UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

JOHN DOE, et al., on behalf of themselves and all others similarly situated, Class Plaintiffs, v. LORI WEAVER, Commissioner of the New Hampshire Department of Health and Human Services, in her official capacity, et al., Defendants	)	No. 1:18-cv-01039-LM

PLAINTIFFS' OPPOSITION TO THE COMMISSIONER'S MOTION TO DISMISS

INTRODUCTION

The Commissioner's years-long resistance to providing meaningful due process—including by filing *five* motions to dismiss Plaintiffs' claims (*see* ECF Nos. 67, 103, 185, 248, 290), needlessly appealing one of the resulting orders to the First Circuit, and appealing a related habeas case to the New Hampshire Supreme Court—highlights the need for continued federal court involvement. While the Commissioner has spent time presenting creative arguments for dismissal, real people continue to be involuntarily detained in hospital emergency departments—sometimes for weeks on end—without meaningful procedural due process. As of September 11, 2023, there were 23 individuals who were detained in hospital emergency departments pursuant to involuntary emergency admission ("IEA") certificates.[1] Those patients' liberty is on the line. The only opportunity many of those patients will have to contest their detention and prove they are not a danger to themselves or others will be a probable cause hearing that a state court judge will conduct *over the phone*. In many cases, the patients will have minimal opportunities to consult with their attorneys, and many of those consultations will happen over the phone. And many patients will not receive any notice of their rights or the allegations that are being used to justify their detention. These IEA hearings do not meet the minimum procedural due process requirements of the Fourteenth Amendment. That is precisely why the federal courts exist and why systemic relief is needed here.

In her latest motion, the Commissioner makes two flawed arguments in support of dismissing this case (and incorporates by reference a third equally flawed argument from the Administrative Judge's motion). First, the Commissioner argues that Plaintiffs lack standing to

[1] *See* N.H. Dep't of Health & Human Servs., *State-Run & Designated Acute Psychiatric Bed Data* (Sept. 11, 2023), https://www.dhhs.nh.gov/about-dhhs/locations-facilities/state-run-and-designated-acute-psychiatric-bed-data.

challenge her policies and practices of denying IEA patients meaningful procedural due process because there is supposedly not a "substantial risk" that the harm will recur. But the harm is recurring every day in New Hampshire. The Commissioner and Administrative Judge have policies and practices that deprive IEA patients of face-to-face hearings, deny them meaningful access to their appointed counsel, and fail to provide them with notice of their rights and the allegations against them. Moreover, there is a substantial risk that the named Plaintiffs will be subjected to the IEA process again in the future, as studies have shown that one of the strongest risk factors for involuntary hospitalization is a prior previous involuntary hospitalization. Thus, Plaintiffs have standing to challenge the Commissioner and Administrative Judge's unconstitutional policies and practices.

Second, the Commissioner contends that IEA patients have no "categorical right" to receive face-to-face hearings under the Fourteenth Amendment. As an initial matter, courts have repeatedly stated—in a variety of contexts—that face-to-face hearings are critical when factfinders must make credibility determinations and assess witnesses' demeanor. That is what is supposed to occur in the probable cause hearings at issue here. A judge must assess whether the patient is "in such mental condition as a result of mental illness to pose a likelihood of danger to himself or others." RSA 135-C:27. Judges cannot meaningfully make those assessments without seeing IEA patients, observing how they act and look, and giving IEA patients an opportunity to speak for themselves about their own mental states. Moreover, despite the Commissioner's claims that these issues must be resolved on a case-by-case basis, she fails to cite any relevant authority supporting her position in any remotely similar contexts. She also ignores the practical futility of any case-by-case approach where Defendants have ***blanket*** policies of denying video or in-person hearings

to broad categories of IEA patients. And federal courts regularly grant relief in cases where state and local governments systematically deny individuals meaningful procedural due process.

The Court should deny the Commissioner's motion to dismiss and allow this case to proceed toward a long overdue resolution.

BACKGROUND

Under New Hampshire law, a person who may be experiencing a mental health emergency can be involuntarily admitted to the state mental health services system for evaluation and treatment. *See* RSA 135-C:27–33. Historically, when a physician or nurse practitioner in an emergency department believed that a patient was in need of emergency mental health treatment, the patient was immediately transferred to one of several specialized mental health facilities in New Hampshire known as Designated Receiving Facilities ("DRFs"). Second Am. Compl. ("SAC") ¶ 5. The physician or nurse practitioner would initiate the IEA process by completing a certificate that described the patient's condition and the reasons the medical provider believed that involuntary emergency treatment was necessary. *See* RSA 135-C:28, I. Once the certificate was completed, a law enforcement officer would immediately transport the patient to a DRF for further evaluation and, if necessary, appropriate mental health care. *See* RSA 135-C:29, I. At the DRF, the patient would be given notice of the patient's rights, access to counsel, and an in-person probable cause hearing before the Circuit Court within three days to assess whether the patient posed "a likelihood of danger to himself or others." *See* RSA 135-C:30–C:31.

Since at least 2015, however, there has been a statewide shortage of beds at DRFs. As a result, when hospital personnel complete an IEA certificate, the patient is no longer immediately transferred to a DRF and given a hearing. SAC ¶ 6. Instead, the Commissioner has responded to this shortage by relying on hospitals to involuntarily detain patients in emergency departments for

extended periods of time while they await transfer to receiving facilities. *Id.* This practice has come to be known as "psychiatric boarding." *Id.*

As the named Plaintiffs' experiences illustrate, individuals are often held for many days or weeks while awaiting transfer to DRFs. *Id.* ¶ 7. For example, one of the named Plaintiffs was involuntary detained in an emergency department for 27 days without receiving any procedural due process. *Id.* Boarding patients in emergency departments for days or weeks at a time is highly detrimental to patients' mental health and well-being and extremely counterproductive from a medical perspective. *Id.* By comparison, the City of Milwaukee declared a psychiatric boarding crisis—and mobilized to address the issue—when patients in emergency departments were involuntarily detained in emergency departments for periods ranging from three to thirty-six hours. *Id.* But patients in New Hampshire are frequently detained in emergency departments for drastically longer periods of time—often many days and even weeks—without any meaningful due process or mental health care. *Id.*

