, I do not reach the issue of qualified immunity.

***33** Defendant Dave's first argument—that plaintiff Monaco was not coerced into signing the agreement of voluntary commitment or deprived of his right to a hearing because he consented—is patently circular. The gravamen of plaintiff's argument is that defendant's threat vitiated his consent. Defendant Dave's attempt to salvage her contention by pointing out in her reply papers that plaintiff Monaco was familiar with the distinction between voluntary and involuntary hospitalization, was represented by counsel, and failed to demand his release do nothing more than add fodder to an existing dispute as to a material fact. Because a rational trier of fact could still find that defendant Dave's threat coerced plaintiff Monaco into waiving his right to a hearing, these contentions will not support the granting of summary judgment.

Defendant Dave also argues, however, that she made her decision based on her professional judgment as an experienced physician. She points out that the MHL specifically requires mental health professionals "to encourage any person suitable therefor and in need of care and treatment for mental illness to apply for admission as a voluntary or informal patient." N.Y. Mental Hyg. Law § 9.21(a).

Treatment decisions made by medical professionals are "presumptively valid," and a plaintiff can only defeat that presumption by showing that the decision constituted "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Youngberg v. Romeo,* 457 U.S. 307, 323, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). Plaintiff Monaco does not argue that defendant Dave's practices departed even slightly from the standard practice of physicians. He argues only that the conversation between him and defendant Dave did not constitute treatment. He offers no authority for an understanding of treatment that excludes a treating physician's discussion with her patient

about the appropriate terms of the patient's hospitalization, and this Court has not found any. *See Langley v. Coughlin,* 715 F.Supp. 522, 538 (S.D.N.Y.1989) (noting that the professional-judgment rule articulated in *Youngberg* applies to decisions "affecting" treatment or habilitation). Accordingly, I grant defendant Dave's motion for summary judgment dismissing the claim asserted against her.

Motion for Access

Plaintiff Law Clinic moves for an order granting it access to both the emergency rooms and admission units of HHC's and LIHC's psychiatric facilities on the grounds that their denial of access violates both the PAIMI and the First Amendment to the United States Constitution. City Defendants oppose this motion on five grounds: (1) access to hospital facilities is not an authorized method of discovery under the Federal Rules of Civil Procedure; (2) plaintiff Law Clinic seeks only to conduct a fishing expedition aimed at finding an individual with standing and curing a fundamental defect in its claims; (3) the PAIMI does not authorize plaintiff Law Clinic to perform investigations of the type sought; (4) the PAIMI prohibits plaintiff Law Clinic from offering services of the type sought because they would duplicate the work already performed by MHLS; and (5) the First Amendment does not require that attorneys be given access to all unidentified, prospective clients or that patients in HHC hospitals receive more access to counsel than they already receive. Defendant Licht opposes the motion on the basis that plaintiff Law Clinic has not alleged a specific injury on the part of any patient at LICH. Because I have dismissed the claims asserted against defendant Licht, the motion is moot inasmuch as it seeks discovery of LIHC. Accordingly, I will consider the motion only with respect to City Defendants.

***34** While plaintiff Law Clinic has not characterized it as such, its application is essentially a motion to compel discovery under the Federal Rules of Civil Procedure. Rule 26(b) of the Federal Rules of Civil Procedure permits parties to "obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." It further provides that, "[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." Rule 34 specifically allows, as a means of discovery, "entry upon designated land or other property in the possession or control of the party upon whom the request is served." Under Rule 37, where a party "fails to permit inspection as requested, the discovering party may move for an order ... compelling inspection in accordance with the request."

City Defendants have properly interpreted plaintiff's application as a motion to compel discovery under Rule 37. They argue, however, that "access to hospital facilities for the purpose of interviewing patients is not a method of discovery authorized under the Federal Rules of Civil Procedure." (City Defs.' Mem. in Opp. Mot. for Access at 3.) This unsupported contention is, however, contrary to the plain and broad language of the rules cited above.

City Defendants next argue that plaintiff Law Clinic should not be permitted to conduct the discovery it seeks because the discovery is aimed at proving that plaintiff has standing to assert claims on behalf of its constituents. They do not contend that information establishing a plaintiff's standing is excepted from the broad definition of discoverable material outlined in Rule 26(b) of the Federal Rules of Civil Procedure. Nor do the cases interpreting those rules support such a contention. *See, e.g., Inv. Props. Int'l, Ltd.,* 459 F.2d at 708.[33]

The final argument made in opposition to plaintiff Law Clinic's motion is that the PAIMI does not authorize plaintiff to conduct this discovery.[34] The PAIMI expressly empowers it to "pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State" and states that it shall "have access to facilities in the State providing care or treatment." 42 U.S.C. § 10805(a). In spite of this clear mandate, City Defendants contend that the PAIMI implicitly limits access to these facilities to instances in which a PAIMI organization is undertaking another activity that it is authorized to undertake—namely, the "investigat[ion]" of "incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred." 42 U.S.C. § 10805(a)(1)(A). As City Defendants concede, however, the legislative history demonstrates Congress' intention to permit "reasonable access to all inpatients and residents" to enable PAIMI organizations "to inform all such individuals of their rights ... and to explain the nature and scope of [their] authority." S.Rep. No. 100–454 (1988), *reprinted in* 1988 U.S.C .C.A.N. 3217, 3227.

***35** While the statute expresses a preference for pursuing administrative remedies prior to prosecuting litigation where that sequence is "appropriate," 42 U.S.C. § 10807(a), it does not require that PAIMI organizations show that they have attempted and failed to achieve their ends through administrative avenues. Similarly, the PAIMI's concern that the organizations it funds will "supplement" and not "supplant" state efforts "to protect and advocate the rights of individuals with mental illness," *id.* § 10821(a)(1), should not be read too strictly.

MHLS, an entity funded by the State of New York, has a broad mandate to provide legal assistance to "persons alleged to be in need of care and treatment." N.Y. Mental Hyg. Law § 47.01(a). Read too broadly, therefore, the PAIMI's concern with duplicative services or with reductions in state funding would cripple the ability of PAIMI organizations to perform any work on behalf of mentally ill persons living in New York. Moreover, the director of the Commission's advocacy services bureau stated in an affidavit submitted in connection with this motion that, if the present action had not been commenced, "there is a substantial question whether the issues raised by this lawsuit would ever be addressed, particularly in the near future." (Chaine Aff. ¶ 11.)

Accordingly, I grant plaintiff Law Clinic's motion for access to the psychiatric facilities operated by City Defendants.

Class Certification Motions

Rule 23 of the Federal Rules of Civil Procedure sets forth a two-step analysis for determining whether a class action is appropriate. First, the proposed class must meet the four threshold requirements of Rule 23(a): (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately represent the interests of the class. Fed.R.Civ.P. 23(a).

