UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

JOHN DOE, CHARLES COE, JANE ROE, DEBORAH A. TAYLOR AS GUARDIAN OF SCOTT STEPHEN JOHNSTONE, H.M., and J.S., individually and on behalf of themselves and all others similarly situated, Plaintiffs v. LORI WEAVER, Interim Commissioner of the New Hampshire Department of Health and Human Services, in her official capacity, Defendant, and DAVID D. KING, Administrative Judge of the New Hampshire Circuit Court, in his official capacity, Defendant.	No. 1:18-cv-01039-LM

SECOND AMENDED CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs John Doe, Charles Coe, Jane Roe, Deborah A. Taylor (as Guardian for Scott Stephen Johnstone), H.M., and J.S. file this action against Lori Weaver, Interim Commissioner of the New Hampshire Department of Health and Human Services, in her official capacity (the "Commissioner"), and David D. King, Administrative Judge of the New Hampshire Circuit Court, in his official capacity (the "Administrative Judge").

INTRODUCTION

1. Over the past several years, the Commissioner has involuntarily detained thousands of people in hospital emergency departments and Designated Receiving Facilities ("DRFs") in New Hampshire for days or weeks on end based on suspicions that these individuals may be experiencing mental health crises. The Commissioner has involuntarily detained some patients in emergency departments for as long as four weeks. While detained in emergency departments, patients often receive no notice of their rights, no access to the petitions that are used to justify their detention, no meaningful access to appointed counsel, no meaningful probable cause hearings, and no meaningful opportunity to contest their detention.

2. Making matters worse, the emergency departments where these patients are held are not designed to support people experiencing mental health crises, and patients are regularly denied the mental health treatment they may need. In many cases, patients are held in windowless and poorly maintained rooms, deprived of basic necessities, cut off from family and friends, and denied access to fresh air and the outside world. Involuntary detention also significantly disrupts individuals' lives as they are prevented from going to work and carrying out their normal daily activities.

3. Moreover, a substantial number of these involuntarily detained patients do not even meet the criteria for involuntary detention. For example, in 2020, more than 250 people were released from detention because the New Hampshire Circuit Court found no probable cause to detain them when it eventually provided the patients with hearings days or weeks later, and more than 30 people were released from detention before their probable cause hearings occurred. This only shows that procedural due process is vital to protecting the rights of people who are involuntarily detained, and that probable cause hearings must be prompt and meaningful.

4. Nonetheless, the Commissioner and Administrative Judge maintain a systemic pattern and practice of refusing to provide constitutionally adequate procedural due process to people who are involuntarily detained in hospital emergency departments and DRFs in New Hampshire.

5. 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 or DRFs. The physician or nurse practitioner would initiate the involuntary emergency admission ("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.

6. 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. 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. This practice has come to be known as "psychiatric boarding."

7. As the named Plaintiffs' experiences illustrate, individuals are often held for many days or weeks while awaiting transfer to DRFs. For example, one of the named Plaintiffs was involuntary detained in an emergency department for 27 days without receiving any procedural due process. 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. 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. Declaration of Jon. S. Berlin, M.D., ¶¶ 21–22, attached as *Exhibit A*. 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.

8. As of October 31, 2018, approximately 46 adults were being involuntarily detained in emergency departments under RSA 135-C:27–33 while awaiting admission to a DRF. As of February 2, 2023, approximately 30 adults were being involuntarily detained in

emergency departments under RSA 135-C:27–33 while awaiting admission to a DRF. As of May 23, 2023, approximately 31 adults were being involuntarily detailed in emergency departments under RSA 135-C:27–33 while awaiting admission to a DRF.[1]

9. Under the Fourteenth Amendment of the United States Constitution, Plaintiffs should have received prompt and meaningful notice of their rights, prompt and meaningful notice of the allegations against them, prompt and meaningful access to counsel, and a prompt and meaningful hearing, at which time a Circuit Court Judge would have determined whether there was probable cause to believe that they were in such a mental condition as a result of mental illness to pose a likelihood of danger to themselves or others. But for many years, the Commissioner and Administrative Judge have refused to provide these constitutional protections to patients who are involuntarily detained pursuant to IEA certificates under RSA 135-C:27–33.

10. 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. 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.

11. Plaintiffs John Doe, Charles Coe, Jane Roe, and Scott Stephen Johnstone (who is represented in this case by his mother and legal guardian, Deborah Taylor) are among the individuals who were involuntarily detained in excess of three days without any meaningful procedural due process under the policies and practices the Commissioner maintained before May 11, 2021. The Commissioner directed the hospitals and local community mental health

[1] This data is tracked daily here: https://www.dhhs.nh.gov/about-dhhs/locations-facilities/state-run-and-designated-acute-psychiatric-bed-data.

centers that were boarding these Plaintiffs to continue detaining them for days and sometimes weeks on end. Moreover, the hospitals and local community mental health centers that boarded these Plaintiffs "renewed" their respective IEA certificates every three days to restart the three-day clock under RSA 135-C:31 and buy time for DRF bed space to become available.

12. On May 11, 2021, 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 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.

13. Some ten months later, on or around March 16, 2022, the Commissioner and Administrative Judge adopted a policy and practice of providing telephonic hearings within three days of the completion of a patient's IEA certificate to most patients who are involuntarily detained in emergency departments and DRFs. The Commissioner and Administrative Judge adopted this policy and practice in coordination with one another, and the Administrative Judge adopted the policy and practice—including by instructing court personnel on how to process IEA petitions—in his administrative capacity outside the context of any individual case.

14. But these telephonic hearings are constitutionally inadequate because they fail to provide a fair and meaningful forum as the Fourteenth Amendment requires. The critical value of a face-to-face interaction between the IEA patient and the Circuit Court Judge is obvious:

these are hearings where a person's liberty is on the line, where oral testimony is heard from witnesses, where credibility assessments are regularly made, where a judge needs to make an assessment that the IEA patient is suffering from a "mental illness," *see* RSA 135-C:27, and where the judge needs to determine whether the person poses "a likelihood of danger to himself or others" as a result of mental illness, *see id.* No mental health clinician would make this type of mental illness assessment by telephone. Yet Circuit Court Judges make this assessment by telephone every day in New Hampshire and, in so doing, deprive well over a thousand individuals per year of their liberty.

15. Even when requested, the Commissioner and Administrative Judge have refused to hold the hearings in-person or even by videoconference—forums that would provide patients, judges, and counsel with critical visual cues and personal connections that would facilitate a fair and meaningful exchange between the parties and the judge. Instead, the Commissioner and Administrative Judge adopted a policy and practice of providing most probable cause hearings telephonically. 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.

16. Compounding this constitutional deficiency, the Commissioner and Administrative Judge have failed to ensure that patients receive timely notice of their rights and the grounds for initiating IEA proceedings against them.

17. 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. Indeed, when attorneys are not able to be present with their clients in

person during probable cause hearings, it is often difficult—if not impossible—for clients to speak with their lawyers on a confidential basis during the proceedings. Thus, the Commissioner and Administrative Judge's policies and practices effectively deny patients meaningful access to counsel.

18. The Commissioner and Administrative Judge's policies are even more detrimental to people who have mental health conditions. Telephonic hearings are particularly limiting for patients who have mental health conditions that affect their understanding of the proceedings. For these patients, telephonic hearings often are disorienting and cause distrust or fear that impedes communication with the judge and the patient's counsel, all of which prevent a fair and accurate assessment of the patient's condition.

19. Plaintiffs H.M. and J.S. are among the individuals who were involuntarily detained in excess of three days without any meaningful procedural due process under the revised policies and practices that the Commissioner and Administrative Judge maintained beginning on or around May 16, 2022. On information and belief, the Commissioner directed the hospitals that were boarding these Plaintiffs to continue detaining them for days and weeks on end, even though these patients did not receive the due process required for the Commissioner and Administrative Judge to deprive them of their liberty. The Commissioner and Administrative Judge provided H.M. and J.S. with a deficient process that did not allow the Circuit Court Judges who heard their cases to make meaningful assessments of whether there was probable cause to believe that they were in such a mental condition as a result of mental illness to pose a likelihood of danger to themselves or others. These Plaintiffs' hearings were conducted entirely by telephone, which deprived them of the ability to see the judges, effectively

communicate with the judges who decided their fates, effectively communicate with their counsel, understand the proceedings, and adequately make their cases.

20. The Commissioner and Administrative Judge's decisions to involuntarily detain Plaintiffs and the Plaintiff Class without procedural due process or reasonable accommodations are both unconscionable and unlawful. And although the Commissioner and Administrative Judge's specific policies have shifted over the years, they have consistently maintained a pattern and practice of refusing to provide prompt and meaningful procedural due process to patients who are involuntarily detained under RSA 135-C:27–33.

21. Plaintiffs John Doe, Charles Coe, Jane Roe, Deborah A. Taylor, H.M., and J.S., individually and on behalf of themselves and all others similarly situated, bring claims pursuant to the Declaratory Judgments Act (28 U.S.C. § 2201) and the Civil Rights Act of 1871 (42 U.S.C. § 1983) against Lori Weaver, Interim Commissioner of the New Hampshire Department of Health and Human Services, in her official capacity, and David D. King, Administrative Judge of the New Hampshire Circuit Court, in his official capacity. Plaintiffs seek injunctive relief, declaratory relief, attorneys' fees and costs, and additional remedies on behalf of themselves and those similarly situated.[2]

THE PARTIES

22. Plaintiff John Doe[3] resides in Hillsborough County, New Hampshire. He was detained at Southern New Hampshire Medical Center ("SNHMC") on November 5, 2018, pursuant to a Petition and Certificate for Involuntary Emergency Admission.

[2] Plaintiffs' counsel believe that the best policy response to the DRF waitlist is not institutionalization, but rather (i) increased community-based outpatient services for crisis prevention and diversion and (ii) full compliance with the Disability Rights Center's 2014 Community Mental Health Agreement (CMHA) as part of the class action settlement with the State of New Hampshire in *Amanda D. v. Hassan*, No. 1:12-cv-53-SM (D.N.H.). These responses will reduce the need for inpatient beds and the incidence of emergency room boarding.

[3] A Motion to Proceed Anonymously was previously granted by this Court. *See* ECF No. 61.

23. Plaintiff Charles Coe[4] resides in Hillsborough County, New Hampshire. He was detained at Concord Hospital on July 25, 2018, pursuant to a Petition and Certificate for Involuntary Emergency Admission.

24. Plaintiff Jane Roe[5] resides in Hillsborough County, New Hampshire. She was detained at St. Joseph's Hospital in Nashua on September 21, 2018, pursuant to a Petition and Certificate for Involuntary Emergency Admission.

25. Plaintiff Deborah A. Taylor is guardian for her son, Scott Stephen Johnstone, and they both reside in Bartlett, New Hampshire, which is in Carroll County. Johnstone was detained at Memorial Hospital in North Conway on July 17, 2018, pursuant to a Petition and Certificate for Involuntary Emergency Admission.

26. Plaintiff H.M.[6] currently resides in Puerto Rico, where she moved in May 2023 from Hillsborough County, New Hampshire. She was detained at Elliot Hospital in Manchester on January 14, 2023, pursuant to a Petition and Certificate for Involuntary Emergency Admission. When her involuntary detention occurred in January 2023, H.M. lived in Hillsborough County, New Hampshire, which is where she grew up and lived for 49 years.

27. Plaintiff J.S.[7] resides in Plymouth County, Massachusetts. She was detained at New London Hospital in New London, New Hampshire, on September 26, 2022, pursuant to a Petition and Certificate for Involuntary Emergency Admission.

28. Defendant Lori Weaver is the Interim Commissioner of the New Hampshire Department of Health and Human Services ("DHHS"). Defendant Weaver oversees all DHHS

[4] A Motion to Proceed Anonymously was previously granted by this Court. *See* ECF No. 85.

[5] A Motion to Proceed Anonymously was previously granted by this Court. *See* ECF No. 85.

[6] A Motion to Proceed Anonymously was previously granted by this Court. *See* Endorsed Order (Feb. 22, 2023).

[7] A Motion to Proceed Anonymously was previously granted by this Court. *See* Endorsed Order (Feb. 22, 2023).

programs, including its program of mental health services. Defendant Weaver's responsibilities include, among other things, overseeing New Hampshire Hospital, as well as designing and delivering a comprehensive and coordinated system of community services for individuals with serious mental illness. Defendant Weaver is obligated to ensure that the State of New Hampshire is providing constitutionally adequate procedural due process to individuals who are being involuntarily detained under RSA 135-C:27–33. Plaintiffs sue Defendant Weaver in her official capacity. At all times relevant to this action, Defendant Weaver and the Commissioners who preceded her acted under color of state law personally and through the conduct of their agents, servants, and employees.

29. The Honorable David D. King is the Administrative Judge of the New Hampshire Circuit Court. In this official administrative capacity, Judge King is in charge of administering the New Hampshire Circuit Court system, including the administration of probable cause hearings under RSA 135-C:31, whereby a determination is made as to whether probable cause exists for an involuntary emergency admission. There are thirty two Circuit Court District Division locations around the state. At all times relevant to this action, Judge King acted under color of state law personally and through the conduct of his agents, servants, and employees.