Before May 11, 2021, the Commissioner incorrectly interpreted RSA 135-C:31 to require procedural due process only after a patient is transferred to a DRF. *Id.* ¶ 10. The end result of this regime was that, while these patients were involuntarily detained in hospital emergency departments for days or weeks awaiting admission to a DRF, they received no notice of their rights or the allegations against them, no attorney, no hearing, and no opportunity to be heard or contest their detention. *Id.* On May 11, 2021, citing this Court's April 30, 2020 decision,[2] the New Hampshire Supreme Court rejected the Commissioner's interpretation of state law and held that the plain and ordinary meaning of RSA 135-C:27–33, read in light of the purpose of RSA Chapter

[2] *See Doe v. Comm'r*, No. 18-cv-1039-JD, 2020 U.S. Dist. LEXIS 75759, at *27 (D.N.H. Apr. 30, 2020) (ECF No. 147).

135-C and in the context of the IEA process as a whole, requires the Commissioner to provide a probable cause hearing to a person detained under RSA 135-C:27–33 within three days of the completion of the person's IEA certificate. *See Jane Doe v. Comm'r of N.H. Dep't of Health & Human Servs.*, 261 A.3d 968, 978 (N.H. 2021).

The Commissioner and Administrative Judge changed their policies and practices in response to the New Hampshire Supreme Court's decision, but they continue to deny patients meaningful procedural due process. SAC ¶ 12. Some ten months later, on or around March 16, 2022, the Commissioner and Administrative Judge adopted a policy and practice of providing hearings within three days of the completion of a patient's IEA certificate, but they began providing those hearings *only by telephone* for most patients who were involuntarily detained in emergency departments and DRFs. *Id.* ¶ 13. The Commissioner and Administrative Judge adopted this policy and practice in coordination with one another. *Id.* At this point, the Commissioner and Administrative Judge hold probable cause hearings exclusively by telephone when patients are detained in almost all hospital emergency departments and when they are detained in the largest DRF in the state—New Hampshire Hospital. *Id.* ¶¶ 158–75.

Compounding this problem, the Commissioner and Administrative Judge have also failed to ensure that patients receive timely notice of their rights and the allegations against them. *Id.* ¶ 16. Many patients receive no notice of their rights until immediately before—or even during—their probable cause hearings. *Id.* ¶ 179. As several of the Plaintiffs' stories demonstrate, patients are also regularly denied access to the IEA petitions that have been filed against them, which specify the allegations that have been used to justify their involuntary detention. *Id.* ¶¶ 86–87, 100–01, 179.

In tandem with the transition to telephonic hearings, the Commissioner and Administrative Judge also revised their policies and procedures for processing and scheduling IEA cases. All IEA petitions from across the state are now centrally processed in Concord, regardless of the location of the hospital in which the patient is detained. *Id.* ¶¶ 17, 188. The centralization of IEA proceedings has had the practical effect of denying many patients full access to counsel by preventing patients and their attorneys from meeting face-to-face before, during, and after hearings. *Id.* ¶ 190. The attorneys who represent patients at probable cause hearings are often scheduled for multiple hearings representing multiple patients who are in different locations across the state in a single day, which significantly limits the attorneys' ability to consult with their clients. *Id.* While attorneys spend much of their time driving to and from locations around the state to maximize in-person meetings and representation, the vast majority of hearings continue to be telephonic without the possibility for the attorneys to meet with and attend hearings in person with their clients. *Id.*

LEGAL STANDARD

When deciding a Rule 12(b)(6) motion, a court assesses whether the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The court must "accept the truth of all well-pleaded facts and draw all reasonable inferences therefrom in the pleader's favor." *García-Catalán v. United States*, 734 F.3d 100, 102 (1st Cir. 2013) (citation omitted). The plausibility requirement "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" of illegal conduct. *Twombly*, 550 U.S. at 556. In addition, where, as here, a defendant challenges the sufficiency of a "plaintiff's version of jurisdictionally-significant facts," this Court "must credit the plaintiff's well-pleaded

factual allegations . . . , draw all reasonable inferences from them in [the plaintiff's] favor, and dispose of the challenge accordingly." *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363–64 (1st Cir. 2001). This is the same standard "as is applied on a Rule 12(b)(6) motion." *Sevigny v. United States*, 2014 WL 3573566, at *3 (D.N.H. July 21, 2014) (citation omitted).

ARGUMENT

I. Plaintiffs Have Article III Standing Because There Is a Substantial Risk They Will Be Wronged Again

To establish Article III standing, a plaintiff need only show: (i) an "injury in fact" that is "actual or imminent, not conjectural or hypothetical"; (ii) a "causal connection between the injury" and the defendant's conduct; and (iii) a likelihood that a favorable decision will "redress[]" the injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotations and citation omitted). To seek an injunction, a plaintiff must show "a sufficient likelihood that he will again be wronged in a similar way." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). This requires either a "substantial risk that the harm will occur" or a threat that is "certainly impending." *Reddy v. Foster*, 845 F.3d 493, 500 (1st Cir. 2017) (internal quotations and citation omitted). The Commissioner does not contest past injury or causality. Instead, the Commissioner's standing challenge focuses on the first prong—whether there is a "substantial risk" or "certainly impending" threat that Plaintiffs' alleged injuries will recur.