Additionally, the class sought must meet one of the descriptions found in Rule 23(b). Rules 23(b)(1)(B) and 23(b)(2) are the relevant subsections in this action. Rule 23(b)(1)(B) covers cases in which separate actions by or against individual class members would "as a practical matter be dispositive of the interests" of nonparty class members "or substantially impair or impede their ability to protect their interests." Fed.R.Civ.P. 23(b)(1)(B). Rule 23(b)(2) permits class actions for declaratory or injunctive relief where "the party opposing the class has acted or refused to act on grounds generally applicable to the class." Fed.R.Civ.P. 23(b)(2).

The party seeking certification has the burden of demonstrating that all of the requirements of Rule 23 are satisfied. *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 613–14, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *Bishop v. New York City Dep't of Hous. Preservation & Dev.,* 141 F.R.D. 229 (S.D.N.Y.1992). Courts must accept the complaint's allegations as true and should avoid a preliminary inquiry into the merits of the case. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 178, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).[35] While class certification motions may be subject to resolution based on the pleadings, at times it is necessary "to probe behind the pleadings before coming to rest on the certification question." *General Tel. Co. v. Falcon,* 457 U.S. 147, 169, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). Class certification should be granted if the court "is satisfied, after a rigorous analysis," that the requirements of Rule 23 have been satisfied. *Id.* at 161. A class may be decertified if later events demonstrate that the reasons for granting class certification no longer exist or never existed.

Modify Original Plaintiff Class

***36** I previously certified the Original Plaintiff Class[36] and the Original Plaintiff Subclass,[37] both to be represented by plaintiff Monaco. Plaintiffs Monaco and Law Center now seek to represent a class of all individuals who satisfy one or more of three criteria: (1) they are or will be confined to a jail pending a competency determination, (2) they have been or will be found incompetent to stand trial and remanded to an OMH facility pursuant to CPL § 730.40; and/or (3) they are or will be subject to a civil commitment evaluation pursuant to Article 9 of the MHL (the "Proposed Plaintiff Class").[38] They also seek to subdivide this class into two subclasses.

The first proposed subclass is composed of all individuals who have been or will be: (1) charged with a minor felony or misdemeanor; (2) evaluated to determine whether or not they are competent to stand trial; (3) found by court appointed psychiatrists to lack the capacity to stand trial, and awaiting a determination of the competency issue by the local criminal court; and (4) if remanded pursuant to CPL § 730.40, subject to a civil commitment evaluation pursuant to Article 9 of the MHL[39] (the "Incompetency Subclass"). In effect, this subclass is nothing other than the Original Plaintiff Class.[40]

Plaintiffs further seek the certification of what they characterize as "three sub-subclasses." (Pls.' Aff. Supp. Class Cert. Mot. ¶ 10.) As defendants rightly point out, the first sub-subclass is the same as the Incompetency Subclass.[41] Plaintiffs offer no justification for, or even acknowledgment of, their intention to certify a separate sub-subclass whose membership criteria are identical to those of the subclass under which it is subsumed. This Court sees no reason to grant such an application, and it is therefore denied. The second sub-subclass includes all individuals who, in addition to satisfying the four criteria for membership in the Incompetency Subclass, have been or will be confined to a local jail while awaiting a competency determination from the court (the "Incompetency Sub–Subclass"). This sub-subclass is, in effect, the Original Plaintiff Subclass.[42] The third sub-subclass consists of all individuals who, in addition to

satisfying the four criteria for membership in the Incompetency Sub–Subclass, have been or will be (1) found by the court to be incompetent and (2) confined to a jail in New York City or Suffolk County while awaiting transport to a facility designated by the OMH (the "Incompetency Sub–Sub–Subclass"). Because this third sub-subclass is properly subsumed within the second one, it will be designated and treated as a sub-sub-subclass.

The second proposed subclass consists of "[a]ll individuals in the counties of Kings, Queens, Richmond, Nassau, and Suffolk[43] who are subject to civil commitment evaluations pursuant to Mental Hygiene Law article 9 at facilities operated by the Office of Mental Health or other state entities, local governments and private entities" (the "Civil Commitment Subclass").[44] (Pls.' Aff. Supp. Class Cert. Mot. ¶ 12.)

***37** The State Defendants, the City Defendants, and defendant Licht, writing separately, oppose plaintiffs' motion on the ground that plaintiffs lack standing and fail to satisfy the requirements of either Rule 23(a) or Rule 23(b)(2). The City Defendants also argue that the Proposed Plaintiff Class is overbroad.

Proposed Plaintiff Class

The Proposed Plaintiff Class includes anyone who satisfies one or more of three criteria: (1) they are or will be confined to a jail pending a competency determination; (2) they have been or will found incompetent to stand trial and remanded to an OMH facility pursuant to CPL § 730.40; and/or (3) they are or will be subject to a civil commitment evaluation pursuant to Article 9 of the MHL. Given the disparate elements of this class and the disjunctive nature of its definition, defendants rightly challenge it as overbroad. The Second Circuit has cautioned that "[a]n over-broad framing of the class may be so unfair to the absent members as to approach, if not amount to, deprivation of due process." *See Haitian Ctrs. Council, Inc. v. McNary,* 969 F.2d 1326, 1337–38 (2d Cir.1992). While overbroadness itself may justify denial of a motion to certify a class, *see, e.g., Wright v. Giuliani,* No. 99 Civ. 10091, 2000 U.S. Dist. LEXIS 8322, at *29 (S.D.N.Y. June 14, 2000), I need not rest my ruling on this ground because I find that plaintiffs have failed to satisfy the commonality requirement of Rule 23(a)(2).

In response to State Defendants' contention that the members of the Proposed Plaintiff Class have "nothing in common" with one another, plaintiffs allege that "the common denominator among all plaintiff class members, and accordingly, all subclass members, is an evaluation to determine whether an individual satisfies the civil commitment criteria." (Pls.' Reply Mem. in Supp. of Class Cert. at 5.) As plaintiffs concede, however, those who are "confined to a jail pending a competency determination" may never be evaluated for civil commitment. Indeed, they may not even be found incompetent by the local criminal court. Many of those who are civilly committed, moreover, may never have been confined to a jail. Indeed, they may not ever have been charged with a criminal offense. Plaintiffs have failed to show that there exists a single question of law or fact that is common to the class members.

Because they cannot satisfy the requirement of Rule 23(a)(2), their application to certify the Proposed Plaintiff Class is denied. As "each subclass must be treated as a class" for the purposes of certification under Rule 23, however, this denial will not affect the analysis of the parties and the Court with respect to the separate issue of whether to certify the individual subclasses. Fed.R.Civ.P. 23(c)(4)(B).