JURISDICTION AND VENUE

30. The federal claims in Count I arise under the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983. This Court has subject-matter jurisdiction over Count I under 28 U.S.C. § 1331.

31. Declaratory relief is authorized by 28 U.S.C. § 2201 and 28 U.S.C. § 2202.

32. Venue in the District of New Hampshire is based on 28 U.S.C. § 1391(b).

STATEMENT OF FACTS

I. Involuntarily Detained Patients' Experiences

A. Plaintiff John Doe

33. Plaintiff John Doe is 30 years old. He has been married for several years and has two young daughters. Doe is the breadwinner for the family, and the family is dependent on his income to survive.

34. On November 5, 2018, Doe was admitted to the emergency department of Southern New Hampshire Medical Center in Nashua, New Hampshire, after a suicide attempt.

35. When admitted to SNHMC, Doe acknowledged that he needed help. Understandably, he also expressed his worry that being admitted to SNHMC for a significant period of time would cause him to miss work, which could financially devastate his family. The SNHMC clinicians on staff took this statement to mean that Plaintiff was reluctant to receive treatment, and as a result, SNHMC completed a Petition and Certificate for Involuntary Emergency Admission under RSA 135-C:27–33. The accompanying "Order from Justice of the Peace for Complaint and Prayer for Compulsory Mental Health Examination" states: "I find that . . . a compulsory mental examination is necessary and hereby order any law enforcement officer to take custody of [John Doe] and, pursuant to RSA 135-C:62(I)(b&g) & (II), deliver him/her to . . . Southern NH Medical Center where a compulsory mental examination is to be conducted for purposes of considering whether an involuntary emergency admission (IEA) shall be ordered in accordance with RSA 135-C:28, I."

36. However, Doe *was* willing to undergo treatment for any mental health issues, including taking medication and receiving out-patient care. Doe strongly believed that he was no longer a danger to himself, and that his issues could best be managed through community-based mental health support, as well as through the loving support of his family while under their

watchful eye. Doe's wife wanted him back at home and wished to supervise his transition. Rather than permit Doe to avail himself of these options, SNHMC continued to involuntarily detain him, causing his family financial uncertainty and preventing Doe from being with his children. SNHMC declined to transition Doe to "voluntary" status at SNHMC's Behavioral Health Unit.

37. John Doe should have received a probable cause hearing by November 8, 2018, at which time a Circuit Court Judge could have determined whether there was probable cause to believe that he was in such mental condition as a result of mental illness to pose a likelihood of danger to himself or others. No such hearing occurred. Instead, SNHMC renewed this IEA Petition on November 8, 2018.[8]

38. At the time this lawsuit was filed on the early morning of Saturday, November 10, 2018, Doe had been detained for 5 days. Without this lawsuit, SNHMC presumably would have decided whether to renew Doe's IEA Petition on Tuesday, November 13, 2018.

39. Doe was understandably frustrated by his involuntary detention. Doe had absolutely no idea when he was going to be released. As SNHMC staff told him before this lawsuit was filed, they did not know when the release would occur, and it could be weeks. Doe was indefinitely detained against his will in a secluded, windowless room. He wished to see his children and was worried about his family's financial security. Doe believed that he would have been best served outside this restrictive environment.

40. Even if it could be disputed that probable cause existed to believe that Doe was in such a mental condition as a result of mental illness as to create a potentially serious likelihood

[8] To the extent liability concerns motivated SNHMC to renew Doe's IEA certificate, it is important to note that, under a law that came into effect on July 1, 2018, "[n]o civil action shall be maintained against a person who rescinds an involuntary admission pursuant to paragraph I or II, provided that the person is acting in good faith within the limits of his or her authority." RSA 135-C:29-a.

of danger to himself or to others, this is precisely why due process is essential—namely, to resolve the dispute so individuals are not needlessly detained and kept away from their jobs and families. Here, Doe was desperate to get back to his family and his work. His family needed him. He was entitled to make that case to a Circuit Court Judge.

41. At approximately 6:00 p.m. on Friday, November 9, 2018, Doe's wife contacted the ACLU of New Hampshire about this situation. This lawsuit was immediately filed at approximately 4:30 a.m. on Saturday, November 10, 2018. A day or two after this lawsuit was filed on November 10, 2018—and presumably in response to this lawsuit—SNHMC transitioned Doe to "voluntary" status at SNHMC's Behavioral Health Unit, and Plaintiff's Petition and Certificate for Involuntary Emergency Admission was rescinded. Doe was ultimately discharged on approximately November 15, 2018.

42. Because Doe has been the subject of a Petition and Certificate for Involuntary Emergency Admission, it is reasonably likely that a health care professional or law enforcement officer would involuntarily detain him 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.

B. Plaintiff Charles Coe

43. Plaintiff Charles Coe is currently 32 years old. As of the July 2019 filing of the First Amended Complaint, Coe had been gainfully employed in the meat processing industry for several years.

44. On July 20, 2018, Coe's family brought him to Concord Hospital's emergency room when he was experiencing significant anxiety. Coe and his family hoped that a voluntary admission to Concord Hospital would lead to prompt out-patient treatment. When Coe went to Concord Hospital on July 20, he was told that he would be admitted voluntarily. He expected to be there, at most, for a few days if that was necessary. No one told him that he would be

involuntarily detained. For five days, Coe was in Concord Hospital's psychiatric ward. On July 25, 2018, Coe asked to be discharged because he was dissatisfied with the treatment he was receiving.

45. Concord Hospital declined to release Coe on July 25, 2018. Instead, Concord Hospital completed a Petition and Certificate for Involuntary Emergency Admission and then transferred Coe to the "yellow pod," which is the wing of the hospital for behavioral health emergencies. Coe's family was upset when Concord Hospital made his admission involuntary on July 25.

46. Concord Hospital then successively renewed this IEA petition on three occasions in approximately three-day increments (on July 28, July 31, and August 3) using boilerplate and conclusory language. For example, the July 31, 2018 renewal states that Coe "will remain in IEA status due to lack of ability to care for self" without any specific facts justifying the view that he was a continued danger.

47. While frustrated with his detention, Coe was polite, calm, and said nothing threatening during the renewal reassessments. Coe was not a danger to himself or others.

48. Coe hired an attorney and challenged his detention through a Petition for Writ of Habeas Corpus, which was filed in Merrimack Superior Court on August 3, 2018. In his petition, Coe is called "John Doe." At the time of the filing, Coe had been held for approximately 10 days while awaiting transfer to a DRF, without any due process. Coe argued that he was not a danger to himself or others and that he should be released because "there has been no independent determination of probable cause by [the] District Court having jurisdiction to determine if there was probable cause for an Involuntary Emergency Admission." *See* Aug. 3, 2018 Petition for Writ of Habeas Corpus, ¶ 27, attached as *Exhibit B* (without exhibits).

49. Concord Hospital released Coe on August 8, 2018, because according to the hospital, Coe's clinical and mental condition improved. However, the hospital reached this decision after Coe filed his petition on August 3, 2018.

50. The next day, in an August 9, 2018 decision, the Merrimack County Superior Court ruled that RSA 135-C:31 requires a probable cause hearing within three days of the completion of an IEA certificate, as opposed to within three days of the person's admission to a DRF. *See* Order at 7, *Doe v. Concord Hosp.*, No. 2018-CV-448 (N.H. Super. Ct. Aug. 9, 2018), attached as *Exhibit C*.[9]

51. With these successive IEA renewals, Concord Hospital involuntarily detained Coe for a total of 15 days (from July 25, 2018, to August 8, 2018) without a probable cause hearing. During this span of time, Concord Hospital had, in total, approximately 12 to 15 other individuals involuntarily detained who were awaiting placement to DRFs.[10]

52. During Coe's 15-day involuntary detention, Concord Hospital effectively kept Coe in solitary confinement. Concord Hospital "boarded" Coe in a small, table-less room (approximately 10 feet by 15 feet) with a bed in the "yellow pod." The room had no window to the outside (it only had a window to the pod), and it contained a video monitoring camera and television. The "yellow pod" contained a common bathroom for all the individuals placed in the block. The "yellow pod" was also locked and kept secure from the rest of the hospital. Though

[9] However, on August 15, 2018, Concord Hospital filed a Motion to Reconsider. On August 27, 2018, Coe, through his counsel at the ACLU of New Hampshire, filed an Objection. *See* Pet. Obj. to Concord Hospital's Mot. for Reconsideration, *Doe v. Concord Hosp.*, No. 217-2018-CV-00448 (N.H. Super. Ct. Aug. 27, 2018), attached as *Exhibit D*. In an order dated September 6, 2018, the Merrimack Superior Court indicated that Concord Hospital, "is not bound in any way by this Court's order of August 9, 2018, now that [Plaintiff] is not restrained of his liberty." *See* Order at 7, *Doe v. Concord Hosp.*, No. 217-2018-cv-00448 (N.H. Super. Ct. Sept. 5, 2018), attached as *Exhibit E*.

[10] *See* Caitlin Andrews, "Mental Health Remains a Challenge for N.H. Hospitals," *Concord Monitor* (Aug. 11, 2018), https://www.concordmonitor.com/Concord-Hospital-mental-health-patients-bed-overload-19236373 ("Last week, Concord Hospital had about 12 patients waiting in its emergency department; the week before that, it was 15.").

the door to Coe's room was not locked and his family was allowed to visit, Concord Hospital did not allow him to leave his room, except to use the bathroom outside his room in the pod and to use the shower that was outside the pod. He was only allowed to shower two to three days after he requested a shower. Concord Hospital also did not allow him to speak to other patients in the pod. His room also had an ant problem.

53. In addition, Coe has received bills from the hospital relating to his involuntary detention from July 25, 2018, to August 8, 2018.

54. Because Coe has been the subject of a Petition and Certificate for Involuntary Emergency Admission, it is reasonably likely that a health care professional or law enforcement officer would involuntarily detain him 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.

C. Plaintiff Jane Roe

55. Plaintiff Jane Roe is 64 years old. As of the July 2019 filing of the First Amended Complaint, Roe was an administrative support professional and had been gainfully employed in this role for the last 15 years.

56. On Thursday, September 20, 2018, Roe left work because she was experiencing significant stress and anxiety from work and because she was the sole caregiver for her disabled husband. She had permission to leave work. She planned on recovering at home for the next few days and then going back to work the following Monday, September 24, 2018.

57. However, the next day, on September 21, 2018, Roe's daughter came to her house and a confrontation ensued that was the product of their troubled, and often contentious, relationship. During or following this confrontation, Roe's daughter apparently called the police and an ambulance. The local police and Emergency Medical Technicians ("EMTs") arrived at

her home. Roe did not want to go with them. The EMTs injected her with a sedative in order to take her into custody.

58. Roe's next memory is being in the emergency department of St. Joseph's Hospital in Nashua, where she was involuntarily admitted pursuant to a September 21, 2018 Petition and Certificate for Involuntary Emergency Admission. Roe's daughter was the petitioner. Employees of St. Joseph's Hospital told her that she could not leave.

59. Roe's IEA petition was then successively renewed on six occasions in approximately three-day increments (on September 24, 27, and 30, and October 3, 6, and 9) with conclusory allegations. Roe does not believe that the hospital conducted meaningful reviews of her condition before renewing the petition. Indeed, these renewals contain little substantive analysis as to whether Roe was, at the time of the reassessment, truly a danger to herself or others as a result of a mental illness. The allegations in the renewals principally focus on the original September 21, 2018 incident, with little substantive assessment as to whether her mental condition had changed since her September 21, 2018 admission and whether she was a current danger to herself or others at the time of the reassessment.

60. On October 10, 2018—after ultimately being detained for 20 days at St. Joseph's Hospital without due process—Roe was transferred to DRF New Hampshire Hospital.

61. On approximately October 12, 2018, while Roe was at New Hampshire Hospital, the Petition and Certificate for Involuntary Emergency Admission was dismissed to the best of her knowledge, as Roe's daughter was not present for the scheduled probable cause hearing. Roe's daughter was apparently traveling at the time. Roe was then released from New Hampshire Hospital that day after approximately 23 total days of being needlessly involuntarily detained.

62. During her entire 20-day detention at St. Joseph's Hospital, Roe denied that she was a danger to herself or others as a result of mental illness. She was neither suicidal nor homicidal. Thus, she declined any medication that was offered to sedate her. She wanted to leave, but employees of St. Joseph's Hospital would not let her. Roe was obviously and understandably upset during her detention, as she wanted to go home and was being held by the hospital against her will.

63. The conditions of Roe's detention at St. Joseph's Hospital were poor. For at least one week of her detention, Roe was only allowed to sleep on a small, approximately four-foot mattress. She was not allowed to get fresh air or exercise. Hospital staff restricted her water intake against her wishes. Her knees swelled up while she was there and it was incredibly painful; she believes that she was not adequately treated for this condition. In her view, the rooms she stayed in were not clean. She also remembers threats to take away privileges—like visits from a priest and phone access—if she did not comply with the hospital's orders. These privileges were ultimately taken away.