In this case, there is a substantial risk Plaintiffs' injuries will recur because Defendants continue to maintain policies and practices that routinely fail to provide IEA patients with face-to-face probable cause hearings, timely access to counsel, notice of their rights, and notice of the charges against them. *See, e.g.*, SAC ¶¶ 13, 15–17, 115, 161, 214. Indeed, the Commissioner's standing arguments are yet another effort to skirt DHHS's obligations. One judge has explained the common handling of civil rights cases as follows: "So no damages for past injury, due to

immunity—and no injunction to stop future injury, due to mootness. Heads I win, tails you lose." *Tucker v. Gaddis*, 40 F.4th 289, 293 (5th Cir. 2022) (Ho, J., concurring). As a result, the government often is able to "avoid being held accountable in the courts." *Id.* The Commissioner's approach in this case embodies this concern. Having successfully prevented Plaintiffs from including claims for monetary damages in their Second Amended Complaint under the ADA and Section 504 of the Rehabilitation Act, *see* ECF No. 278, the Commissioner now seeks dismissal of Plaintiffs' Fourteenth Amendment procedural due process claim on the basis that—even though she does not dispute the factual bases of these alleged violations—Plaintiffs supposedly lack standing. Nonetheless, for the reasons explained below, the Second Amended Complaint meets the lenient standard of "establishing sufficient factual matter to plausibly demonstrate . . . standing to bring the action." *See Hochendoner v. Genzyme Corp*., 823 F.3d 724, 731 (1st Cir. 2016).

A. Defendants' Policies and Practices Remain in Place

"The rationale for permitting injunctive or declaratory relief to abate a pervasive practice or official policy is that, where a past injury is alleged to be due to the practice or policy, there is a substantial likelihood that the injury will recur." *Drewniak v. U.S. Customs & Border Prot.*, 554 F. Supp. 3d 348, 364 (D.N.H. 2021). In this case, there is no dispute that "[t]he offending policy remains firmly in place." *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 306 (1st Cir. 2003). As the Second Amended Complaint explains, the Commissioner and Administrative Judge have "adopted a policy and practice of providing most probable cause hearings telephonically." SAC ¶ 15; *see also, e.g.*, *id.* ¶¶ 13, 156, 161. "In these sensitive settings where judges must assess the extent to which patients' alleged mental health conditions present a risk that the patients might be a danger to themselves or others, a telephonic hearing fails to provide meaningful and adequate due process." *Id.* ¶ 15. "The Commissioner and Administrative Judge have also shifted to having Circuit Court Judges conduct all telephonic and video hearings from a centralized location in

Concord, a policy that often prevents patients from meeting with their attorneys in person before, during, and after the hearings." *Id.* ¶ 17; *see, e.g.*, *id.* ¶ 214. Thus, this is not a case where the "harmful conduct may be too speculative to support standing." *Friends of the Earth, Inc. v. Laidlaw Env't. Servs. (TOC), Inc*., 528 U.S. 167, 190 (2000). Rather, the Commissioner and Administrative Judge are failing to provide meaningful due process to IEA patients every day.

Plaintiffs have standing to seek injunctive relief because their "alleged future injury does not depend upon defendants' future illegal conduct untethered to a pattern of past practice . . . , but rather upon recurring conduct authorized by official policies." *Alasaad v. Nielsen*, 2018 WL 2170323, at *10 (D. Mass. May 9, 2018). Indeed, courts routinely recognize that plaintiffs have standing to challenge government policies and practices that remain in effect and continue to harm members of the public. *See, e.g.*, *Drewniak*, 554 F. Supp. 3d at 364 (denying motion contesting standing where defendants "fail to meaningfully contest Drewniak's allegation that CBP and Garcia have a policy or practice of conducting traffic checkpoints in New Hampshire"); *Mack v. Suffolk County*, 191 F.R.D. 16, 21 (D. Mass. 2000) (similar for strip searches); *Petrello v. City of Manchester*, No. 16-cv-008-LM, 2017 U.S. Dist. LEXIS 144793, at *65 (D.N.H. Sep. 7, 2017) (granting injunction against a police department's practice of an ordinance restricting panhandling).

Past enforcement also supports standing. Here, "the frequency of alleged injuries inflicted by the practices at issue . . . creates a likelihood of future injury sufficient to address any standing concerns." *Floyd v. City of New York*, 283 F.R.D. 153, 170 (S.D.N.Y. 2012); *see also Drewniak*, 554 F. Supp. 3d at 365 ("The checkpoints' recurring nature supports the existence of an official practice or policy.") (citation omitted). Here, "the Commissioner has involuntarily detained thousands of people in hospital emergency departments and Designated Receiving Facilities . . .

in New Hampshire for days or weeks on end." SAC ¶ 1.[3] New Hampshire Circuit Court Judges assess whether patients are a danger to themselves or others "by telephone every day in New Hampshire and, in doing so, deprive well over a thousand individuals per year of their liberty." *Id.* ¶ 14. Plaintiffs H.M. and J.S. were subjected to those practices as part of the new system Defendants have developed. *See id.* ¶¶ 19, 86, 89, 104. And the Commissioner and Administrative Judge have been denying IEA patients face-to-face hearings since at least March 2022. *See id.* ¶¶ 13, 15, 17, 156, 161, 214.

Under these circumstances, the Commissioner's reliance on *Lyons* is misplaced. "[I]n *Lyons*, there was no proof of a pattern of illegality as the police had discretion to decide if they were going to apply a choke hold and there was no formal policy which sanctioned the application of the choke hold." *Charlotte E. ex rel. Deshawn E. v. Safir*, 156 F.3d 340, 344–45 (2d Cir. 1998). By contrast, in this case, Plaintiffs "have standing to seek injunctive relief" because they challenge "officially endorsed policies" that the Commissioner and Administrative Judge have "ordered or authorized." *See id.* ; *see also La Duke v. Nelson*, 762 F.2d 1318, 1324 (9th Cir. 1985) ("The Supreme Court has repeatedly upheld the appropriateness of federal injunctive relief to combat a 'pattern' of illicit law enforcement behavior."), *amended on other grounds*, 796 F.2d 309 (9th Cir. 1986); *Drewniak*, 554 F. Supp. 3d at 364 (similar).