Incompetency Subclass

Defendants offer no specific arguments in opposition to plaintiffs' request that this Court certify the Incompetency Subclass, the Incompetency Sub–Subclass, and the Incompetency Sub–Sub–Subclass. This Court's analysis in previously certifying the Original Plaintiff Class and the Original Plaintiff Subclass applies with equal force to the issue of whether it should now certify the Incompetency Subclass and the Incompetency Sub–Subclass, respectively. Similarly, this Court's analysis in deciding that plaintiff Monaco may serve as the class representative for both the Original Plaintiff Class and the Original Plaintiff Subclass applies with equal force to the issue of whether he may serve as the class representative for the Incompetency Subclass and the Incompetency Sub–Subclass, respectively. Accordingly, I grant plaintiffs' request to certify, and to have plaintiff Monaco represent, the Incompetency Subclass and the Incompetency Sub–Subclass.

***38** For the same reasons, moreover, the requirements of Rule 23(b) and of subsections (1) and (2) of Rule 23(a) are satisfied with respect to the certification of the proposed Incompetency Sub–Sub–Subclass. The Court will now consider whether plaintiff Law Clinic satisfies the general requirements of class representation and the requirements of subsections (3) and (4) of Rule 23(a) with respect to the Incompetency Subclass, the Incompetency Sub–Subclass, and the Incompetency Sub–Sub–Subclass.[45]

Defendants oppose plaintiff Law Clinic's application to serve as a representative of these classes on two grounds: lack of standing and conflict of interest. Plaintiffs contend

that they have standing to assert claims on behalf of their constituents and that any conflict of interest is insufficiently serious to prevent it from representing these subclasses.

Defendants first argue that plaintiff Law Clinic may not serve as a class representative because it lacks standing. This argument has no merit. In seeking to assert claims on behalf of these class members, plaintiff Law Clinic is not relying on any injuries of its own. Rather, its standing is predicated on the injuries of its constituents based on a theory of associational standing. As explained above, plaintiff Law Clinic may achieve associational standing where its constituents would otherwise have standing to sue in their own right, the interests it seeks to protect are germane to its purpose, and neither the claim asserted nor the relief requested requires the constituents to participate themselves. *Hunt,* 432 U .S. at 343. Plaintiff Law Clinic has alleged injuries in fact to its constituents that are fairly traceable to defendants and capable of being redressed by a favorable outcome.[46] Moreover, as outlined above, the interests it seeks to protect are germane to its purpose, and neither the claim asserted nor the relief requested requires the constituents to participate themselves.

While it is true that the representative of a class "must possess the same interest and suffer the same injury shared by all members of the class he represents," *Schlesinger v. Reservists Committee To Stop The War,* 418 U.S. 208, 216 (1974), many courts have held that organizations with associational standing may serve as class representatives, at least where the underlying purpose of the organization is to represent the interests of the class. *See, e.g., Nestle Ice Cream Co. v. NLRB,* 46 F.3d 578, 586 (6th Cir.1995); *California Rural Legal Assistance, Inc. v. Legal Servs. Corp.,* 917 F.2d 1171, 1175 (9th Cir.1990); *Communities for Equity v. Michigan High Sch. Athl. Ass'n,* 192 F.R.D. 568, 573 (W.D.Mich.1999); *Upper Valley Assoc. for Handicapped Citizens v. Mills,* 168 F.R.D. 167, 171 (D.Vt.1996); *Eastern Paralyzed Veterans Ass'n, Inc. v. Veterans' Admin.,* 762 F.Supp. 539, 547 (S.D.N.Y.1991); *Women's Committee for Equal Employment Opportunity v. Nat'l Broadcasting Co., Inc.,* 71 F.R.D. 666, 668–71 (S.D.N.Y.1976). Such a showing, moreover, is enough to satisfy the typicality requirement of Rule 23(a)(3). *See Communities for Equity,* 192 F.R.D. at 573; *Eastern Paralyzed Veterans Ass'n, Inc.,* 762 F.Supp. at 547.

***39** Defendants' second argument challenges the adequacy of the representation that plaintiff Law Clinic will provide. The Court notes that the experience and resources of plaintiff Law Clinic formed the basis for the Court's earlier determination that plaintiff Monaco would adequately represent the class. Defendants contend, however, that plaintiff Law Clinic may not serve both as counsel and as a class representative because of the conflict of interest that such a situation engenders. Some courts have adopted a *per se* rule barring attorneys from assuming this dual role. *See, e.g., Zylstra v. Safeway Stores, Inc.,* 578 F.2d 102, 104 (5th Cir.1978) ("We are persuaded ... that attorneys who ... themselves are members of the class of plaintiffs should be subject to a per se rule of disqualification under Canon 9 and should not be permitted to serve as counsel for the class."); *Turoff v. May Co.,* 531 F.2d 1357, 1360 (6th Cir.1976) ("For the same individual to attempt representation of the class as plaintiff and as counsel presents an inherent conflict of interests."). The Second Circuit has declined to adopt a *per se* rule prohibiting counsel from representing the class. *See Brick v. CPC International, Inc.,* 547 F.2d 185, 186–87 (2d Cir.1976); *In re AM International, Inc. Sec. Litigation,* 108 F.R.D. 190, 197 (S.D.N.Y.1985) ("[T]he Second Circuit has not adopted a per se rule."). The issue, therefore, "is one within this Court's discretion." *In re AM International, Inc. Sec. Litigation,* 108 F.R.D. at 198. The principal concern expressed by most courts that have confronted this issue is that an attorney's interest in attorneys fees will affect his conduct as a class representative and create an appearance of manufactured litigation. *See, e.g., Turoff,* 531 F.2d at 1360; *Davidson v. Yeshiva University,* 555 F.Supp. 75, 78 (S.D.N.Y.1982). In a case such as this one, aimed primarily at injunctive and declaratory relief,[47] the concern about the distortion that attends the pursuit of money is considerably abated.[48] Indeed, defendants do not even argue that this issue is present here at all. Rather, they argue that the potential need for testimony by plaintiff Law Clinic and the risk that it might be forced to withdraw militate against permitting it to serve as a representative. Plaintiff Law Clinic points out in response that the Code of Professional Responsibility expressly permits an attorney to testify where "disqualification as an advocate would work a substantial hardship on the client because of the distinctive value of the lawyer as counsel in the particular case." D.R. 5–102(A)(4). Moreover, it alleges that there is little reason to believe that it will be required to offer any testimony at all. As the Second Circuit has made clear, a conflict between a class representative and a class member should not prevent certification unless it is "fundamental," and "speculative conflict should be disregarded at the class certification stage." *In re Visa Check/MasterMoney Antitrust Litig. v. Visa, USA Inc.,* 280 F.3d 124, 145 (2d Cir.2001) (citations and quotation marks omitted).