64. Moreover, Roe felt that hospital staff did not make meaningful efforts to assess whether she was truly a danger to herself or others (she was not); instead, she believes that the hospital simply wanted to hold her until a spot became open at New Hampshire Hospital so that she could then become that hospital's responsibility. As one September 27, 2018 entry from her medical file states: "Pt notified she needs to remain in this hospital until she is placed in a facility that will further help her." Of course, if Roe's condition had improved such that she was no longer a danger to herself or others (and she never was), the hospital was under an obligation to rescind the petition even before transfer to a DRF. However, the hospital never took seriously

this obligation to rescind the petition and, instead, simply held her until a DRF bed became available.

65. St. Joseph's Hospital, through Covenant Health, has sent Roe bills arising out of her involuntary detention from September 20, 2018, to October 10, 2018, in the total amount of approximately $2,703.05 (excluding related services billed by other St. Joseph's Hospital providers). She believes that this bill has been sent to collections.

66. Because Roe has been the subject of a Petition and Certificate for Involuntary Emergency Admission, it is reasonably likely that a health care professional or law enforcement officer would involuntarily detain her 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.

D. Scott Stephen Johnstone (Through His Legal Guardian, Plaintiff Deborah A. Taylor)

67. Scott Stephen Johnstone is 35 years old. Plaintiff Deborah A. Taylor is his mother and legal guardian.

68. On July 17, 2018, Johnstone was involuntarily admitted to the emergency room of Memorial Hospital in North Conway, New Hampshire, pursuant to a Petition and Certificate for Involuntary Emergency Admission. This was the third time Johnstone had been involuntarily admitted pursuant to an IEA petition.

69. Plaintiff Deborah Taylor was the petitioner because she was concerned that Johnstone was not taking his medication, including medication to treat his diabetes, high blood pressure, and bipolar disorder. She also believed that Johnstone could not take care of himself and was endangering himself by sleeping in a closet with a lamp kept near flammable material. She believed that Johnstone was sleeping in his closet because he was excessively hoarding items in his bedroom.

70. Johnstone did not believe that he needed to take his medication, and he denied that he needed medical treatment for a mental health condition. He wanted to go home. Johnstone denied suicidal or homicidal thoughts.

71. Johnstone was involuntarily detained at Memorial Hospital for 27 days until approximately August 13, 2018, while awaiting placement at a DRF. Johnstone's IEA petition was successively renewed on approximately July 20, 22, 24, 26, and 28, and August 1, 3, 6, 8, 10, and 13.

72. As Johnstone's detention progressed at Memorial Hospital, Taylor became dismayed. Johnstone was originally placed in an isolated room with no windows. He was let out of that room when Taylor demanded that he be let out. Taylor believed that Johnstone was not getting medical attention for his mental health condition. Johnstone was not allowed to have his cell phone and (initially) a cord to charge his computer. As a result, Taylor brought Johnstone a laptop with a cordless keyboard and mouse. When the battery ran out, Johnstone had to take the laptop to the nurse's desk to charge, which would sometimes agitate hospital staff. In short, Taylor believes that the hospital viewed her son as a burden. Johnstone was also frustrated by his detention.

73. As this detention continued, Taylor—because of the restrictive conditions and the fact that Johnstone was not getting help—wanted her son to be released so she could find better care for him. Johnstone was not getting meaningful mental health care at Memorial Hospital. However, Memorial Hospital and the local community mental health center said that this was not an option.

74. As a result, Taylor began to get desperate. She contacted New Hampshire political leaders, including the Governor, and went to the press to express her concerns. This

ultimately led to a *WMUR* story that aired on August 8, 2018, and reported the fact that Johnstone had been involuntarily detained then for 22 days with no end in sight. As Taylor told *WMUR*: "I feel like I'm living in a Third World country. Any other illness, you would not wait in the emergency room . . . . The animals at our local shelter get better treatment."[11] The *Conway Daily Sun* also documented this story.[12] Taylor went to the press because she wanted to tell people what happens to people who are mentally ill, like her son. She wanted to raise awareness of the problem so that it could be corrected.

75. On approximately August 13, 2018, Johnstone was transferred to the DRF New Hampshire Hospital. A hearing was conducted at which a finding was made that there was probable cause to believe that Johnstone was in such mental condition as a result of mental illness to pose a likelihood of danger to himself or others. Johnstone was treated at New Hampshire Hospital for approximately one month. Taylor has been unable to get some of her son's belongings that were taken by Memorial Hospital staff.

76. Though Taylor was the petitioner in this case, Taylor believes that Johnstone should have been given procedural due process within three days of his admission to Memorial Hospital and the completion of his initial Petition and Certificate for Involuntary Emergency Admission (by July 20, 2018). She believes that due process could have provided closure to Johnstone while he was being held. In addition, as Johnstone's legal guardian, Taylor believes

[11] *See* Jennifer Crompton, "Shortage of Mental Health Beds Forces Man into ER for More Than 3 Weeks," *WMUR* (Aug. 8, 2018), https://www.wmur.com/article/shortage-of-mental-health-beds-forces-man-into-er-for-more-than-3-weeks/22680883 ("A shortage of psychiatric facility beds in the state is having real consequences in North Conway, where a man has been living in an emergency room for more than three weeks. Scott Johnstone, 29, has been forced to live in Memorial Hospital's emergency room going on 22 days now as he waits for a bed in a psychiatric facility."). *WMUR* aired a follow-up story on November 9, 2018, further detailing the 28-day detention. *See* Jennifer Crompton, "Mental Health Patients Continue to Languish in NH Emergency Rooms," *WMUR* (Nov. 9, 2018), https://www.wmur.com/article/mental-health-patients-continue-to-languish-in-nh-emergency-rooms/24868843?src=app.

that it is important for Johnstone to receive all the legal rights to which he is entitled, including a timely hearing where he would have had the ability to explain to a judge his view as to why he should not be detained. She believes that due process is important to ensure that people are not being involuntarily detained longer than they need to be.

77. Johnstone has been diagnosed with bipolar I disorder, autism spectrum disorder, and intellectual disability disorder. Further, by virtue of the IEA certificate and the Court's probable cause finding, Johnstone was regarded by both the Commissioner and Administrative Judge as having a "mental illness" under RSA 135-C:27.

78. Because of Johnstone's mental illness and the fact that he has been the subject of a Petition and Certificate for Involuntary Admission three times, it is reasonable to expect that he will be the subject of such a petition in the future. If Johnstone is the subject of a Petition and Certificate for Involuntary Admission again in the future, it is likely—if not inevitable—that his probable cause hearing will be conducted by telephone pursuant to the Commissioner and Administrative Judge's policies and practices.

E. Plaintiff H.M.

79. Plaintiff H.M. currently resides in Puerto Rico, where she moved in May 2023 from Hillsborough County, New Hampshire. She was involuntarily detained in the early morning on Saturday, January 14, 2023, at Elliot Hospital in Manchester pursuant to a Petition and Certificate for Involuntary Emergency Admission. The Petition was signed that day by a physician. H.M. was suspected of attempting suicide, which she contests. When her involuntary detention occurred in January 2023, H.M. lived in Hillsborough County, New Hampshire, which is where she grew up and lived for 49 years.

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[12] *See* Daymond Steer, "Bartlett Mom Seeks Relief for Mentally Ill Son," *Conway Daily Sun* (Aug. 8, 2018), https://www.conwaydailysun.com/news/local/bartlett-mom-seeks-relief-for-mentally-ill-son/article_63ddd712-9a69-

80. H.M. arrived at the emergency department at Elliot Hospital in the early morning on Saturday, January 14, 2023. After spending most of Saturday in the emergency department, hospital staff told H.M. that she was released medically, which gave her the impression that she could go home. The emergency department staff told her that they were just waiting to obtain a mental health evaluation, at which time she would be released.

81. When the licensed social worker spoke with H.M., the social worker asked if H.M. would submit to a voluntary psychiatric admission. H.M. declined and explained that what happened was a mistake and that she had no intention of killing herself. She said she just wanted to go home.

82. However, Elliot Hospital elected to file a Petition and Certificate for Involuntary Emergency Admission that Saturday afternoon, at which time H.M. was transferred out of the emergency department by a security guard with a gun and two nurses, which was humiliating.

83. H.M. was transferred to a holding area at Elliot Hospital—possibly where people are placed as part of the Psychiatric Evaluation Program—where she was forced to strip down and put on paper scrubs. She felt that she was being imprisoned. The holding area was made of concrete, and the bed had a plastic covering. In this holding area, there was one bathroom for everyone in the unit to share. The bathroom had a plastic Velcro "door." She was in the holding area from approximately 6:00 p.m. to 11:00 p.m. that Saturday evening.

84. That night, hospital staff told H.M. that she was going to be transferred to Pathways at Elliot Hospital. Hospital staff then strapped H.M. to a wheelchair and moved her to Pathways in the wheelchair. She was escorted by a security guard.

11e8-9179-37823772a3fb.html.

85. While she was in the emergency department at Elliot Hospital—and before any Petition and Certificate for Involuntary Emergency Admission was filed on Saturday—H.M. asked for her purse and phone so she could communicate with family members about her situation. Hospital staff denied H.M.'s request. After the petition was filed and H.M. was at Pathways, Pathways staff went through the items that the emergency department had taken from her to determine what she could keep. Pathways staff kept H.M.'s phone, so she continued to have no meaningful ability to contact anyone. She could not even have a pen.

86. Moreover, though H.M. asked Elliot Hospital staff on about three occasions for a copy of the petition and a copy of the statute being used to justify the detention, the hospital staff refused. H.M. did not see the petition until her attorney, who had a copy, went through it with her in person the day before the hearing on Tuesday, January 17, 2023. It was only then that H.M. verbally learned about her rights. H.M. felt that the hospital staff's refusal to give her a copy of the petition was unfair and prevented her from learning and invoking her rights, especially given that she was told by one Elliot Hospital health care provider before the hearing that she did not need to be there. H.M. felt that she was not meaningfully informed about this process until she met with her lawyer.

87. On the Certificate of the Examining Physician dated January 14, 2023, the physician checked a box indicating that the physician "conveyed [to H.M.] that this Involuntary Emergency Admission is pending and provided the Notice of Rights that was attached as page 10 to the person sought to be admitted." Page 10 was given to H.M. while she was in the Elliot Hospital emergency department, but she did not receive the petition in its entirety.

88. Under RSA 135-C:31, H.M. was entitled to receive a hearing by Thursday, January 19, 2023, at which time a Circuit Court Judge would determine whether there was

probable cause to believe that she was in such mental condition as a result of mental illness to pose a likelihood of danger to herself or others.

89. H.M. received a hearing on Wednesday, January 18, 2023. Though her counsel was physically with her at Pathways of Elliot Hospital during this hearing, the hearing was held by telephone. (Pathways conducted many hearings by video before changes in Circuit Court policy were put in place on November 1, 2022.) As a result, H.M. could not see the Judge, and the Judge could not see her. At the hearing, the Circuit Court Judge found probable cause for the detention under RSA 135-C:27, I(a). Pathways released her about two days after her hearing on the afternoon of Friday, January 20, 2023.

90. Because the hearing was telephonic, it deprived H.M. of procedural due process protections of the Fourteenth Amendment.

91. This was H.M.'s first time in the emergency mental health system, and she felt dehumanized and criminalized by the process. Because the probable cause hearing was telephonic, she did not feel like it was a real process where she was meaningfully heard, especially given that she wanted to fully convey that she had not attempted suicide.

92. H.M. has been diagnosed with depression and has been prescribed Effexor. Further, by virtue of the IEA certificate and the Court's probable cause finding, H.M. was regarded by both the Commissioner and Administrative Judge as having a "mental illness" under RSA 135-C:27.

93. Because H.M. has been the subject of a Petition and Certificate for Involuntary Emergency Admission and 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), it is reasonably likely that a health care professional or law enforcement officer would involuntarily detain her 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.

F. Plaintiff J.S.

94. J.S. resides in Plymouth County, Massachusetts. She is married with three children, including one who is in the military. J.S. is a volunteer for a local visiting nurse association and for veterans' causes. She also has a real estate license.

95. J.S. was involuntarily detained starting on Monday, September 26, 2022, in New London Hospital pursuant to a Petition and Certificate for Involuntary Emergency Admission. A physician signed the Petition the next day, on Tuesday, September 27, 2022.

96. While at the New London Hospital emergency department, hospital staff took all of J.S.'s belongings away from her. The hospital only allowed her to have a book.

97. Hospital staff gave J.S. a special gown that appears to only be used for mental health patients. Hospital staff placed J.S. in a small room, about 12 feet by 12 feet. The room had a television encased in plastic, which made it hard to view and listen to. J.S. had no ability to change the channel. There was a camera in the ceiling of the room. There was a door to and from the room that was closed. The door was not locked, but she knew that she was not free to leave. There was no restroom in the room, so she had to ask permission every time she needed to use the restroom. She was accompanied to the restroom the first day of her detention.

98. Hospital staff also denied J.S. contact with the outside world. Hospital staff took her phone. She asked hospital staff for her phone to make a call but was told "no." Hospital staff also ordered J.S.'s meals for her. She did not select them.