B. Plaintiffs Adequately Allege a Substantial Risk They Will Be Exposed to the Challenged Policies and Practices Again

Plaintiffs also face a substantial risk of future exposure to the challenged policies and practices. Although "[p]ast exposure to illegal conduct does not in itself show a present case or

[3] *See* Sruthi Gopalakrishnan, *Despite New Process, Mental Health Emergency Hearings Remain Flawed*, CONCORD MONITOR (Sept. 9, 2023), https://articles.concordmonitor.com/Mental-Health-System-New-Hampshire-51535899 ("Between March 21, 2022 and Aug. 18, 2023, a total of 3,488 emergency admission hearings were held for patients outside of a mental health facility.").

controversy regarding injunctive relief," past wrongs are "evidence bearing on whether there is a real and immediate threat of repeated injury." *Lyons*, 461 U.S. at 102 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974)). Plaintiffs' previous exposure to unconstitutional practices—combined with their continued risk of being subjected to IEA petitions in the future—is sufficient to establish standing at the pleadings stage. *See, e.g.*, *Alasaad*, 2018 WL 2170323, at *10 ("Plaintiffs' subjection to prior searches further bolsters their allegations of likely future searches.").

Because all six named Plaintiffs have been subjected to IEA petitions, there is a substantial risk that "a health care professional or law enforcement officer would involuntarily detain [them] under an IEA petition in the future due to the stigma that exists with respect to those who have or are perceived to have experienced a mental health crisis." SAC ¶¶ 42, 54, 66, 93, 108. "When someone has been the subject of an IEA certificate, family members, law enforcement, and health care professionals are far more likely to inaccurately assume that the person's behavior indicates that the person is experiencing a mental condition as a result of mental illness that creates a potentially serious likelihood of danger to himself or to others." *Id.* ¶ 197. Indeed, although it has been several years since his last IEA petition, Scott Johnstone has "been the subject of a Petition and Certificate for Involuntary Admission three times." *Id.* ¶ 78. Furthermore, the New Hampshire Circuit Court already concluded that J.S., H.M., and Mr. Johnstone were a danger to themselves or others as a result of a mental illness under RSA 135-C:27. *Id.* ¶¶ 75, 92, 93, 105, 108. And these individuals are at an increased risk of involuntary detention because of their mental health diagnoses. J.S. has been diagnosed with bipolar II disorder, *id.* ¶ 107, H.M. has been diagnosed with depression, *id.* ¶ 92, and Mr. Johnstone has been diagnosed with bipolar I disorder, *id.* ¶ 77.

While the Commissioner dismisses these allegations as "conclusory," Comm'r Mem. 10–11, Plaintiffs need only plead "enough fact to raise a reasonable expectation that discovery will reveal evidence" supporting their claims. *Twombly*, 550 U.S. at 556; *see also Valentin*, 254 F.3d at 363 (courts "must credit the plaintiff's well-pleaded factual allegations" and "draw all reasonable inferences from them in [the plaintiff's] favor"). Plaintiffs' allegations of the risks they face due to their histories with the IEA system and their mental health diagnoses meet that threshold. Moreover, discovery will bolster Plaintiffs' allegations that they face a substantial risk of being subjected to the IEA process in the future. As explained in a survey of 77 scientific studies from 22 countries, including the United States, "the risk factors associated most strongly with involuntary hospitalisation for psychiatric care are a diagnosis of a psychotic disorder *and previous involuntary hospitalisation*."[4] This scientific conclusion is an obvious one: if a patient has been hospitalized for a mental health condition in the past, it is more likely to happen again in the future. And under similar circumstances, another court held that a patient was "likely to be hospitalized involuntarily again" because she "has a persistent mental illness, which has already required her hospitalization once as of the time the amended complaint was filed, indicating that she posed a risk of harm to herself or others." *Mental Disability L. Clinic v. Hogan*, 2008 WL 4104460, at *8 (E.D.N.Y. Aug. 28, 2008).

The Commissioner criticizes Plaintiffs for using the phrase "reasonably likely" when describing the risk that they will be subjected to IEA proceedings again in the future. Comm'r Mem. 11. But regardless of the precise labels in their pleading, Plaintiffs have adequately alleged that they face a substantial risk of future injury. *See, e.g.*, SAC ¶¶ 93, 108. And Plaintiffs need

[4] *See* Susan Walker, et al., *Clinical and Social Factors Associated with Increased Risk for Involuntary Psychiatric Hospitalisation: A Systematic Review, Meta-analysis, and Narrative Synthesis*, 6 LANCET PSYCHIATRY 1039, 1049 (Dec. 2019), https://www.thelancet.com/action/showPdf?pii=S2215-0366%2819%2930406-7 (emphasis added).

not prove that they "inevitably will suffer" future injury. *Dimarzo v. Cahill*, 575 F.2d 15, 18 (1st Cir. 1978); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013) ("Our cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about."). A defendant cannot "recast the imminence requirement as one of near certainty." *See Massachusetts v. U.S. Dep't of Health & Hum. Servs.*, 923 F.3d 209, 225 (1st Cir. 2019).

The Commissioner also argues that Plaintiffs lack standing because J.S. and H.M. "do not live in New Hampshire" and supposedly have not adequately alleged there is a substantial risk "they will be subject to IEA proceedings" when they visit New Hampshire. Comm'r Mem. 12 (citation omitted). But courts have held that plaintiffs have standing based on allegations that they regularly travel to places where they are likely to be exposed to unconstitutional policies or practices. *See, e.g.*, *Drewniak*, 554 F. Supp. 3d at 365–66 (plaintiff "has sufficiently demonstrated standing at the pleading stage," in part, because "[h]e has plausibly alleged that he travels along I-93 in Woodstock on a frequent basis"); *Alasaad*, 2018 WL 2170323, at *10–11 (plaintiffs adequately alleged a realistic risk of future exposure to ICE's policy of searching and confiscating electronic devices at ports of entry where they alleged they "regularly travel outside the U.S." and "will continue to do so in the future"); *Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 993–94 (9th Cir. 2012) (plaintiff sufficiently pleaded standing to challenge border screening policies by alleging that she intended to travel to the United States). J.S. lives in Massachusetts, and "travels in New Hampshire several times a year." *Id.* ¶¶ 94, 107–08. H.M. lived in New Hampshire when she was subjected to this IEA process, and although she has since moved to Puerto Rico, H.M. "plans on visiting New Hampshire several times per year to visit family (with these trips potentially lasting as long as a week or a month)." *Id.* ¶¶ 79, 92–93. Because they have been subjected to

IEA petitions in New Hampshire in the past, J.S. and H.M. face a realistic risk that they will be subjected to the IEA process when they visit in the future. SAC ¶¶ 93, 108.