***40** Because I find that plaintiff Law Clinic has adequately shown that it has standing and has satisfied the requirements of subsections (3) and (4) of Rule 23(a), I grant its request to serve as a class representative for the Incompetency Subclass, the Incompetency Sub–Subclass, and the Incompetency Sub–Sub–Subclass.

Civil Commitment Subclass

Defendants object to the certification of the Civil Commitment Subclass on the ground that it is overbroad and includes individuals who (1) are not ultimately committed, (2) consent to their commitments, (3) are properly committed, and (4) have been found dangerous by a state court in the context of a habeas corpus proceeding. However, if this Court assumes the truth of the contentions contained in the complaint, as it must for the purposes of deciding this motion, then all those who are evaluated for civil commitment face a real and immediate threat of injury at that moment in time because, according to plaintiffs, the evaluating physicians can be expected to conduct grossly inadequate examinations.[49]

Generally, courts will find that the numerosity requirement has been satisfied when the class comprises forty or more members. *See Consolidated Rail Corp. v. Town of Hyde Park,* 47 F.3d 473, 483 (2d Cir.1995); *Ansari v. New York Univ.,* 179 F.R.D. 112, 114 (S.D.N.Y.1998). Moreover, they do not require evidence of the exact class size or identity of class members. *See Robidoux v. Celani,* 987 F.2d 931, 935 (2d Cir.1993). They may rely on a "good faith estimate ... when the number of class members is not readily ascertainable." *Jackson v. Foley,* 156 F.R.D. 538, 542 (E.D.N.Y.1994). Plaintiffs estimate that somewhere between one hundred and one hundred fifty individuals are involuntary hospitalized in Suffolk County each month and that approximately three thousand five hundred individuals are involuntarily hospitalized at a single HHC facility each year. Therefore, the Civil Commitment Subclass clearly satisfies the numerosity requirement. *See Goetz v. Crosson,* 728 F.Supp. 995, 1003 (S.D.N.Y.1990) (estimated class of one hundred to two hundred individuals satisfies numerosity requirement).

However, a determination of the practicability of joinder depends not only on numbers, but on the totality of the circumstances of a case. *See Robidoux,* 987 F.2d at 936. Other relevant considerations include "judicial economy arising from the avoidance of a multiplicity of actions, geographic dispersion of class members, financial resources of class members, the ability of claimants to institute individual suits, and requests for prospective injunctive relief which would involve future class members." *Id.* at 936.

Many of these additional factors are present in this case. Consolidating in a single class action what could be thousands of individual suits serves judicial economy. While the potential class members are not particularly dispersed from a geographical perspective, the fact that the class is comprised of individuals whose mental health is sufficiently questionable that they are being evaluated for civil commitment makes individual suits fairly unlikely. Moreover, plaintiffs seek prospective injunctive relief that would involve future class members. I previously certified the Original Plaintiff Class and the Original Plaintiff Subclass under similar circumstances. *See Monaco v. Stone,* 187 F.R.D. 50, 61 (E.D.N.Y.1999).

***41** Rule 23(a)(2) of the Federal Rules of Civil Procedure requires a showing of "questions of law or fact common to the class." Commonality "does not mean that all issues must be identical as to each member, but it does require that plaintiffs identify some unifying thread among the members' claims that warrants class treatment." *Jackson v. Foley,* 156 F.R.D. at 542. "[A] single issue common to all class members is sufficient to satisfy the requirement." *See Lewis v. Gross,* 663 F.Supp. 1164, 1167 (E.D.N.Y.1986). Plaintiffs argue that there are at least two common questions of fact: (1) whether physicians evaluating candidate for civil commitment rest findings of dangerousness on the symptoms of mental illness rather than the well documented criteria for assessing dangerousness; and (2) whether physicians will certify mentally ill persons for hospitalization without determining whether they satisfy the criteria for hospitalization set forth in the statute under which the certification is being conducted. Moreover, they have submitted numerous records and affidavits to buttress their contention that these practices occur on a class-wide basis.

State Defendants argue that commonality is absent because Section 9.27 differs from the other provisions of the MHL authorizing civil commitments in that it does not require a determination of dangerousness. As plaintiffs' specific contentions to the contrary are amply supported by case law, *see Project Release,* 722 F.2d at 971; *Scopes,* 59 A.D.2d at 205–06, 398 N.Y.S.2d 911, this Court declines to delve into the merits of plaintiffs' claims for the purposes of this motion. *See Caridad v. Metro–North Commuter R.R.,* 191 F.3d 283, 291 (2d Cir.1999) ("[A] motion for class certification is not an occasion for examination of the merits of the case."). City Defendants posit that the civil commitments in question involve complex factual determinations that are made by multiple physicians at different facilities. While the specific circumstances "will doubtless vary" from one examination to another, "the common factual issue remains as to whether" the physicians ignore statutory and clinically accepted criteria where they encounter symptoms of mental illness. *Port Authority Police Benevolent Ass'n. v. Port Authority of New York,* 698 F.2d 150, 154 (2d Cir.1983). As the common questions of fact will likely predominate over the individual ones, commonality is satisfied. *See Jackson,* 156 F.R.D. at 542.

Rule 23(a)(3) requires that the representative's claims be typical of the claims of the class members. This requirement "is satisfied when each class member's claim arises from the same course of events, and each class

member makes similar legal arguments to prove the defendant's liability." *Marisol A. v. Giuliani,* 126 F.3d 372, 376 (2d Cir.1997). The requirement ensures that "maintenance of a class action is economical and [that] the named plaintiff's claim and the class claims are so interrelated that the interest of the class members will be fairly and adequately protected in their absence." *Id.* (quoting *General Tel. Co. v. Falcon,* 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)). "Of particular interest to the court is whether the individual[ly] named plaintiffs may be subject to defenses which are unique to their particular factual situation, *e.g.,* claims barred by res judicata" or collateral estoppel. *Swanson v. Perry,* No. 01 CV 0258, 2002 U.S. Dist. LEXIS 3346, at *10 (N.D.Tex. Feb. 28, 2002).