99. This was J.S.'s first time in the emergency mental health system. She felt like she was not trusted. She felt like a caged animal. In short, her involuntary stay at the New London Hospital emergency department was like being in a prison.

100. Moreover, though J.S. asked New London Hospital staff for a copy of the petition used to detain her, the hospital staff refused. She did not see the petition until she was discharged over two weeks later (though her lawyer verbally went through the petition with her by phone before the hearing). As indicated in the Circuit Court's probable cause order, J.S. testified at the hearing that she did not receive a copy of the notice of rights.

101. On the Certificate of the Examining Physician dated September 27, 2022, the physician checked the box checked indicating that the physician "conveyed [to J.S.] that this Involuntary Emergency Admission is pending and provided the Notice of Rights that was attached as page 10 to the person sought to be admitted." J.S. does not recall receiving a copy of page 10 of the IEA certificate, but even if page 10 was given to her, J.S. still did not receive a copy of the petition in its entirety.

102. Under RSA 135-C:31, I, J.S. was entitled to receive a hearing by Friday, September 30, 2022, at which time a Circuit Court Judge would determine whether there was probable cause to believe that she was in such mental condition because of mental illness as to create a potentially serious likelihood of danger to herself or to others.

103. The Circuit Court scheduled a hearing for J.S. on Friday, September 30, 2022. However, this hearing was continued to Monday, October 3, 2022, after J.S. absconded from New London Hospital around the evening of Thursday, September 29, 2022, because she was not meaningfully notified of her rights, was not meaningfully told what would occur as part of the process, and was not informed of the details of any hearing. J.S. did not view herself as a danger to herself or others. She was later found the next day, detained, and held at the emergency department of Concord Hospital. J.S. was then transferred to Pathways of Elliot Hospital in Manchester.

104. During the October 3, 2022 probable cause hearing, J.S. was involuntarily detained at Pathways of Elliot Hospital, and her attorney was patched in telephonically. At the time, Pathways conducted many hearings by video, but this hearing was conducted telephonically (perhaps because the petition was filed while J.S. was at the New London Hospital emergency department, before she arrived at Pathways, which is a DRF). The entire hearing was held by telephone. J.S. therefore could not see her attorney or the Judge during the hearing, and they could not see her. Because the hearing was telephonic, it felt like a mechanical process in which J.S. did not have a voice. The connection was also poor, which interrupted the hearing. J.S. would have had a better opportunity to make her case if the Judge saw her because the Judge would have been able to evaluate mannerisms and physical behavior that demonstrated that she was not a danger. Without video, J.S. could not fully convey her lucidity and why her actions were not worthy of continued detention.

105. The Circuit Court Judge found probable cause for the detention under RSA 135-C:27, I(c). J.S. was released about two weeks later from Pathways. She only received a copy of the probable cause decision when she was discharged from Pathways.

106. Because the hearing was held telephonically, it denied J.S. of procedural due process protections of the Fourteenth Amendment.

107. J.S. has been diagnosed with bipolar II disorder; she received this diagnosis in mid-July 2022. Further, by virtue of the IEA certificate and the Court's probable cause finding, J.S. was regarded by both the Commissioner and Administrative Judge as having a "mental illness" under RSA 135-C:27.

108. Because J.S. has been the subject of a Petition and Certificate for Involuntary Emergency Admission and travels in New Hampshire several times a year, it is reasonably likely

that a health care professional or law enforcement officer would involuntarily detain her 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.

G. Witness C.S.

109. Many other people have endured similar experiences in hospital emergency departments and DRFs. C.S. resides in Hillsborough County, New Hampshire. He was involuntarily detained on Friday, January 13, 2023, at the emergency department of Southern New Hampshire Medical Center in Nashua pursuant to a Petition and Certificate for Involuntary Emergency Admission. The Petition was signed that day by a physician. C.S. contested that he was a danger to himself or others.

110. C.S.'s involuntary detention began when he was pulled out of his own home and detained by the police. Police twisted C.S.'s arm and dislocated it to get him into handcuffs.

111. When C.S. arrived at the Southern New Hampshire Medical Center emergency room, he felt disempowered. Hospital staff took C.S.'s blood without his permission. The room was sparse. He did not have a desk or paper to prepare his defense, so he wrote ideas as to how to defend himself before his probable cause hearing on a napkin with a crayon he took from a woman at the hospital. It was like being locked up in a prison. The whole experience was stressful and disabling.

112. Under RSA 135-C:31, I, C.S. was entitled to receive a hearing by Wednesday, January 18, 2023, at which time a Circuit Court Judge would determine whether there was probable cause to believe that he was in such mental condition because of mental illness as to create a potentially serious likelihood of danger to himself or to others.

113. C.S. received a hearing on Wednesday, January 18, 2023. During the probable cause hearing, C.S. was at the emergency department of SNHMC, and his attorney was patched

in telephonically. The entire hearing was held by telephone. C.S. therefore could not see his attorney or the Judge during the hearing, and they could not see him.

114. At the hearing, the Circuit Court Judge dismissed the Petition, and C.S. was released that same day. C.S.'s attorney presented two arguments at the hearing.

115. First, at the start of the hearing, C.S.'s lawyer orally moved that the hearing be conducted by video on due process grounds. 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. The Circuit Court Judge stated that, "given all of the other procedural protections provided by RSA Chapter 135-C and the technical challenges presented by conducting video hearings in emergency rooms, due process does not require video hearings in these cases." This decision should come as little surprise in light of the Administrative Judge's decision, in his administrative capacity, to use telephonic hearings as a matter of policy. In other words, the decision in this case was consistent with the policy adopted by the Commissioner and Administrative Judge to conduct most hearings by telephone—a policy that had been communicated to court personnel as to how to process IEA petitions.

116. Second, C.S.'s attorney orally moved to dismiss the case on the ground that C.S. was not given a copy of the petition prior to the hearing. As a result, C.S.'s counsel argued that C.S. was not prepared to go forward with the evidentiary portion of the hearing and, therefore, requested a continuance. As the Circuit Court explained the situation:

> In this case, which was heard at approximately 12:45 PM on January 18, 2023, the Court received the Petition at approximately 3:27 PM on January 17, 2023 and provided notice of the hearing and the petition to counsel at approximately 4:12 PM on the same date. It is undisputed that the Petitionee [C.S.] did not receive a copy of the Petition, despite counsel calling the hospital and requesting that staff there provide it to her client. Because of the timing of the hearing and her office location, counsel was not able to meet with her client in person prior to the hearing in order to review a copy of the petition with him. [Counsel] represented that she attempted to read the Petition to the Petitionee [C.S.]

> and discuss the case with him over the phone, but that given the length and complexity of the Petitioner's Statement (3 pages spanning [sic] describing behavior over several weeks) and the Witness Statement (2 pages describing one day), combined with his presence in an emergency room and the telephonic nature of the consultation, she was not able to advise the Petitionee [C.S.] of all the allegations against him, meaningfully discuss the case with her client, or adequately prepare for the hearing.

Accordingly, the Court concluded C.S. "has established that the failure to provide the Petition directly to him deprived him of the ability to adequately prepare for his hearing."

117. Because the hearing was telephonic, it deprived C.S. of procedural due process protections of the Fourteenth Amendment.

118. Because the probable cause hearing was telephonic, C.S. did not feel that it was a genuine hearing and serious process. As part of any hearing, C.S. would want to see the judge visually because he had the impression from his telephone hearing that the judge was not duly and diligently hearing his case, as the judge was confrontational with his attorney and did not question what the petitioner was saying. C.S. also wanted a video hearing so he could see the petitioner and evaluate the petitioner's credibility—something he was denied.

119. As the Circuit Court acknowledged, C.S. was not timely given the full Petition so that he could understand the allegations being made against him. C.S. did not see the petition. C.S.'s attorney summarized the petition for him by telephone a day or two before the hearing, but the summary did not include all the details (because it could not). C.S. felt that he was not meaningfully informed about this process until he spoke with his attorney by telephone.

120. On the Certificate of the Examining Physician dated January 13, 2023, the physician checked the box indicating that the physician "conveyed [to C.S.] that this Involuntary Emergency Admission is pending and provided the Notice of Rights that was attached as page 10 to the person sought to be admitted." But even if page 10 was given to C.S. while he was in the

SNHMC emergency department, C.S. did not timely receive the Petition in its entirety, as the Circuit Court acknowledged.

121. C.S. experiences some hallucinations, memory "breakage," and blackouts. Further, by virtue of the IEA certificate and the Court's probable cause finding, C.S. was regarded by both the Commissioner and Administrative Judge as having a "mental illness" under RSA 135-C:27.

II. The Commissioner Has Refused to Provide Procedural Due Process to IEA Patients Who Are Involuntarily Detained in Hospital Emergency Departments for Years

A. The Systemic Nature of the Psychiatric Boarding Crisis

122. Plaintiffs' experience is part of a systemic pattern and practice in New Hampshire where people who may be experiencing mental health crises are involuntarily detained in hospital emergency departments and DRFs for days or weeks with no access to counsel, no notice of their rights, and no meaningful opportunity to contest their detention. The practice of involuntarily detaining patients in hospital emergency departments is known as "psychiatric boarding."

123. As of October 31, 2018, approximately 46 adults and 4 children were being involuntarily detained in emergency departments under RSA 135-C:27–33 while awaiting admission to a DRF. *See* NAMI-NH, NHH Delay Data, https://goo.gl/o9R1Yv. As of July 16, 2019, the number of adults who were involuntarily detained in emergency departments was 19. *See id.* As of February 2, 2023, approximately 30 adults were being involuntarily detained in emergency departments under RSA 135-C:27–33 while awaiting admission to a DRF. *See* New Hampshire Department of Health and Human Services, Designated Receiving Facility (DRF) Data (Feb. 2, 2023), attached as *Exhibit F*.

124. The number of individuals waiting fluctuates, as it is often both cyclical and seasonal, but the psychiatric boarding crisis has remained constant.

125. While awaiting transfer to a DRF, many class members are detained in conditions that are tantamount to solitary confinement.[13] Often, they are confined to poorly maintained spaces with no windows or access to the outside world.

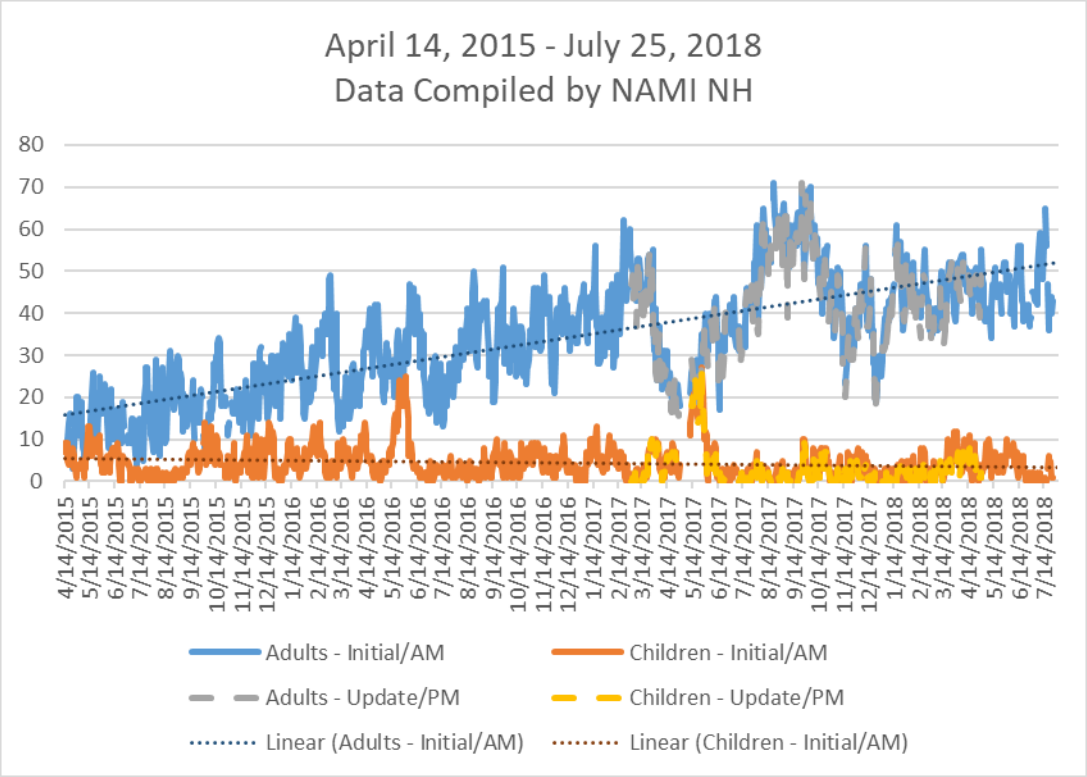
126. As these emergency departments are not community-based mental health treatment programs, mobile crisis teams, or DRFs designed to treat those involuntarily admitted under Chapter 135-C, many detained individuals receive no mental health treatment, even though the hospitals claim they are experiencing mental health crises.