Many of the Commissioner's standing arguments are premised on her contention that Plaintiffs' future exposure to the unconstitutional policies and practices is supposedly speculative. *See* Commissioner's Mem. 9–10, 14. But thousands of IEA patients have been harmed over the past several years and many more will be harmed in the future because of Defendants' policies and practices. SAC ¶¶ 1, 14. With thousands of IEA patients each year, no speculation is required. *See id.* Indeed, Plaintiffs' allegations are no more speculative than the plaintiffs' Fourth Amendment claim challenging border patrol checkpoints in *Drewniak*. In that case, it was unclear whether the U.S. Border Patrol would set up checkpoints in the future, but plaintiffs nonetheless were able to establish standing because the agency had not "abandoned the use of checkpoints as an enforcement tool." *See Drewniak*, 554 F. Supp. 3d at 365. This case is even stronger than *Drewniak* given that the challenged practices recur every day and will recur tomorrow. There is no speculation, but rather a "persistent pattern" of violating patients' constitutional rights. *See Allee v. Medrano*, 416 U.S. 802, 815 (1974). Plaintiffs' prior involvement in the IEA system makes them likely to be subjected to IEA petitions in the future. And when that occurs, it is not speculative that they will have telephonic hearings in almost every hospital emergency department in New Hampshire or in the state's largest DRF—New Hampshire Hospital. *See also Berner v. Delahanty*, 129 F.3d 20, 24 (1st Cir. 1997) (standing existed where plaintiff was "a member of the Maine bar and a full-time practicing lawyer who regularly handles litigation.").

Moreover, unlike *Clapper*, where human rights organizations did not have standing to challenge a federal statute authorizing surveillance of foreign individuals with whom the organizations might communicate, the harm alleged here "does not depend on the government

enforcing a law against another person with whom the plaintiffs might potentially interact." *Martin v. Evans*, 241 F. Supp. 3d 276, 283 (D. Mass. 2017) (emphasis added) (distinguishing *Clapper*). In this case, it is Plaintiffs—and thousands of others—who are likely to have these unconstitutional policies and practices enforced *against them*. The Commissioner's motion ignores, without disputing, this harm imposed on these hundreds, if not thousands, of patients.

The Commissioner further argues that Plaintiffs' "allegations of future harm" are based on the "highly attenuated" possibility that Plaintiffs will "engage in conduct" that will prompt others to initiate IEA proceedings and result in findings of probable cause to detain them. Comm'r Mem. 9–10. But the Commissioner overlooks the realities that patients with mental health diagnoses face. This is not the type of case where Plaintiffs can simply avoid future injury by obeying the law and avoiding conflict with police.[5] As one court has explained, "the threat of future harm to [people with mental health conditions] is not dependent on their conscious decisions to purposefully engage in [an] . . . activity" that may result in detention. *United States v. County of Los Angeles*, 2016 WL 2885855, at *4 (C.D. Cal. May 17, 2016). Rather, "the very nature" of their mental health conditions and "concomitant symptoms and behaviors, which may be aggravated by the types of practices challenged here, are likely to lead to repeated [detentions] and exposure to the harms alleged." *Id.*

Given their prior involuntary hospitalizations, Plaintiffs face a substantial risk of being subjected to IEA petitions and thus subjected to the Commissioner and Administrative Judge's

[5] *See, e.g.*, *La Duke*, 762 F.2d at 1326 ("Unlike *Lyons*, the members of plaintiff class do not have to induce a police encounter before the possibility of injury can occur."); *Hernandez v. Cremer*, 913 F.2d 230, 234–35 (5th Cir. 1990) (similar); *Smith v. City of Chicago*, 143 F. Supp. 3d 741, 752 (N.D. Ill. 2015) (similar); *Cherri v. Mueller*, 951 F. Supp. 2d 918, 930 (E.D. Mich. 2013) (similar); *Roe v. City of New York*, 151 F. Supp. 2d 495, 503 (S.D.N.Y. 2001) (similar); *Nat'l Cong. for Puerto Rican Rights by Perez v. City of New York*, 75 F. Supp. 2d 154, 161 (S.D.N.Y. 1999) (similar).

unconstitutional policies and practices in the future. Accordingly, Plaintiffs have Article III standing to challenge those policies and practices.

II. The Court Should Not Abstain Under *Younger*

The Commissioner joins the Administrative Judge's arguments in favor of dismissing this case under *Younger v. Harris*, 401 U.S. 37 (1971). For the reasons set forth in Plaintiffs' opposition to the Administrative Judge's motion to dismiss, the Court should not abstain from hearing this case under *Younger*.

III. Plaintiffs Have Adequately Alleged Procedural Due Process Violations Under the Fourteenth Amendment

In assessing procedural due process claims, courts weigh the following factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). In this case, IEA patients have a strong liberty interest in remaining free from unjustified involuntary detention for mental health treatment. The Commissioner and Administrative Judge have adopted policies and practices that pose significant risks of erroneously depriving IEA patients of their liberty. Indeed, Defendants categorically deny large categories of IEA patients the opportunity to participate in face-to-face hearings where they can contest their involuntary detention. And Defendants have not articulated any government interest that justifies denying patients the opportunity to participate in face-to-face hearings. Thus, the Commissioner and Administrative Judge's policies and practices violate the procedural due process protections of the Fourteenth Amendment.