***42** Defendants argue that plaintiffs fail to satisfy the typicality requirement—Monaco, because issue preclusion bars him from asserting that he was not dangerous, and Law Clinic, because it is not a member of the class. None of the parties have briefed the issue of how issue preclusion affects a representative's ability to show typicality. Defendants argue in a conclusory manner that it destroys typicality, and plaintiffs rely on their flawed argument that issue preclusion should not be applied in this instance. Under the case law, the preclusive effect of a prior determination will preclude a party from representing a class unless issue preclusion is not unique to the party, *see Zenith Laboratories, Inc. v. Carter–Wallace, Inc.,* 530 F.2d 508, 512 (3rd Cir.1976); *Blankner v. Chicago,* 504 F.2d 1037 1043 (7th Cir.1974) ("Since the *res judicata* and collateral estoppel issues which have dominated this litigation are unique to [the plaintiff], she is not a proper class representative."), or it does not cripple the party's claims, *Thillens, Inc. v. Community Currency Exchange Ass'n,* 97 F.R.D. 668, 681 (N.D.Ill.1983) (allowing party to represent class where the determination with preclusive effect "would not result in an automatic [adverse] finding"). Plaintiff Monaco's dangerousness appears to be central to the success of his claims. The record, moreover, contains no evidence upon which to conclude that issue preclusion will be raised as a defense against the claims of many members of the class. Plaintiff Monaco has thus failed to meet his burden of demonstrating typicality.

As explained above, plaintiff Law Clinic may achieve typicality by virtue of its associational standing to assert the relevant claims on behalf of its constituents. While plaintiff Monaco may not serve as a representative on his own, his uncontested standing to assert claims against defendant Weinstock[50] provides the basis for the associational standing of plaintiff Law Clinic.[51] In light of plaintiff Law Clinic's supported contention that its representation of the class advances its mission, it has satisfied the requirement of typicality. *See Communities for Equity,* 192 F.R.D. at 573; *Eastern Paralyzed Veterans Ass'n, Inc.,* 762 F.Supp. at 547.

Plaintiff Law Clinic has also carried its burden of demonstrating the adequacy of its representation under Rule 23(a)(4). A representative demonstrates that it will fairly and adequately protect the interests of the class by showing that its attorney is "qualified, experienced and generally able to conduct the proposed litigation" and that it does not have "interests antagonistic to those of the remainder of the class." *Eisen v. Carlisle & Jacquelin,* 391 F.2d 555, 562 (2d Cir.1968). For the same reasons set forth above, the qualifications and experience of plaintiff Law Clinic's director and the shared interests it has with its constituents make it an adequate representative.[52] Accordingly, I find that plaintiff Law Clinic has fulfilled the prerequisites of Rule 23(a).

***43** In addition, plaintiff clearly meets the requirements of Rule 23(b)(2), which permits class actions for declaratory or injunctive relief where "the party opposing the class has acted or refused to act on grounds generally applicable to the class." Plaintiff Law Clinic is challenging practices on the part of defendants that it contends are systemic, and it seeks declaratory and injunctive relief applicable to the Civil Commitment Subclass as a whole. *See Monaco,* 187 F.R.D. at 62.

Defendants argue that their conduct is lawful and that the relief sought will be ineffective. Neither argument alters the result. The former is simply inappropriate in the context of a motion for class certification because it relates directly to the merits of the underlying claims. *See Caridad,* 191 F.3d at 283. The latter imposes a requirement that does not exist in the law. A class representative need only show (1) that "a reasonable plaintiff would bring suit to obtain injunctive relief even if monetary recovery were not possible" and (2) that "injunctive relief would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits." *Dodge v. County of Orange,* 208 F.R.D. 79, 90 (S.D.N.Y.2002). The decision to seek injunctive relief was a reasonable response to perceived systemic problems of the sort alleged. In the event that plaintiffs prevail in this action, moreover, a grant of injunctive relief would be no less reasonable.

Accordingly, I certify a class, to be represented by plaintiff Law Clinic, of all individuals in the counties of Kings, Queens, Richmond, Nassau, and Suffolk who are subject to civil commitment evaluations pursuant to Mental Hygiene Law article 9 at facilities operated by the Office of Mental Health or other state entities, local governments, and private entities.

Defendant Hospital Directors Class

Plaintiffs also seek to certify the putative Defendant Hospital Directors Class, consisting of the directors or chief operating officers of all OMH-licensed in-patient psychiatric facilities that are located in the Eastern District of New York,[53] because this certification represents "the only way to provide relief to all members of the civil commitment subclass." (Pls.' Mem. L. Supp. M. Class Cert. at 9.) Because defendants Stone and Marcos oversee only those facilities operated by OMH and HHC, they argue by way of illustration, that a judgment against them alone would not provide effective relief to all members of the Civil Commitment Subclass.

Plaintiffs also seek to subdivide the Defendant Hospital Directors Class into three subclasses: (1) a subclass of directors or chief operating officers of all state-operated psychiatric centers (the "State Hospital Directors Subclass"), (2) a subclass of directors or chief operating officers of all hospitals that are operated by a governmental entity other than the state and contain psychiatric units (the "Local Hospital Directors Subclass"); and (3) a subclass of directors or chief operating officers of all privately operated hospitals that contain psychiatric units (the "Private Hospital Directors Subclass"). Plaintiffs allege that there are forty[54] facilities in the Eastern District that offer psychiatric care, six of which are state facilities, six of which are facilities operated by local governments, and twenty-eight of which are privately operated.

***44** Plaintiffs have named as representatives of the Defendant Hospital Directors Class and, respectively, as representatives of the three subclasses: (1) defendant Weinstock, the director of PPC, a facility operated by OMH; (2) defendant Kesselman, the director of KCHC's psychiatric unit, a facility operated by HHC; and (3) defendant Licht, the director of LICH, a privately operated facility.

In anticipation of potential objections and in response to actual objections by defendants, plaintiffs have proposed three alternative models. Expecting that defendants would object to the ability of the three subclasses to satisfy the numerosity requirement, plaintiffs have alternatively proposed that no subclass be certified (the "First Alternative Model"). After the City Defendants argued that the Local Hospital Directors Subclass fails to satisfy the numerosity requirement, plaintiffs proposed that only the Private Hospital Directors Subclass be certified (the "Second Alternative Model"). Plaintiffs also propose that, in the event that the Court holds that neither plaintiff has standing to prosecute claims against certain members of the Defendant Hospital Directors Class, the Court certify no subclass and name defendant Weinstock as the sole representative of the Defendant Hospital Directors Class (the "Third Alternative Model").

Plaintiffs propose that the members of the Defendant Hospital Directors Class be afforded three options: (1) to remain members, (2) to exclude themselves from the class but agree to be bound by the judgment of this Court, or (3) to exclude themselves from the class and not agree to be bound by the judgment of this Court. Plaintiffs also move for leave to join any member who chooses the third option.

As the claims asserted against defendant Licht have all been dismissed, the Court need only consider the Third Alternative Model. Whichever model it considers, however, plaintiffs' inability to satisfy the requirements of Rule 23(b) precludes certification.