127. Further, class members who are grappling with mental health crises often see their mental health conditions worsen as they are subjected to solitary confinement, inadequate treatment, and a lack of due process. *See* Declaration of Jon. S. Berlin, M.D., ¶¶ 21, 24, attached as *Exhibit A*.

128. Over the past several years, thousands of people have been and continue to be subject to psychiatric boarding. According to data collected by the National Alliance on Mental Health-New Hampshire ("NAMI-NH), approximately 14 adults and 6 children, on average on a given day during the second quarter of 2015, were detained in emergency rooms with no due process until their placement in a DRF. *See* July 2018 NAMI-NH Data, Slide 4, attached as *Exhibit G*. Shortly before this lawsuit was filed in November 2018, the number of adults being

[13] *See* Gali Katznelson and J. Wesley Boyd, "Solitary Confinement: Torture, Pure and Simple," *Psychology Today* (Jan. 15, 2018), https://www.psychologytoday.com/us/blog/almost-addicted/201801/solitary-confinement-torture-pure-and-simple ("The psychological effects of isolation last long after individuals are removed from isolation. Indeed, years after their release, many who experienced solitary confinement in Pelican Bay had difficulty integrating into society, felt emotionally numb, experienced anxiety and depression, and preferred to remain in confined spaces.").

detained had increased by over 350% to the 50s on average. A chart prepared by NAMI-NH highlights this significant increase:



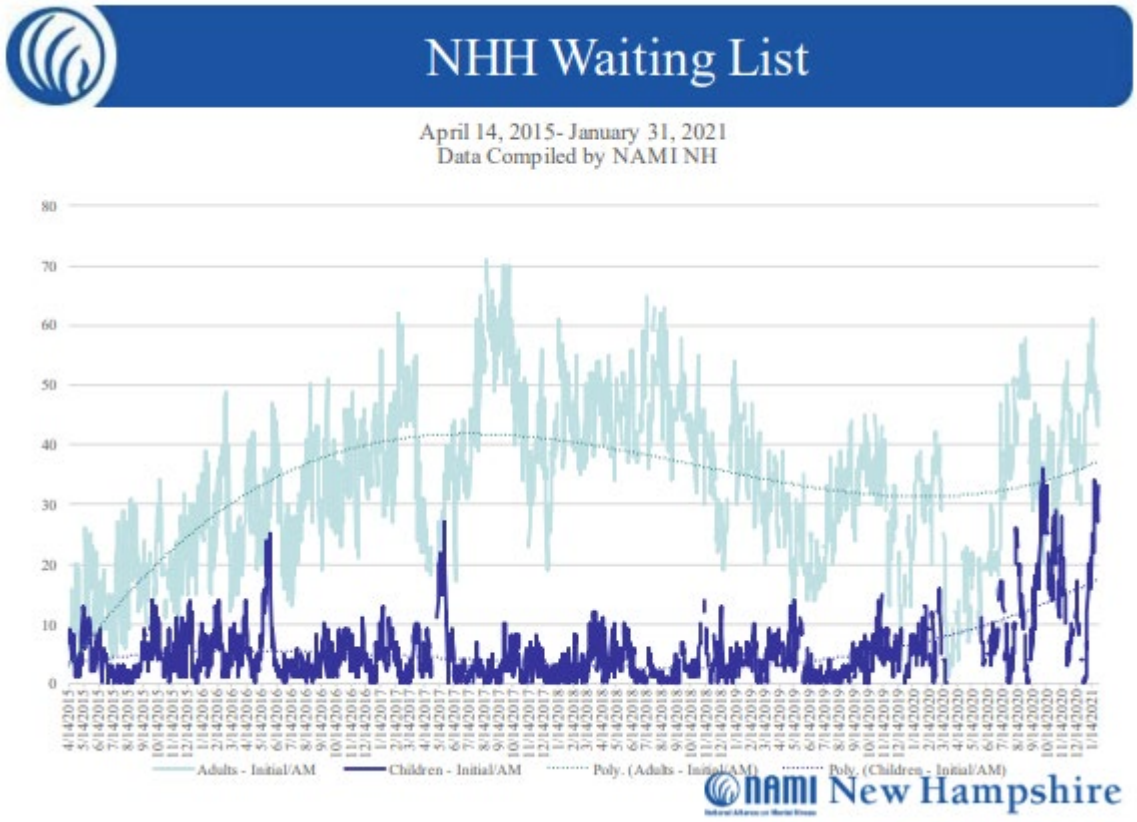
See id. at Slide 1.[14]

129. On August 21, 2017, at one of the worst points in the boarding crisis, 71 adults were involuntarily detained while awaiting treatment. *See id.* at Slide 2; NAMI-NH, NHH Delay Data, https://goo.gl/o9R1Yv. These staggering figures continued into the second quarter of 2018, which saw the average wait list numbers for adults and children combined reach 50 total individuals. *See* July 2018 NAMI-NH Data, Slide 4, attached as *Exhibit G*.[15]

[14] *See also* Human Services Research Institute, Final Report: Evaluation of the Capacity of the New Hampshire Behavioral Health System 20 (Dec. 22, 2017), https://www.hsri.org/publication/evaluation-of-the-capacity-of-the-new-hampshire-behavioral-health-system (Exhibit 1 documenting waitlist numbers from April 2015 to September 2017).

[15] As the Human Services Research Institute's December 22, 2017 report entitled "Evaluation of the Capacity of the New Hampshire Behavioral Health System" explained: "*There has been a steady increase in the number of individuals experiencing boarding in New Hampshire ERs*. On September 24, 2017, there were 70 people waiting for admission. The greatest total number of individuals at one time was 72." *See* Human Services Research

130. As illustrated in the chart below, which summarizes the waiting list from April 14, 2015, to January 31, 2021, these wait list numbers once again surged during the pandemic. *See* NAMI-NH, NHH Delay Data, https://goo.gl/o9R1Yv.[16]



131. Now, over four years after filing this suit—and after the Commissioner publicly promoted a fleeting moment in June 2021 in which the waitlist reached zero[17]—the waitlist numbers for adults in emergency departments waiting for a DRF bed have crept up again, with

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Institute, Final Report: Evaluation of the Capacity of the New Hampshire Behavioral Health System 4 (Dec. 22, 2017) (emphasis added), https://www.hsri.org/publication/evaluation-of-the-capacity-of-the-new-hampshire-behavioral-health-system. This waitlist has increased despite a recent upward trend in the number of inpatient beds and community-based services available. *Id.*

[16] *See also* Executive Order 2021-09 (May 13, 2021), attached as *Exhibit H* ("[D]uring the height of the COVID-19 pandemic, treatment options were limited, including a limitation on the number of emergency psychiatric beds and community-based services, which further exacerbated the growing mental health crisis.").

[17] New Hampshire Department of Health and Human Services, Adult Psychiatric Bed Waiting List Reaches Zero (June 7, 2021), https://www.dhhs.nh.gov/news-and-media/adult-psychiatric-bed-waiting-list-reaches-zero.

the waitlist for adults reaching 44 on January 30, 2023. *See* NAMI-NH, NHH Delay Data, https://goo.gl/o9R1Yv.

132. Though emergency department wait times vary, they can last up to four weeks. For example, Scott Stephen Johnstone, represented in this case by his mother and legal guardian Plaintiff Deborah Taylor, was detained for 27 days in an emergency department without due process. Plaintiff Jane Roe was detained in St. Joseph's Hospital in Nashua for 20 days. And Plaintiff Charles Coe was detained for 15 days in Concord Hospital before he was released after filing a habeas corpus petition in Merrimack Superior Court. *See* Pet. Obj. to Concord Hospital's Mot. for Reconsideration ¶¶ 2–3, *Doe v. Concord Hosp.*, No. 217-2018-CV-00448 (N.H. Super. Ct. Aug. 27, 2018), attached as *Exhibit D*. New Hampshire Circuit Court Administrative Judge Edwin W. Kelly also documented three individuals who were held in emergency departments from 14 to 15 days before being transferred to a DRF. *See* Interlocutory Transfer Statement Order at 3–4, *In re T.D.*, No. 429-2016-EA-01258 (Nov. 17, 2016), attached as *Exhibit I*.

133. From July 11, 2017, to September 6, 2017, emergency department wait times usually exceeded three days on average. *See* July 2018 NAMI-NH Data, Slide 6, attached as *Exhibit G* (data presented by New Hampshire Hospital's interim Chief Executive Officer Don Shumway at the 2017 N.H. Hospital Association Annual Meeting; during this time period, 35% of involuntary admissions were 3–10 days, and 17% of involuntary admissions were in excess of 10 days).

B. The Commissioner Refused to Provide Procedural Due Process to Patients in Hospital Emergency Departments

134. Before May 11, 2021—when the New Hampshire Supreme Court forced the Commissioner to act in *Jane Doe v. Commissioner of New Hampshire Department of Health & Human Services*—the Commissioner incorrectly took the position that she was not required to

provide any procedural due process to a patient until after the patient was transferred to a DRF. The Commissioner also believed that New Hampshire state law did not require her to provide a probable cause hearing to a patient who was involuntarily detained in an emergency department until three days after that individual was transferred to a DRF, excluding Sundays and holidays. The Commissioner and her staff at DHHS communicated this policy to hospitals. *See* Hospitals' Intervenor Compl. ¶ 37 (ECF No. 63).

135. The Commissioner incorrectly understood her obligations under the U.S. Constitution, which requires the Commissioner to provide involuntarily detained patients with prompt and meaningful procedural due process, and under New Hampshire law, which requires the Commissioner to provide involuntarily detained patients with procedural due process and a probable cause hearing "[w]ithin 3 days after an involuntary emergency admission"—*i.e.*, within three days of when a patient's initial IEA certificate is completed. *See* RSA 135-C:31, I (providing process "[w]ithin 3 days after an involuntary emergency admission").

136. Indeed, in an August 9, 2018 decision issued after Plaintiff Charles Coe filed a habeas corpus petition, the Merrimack County Superior Court held that RSA 135-C:31 requires procedural due process within three days of the completion of an IEA certificate, as opposed to within three days of the person's admission to a DRF. *See* Order at 7, *Doe v. Concord Hosp.*, No. 2018-CV-448 (N.H. Super. Ct. Aug. 9, 2018), attached as *Exhibit C*. In this decision, Coe was called "John Doe."

137. Neither the Commissioner nor New Hampshire hospitals complied with this legal interpretation of the Merrimack County Superior Court. While the Commissioner failed to provide procedural due process and probable cause hearings within three days, New Hampshire hospitals continued to detain individuals under color of law after three days had elapsed.

138. Due process is critical. According to data from DHHS, in 2017, of 1,290 IEA cases docketed after a patient was transferred to a DRF, the patient was discharged *before* the probable cause hearing occurred in 13% of the cases (162), and no probable cause was found in 1% of the cases (14). Assuming that some of these 176 cases consisted of patients who spent time in emergency departments before placement to a DRF, many of these patients may have been released sooner had they received timely procedural due process as required.

139. The importance of procedural due process is highlighted by Plaintiffs' experiences. Plaintiff Jane Roe contested her detention at St. Joseph's Hospital, which ultimately lasted 20 days. When Roe was ultimately transported to a DRF, she was promptly released because the petitioner in her case did not move forward with her claim that Roe was a danger to herself or others. Similarly, Plaintiff Charles Coe contested his detention at Concord Hospital, which ultimately lasted 15 days and did not end until he filed a habeas corpus petition in Merrimack Superior Court.

C. The Commissioner Was Aware of this Problem and Failed to Solve It

140. On November 17, 2016, Circuit Court Chief Judge Kelly issued an order with respect to three individuals who ultimately waited 17 to 20 days between the dates of their initial emergency department detention and the dates of their probable cause hearings challenging their involuntary detention. *See* Interlocutory Transfer Statement Order at 8, *In re T.D.*, No. 429-2016-EA-01258 (Nov. 17, 2016), attached as *Exhibit I*; *see also* Supplemental Order at 1–2, *In re T.D.*, No. 429-2016-EA-01258 (Nov. 16, 2016), attached as *Exhibit J*. As the Court explained: "In the cases before the court, up to four additional petitions and certificates were filed before the transfer to the receiving facility was accomplished, resulting in stays in the emergency room up to 15 days long." *See* Interlocutory Transfer Statement Order at 8, *In re T.D.*, No. 429-2016-EA-01258 (Nov. 17, 2016), attached as *Exhibit I*.