A. Defendants' Policies and Practices of Denying In-person or Video Hearings Violate Patients' Procedural Due Process Rights

"[C]ommitment to a mental hospital produces a massive curtailment of liberty" that "requires due process protection." *Vitek v. Jones*, 445 U.S. 480, 491–492 (1980) (cleaned up); *Addington v. Texas*, 441 U.S. 418, 425 (1979); *Zinermon v. Burch,* 494 U.S. 113, 131 (1990); *Rockwell v. Cape Cod Hosp.*, 26 F.3d 254, 256 (1st Cir. 1994). Such protection includes the opportunity to be heard "at a meaningful time and in a ***meaningful manner***." *See Armstrong v. Manzo*, 380 U. S. 545, 552 (1965) (emphasis added). Yet the Commissioner and Administrative Judge's policies and practices of providing probable cause hearings by telephone and systematically denying patients' requests for hearings by videoconference deprive patients of constitutionally adequate procedural due process. SAC ¶ 213. The Commissioner fails to acknowledge—much less refute—the risks her policies and practices pose to patients' liberty.

Different forms of participation in a hearing—in-person, video, and teleconference—provide varied means of exchanging information and developing a record for decision-making. *See United States v. Yates*, 438 F.3d 1307, 1315 (11th Cir. 2006) ("The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation."). As the New Hampshire Supreme Court has explained, "[u]sing a telephone connection . . . may prevent [a] party from hearing witnesses or the proceedings, and may place greater burdens on the party's counsel, affecting counsel's ability to represent the client's interests." *In re Baby K.*, 722 A.2d 470, 473 (N.H. 1998). "As a result, the party may be unable to respond effectively to evidence presented in the proceeding. While the proceeding occurs, the telephonically connected party is practically excluded from any meaningful participation." *Id.* Thus, telephonic, video, and in-person hearings are not constitutionally equivalent. *See, e.g.*, *Yates*, 438 F.3d at 1315 ("The Sixth Amendment's guarantee of the right to confront one's accuser is most certainly compromised

when the confrontation occurs through an electronic medium."); *EF Int'l Language Schs., Inc. v. NLRB*, 673 F. App'x 1, 3–4 (D.C. Cir. 2017) (finding videoconferencing "obviated" due process concerns regarding telephonic participation because video testimony "enabled observation of the witness at all material times.").

Courts have recognized the value of face-to-face participation in the context of civil commitment where a person's liberty is on the line. *See Vitek*, 445 U.S. at 494–95; *United States v. Frierson*, 208 F.3d 282, 287 (1st Cir. 2000). In *Vitek*, the Supreme Court held that "appropriate procedural safeguards" during civil commitment proceedings included "an opportunity to be heard *in person* and to present documentary evidence." 445 U.S. at 494–95 (emphasis added). And in *Frierson*, the First Circuit held that a federal prison inmate had a right to an in-person hearing on his involuntary commitment to a medical facility, even though the statute at issue did not expressly require his physical presence. 208 F.3d at 287. Finding telephonic participation did not provide him with the requisite opportunity to participate, the court concluded that he "*should have been brought to court*, or if the judge felt that it was unsafe . . . . , the court should have traveled to the federal medical center." *Id.* (emphasis added). Such participation "assist[s] the judge in reaching the correct decision . . . and, more generally, reaffirms the dignity of the individual." *Id.* at 288.

Indeed, where an individual's liberty is at stake or credibility is at issue, courts regularly require face-to-face testimony to satisfy due process requirements. *See, e.g.*, *State v. LaPlaca*, 27 A.3d 719, 723 (N.H. 2011) (a defendant has a due process right "to be heard in person" where the state seeks to revoke a suspended sentence); *Yates*, 438 F.3d at 1315 (videoconference testimony and cross-examination of witness violated defendant's Sixth Amendment right to confront one's accuser in-person); *Terrell v. United States*, 2007 WL 2903202, at *8 (E.D. Mich. Sept. 30, 2007) (videoconference was inadequate to satisfy due process given the substantial liberty interest in

early release on parole), *aff'd*, 564 F.3d 442 (6th Cir. 2009); *Missouri v. Hudson*, 607 S.W.3d 756, 758 (Mo. Ct. App. 2020) ("[A] defendant has a due process right to be personally present at the time of sentencing and to be heard on the pronouncement" (internal quotation marks and citation omitted)); *Whitesides v. Alaska*, 20 P.3d 1130, 1139 (Alaska 2001) (telephonic driver's license revocation hearings violate due process where the drivers' credibility is material); *see also United States v. Navarro*, 169 F.3d 228, 239 (5th Cir. 1999) ("Sentencing a defendant by video conferencing creates the risk of a disconnect that can occur because [t]he immediacy of a living person is lost." (internal quotations and citation omitted)).[6]

The opportunity to observe the demeanor of an individual while testifying is an essential tool in assessing credibility. *See United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 339 (1952) ("Face to face with living witnesses, the original trier of the facts holds a position of advantage . . . . In doubtful cases, the exercise of his power of observation often proves the most accurate method of ascertaining the truth. How can we say the judge is wrong? We never saw the witnesses.") (internal ellipses and citation omitted). "Evaluation of a witness's credibility cannot be had without . . . some method of compelling a witness to stand face to face with the fact finder in order that it may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 402 (6th Cir. 2017) (cleaned up) (quoting *Mattox v. United States*, 156 U.S. 237, 242–43 (1895)). Thus, "[w]here the witness's truthfulness is disputed, . . . denying an in-person hearing denies a party an opportunity to present evidence in the most effective way possible." *Whitesides*,

[6] Although many of the relevant cases indicate that videoconference hearings fail to provide meaningful procedural due process, many of those cases predate the proliferation of high-quality videoconferencing technology that began during the early days of the COVID-19 pandemic. Therefore, Plaintiffs maintain that "in-person probable cause hearings are the best way for judges to assess whether a patient should be detained under RSA 135-C:27–33, but hearings conducted by videoconference may often suffice if the hearing cannot be conducted in-person." SAC ¶ 173.