Although Rule 23 provides for defendant classes as well as plaintiff classes, the certification of defendant classes is relatively rare. *Akerman v. Oryx Communications, Inc.,* 609 F.Supp. 363, 374 (S.D.N.Y.1984). Because the certification of a defendant class raises due process issues not encountered in the context of a plaintiff class, a defendant class generally should not be certified unless each member of the plaintiff class has a claim against each member of the defendant class. *See Monaco,* 187 F.R.D. at 65. Plaintiffs do not contend that this requirement is satisfied in the present case. Instead, they contend that there exists a "juridical link" connecting all the members of the putative class.

"The requirement that each named plaintiff must have a claim against each defendant may be waived where the defendant members are related by a conspiracy or 'juridical link." ' *Thillens, Inc.,* 97 F.R.D. at 675–76. A juridical link is "some legal relationship which relates all defendants in such a way that a single resolution of the dispute is preferred to a multiplicity of similar actions."

***45** Courts have found that such a link exists when all of the members of the defendant class are state officials who are bound to enforce the state statutes or regulations challenged by the plaintiff. *See Monaco,* 187 F.R.D. at 66 (holding that a "juridical link" existed among the members of the Defendant Judges Class because they were all local criminal court judges bound to enforce § 730.40); *Luyando v. Bowen,* 124 F.R.D. 52, 58 (S.D.N.Y.1989) ("All the members of the defendant class are local commissioners bound to enforce the state regulations challenged by plaintiff.")

Courts have also found juridical links where the plaintiffs have been injured by a "unified governmental policy carried out by the individual defendants." *Akerman v. Oryx Communications, Inc.,* 609 F.Supp. 363, 376 (S.D.N.Y.1984). In *Marcera v. Chinlund,* 595 F.2d 1231, 1238–39 (2d Cir.), *vacated on other grounds,* 442 U.S. 915, 99 S.Ct. 2833, 61 L.Ed.2d 281 (1979), the Second Circuit allowed a statewide class of inmates to challenge a uniform ban on contact visits imposed by a class of forty-two defendant county sheriffs. Because the sheriffs

had adopted "identical" policies and had previously brought a joint action to enjoin enforcement of the state-imposed rule mandating contact visitation, the *Marcera* court concluded that the plaintiffs' challenge was no different from a challenge to a statewide statute or regulation. *Marcera,* 595 F.2d at 1238. The *Marcera* court treated the sheriffs as a unified group acting in concert and rendered them subject to suit as a defendant class. In *DeAllaume v. Perales,* 110 F.R.D. 299 (S.D.N.Y.1986), another court held that a "unified policy" linked the members of a proposed defendant class of local commissioners because the commissioners had implemented an illegal policy which was promulgated in the administrative directives issued by the New York State Department of Social Services. *Id.* at 304.

Plaintiffs' effort to invoke this line of precedents is without merit. They do not allege that the members of the putative class are following a state statute, regulation, or formal policy.[55] Indeed, they allege the opposite—flagrant violations of state law. Nor do they contend that the directors of the forty psychiatric facilities crafted a uniform policy. Rather, they contend that individual physicians, without the necessary guidance or training from their supervisors or state officials, make autonomous decisions based on their individual desires to have mentally ill persons receive care and treatment.

Plaintiffs make no other argument that they satisfy the requirement of Rule 23(b). Accordingly, I deny their motion to certify the Defendant Hospital Directors Class and any of its constituent subclasses.

CONCLUSION

For the reasons stated above, City Defendants' motion to dismiss is granted with respect to the claims asserted by plaintiff Monaco but denied with respect to the claims asserted by plaintiff Law Clinic; defendant Licht's motion to dismiss all of the claims asserted against it is granted; and the summary judgment motions of defendants Sarwal, Palma–Acquino, Tuzel, and Dave are all granted.

***46** Plaintiffs' motion for access is granted with respect to the facilities operated by City Defendants. Plaintiffs' motion to modify the Original Plaintiff Class is granted in part and denied in part: (1) their application to certify the Proposed Plaintiff Class is denied; (2) their application to certify and jointly represent the Incompetency Subclass is granted; (3) their application to certify and jointly represent the Incompetency Sub–Subclass is granted; (4) their application to certify, and to have plaintiff Law Clinic represent, the Incompetency Sub–Sub–Subclass is granted; (5) their application to certify the Civil Commitment Subclass is granted, but only plaintiff Law Clinic may serve as its representative. Plaintiffs' motion to certify a Defendant Hospital Directors Class is denied.

The Clerk is directed to furnish a filed copy of the within to all parties and to the magistrate judge.

SO ORDERED.

Footnotes

1 For the purposes of this statute, a "local criminal court" means a district court, the New York City criminal court, a city court, a town court, a village court, a supreme court justice sitting as a local criminal court, or a county judge sitting as a local criminal court. N.Y.Crim. Proc. Law § 10.10(3).

2 This review requirement only applies to individuals committed under CPL § 730.40 and does not apply to individuals committed under the civil commitment provisions of the Mental Hygiene Law.

3 Again, these requirements only apply to individuals committed to psychiatric facilities pursuant to CPL § 730.40 and do not apply to individuals committed to such institutions under the civil commitment provisions of the Mental Hygiene Law.

4 Plaintiff claims that each facility refers to this panel by a different name, such as a forensic cluster, in-house commission, or special release committee.

5 A third physician, who is a member of the hospital's psychiatric staff, must also certify that the admission criteria are met. N.Y. Mental Hyg. Law § 9.27(a).

6 In this case, the need for immediate hospitalization must be confirmed by a hospital physician prior to admission, and, if the hospital wishes to retain the patient involuntarily for more than seventy-two hours, another hospital physician must certify that the patient is in need of involuntary care and treatment. N.Y. Mental Hyg. Law § 9.37(a).

7 In this case, if the hospital wishes to retain the patient involuntarily for more than forty-eight hours, another hospital physician must confirm the initial certification. N.Y. Mental Hyg. Law § 9.39(a).

8 Prior to 1983, physicians could involuntarily hospitalize mentally ill individuals without determining whether these individuals posed a threat to themselves or to others. Federal and state courts have since held that the United States Constitution prohibits the involuntary hospitalization of a nondangerous individual. *See Project Release v. Prevost,* 722 F.2d 960, 971 (2d Cir.1983); *Matter of Harry M.,* 96 A.D.2d 201, 208, 468 N.Y.S.2d 359 (2d Dep't 1983).

9 Plaintiffs allege that significant criteria for assessing a threat of harm to oneself because of suicidal tendencies include: the presence of hallucinations or delusions; previous attempts that could have resulted in death; divorced, separated, or single marital status; hopelessness; impulsiveness; a lack of future plans; signals of intent to die; and a recent loss. Plaintiffs allege that significant criteria for assessing a threat of harm to oneself because of an inability to meet one's essential needs for food, clothing, and shelter include: malnutrition or dehydration; plans to obtain adequate food, clothing, and shelter; serious medical problems left unattended; an understanding of the necessity of meeting one's needs; and personal support or an ability to live independently.