141. The Circuit Court acknowledged that these cases "present[ed] issues of significant statutory and constitutional dimensions," and highlighted the due process implications of the current regime. *Id.* at 11. The Court explained that, while a person is being involuntarily detained in an emergency department before admission to a DRF, the Court "[is] not aware that the person [is] the subject of a petition." *Id.* at 8. Instead, the Court only becomes aware of the detention when "the individual [is] eventually transferred to the receiving facility and the petition [is] filed [with the Court after admission to the DRF]." *Id.* The Court also acknowledged the systemic nature of the problem. According to the Circuit Court, a "review of 1251 IEA cases filed during 2015 found that in 43% of those cases, the person was not transferred immediately to a receiving facility," with the result being that these individuals were detained in emergency departments for periods of time before admission to a DRF without any procedural due process. *Id.* The Court noted the obvious due process concerns with this system, explaining that "[d]uring the period leading up to the probable cause hearing, the liberty interest of the person sought to be admitted is impacted." *Id.* at 11.[18]

142. As a result of Circuit Court Chief Judge Kelly's order and the work of advocacy organizations, the state legislature enacted law in 2017—House Bill 400—that, in part, required the Commissioner to "develop a plan with recommendations to ensure timely protection of the statutory and due process rights of patients subject to the involuntary emergency admissions

[18] Given these serious concerns, Circuit Court Chief Judge Kelly sought to transfer to the New Hampshire Supreme Court, among other legal questions, the question of whether New Hampshire's practice violated procedural due process. *Id.* at 5, Question Nos. 4 and 5. Chief Judge Kelly explained that, because individuals are admitted to DRFs within weeks, at which time process is provided, these legal questions were capable of repetition yet evading review. *Id.* at 11. On December 7, 2016, the New Hampshire Attorney General's Office objected to the Circuit Court's interlocutory transfer statement on the ground that the New Hampshire Supreme Court "lacks the authority to render an opinion on those questions outside the context of a concrete case or controversy." *See* Attorney General Objection, *In re T.D.*, No. 2016-0618 (Dec. 7, 2016), attached as *Exhibit K*. On December 8, 2016, the New Hampshire Supreme Court denied the Circuit Court's interlocutory transfer statement. *See* Interlocutory Transfer Order, *In re T.D.*, No. 2016-0618 (Dec. 8, 2016), attached as *Exhibit L*.

process of RSA 135-C who are awaiting transfer to a designated receiving facility." *See* 2017 House Bill 400, Section 112:3, at 1, attached as *Exhibit M*.[19]

143. In response to House Bill 400, on August 31, 2017, the Commissioner issued a report proposing a 90-day pilot program in which four hospitals (Catholic Medical Center in Manchester, Dartmouth Hitchcock Medical Center in Lebanon, SNHMC in Nashua, and Speare Memorial Hospital in Portsmouth), DHHS, and the New Hampshire Circuit Court system would, consistent with the terms of RSA 135-C:31, provide due process for individuals being involuntarily detained at these hospitals before DRF placement. As the Commissioner's August 31, 2017 proposal explained, "[t]he proposed pilot project would be led by a task force and will focus on how to facilitate the conduct of probable cause hearings within 72 hours of a patient being certified for IEA in a hospital ED department." *See* Pilot Project Proposal at 6 (Aug. 31, 2018), attached as *Exhibit N*. The Commissioner's report also explained that, as part of this pilot program, individuals involuntarily detained in hospital emergency departments would receive, among other things, a hearing conducted via video link and telephone, access to legal counsel, and adequate and humane treatment while in the emergency department awaiting DRF placement. *Id.* at 3. The pilot project was scheduled to run from November 1, 2017, to January 31, 2018. *Id.* at 6.

144. However, in late 2017, the pilot project collapsed because the hospitals backed out of the program. Due to the concerns raised by the hospitals, "there was . . . a consensus that

[19] The bill continued: "The recommendations shall provide for judicial review on a schedule consistent with the statutorily required schedule for persons who have been admitted to a designated receiving facility. The commissioner shall consult with representatives of the American Civil Liberties Union of New Hampshire, New Hampshire Hospital Association, the New Hampshire Medical Society, the New Hampshire Psychiatric Society, the superior court system, the New Hampshire Bar Association, the National Alliance on Mental Illness, and the Disability Rights Center-NH. The plan shall be submitted to the oversight committee on health and human services, established in RSA 126-A:13, for approval as soon as practicable. The commissioner shall make a report relative to the plan which shall be submitted to the speaker of the house of representatives, the president of the senate, and the governor on or before September 1, 2017." *Id.* (emphasis added).

there remained very significant barriers for the implementation of even the pilot program that the workgroup believe to be 'insurmountable' in light of the current structure of the hospital system in the state." *See* Letter from Commissioner at 4 (Dec. 21, 2017), attached as ***Exhibit O***. The hospitals' concerns consisted of "[s]ecurity [c]oncerns," the fear of "[l]iability associated with a plan to conduct hearings outside of statutory authority,"[20] and staffing needs. *Id.*

145. The 2017 budget also approved funding for 20 more DRF beds, but implementation stalled given that no bids were received from hospitals and health-care facilities to create those beds in response to DHHS's request for proposals.[21] In December 2017, as the pilot project collapsed because of the concerns raised by hospitals, the Commissioner then placed an emphasis on a so-called "back door" approach designed to discharge individuals currently in DRF beds at New Hampshire Hospital—an approach which, if successful, would open up DRF bed space and help mitigate the DRF waitlist. This approach was not successful either.[22]

146. Moreover, despite the Merrimack County Superior Court's August 9, 2018 order stating unequivocally that RSA 135-C:31 requires due process within three days of the completion of an IEA certificate (as opposed to admission to a DRF), the Superior Court later

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[20] Again, this liability fear is misplaced, as Chapter 135-C:31 requires process "[w]ithin 3 days of an involuntary emergency admission" under RSA 135-C:31, I—*i.e.*, within three days of when the initial IEA certificate is completed in the hospital emergency department at the non-DRF hospital.

[21] *See* Dave Solomon, "'Back door' Approach to Shortage of Mental Health Beds Has Some Success," *Union Leader* (Dec. 17, 2017), https://www.unionleader.com/news/politics/dave-solomons-state-house-dome-back-door-approach-to-shortage-of-mental-health-beds-has-some-success/article_1305aac7-8d05-572a-80e2-db85fb55ef23.html.

[22] Under this "back door" approach, the focus would be on discharging individuals who no longer need to be at New Hampshire Hospital, which is the largest DRF. Such discharges presumably would then free up space that could then be used by individuals who were being boarded. As the *Union Leader* explained, "Discharging a patient at the hospital is a far cheaper and faster way to open up a bed than waiting for new ones to be created, as long as there is somewhere to send the discharged patients." *See* Dave Solomon, "'Back Door' Approach to Shortage of Mental Health Beds Has Some Success," *Union Leader*, Dec. 17, 2017. This "back door" approach was not successful. The Governor stated that one reason this "back door" approach was not successful was because New Hampshire lacks transitional housing. *See* Jennifer Crompton, "Officials: Not Enough Transitional Housing for Psychiatric Patients," *WMUR* (Aug. 8, 2018), https://www.wmur.com/article/officials-not-enough-transitional-housing-for-psychiatric-patients/22692452 ("We have about 20 to 30 people minimum at New Hampshire Hospital that could be discharged today and free up those beds, but we don't have the transitional housing for them.").

explained in a September 6, 2018 order that the hospital in that case, Concord Hospital, was "not bound in any way by this Court's order of August 9, 2018, now that [Plaintiff] is not restrained of his liberty." *See* Order at 7, *Doe v. Concord Hosp.*, No. 217-2018-cv-00448 (N.H. Super. Ct. Sept. 5, 2018), attached as *Exhibit E*. The Court added: "This Court's Order of August 9, 2018 is not res judicata nor may Concord Hospital be collaterally estopped by any findings the Court made in it." *Id.* at 8. In short, despite that Court's significant and correct interpretation of the law requiring that due process be provided within three days of the completion of an IEA certificate, the Commissioner and New Hampshire hospitals did not comply with the legal ruling, and there was no vehicle to enforce it except in individual, non-binding cases that would not bring systemic relief.

147. During the 2019 legislative session, the New Hampshire state legislature enacted Senate Bill 11, which was designed to create incentives for hospitals to add DRF capacity. *See* Senate Bill 11, attached as *Exhibit P*. However, this bill, though well-intentioned, was inadequate to address the psychiatric boarding issues. Senate Bill 11 did not provide a mechanism to ensure that individuals who are currently being held in hospital emergency departments immediately receive any procedural due process—including appointed counsel, notice of their rights, and a meaningful opportunity to contest their detention—while they wait for placement at a DRF.

D. The Commissioner Bears Responsibility for Involuntarily Detaining Patients and Refusing to Provide Them with Procedural Due Process

148. For many years, the Commissioner has played an active role in involuntarily detaining patients in hospital emergency departments and DRFs. Under the Fourteenth Amendment, the Commissioner has a duty to provide prompt and meaningful procedural due process to patients who are involuntarily detained under her supervision pursuant to RSA 135-

C:27–33, but the Commissioner has consistently refused to provide those patients with the procedural due process that is constitutionally required.

149. Before May 11, 2021—when the New Hampshire Supreme Court forced the Commissioner to act in *Jane Doe v. Commissioner of New Hampshire Department of Health & Human Services*—the Commissioner maintained a clear policy and practice of refusing to provide procedural due process to IEA patients before they were transferred to DRFs. In fact, as the Hospital Intervenors explained, the Commissioner "advised the Circuit Court that it is unnecessary to hold a probable cause hearing within three days of completion of an IEA certificate at a Hospital ED." *See* Hospitals' Intervenor Compl. ¶ 36 (ECF No. 63). DHHS maintained that "the three-day period for a probable cause hearing does not commence until an IEA patient is received at a DRF." *Id.* This official policy was also on the DHHS's website, where it stated: "Within three days of *admission to NHH [DRF New Hampshire Hospital]* (not counting Sundays and holidays), a court hearing is scheduled to consider whether there was reasonable cause to confine the person at NHH, due to alleged behaviors that were dangerous to self or others, as a result of mental illness." *See* New Hampshire Department of Health and Human Services, Involuntary Admissions, attached as *Exhibit Q* (emphasis added).

150. Through this policy and practice, the Commissioner abandoned these patients and compelled them to detention in non-DRF emergency departments—like SNHMC, Concord Hospital, St. Joseph's Hospital, and Memorial Hospital—that are not necessarily equipped to treat them often for weeks at a time without providing them with an attorney, any notice of their rights or the allegations against them, or any ability to contest their detention. Through this weeks-long abandonment, the Commissioner avoided her obligations to make treatment "immediately" available to these individuals in DRFs—responsibilities that are exclusively

reserved to the Commissioner—by delegating those responsibilities to non-DRF hospitals that may not have the resources to provide adequate medical and psychiatric treatment. Involuntarily detaining and caring for patients who may be a danger to themselves or others is traditionally a public function that was performed by DHHS. But through psychiatric boarding, non-DRF hospitals like SNHMC, Concord Hospital, St. Joseph's Hospital, and Memorial Hospital were compelled to perform functions that DHHS had traditionally performed.

151. Moreover, the Commissioner was intimately involved in the process of involuntarily detaining patients in hospital emergency departments and actively directed hospitals to continue detaining patients. As the boarding crises worsened, the Commissioner began "requir[ing] Hospital personnel to complete successive IEA certificates every three days and to perform mental and physical examinations of the IEA patient for each IEA certificate." *See* Hospitals' Intervenor Compl. ¶ 37 (ECF No. 63). Put another way, rather than provide procedural due process to these patients as legally required, the Commissioner directed hospitals to simply "renew" the IEA certificate after three days under the belief that this renewal would restart the three-day clock each time. These "renewals" would then be added to the patient's file every three days until the patient was transferred to a DRF as a way to circumvent the constitutional and statutory requirements that procedural due process be provided by the Commissioner within three days of the initial involuntary admission.

III. The Commissioner and Administrative Judge's Recent Policies and Practices Continue to Deny Patients Procedural Due Process

152. At the time this suit was originally filed in November 2018, the Commissioner took the position that the three-day period within which a probable cause hearing is required begins after the person is transferred to a DRF and not upon the completion of the IEA certificate. After Class Plaintiffs initiated this action, the Commissioner and Administrative

Judge adopted revised policies on or around March 16, 2022, that purport to provide probable cause hearings within three days of an IEA certificate, but these policies fail to meet the requirements of the United States Constitution.

A. Developments After this Case Was Filed

153. In September 2019, the Commissioner moved to dismiss Class Plaintiffs' claims in this case. Following extensive briefing and oral argument, on April 30, 2020, the late Judge DiClerico denied the motion to dismiss, holding that the Commissioner has a "duty to provide IEA-certified persons with probable cause hearings within three days after an IEA certificate is completed." *Doe v. Comm'r of N.H. Dep't of Health & Hum. Servs.*, No. CV 18-CV-1039-JD, 2020 WL 2079310, at *12 (D.N.H. Apr. 30, 2020) (ECF No. 147). However, despite the Court's ruling—and similar to the Commissioner's response to the August 9, 2018 Merrimack County Superior Court ruling—the Commissioner continued to maintain that she had no obligation to provide any procedural due process to patients until after they were transferred to New Hampshire Hospital or another DRF.