20 P.3d at 1137. In fact, one of the cases the Commissioner cites, *Montana v. Megard*, makes clear that, "[a]bsent special circumstances or the parties' consent, telephonic testimony generally is *not allowed* in trials." 87 P.3d 448, 451 (Mont. 2004) (emphasis added) (citation omitted). Rather, "[r]equiring an individual to testify in person . . . assist[s] the factfinder in evaluating witness credibility." *Id.*

Equally important, demeanor plays a crucial part in allowing the *listener* to understand what is being said. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985) ("[O]nly the [factfinder] can be aware of the variations in demeanor . . . that bear so heavily on the listener's understanding of and belief in what is said."); *State v. Addison*, 87 A.3d 1, 63 (N.H. 2013) ("Demeanor, inflection, the flow of the questions and answers can make confused and conflicting utterances comprehensible.") (citation omitted). Logically, this holds true regardless of whether the listener is the judge, the jury, or a party to the case.

Based on this body of case law, Plaintiffs allege that the Commissioner and Administrative Judge's reliance on telephonic testimony to assess the credibility and mental states of involuntarily detained patients carries a high risk of erroneous deprivation of liberty. And that risk outweighs any interests Defendants may have in holding hearings telephonically. *See Eldridge*, 424 U.S. at 335. Unlike the in-person and video hearings the Commissioner and Administrative Judge provided to some IEA patients in DRFs before March 2022, "[t]elephonic hearings do not allow judges to fairly and accurately assess an individual's mental condition to determine whether an involuntary emergency admission is legally warranted." SAC ¶¶ 168–71. A judge must assess whether the patient is "in such mental condition as a result of mental illness to pose a likelihood of danger to himself or others." RSA 135-C:27. "To adequately make this assessment, a judge must be able to see a patient's facial expressions and body language, observe how the patient looks

and is acting, and give the patient an opportunity to speak and be heard." SAC ¶ 169. "All of this information is lacking in a telephonic setting." *Id.* "Further, telephonic hearings do not afford judges the visual connection with patients necessary to establish a level of trust that allows patients to communicate openly and accurately about their conditions." *Id.* ¶ 170. And "[w]ithout the ability to see the patients, judges are also unable to fully assess whether patients are understanding the proceedings and comprehending what is being said." *Id.* ¶ 171.

The Commissioner acknowledges that "[t]here may well be instances in which a court . . . would determine that a video or in-person hearing is required." Comm'r Mem. 18. But she does not address how that squares with Defendants' ***blanket*** policies of denying video or in-person hearings to broad categories of IEA patients, which has been reflected in both public statements and at least one case where the Circuit Court System categorically asserted that telephonic hearings constitute adequate due process. *See, e.g.*, SAC ¶ 161.[7] Nor does the Commissioner address the policy's administrative benefits or cite any cases suggesting that telephonic civil commitment hearings satisfy her obligation to provide IEA patients with due process in a "meaningful manner." *See Armstrong*, 380 U. S. at 552. Thus, the Commissioner has failed to establish that Plaintiffs' claims should be dismissed under the *Eldridge* balancing test.

Instead, the Commissioner relies heavily on inapposite cases, mostly relating to parental rights proceedings. As a general matter, the fact that an "incarcerated litigant *might* obtain meaningful access through a telephone connection to the courtroom" at a particular stage in a parental termination proceeding does not warrant the dismissal of this case involving hearings in

[7] *See also* SAC ¶ 115 (noting that the Circuit Court System, consistent with its policy, has concluded in at least one individual case that telephonic hearings categorically do not violate procedural due process); Gopalakrishnan, *supra* note 3 ("Judge Ryan Guptill said as much as he does understand individuals wanting to be heard in person, he said the process is evolving and ***the proceeding meets the obligations of due process under the Constitution***.") (emphasis added).

a different context—involuntary admission for mental health treatment. *See Baby K.*, 722 A.2d at 474-75 (finding the due process rights of an incarcerated indigent person were violated by inadequate telephonic procedures). Nor does the Commissioner cite any cases that undermine the need for face-to-face hearings in settings where factfinders make credibility determinations and assess patients' mental states. Contrary to the Commissioner's assertions, ample case law indicates that face-to-face hearings are necessary in high-stakes determinations where courts must assess whether to deprive individuals of their personal liberty. *See, e.g.*, *Adoption of Patty*, 186 N.E.3d 184, 194 (Mass. 2022) (acknowledging that virtual hearings are "generally not preferable" and highlighting the features of the Zoom platform that can "approximate a live physical hearing") (citation omitted); *LaPlaca*, 27 A.3d at 723 (acknowledging a defendant's right "to be heard in person" where the state seeks to revoke a suspended sentence); *Yates*, 438 F.3d at 1315 (similar); *Terrell*, 2007 WL 2903202, at *8 (similar); *Hudson*, 607 S.W.3d at 758 (similar); *Whitesides*, 20 P.3d at 1139 (similar).

B. Defendants Maintain Policies and Practices of Categorically Denying Patients In-person and Video Probable Cause Hearings

Rather than analyzing Plaintiffs' claims under the *Eldrige* test, the Commissioner argues that this Court cannot afford Plaintiffs relief because the "flexible nature of the [due process] analysis" supposedly requires Plaintiffs' claims to be "addressed on a case-by-case basis." Comm'r Mem. 15. But federal courts regularly determine that governments' policies or practices are unconstitutional when they systematically violate plaintiffs' procedural due process rights. *See, e.g.*, *Vitek*, 445 U.S. at 491–92 (predeprivation hearing is necessary before involuntary civil commitment to protect the individual from an erroneous decision that would massively curtain his liberty); *Gagnon v. Scarpelli*, 411 U.S. 778, 788 (1973) (acknowledging that "the case-by-case approach to the right to counsel in felony prosecutions . . . was later rejected in favor of a per se

rule"); *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1131 (W.D. Wash. 2013) (finding the public defense system had systemic flaws that deprived indigent criminal defendants of their right to the assistance of counsel); *Fasciana v. County of Suffolk*, 996 F. Supp. 2d 174, 182 (E.D.N.Y. 2014) (finding plaintiff sufficiently alleged that "the County's hearing officers systemically [came] to a predetermined resolution in the County's favor—'ordering' continued retention of the vehicle absent a General Release regardless of whether the County has satisfied its burden."); *Saucedo v. Gardner*, 335 F. Supp. 3d 202 (D.N.H. 2018) (signature matching process).