10 Plaintiffs allege that the most important criteria for assessing a threat of harm to others include present substance abuse, a history of harmful behavior, the presence or absence of homicidal ideation, the capacity to cause harm, the presence of certain types of hallucinations, a lack of impulse control, a lack of personal support, non-compliance with clinical intervention, and stress.

11 These initiatives include the creation of financial incentives by, for example, changing Medicaid rate methodologies.

12 In the counties of Nassau and Suffolk, the Nassau County Medical Center, operated by Nassau County, and the Stony Brook University Medical Center, operated by New York State, evaluate nearly all candidates for civil commitment. Depending on such factors as the availability of beds, they will confine individuals to be civilly committed either to their own facilities or to private facilities.

13 As the allegations regarding plaintiff Monaco are not the subject of any motion that this Court must consider solely on the basis of the facts alleged in the complaint, this section contains facts alleged both in the pleadings and in the supplemental materials submitted in connection with the present motions.

14 During that stay, he became familiar with the difference between voluntary and involuntary status and with the duties of a hospital director who receives a request for release from a voluntary patient.

15 In her affidavit, Ms. Sierp denies having any conversation with the staff of PPC during the first week of her son's hospitalization.

16 As the allegations regarding plaintiff Law Clinic are not the subject of any motion that this Court must consider solely on the basis of the facts alleged in the complaint, this section contains facts alleged both in the pleadings and in the supplemental materials submitted in connection with the present motions.

17 The facts contained in this section are taken from the record in this case.

18 Plaintiff Monaco also asserted claims against the Honorable Jonathan Lippman, in his official capacity of Chief Administrative Judge of the State of New York, but he failed to reassert these claims in plaintiffs' third and fourth amended complaints.

19 Plaintiff Monaco neglected to request an award of damages from defendant Packard and added that request in plaintiffs' fourth amended complaint.

20 Plaintiff Monaco also asserted claims against V. Goryalis, PPC's clinical director, and Kathleen Kelly, its executive director, for maintaining unconstitutional practices in violation of 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution. He failed to reassert these claims in plaintiffs' fourth amended complaint.

21 The following facts are drawn from the papers submitted in connection with the present motions.

22 On February 13, 2002, the State Defendants filed a motion to dismiss the claims asserted against them pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted. By letter dated May 2, 2002, and so-ordered on May 7, 2002, they withdrew their motion.

23 City Defendants and defendant Licht moved for a stay of discovery pending a decision on their motions to dismiss. City Defendants also moved to quash a subpoena that plaintiffs had served on a third party. These motions were both filed with Magistrate Judge Robert M. Levy. At Magistrate Levy's request, I heard oral arguments on these motions on December 4, 2002, because they were integrally related to the dismissals motions presently before the Court. At that time, I granted the motion for a stay, and plaintiffs stated that they had withdrawn the subpoena which thereby mooted the motion to quash.

24 MHLS is responsible for providing legal representation to, among others, hospital patients who have been involuntarily

hospitalized. N.Y. Mental Hyg. Law §§ 47.01, 47.03.

25 Plaintiffs have attached the affidavits of the dean of Touro College and the director of the Commission, which state that the clinic is authorized and expected to provide non-litigation services to the mentally ill.

26 City Defendants contend that this client "apparently" retained the services of plaintiff Law Clinic only recently because plaintiff "provides no evidence that it expended any resources involving this issue and City defendants prior to the commencement of this action." (City Defs.' Reply Mem. at 7–8.) In the absence of any contradictory evidence, however, plaintiff Law Clinic's allegations are sufficient to withstand a motion to dismiss under Rule 12(b)(1). See *Lujan,* 504 U.S. at 561 (stating that "plaintiff's mere allegations of injury would be sufficient to overcome a pre-trial motion to dismiss").

27 Lisa Grumet, counsel for the City Defendants, has attached pages from plaintiff Law Clinic's website to a declaration submitted in connection with the present motions. The clinic description contained in the website states that plaintiff Law Clinic "offers students hands-on experience representing mentally ill individuals who are current or former residents of psychiatric facilities" and allows students to "handle cases involving such civil rights issues as forced treatment, abuse and neglect, transfer, civil commitment, and discharge planning." (Grumet Decl. Ex. A.)

28 Although a motion to dismiss for lack of standing is more appropriately made under Rule 12(b)(1), a defendant may also move for dismissal on this ground under Rule 12(b)(6). *See Thompson v. County of Franklin,* 15 F.3d 245, 247–48 (2d Cir.1994).

29 There does appear to be ambiguity in the case law about how the term "constituent" should be defined in the context of PAIMI organizations. The Eleventh Circuit, for instance, referred to a PAIMI's "constituents" in different parts of the same decision, on the one hand, as the State's "individuals with mental illness" or "the class of persons with mental illness whom the [organization] may represent under PAIMI" and, on the other, as the "clients of the [organization]." *Doe,* 175 F.3d at 886–87. In light of the court's careful analogy between the former group and the membership of a conventional organization, its use of the word "clients" should not be read to suggest that it was referring only to those bound to the advocacy organization by a traditional retainer agreement. *See Risinger v. Concannon,* 117 F.Supp.2d 61, 71 (D.Me.2001) (reading *Doe* to mean that a PAIMI has "standing to bring suit on behalf of individuals with mental illness").

30 Plaintiffs attach an affidavit, excerpts from several depositions, and another exhibit to support their allegations. While I do not consider those materials at all in deciding this motion, I note that conversion of this dismissal motion into a motion for summary judgment would not have changed the result. Apart from introducing evidence of comprehensive psychiatric emergency programs, which entail appreciable interactions with OMH and have been instituted at a group of hospitals that does not include LICH, the materials do little more than substantiate the allegations in the complaint, which the Court has assumed to be true for the purposes of deciding this motion.

31 It is well settled that licensure itself represents an insufficient nexus for a finding of state action. *See Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972) (holding that the granting of a liquor license to a private club did not make that club a state actor). Plaintiffs do not dispute this.

32 Plaintiffs do make this allegation with respect to facilities in Nassau and Suffolk counties, but not with respect to those in New York City.

33 Indeed, this Court has expressly permitted plaintiff Law Clinic to conduct precisely the sort of discovery that it now seeks because additional information is necessary to prove its allegations concerning standing. As the Federal Rules of Civil Procedure must be "construed and administered to secure the just, speedy, and inexpensive determination of every action," Fed.R.Civ.P. 1, discovery on the issue of standing is particularly appropriate.