154. Meanwhile, on May 11, 2021, the New Hampshire Supreme Court weighed in on one of these issues in a separate proceeding—an individual habeas case called *Jane Doe v. Commissioner of New Hampshire Department of Health & Human Services*, 261 A.3d 968 (N.H. 2021). The New Hampshire Supreme Court issued this decision after a New Hampshire Superior Court again concluded that hearings were required within three days of when an IEA certificate is completed. The New Hampshire Supreme Court agreed with the conclusion of Judge DiClerico and the lower court that the Commissioner has a "duty mandated by statute to provide for probable cause hearings within three days of when an [IEA] certificate is completed." *Id.* at 984 (citation omitted). The New Hampshire Supreme Court also held that the "state mental health services system" includes "medical service providers" in hospital

emergency departments "'who are approved by either a designated receiving facility or a community mental health program approved by the commissioner' to complete certificates for involuntary emergency admission." *Id.* at 981–82 (quoting RSA 135-C:28); *see also* RSA 135-C:28, I ("The involuntary emergency admission of a person shall be to the state mental health services system under the supervision of the commissioner.").

155. Following the New Hampshire Supreme Court's decision, Governor Christopher Sununu issued an executive order directing DHHS to take additional actions to address the mental health crisis. *See* Executive Order 2021-09 at 2 (May 13, 2021), attached as *Exhibit H*.

156. Since May 11, 2021, the Commissioner and Administrative Judge have made significant changes to their policies, practices, and procedures under the guise of complying with the New Hampshire Supreme Court's *Jane Doe* decision. But the policy changes that the Commissioner and Administrative Judge have adopted continue to fall short of providing patients prompt and meaningful procedural due process as required by the Fourteenth Amendment of the U.S. Constitution. Thus, although the specific means by which the Commissioner denies patients procedural due process have shifted, the Commissioner has maintained her pattern and practice of refusing to provide prompt and meaningful procedural due process to patients who are involuntarily detained under her supervision.

157. Moreover, the Commissioner and Administrative Judge have adopted these policies and practices in coordination with one another. Although the Commissioner is responsible for providing patients with notice of their rights and access to counsel, arranging probable cause hearings, and ensuring that patients receive timely and meaningful hearings, the Circuit Court system is responsible for holding the actual probable cause hearings. Accordingly,

both the Commissioner and Administrative Judge are responsible for protecting the procedural due process rights of IEA patients.

B. The Commissioner and Administrative Judge Have Shifted to Providing Most Probable Cause Hearings by Telephone

158. As discussed above, the Commissioner has a duty under state law to arrange and provide timely probable cause hearings to patients who are involuntarily detained within her custody pursuant to RSA 135-C:27–33. Accordingly, the Commissioner is responsible for coordinating with the Administrative Judge to ensure that probable cause hearings are scheduled and conducted in a timely manner and in a format that adequately safeguards the constitutional rights of the patients who are involuntarily detained.

159. Under state law, the Administrative Judge is likewise responsible for ensuring that the Circuit Court system provides timely probable cause hearings to patients who are involuntarily detained under RSA 135-C:27–33 and for ensuring that probable cause hearings are conducted in a format that adequately safeguards the patients' constitutional rights.

160. Both the Commissioner and Administrative Judge have refused to provide prompt and meaningful probable cause hearings to patients who are involuntarily detained under RSA 135-C:27–33 as required by the Fourteenth Amendment.

161. On or about March 16, 2022, the Commissioner and Administrative Judge adopted a policy and practice of providing telephonic probable cause hearings to patients who are involuntarily detained in emergency departments and DRFs under RSA 135-C:27–33. *See* David D. King, Administrative Judge, "Changes to IEA Processing," Memo. to Attorneys Representing Patients in IEA Cases at 2 (Mar. 16, 2022), attached as *Exhibit R* ("At the beginning of each hearing, the Court will now be able to attempt to telephonically contact

patients who remain in local hospitals using the information provided on the cover sheet.").[23] Pursuant to the Commissioner and Administrative Judge's policies, Circuit Court Judges systematically deny patients' requests for videoconference probable cause hearings, even when the technology for videoconferencing is readily available.

162. Before November 2022, patients who were involuntarily detained in DRFs often, though not always, received probable cause hearings by videoconference.[24] But starting in November 2022, as part of the Circuit Court's centralization of this process in Concord and in a reversal from prior practice, the Commissioner and Administrative Judge adopted policies and practices of *only* providing telephonic probable cause hearings, even when a patient had already been transferred to a DRF and the patient's counsel was prepared to proceed by video. The Commissioner and Administrative Judge made this decision to hold all hearings by telephone despite the fact that the technology had been in place to conduct these hearings by video in DRFs. In other words, as detailed further below, with respect to those patients in DRFs, the revised procedures implemented by the Commissioner and Administrative Judge provide *even less due process to patients in DRFs* than was often provided before November 2022.

163. On January 27, 2023, the Administrative Judge announced that he planned to begin holding video hearings for some patients who are physically located at DRFs beginning on February 6, 2023. Although this announcement suggests that some of the Administrative

[23] *See also* "New IEA Procedures in the New Hampshire Circuit Court, Effective: Thursday, March 17, 2022," ¶¶ 11, 15, attached as *Exhibit S* ("The Hearing Notice includes the date, time, and location of the hearing. It also notes that Petitioners and Petitionees who are not at the DRF at the time of the hearing must be available to receive a telephone during the time for which the hearing is scheduled . . . . If the Petitionee is not at the DRF and is not connected to the hearing by telephone, the case may be dismissed based on failure to provide timely hearing.").

[24] From March 2022 to November 2022, some patients in DRFs did not receive video hearings because their cases had been docketed in Concord as part of the newly-developing centralization process or because the petition was filed while the patient was in an emergency department (even though the patient was later transferred before the scheduled hearing to the DRF where video technology was available).

Judge's policies may be moving in the right direction, the announced plan has multiple shortcomings.

164. First, the Administrative Judge indicated that this pilot program would begin with only the DRF at Portsmouth Hospital, and the Circuit Court system would then work with each DRF thereafter to implement video hearings at their respective locations. On May 18, 2023, the Administrative Judge announced that videoconference hearings were being offered in five of the seven DRFs in New Hampshire. Thus, the Commissioner and Administrative Judge are still not providing videoconference hearings on a statewide basis in DRFs, and the pilot program has not resolved the problems with the Commissioner and Administrative Judge's existing policies and practices. Indeed, this pilot program is merely designed to incrementally reintroduce a video hearing process that was widely used several months ago in DRFs. In other words, the pilot program endeavors to provide the videoconference hearings that the Commissioner and Administrative Judge needlessly stripped away from DRFs as part of the centralization process.

165. Second, the Administrative Judge's January 27, 2023 announcement acknowledged that, even under this pilot program, not all patients in DRFs will receive video hearings. According to the announcement, patients in DRFs will only get videoconference hearings if they are transferred from hospital emergency departments that had the same hearing times as the DRFs to which they are transferred. However, any patient who is transferred to a DRF before the hearing from a hospital emergency department that does *not* have the same hearing time as the DRF to which the patient is transferred will still receive only a telephonic hearing.

166. On May 18, 2023, the Administrative Judge announced that the Circuit Court is now seeking to conduct hearings by video for patients in hospital emergency departments that

are willing to allow video hearings to be held in their facilities. The Administrative Judge invited hospitals to contact the Circuit Court if they are interested in exploring the possibility of video hearings. However, in light of the hospitals' longstanding unwillingness to allow video hearings in their facilities, it is unclear whether any hospital emergency departments will work with the Administrative Judge to facilitate video hearings in their facilities.

167. Moreover, despite the Administrative Judge's goal to not have IEA patients wait in hospital emergency departments, IEA patients have been waiting in hospital emergency departments for nearly a decade now. And as the *Jane Doe* Court noted, those patients are entitled to meaningful due process while they wait in hospital emergency departments. But in most cases, the Commissioner and Administrative Judge only provide probable cause hearings by telephone when patients are detained in emergency departments at the time of their hearings.

168. Providing probable cause hearings solely by telephone is effectively the same as providing no probable cause hearings at all. Telephonic 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.

169. A judge must determine 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. *See* Declaration of Jon. S. Berlin, M.D., ¶¶ 14–17, attached as *Exhibit A*. The manner in which patients present themselves can influence how the judges will formulate questions and evaluate responses. For example, the visual information available in a face-to-face

hearing may prompt the judge to ask follow-up questions that deepen the judge's understanding of the individual's condition. All of this information is lacking in a telephonic setting.

170. 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. *See* Declaration of Jon. S. Berlin, M.D., ¶ 15, attached as *Exhibit A*. This is particularly true regarding sensitive information patients may feel reluctant to share during a hearing, such as specific details about the nature of the patients' mental health concerns and conditions, the patients' inner thoughts and feelings, and the extent to which patients are at risk of hurting themselves or others. *Id.* Patients' forced detention may make them hesitant to be open about their true level of risk for fear that the judge will automatically assume that hospitalization is the only solution, and the personal connection established through in-person hearings or by videoconference hearings helps to establish more trust. *Id.* ¶ 16.

171. Without 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. Judges often rely on visual clues and facial expressions when assessing whether people are understanding what is happening. Those types of visual indicators are especially important in a legal proceeding, where judges and attorneys often use legal terms and other complicated language that laypeople are far less likely to understand. But telephonic hearings take away those visual clues and thereby prevent judges from adequately assessing whether the patients are following and comprehending the proceedings.

172. Just as psychiatrists may hesitate to approve the release of a new patient previously unknown to them that had risk factors for suicide or harm to others, mental health courts may also feel pressured into taking the conservative route and opting for continued

detention without the data afforded by a face-to-face hearing. *Id.* ¶ 17. Where an involuntary detention is unwarranted, the visual information a judge gathers through in-person or videoconference hearings may provide a judge comfort in reaching this determination.

173. Accordingly, 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. By contrast, a probable cause hearing that is carried out telephonically does not give the judge an adequate opportunity to see the patient and assess the patient's mental condition and does not give the patient a meaningful opportunity to contest the involuntary detention. The inadequacies of a telephonic hearing are particularly troubling because a person's liberty is at stake. As Executive Councilor Cinde Warmington observed in September 2022, the use of telephonic hearings is "shocking." *See* Paula Tracy, "Ryan Guptill's Judicial Nomination Lauded at Hearing," *InDepthNH.org* (Sept. 23, 2022), https://indepthnh.org/2022/09/23/ryan-guptill-s-judicial-nomination-lauded-at-hearing/, attached as *Exhibit T*.

174. Moreover, despite the shift to conducting probable cause hearings by telephone, the Commissioner and Administrative Judge are still falling short of providing hearings to all patients within three days of the completion of their initial IEA certificates. From March 17, 2022, to November 30, 2022, the Circuit Court dismissed at least ten IEA cases under RSA 135-C:31 because the Commissioner and Administrative Judge failed to provide patients with probable cause hearings within three days of the completion of their IEA certificates.

175. In overhauling the structure and format of IEA probable cause hearings, neither the Commissioner nor the Administrative Judge sought advanced input from Class Plaintiffs. Moreover, the Commissioner and Administrative Judge gave no indication that they performed a

formal evaluation to assess and address any accessibility issues, delays, and other problems caused by these policy changes.

C. The Commissioner and Administrative Judge Fail to Provide Patients Adequate Notice of Their Rights and the Allegations Against Them

176. The Commissioner also has a duty under state law to ensure that patients who are involuntarily detained within her custody pursuant to RSA 135-C:27–33 receive prompt and meaningful notice of their rights and prompt and meaningful notice of the allegations against them that are being used to justify their involuntary detention.

177. Under state law, the Administrative Judge is likewise responsible for ensuring that IEA patients receive prompt and meaningful notice of their rights and prompt and meaningful notice of the allegations against them.

178. Both the Commissioner and Administrative Judge have failed to provide IEA patients with prompt and meaningful notice of their rights and prompt and meaningful notice of the allegations against them as required by the Fourteenth Amendment.

179. Many patients receive no notice of their rights until immediately before—or even during—their probable cause hearings. 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.

180. As discussed above, medical service providers in hospital emergency departments who involuntarily detain patients pursuant to IEA certificates are part of the state mental health services system. Therefore, the Commissioner is responsible for overseeing those medical service providers. Nonetheless, the Commissioner fails to ensure that the medical service providers under her supervision and control give patients timely notice of their rights and access to their IEA petitions. To the contrary, medical service providers under the Commissioner's

supervision and control frequently fail to give IEA patients notice of their rights and refuse to give patients access to the IEA petitions that have been filed against them, even when patients ask about their rights and ask for copies of the IEA petitions.

181. In fact, a patient's first meaningful insight into the IEA process may be in the form of a phone call from an attorney the patient does not know shortly before a hearing with a judge that the patient cannot see and concerning a petition the patient is not privy to. This is insufficient notice that falls well below constitutional procedural due process requirements.

182. Indeed, notice of a patient's rights, notice of the action the government intends to take against the patient, and notice of the allegations supporting an involuntary detention are all essential components of the patient's constitutional right to procedural due process. And for good reason: Without this information, the patient does not know and cannot assess the State's asserted justification for detaining them, which in turn prevents the patient from knowing what information to share with counsel to aid the attorney in representing the patient in the hearing.

183. A patient's knowledge of the right to counsel and the asserted grounds for involuntary detention enables the patient to provide counsel with information that is critical to ensuring a fair adjudication. A patient might need to share, for example, background facts that might explain the patient's behavior as alleged in the petition or medical history details, all of which assist the patient's attorney in effectively representing the patient during the hearing and may help the attorney show why an involuntary detention is not justified.