That is precisely the situation here. The Commissioner and Administrative Judge have "adopted policies and practices of *only* providing telephonic probable cause hearings" to certain groups of IEA patients. SAC ¶¶ 162–67. And Defendants systematically deny IEA patients' requests for videoconferences in cases where face-to-face hearings are necessary. *E.g.*, *id.* ¶ 213. For example, the attorney for C.S., one of the IEA patients discussed in the Second Amended Complaint, "orally moved that the hearing be conducted by video on due process grounds." *Id.* ¶ 115. "The Circuit Court Judge denied this request in accordance with the Commissioner and Administrative Judge's policy and practice of conducting most IEA hearings by telephone." *Id.* As discussed above, Defendants' blanket refusals to provide face-to-face hearings to IEA patients like C.S. who wish to contest their detention violate the patients' procedural due process rights.

Nevertheless, the Commissioner argues that there is "a significant body of persuasive authority" dismissing "categorical due process claims of the kind the plaintiffs assert." Comm'r Mem. 15. But the cases the Commissioner cites involved completely different factual scenarios and never declared that procedural due process claims cannot be subject to categorical rules. Indeed, the Commissioner relies heavily on a recent decision in which "Judge Barbadoro dismissed a due-process claim" that was supposedly "premised on an assertion 'that plaintiffs, as a class,

have a categorical right to court-appointed counsel in every dependency proceeding regardless of the circumstances of their individual cases." *Id.* at 16 (quoting *G.K. ex rel. Cooper v. Sununu*, 2021 WL 4122517, at *4 (D.N.H. Sept. 9, 2021)). But even in that case, Judge Barbadoro acknowledged that the analysis would be different if "state judges [were] systematically refusing to grant requests for counsel where the *Eldridge* factors would mandate that counsel be appointed." *G.K.*, 2021 WL 4122517, at *7 n.5. Here, the Commissioner and Administrative Judge are "systematically denying class members' requests for hearings by videoconference." SAC ¶ 213. Thus, *G.K.* is readily distinguishable.

Likewise, in *United States v. Briggs*, the Second Circuit noted that "[t]here is no bright-line limit on the length of [pretrial] detention that applies in all circumstances; but for every set of circumstances, *due process does impose some limit*." 697 F.3d 98, 103 (2d Cir. 2012) (emphasis added), *as amended* (Oct. 9, 2012). Thus, the Second Circuit expressly acknowledged that state governments cannot detain people indefinitely without at least some procedural due process safeguards. And here, one constitutional limit on the Commissioner's ability to involuntarily detain patients is the requirement that she provide meaningful procedural due process, including a meaningful hearing in which patients can adequately contest their detention. *See, e.g.*, *Adoption of Patty*, 186 N.E.3d at 195; *LaPlaca*, 27 A.3d at 723; *Yates*, 438 F.3d at 1315; *Terrell*, 2007 WL 2903202, at *8; *Hudson*, 607 S.W.3d at 758; *Whitesides*, 20 P.3d at 1139.

Moreover, the Supreme Court cases the Commissioner cites merely stand for the principle that "[i]t is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements" in certain civil contexts. *Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 32 (1981) (quoting *Scarpelli*, 411 U.S. at 790). But those cases

said nothing about whether governments may categorically refuse to provide face-to-face hearings when assessing whether to involuntarily detain patients for mental health reasons. And in *Scarpelli*, the Supreme Court actually endorsed a categorical due process rule: "counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim." *Scarpelli*, 411 U.S. at 790. Thus, contrary to the Commissioner's suggestion that the Supreme Court has largely disavowed the use of categorical rules in procedural due process contexts, the Supreme Court has expressly defined the bounds of due process again and again.

Finally, based on this line of distinguishable cases, the Commissioner argues that courts "have rejected categorical due-process claims when the concerns animating those claims can be addressed on a case-by-case basis." Comm'r Mem. 15. But IEA patients' rights to meaningful procedural due process are not being addressed case-by-case. As illustrated by the example above, C.S.'s attorney asked the state court to conduct his probable cause hearing by video. SAC ¶ 115. But the judge summarily rejected that request based on Defendants' policies of withholding in-person and videoconference hearings from IEA patients in certain facilities. *Id.* Thus, the Commissioner and Administrative Judge are not addressing IEA patients' due process concerns.

In short, Plaintiffs have adequately alleged procedural due process violations under the Fourteenth Amendment. The Court should allow their claims to proceed.[8]

CONCLUSION

For these reasons, the Court should deny the Commissioner's motion to dismiss.

[8] The Commissioner says nothing about Plaintiffs' challenges to Defendants' policies and practices that deprive IEA patients of adequate notice of their rights and the allegations against them and deprive patients of meaningful access to counsel. Thus, those claims should proceed regardless of how the Court rules on Plaintiffs' challenges to Defendants' policies of denying face-to-face probable cause hearings.

Respectfully submitted,

John Doe, et al., in their individual capacities and on behalf of themselves and all others similarly situated,

By and through their attorneys affiliated with the American Civil Liberties Union of New Hampshire Foundation and Weil, Gotshal & Manges LLP,

/s/ Gilles R. Bissonnette
Gilles R. Bissonnette (N.H. Bar. No. 265393)
Henry R. Klementowicz (N.H. Bar No. 21177)
AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE
18 Low Avenue
Concord, NH 03301
Tel. 603.224.5591
gilles@aclu-nh.org
henry@aclu-nh.org

Theodore E. Tsekerides*
Aaron J. Curtis*
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
Tel. 212.310.8000
Fac. 212.310.8007
theodore.tsekerides@weil.com
aaron.curtis@weil.com
* Admitted *Pro Hac Vice*

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