34 City Defendants point out that the MHL requires the Commission to establish procedures for the investigation of patients' complaints and grants contracting organizations access to investigate such complaints. City Defendants have not made, and the Court will therefore not address, the argument that these provisions impose a categorical prohibition on any access that is not initiated by a complaint.

35 State Defendants argue that a 1978 decision by the Supreme Court, which states in a footnote that the "[e]valuation of many of the questions entering into determination of class action questions is intimately involved with the merits of the claims," *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 469 n. 12, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978), stands for the proposition that this Court "may not be able to assume the truth of the allegations in the Complaint." (State Def.'s Mem. L. Opp. M. Class Cert. at 14.) They have offered no legal authority for their tortured interpretation, and this Court declines to accept it.

36 This class, again, contains all individuals who have been or will be: (1) charged with a minor felony or misdemeanor; (2) evaluated to determine whether or not they are competent to stand trial; and (3) found by court appointed psychiatrists to lack the capacity to stand trial, and awaiting a determination of the competency issue by the local criminal court.

37 This subclass, again, contains all individuals who have been or will be: (1) charged with a minor felony or misdemeanor; (2)

evaluated to determine whether or not they are competent to stand trial; (3) found by court appointed psychiatrists to lack the capacity to stand trial, and awaiting a determination of the competency issue by the local criminal court; and (4) confined to a local jail pending a competency determination.

38 In their fourth amended complaint, plaintiffs stated their intention to represent a class with precisely these characteristics. In the initial affidavit and memorandum of law that they submitted in support of their present motion for class certification, however, plaintiffs defined the proposed class to include all the individuals who satisfy at least one of two sets of criteria: (1) they have been (a) charged with a minor felony or misdemeanor, (b) evaluated to assess competency to stand trial, and (c) found by a court to lack competency and remanded to an OMH facility; or (2) they have been subject to evaluation for civil commitment pursuant to Article 9 of the MHL. In their reply memorandum of law, however, plaintiffs returned to their original formulation of the proposed class.

39 This fourth criterion is listed as "subject to a civil commitment evaluation pursuant to [Article 9 of the MHL] upon remand pursuant to [CPL § 730.40]." As evidenced by the confusion expressed in the opposition papers, the phrase "subject to" creates ambiguity as to whether the evaluation is a certainty or a possibility. Because plaintiffs' reply papers state that the term "if remanded" should be placed at the start of the clause to "eliminate any conceivable confusion," the Court has edited the definition accordingly. (Pls.' Reply Mem. L. Supp. Class Cert. M. at 24.)

40 The first three criteria for membership in the proposed subclass are precisely the same as the criteria for membership in the Original Plaintiff Class. The fourth criterion—namely, that the members of this proposed subclass are "subject" to a civil commitment evaluation *if* they are found incompetent and remanded to the custody of the OMH—is the only distinction, and it is one of categorization and not of substance. Anyone who satisfies the first three criteria will be "subject" to a civil commitment evaluation if they are found incompetent and remanded. State Defendants contend that there exist "significant differences," but their only effort to identify a difference—namely, their contention that "[t]he previously certified class contained persons who were awaiting adjudications of competency" while the proposed Incompetency Subclass contains persons "who have been remanded to an OMH facility"—is based on a misunderstanding of the proposed Incompetency Subclass. (State Defs.' Mem. L. Opp. M. Class Cert. at 6.) As explained above, the fourth criterion is only conditional in nature.

41 The proposed sub-subclass would include "all individuals who have been or will be (1) charged with a minor felony or misdemeanor, (2) evaluated to determine whether or not they are competent to stand trial, (3) found by court appointed psychiatrists to lack the capacity to stand trial, and awaiting a determination of the competency issue by the local criminal court, and (4) subject to a civil commitment evaluation pursuant to [Article 9 of the MHL] upon remand pursuant to [CPL § 730.40]." (Pls.' Aff. Supp. Class Cert. Mot. ¶ 10.)

42 Again, the only distinction is that the proposed sub-subclass is defined in such a manner as to include those individuals who are subject to civil commitment evaluation upon remand.

43 Plaintiffs limited the class to individuals located in this geographic area "because a larger class may overextend the resources of plaintiffs' counsel." (Pls.' Aff. Supp. Class Cert. Mot. ¶ 13.)

44 In their fourth amended complaint, plaintiffs state that they seek to divide this subclass into two sub-subclasses—one consisting of individuals evaluated at facilities operated by OMH and the other consisting of individuals evaluated at facilities not operated by OMH. They have made no argument for, or mention of, this subdivision in their moving papers, however, and this Court will not consider that which it has not been asked to consider.

45 Plaintiff Monaco does not seek to represent the Incompetency Sub–Sub–Subclass.

46 The most obvious constituent, of course, is plaintiff Monaco, whose standing to assert these claims has not been challenged.

47 The Court notes that it has dismissed the claims for damages against all defendants other than defendant Packard.

48 Plaintiff Law Clinic points out that PAIMI organizations commonly serve both as counsel for mentally ill clients and as third-party plaintiffs asserting claims under statutes that permit awards of attorneys fees.

49 The only class definition that restricts membership in a manner that addresses defendants' concerns is one that includes only those who are indisputably nondangerous. Defendants fail to explain how such a definition would prove to be of any practical value in this case.

50 Plaintiff Monaco commenced this action on May 5, 1998. He alleges that, because he was a nondangerous, mentally ill individual and because physicians generally commit such individuals as a pretext for treating them, he faced a real and immediate threat of wrongful commitment—a threat which was actually realized when, six days later, physicians under the supervision of defendant Weinstock certified him for civil commitment. Defendants have not disputed the existence of a case or controversy between him and defendant Weinstock.

51 Should plaintiff Law Clinic's allegations of injury traceable to City Defendants prove unsubstantiated after further discovery, plaintiffs may move to designate another representative, and City Defendants may move to decertify the class. *Central Wesleyan College v. W.R. Grace & Co.,* 6 F.3d 177, 186 (4th Cir.1993) (affirming decision to certify a class and to permit the plaintiff to prove its allegations of standing through discovery).

52 The Court notes in this regard that plaintiff Law Clinic deliberately limited the size of the class so as to make its representation manageable.

53 Because state law requires all public and private facilities that psychiatrically hospitalize allegedly mentally ill individuals to be licensed by OMH, this class will include the directors or chief operating officers of all hospitals with psychiatric facilities.

54 Plaintiffs state that they list forty-one facilities, but they in fact list only forty facilities.

55 Likewise, plaintiffs' attempt to place the present motion within the ambit of the holding in *Follette v. Vitanza,* 658 F.Supp. 492 (N.D.N.Y.1987), must fail. That case involved a facial challenge to the wage garnishment procedures outlined in New York's statutory law, and the actions of the defendant class were carried out in accordance with that law (and in contravention of federal law).