184. Compounding these problems, as of November 1, 2022, the Administrative Judge altered the Certificate of Examining Physician form at Page 3 of the Petition by eliminating the box where the physician would affirmatively indicate, by checking this box, that they "conveyed that this Involuntary Emergency Admission is pending and provided the Notice of Rights that

was attached as page 10 to the person (petitionee) sought to be admitted." *Compare* IEA Form NHJB-2826-D (11/01/2022), attached as *Exhibit U*, *with* IEA Form NHJB-2826-D (03/17/2022), attached as *Exhibit V*. While this text remains on the form, the deletion of the box where the physician had to affirmatively indicate that notice had been provided has made it more difficult for patients to establish in court that the relevant paperwork was not provided.

D. The Commissioner and Administrative Judge Have Adopted Policies and Practices that Deny Patients Meaningful Access to Counsel

185. The Commissioner also has a duty under state law to ensure that patients who are involuntarily detained within her custody pursuant to RSA 135-C:27–33 receive prompt and meaningful access to counsel. Accordingly, the Commissioner is responsible for coordinating with the Administrative Judge to ensure that attorneys are appointed for IEA patients and that the patients have meaningful opportunities to consult with their attorneys before, during, and after probable cause hearings.

186. Under state law, the Administrative Judge is likewise responsible for ensuring that attorneys are appointed for IEA patients and that the patients have meaningful opportunities to consult with their attorneys before, during, and after probable cause hearings.

187. Both the Commissioner and Administrative Judge have failed to provide prompt and meaningful access to counsel for patients who are involuntarily detained under RSA 135-C:27–33 as required by the Fourteenth Amendment.

188. In tandem with the transition to telephonic hearings, the Commissioner and Administrative Judge revised their policies and procedures for processing and scheduling IEA cases. Under the revised procedures, all IEA petitions from across the State of New Hampshire are now centrally processed in Concord, regardless of the location of the court in which the petition is filed or the hospital in which the patient is detained.

189. This centralization, though well intentioned, has caused significant constitutional problems. Before the Commissioner and Administrative Judge decided to centralize all probable cause hearings in Concord, patients who were involuntarily detained pursuant to IEA certificates typically had the opportunity to consult with their counsel in person before, during, and after hearings. Attorneys relied on visual cues and non-verbal communication to tailor their questions to individual clients, provide advice and representation based on full information about the client's condition and case history, and build the trust necessary for effective communication and representation. In-person consultation enabled attorneys to confirm strategy, clarify facts, review evidence, and inform clients on the nature and status of the proceedings. Clients could more easily indicate if they were unable to follow any aspect of the discussion or proceeding. During probable cause hearings, attorneys and clients could more easily consult with one another through verbal and non-verbal communication, and attorneys could more readily convene with their clients privately when needed.

190. The centralization of IEA proceedings has had the practical effect of often denying patients full access to counsel by preventing patients and their attorneys from meeting face-to-face before, during, and after hearings. The patient, judge, attorney, and petitioner are often in four different locations at the time of the probable cause hearing. Moreover, 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 before, during, and after probable cause hearings. 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. Further, conducting telephonic interviews in advance of a hearing can be difficult and sometimes ineffective, which hampers counsel's ability to gather the information they need to represent their clients and communicate freely and most effectively with their clients. If the Court System allowed the probable cause hearings to be rescheduled to the designated date and time slots of the DRFs in which patients are ultimately transferred, this would make it easier for these attorneys to meet with and attend more hearings with their clients. However, the Court System has declined to make this accommodation.

E. The Commissioner and Administrative Judge's Due Process Violations Impact Those with Mental Health Conditions

191. The damaging effects of the practices and policies that the Commissioner and Administrative Judge have adopted in recent months are multiplied for individuals with mental health conditions.

192. Patients with mental health conditions may experience cognitive challenges concerning attention, memory, and visual and spatial awareness, which make it difficult for them to comprehend and fully engage in a telephonic hearing where the participants are not visible to the patient. For these patients, teleconferences are particularly disorienting and disturbing because the judge appears at a hearing only as an anonymous voice. Absent visual cues, a patient may not trust that the speaker is in fact a judge. Visual information is also critical to aiding a patient in recognizing which participant is speaking and in understanding the proceedings. Without seeing the parties, a patient cannot fully participate in the hearing.

193. The stress of telephonic hearings and the patient's inability to effectively participate in such a critical proceeding may also cause the mental health of these patients to further deteriorate during and after the hearing. *See* Edward Alan Miller, Telemedicine and the Provider-Patient Relationship: What We Know So Far at 40 (2010) (study in acute psychiatric

unit found that, compared to video or face-to-face interactions, patients were "more anxious in non-visual modes [such as telephone] where they tended to adopt the least relaxed body postures").[25] And a telephonic hearing's effect on a patient's condition may impede the judge's neutral and fair evaluation of whether detention is warranted.

194. Moreover, because the judge cannot see the patient—and frequently the attorney cannot see the patient either—it may not be evident to the other participants that the patient is struggling to understand the proceedings and may need assistance. Thus, the policies and practices that the Commissioner and Administrative Judge have implemented in recent months increase the risk that this vulnerable population will not be able to adequately access the court or their attorneys.

CLASS ACTION ALLEGATIONS

195. Pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, the named Plaintiffs bring this action on behalf of themselves and all other individuals who are currently being, have been, or will be involuntarily detained under RSA 135-C:27–33 without receiving prompt and meaningful procedural due process or a meaningful probable cause hearing within three days (not including Sundays and holidays) of the completion of an involuntary emergency admission certificate (the "Plaintiff Class").

196. These individuals are at serious risk of institutionalization at New Hampshire Hospital and other DRFs. Individuals who have previously been the subject of an IEA certificate are more likely to be the subject of an emergency admission certificate in the future.

197. 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

[25] https://www.nuffieldbioethics.org/wp-content/uploads/Miller-E-2010-Evidence-review-Telemedicine-and-the-Provider-Patient-Relationship-what-we-know-so-far.pdf.

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. This is because there is a significant stigma towards those who have (or are perceived to have) experienced mental illness.

198. As is well documented, negative attitudes and beliefs toward people who have a mental health condition are common.

199. The Commissioner and Administrative Judge provide these IEA patients with no notice of their rights, no access to the IEA petitions that are used to justify their detention, no meaningful access to counsel, no meaningful probable cause hearings, and no meaningful opportunity to contest their detention. Plaintiffs seek declaratory and injunctive relief individually and on behalf of the class to remedy this procedural due process violation.

200. The Plaintiff Class is so numerous that joinder of all members is impracticable. As of October 31, 2018, the class consisted of more than 50 individuals (46 adults and 4 children) being involuntarily detained in emergency departments without due process while awaiting DRF admission, as well as those individuals who would be involuntarily detained at non-DRF facilities in the future. As of May 24, 2023, the class consisted of hundreds—if not thousands—of individuals who have been involuntarily detained without receiving prompt and meaningful procedural due process.

201. There are questions of law and fact common to the Plaintiff Class, including whether the Commissioner and Administrative Judge are violating the procedural due process protections of the Fourteenth Amendment by refusing to provide prompt and meaningful procedural due process to individuals who are involuntarily detained under RSA 135-C:27–33.

202. The named Plaintiffs' claims are typical of the Plaintiff Class, thereby allowing the named Plaintiffs to adequately and fairly represent the interests of the class members. The named Plaintiffs will fully and vigorously prosecute this action and are represented by attorneys from the ACLU of New Hampshire and Weil, Gotshal & Manges LLP who are experienced in federal class action litigation, constitutional law, and civil litigation. Individual members of the class would have difficulty pursuing claims remedying systemic violations on their own.

203. The Commissioner and Administrative Judge have administered the state mental health system in a way that fails to provide constitutionally required procedural due process to individuals who are being involuntarily detained under RSA 135-C:27–33. Therefore, the Commissioner and Administrative Judge have acted or declined to act on grounds that apply generally to the class, making injunctive or corresponding declaratory relief appropriate with respect to the class as a whole. As a result, and consistent with similar civil rights actions, the named Plaintiffs and Plaintiff Class seek certification pursuant to Fed. R. Civ. P. 23(b)(2).

CLAIMS FOR RELIEF

Count I
Class Action Count
(Fourteenth Amendment to the U.S. Constitution, as enforced by 42 U.S.C. § 1983 – PROCEDURAL DUE PROCESS)

All Plaintiffs, Individually and on Behalf of the Plaintiff Class, Against the Commissioner and Administrative Judge

204. The named Plaintiffs and the members of the Plaintiff Class reallege and incorporate by reference the allegations contained in the preceding paragraphs.

205. Section 1 of the Fourteenth Amendment to the United States Constitution prohibits states from depriving "any person of . . . liberty … without due process of law." This

principle protects the right of a person to not be deprived of his or her liberty without appropriate process.

206. Under 42 U.S.C. § 1983, the Defendant Commissioner and the Defendant Administrative Judge are both "persons" liable for unconstitutional policies, practices, and customs.

207. Under 42 U.S.C. § 1983, every person acting under color of state law who deprives another person of his or her constitutional rights is also liable at law and in equity.

208. The Commissioner and Administrative Judge have policies, practices, or customs of refusing to provide prompt and meaningful procedural due process or a meaningful probable cause hearing within three days (not including Sundays and holidays) of the completion of an involuntary emergency admission certificate.

209. The Commissioner and Administrative Judge have known or should have known about the existence of these policies, practices, or customs.

210. The named Plaintiffs and the members of the Plaintiff Class are currently being, have been, or will be involuntarily detained pursuant to the involuntary emergency admission process set forth in RSA 135-C:27–33.

211. The named Plaintiffs and the members of the Plaintiff Class have a protected liberty interest in not being involuntarily detained under Chapter 135-C. *See State v. Lavoie*, 155 N.H. 477, 482 (2007) (loss of liberty and social stigma are "substantial" private constitutional interests). How a hearing is conducted implicates the same, vital liberty interest in every IEA proceeding. Here, the invariable attribute of every IEA hearing is the fact that the Judge (i) must evaluate mental illness status and dangerousness, and (ii) the patient's liberty is at stake.

212. Before *Jane Doe*, the Commissioner and Administrative Judge denied Plaintiffs and the Plaintiff Class constitutionally adequate procedural due process by refusing to provide them with prompt and meaningful notice of their rights and the allegations against them, prompt and meaningful access to counsel, and meaningful probable cause hearings within three days of the completion of their IEA certificates.

213. After *Jane Doe*, the Commissioner and Administrative Judge have denied Plaintiffs and the members of the Plaintiff Class constitutionally adequate procedural due proess by holding probable cause hearings by teleconference, and systematically denying class members' requests for hearings by videoconference.

214. The Commissioner and Administrative Judge have denied Plaintiffs and the members of the Plaintiff Class constitutionally adequate procedural due proess by implementing a policy centralizing hearings in Concord that has denied Plaintiffs and the members of the Plaintiff Class access to counsel.

215. The Commissioner and Administrative Judge have denied Plaintiffs and the members of the Plaintiff Class constitutionally adequate procedural due proess by failing to provide each patient with timely notice and a copy of the patient's IEA petition.

216. As a result of these policies, practices, or customs, the named Plaintiffs and Plaintiff Class have suffered and members of the Plaintiff Class will continue to suffer irreparable harm—namely being deprived of their rights to procedural due process.

217. Unless restrained from doing so, the Commissioner and Administrative Judge will continue to violate the Fourteenth Amendment by enforcing these policies, practices, or customs.

218. Unless enjoined, the Commissioner and Administrative Judge will continue to inflict injuries for which the named Plaintiffs and the members of the Plaintiff Class have no adequate remedy at law.

219. The named Plaintiffs and the members of the Plaintiff Class are entitled to reasonable attorneys' fees and costs.

220. The named Plaintiffs and the members of the Plaintiff Class are entitled to declaratory relief, injunctive relief, attorneys' fees and costs, and such other and further relief as the Court deems just and proper.

REQUEST FOR RELIEF

WHEREFORE, as to Count I, the named Plaintiffs and the Plaintiff Class respectfully request the following relief:

a) Re-certify this case as a class action pursuant to Fed. R. Civ. P. 23;

b) Declare that the Commissioner's and Administrative Judge's policies, practices, and customs of failing to provide prompt and meaningful procedural due process to individuals who are involuntarily detained under RSA 135-C:27–33 violate the Fourteenth Amendment to the United States Constitution;

c) Permanently enjoin the Commissioner and Administrative Judge from failing to provide prompt and meaningful procedural due process to individuals who are involuntarily detained under RSA 135-C:27–33;

d) Require the Commissioner and Administrative Judge to provide prompt and meaningful procedural due process to individuals who are involuntarily detained under RSA 135-C:27–33;

e) Award Plaintiffs attorneys' fees in this action pursuant to 42 U.S.C. § 1988(b);

f) Award Plaintiffs their costs of suit; and

g) Grant such other and further relief as this Court deems just and proper in the circumstances.

Respectfully submitted,

John Doe, Charles Coe, Jane Roe, Deborah A. Taylor as Guardian to Scott Stephen Johnstone, H.M., and J.S. 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,

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