UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

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

PLAINTIFFS' SURREPLY IN FURTHER OPPOSITION TO THE COMMISSIONER'S MOTION TO DISMISS

ARGUMENT

Plaintiffs have plausibly alleged that the State engages in direct action that violates the U.S. Constitution and New Hampshire law by compelling Hospitals to involuntarily detain patients and refusing to provide patients with timely due process hearings. Contrary to the Commissioner's assertions, that is all that Rule 12(b)(6) requires. Moreover, the Commissioner's flawed interpretation of the IEA statute does not show that a due process hearing is only required after a patient's transfer to a DRF. The Commissioner also offers no legal support for her sweeping contention that state inaction never triggers liability under § 1983, and even so, Plaintiffs have alleged much more than inaction. Finally, despite the Commissioner's misleading assertion, Plaintiffs have no obligation to allege that a DHHS Commissioner "through his or her own individual actions" violated Plaintiffs' rights. Plaintiffs allege that the State maintains a policy, practice, and custom of depriving patients involuntarily detained in emergency rooms of their right to timely due process hearings. Nothing more is needed under § 1983.

1. Plaintiffs have adequately alleged direct state action. As Plaintiffs have already shown, the Commissioner's motion to dismiss fails because the Amended Complaint plausibly alleges that the State is using the Hospitals to detain patients involuntarily. Obj. 10–13. The Commissioner nonetheless argues that Plaintiffs' allegations—for example that the State requires Hospitals to complete successive IEA certificates every three days—are insufficient to show direct state action. Reply ¶ 11. The Commissioner's argument, however, would require Plaintiffs to present detailed evidence showing that the State directed the Hospitals to involuntarily detain patients. The Federal Rules do not impose such an exacting standard.

To allege state action, Plaintiffs need only allege "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678

(2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Thus, the relevant question here "is not whether the complaint makes any particular factual allegations but, rather, whether 'the complaint warrant[s] dismissal because it failed in toto to render plaintiffs' entitlement to relief plausible.'" *Rodriguez-Reyes v. Molina-Rodriguez*, 711 F.3d 49, 55 (1st Cir. 2013). In this analysis, "[w]hat counts is the 'cumulative effect of the [complaint's] factual allegations.'" *Id.* Furthermore, at this stage, the Court must "draw all reasonable inferences" in Plaintiffs' favor. *Cardigan Mountain Sch. v. N.H. Ins. Co.*, 787 F.3d 82, 87 (1st Cir. 2015).

As even the Commissioner acknowledges, Plaintiffs have alleged that "the state directed hospitals to simply 'renew' the IEA certificate after three days under the ruse that this renewal would restart the 3-day clock again." Reply 6–7; Am. Compl. ¶ 72, ECF No. 78. Plaintiffs further allege that the State "compels [patients] to detention in non-DRF emergency rooms," and "has exercised coercive power or has provided such significant encouragement . . . that the challenged conduct . . . must be deemed to be that of the state." Am. Compl. ¶ 71. These allegations, taken together and further supported by the Hospitals' own allegations that the State directs them to hold patients until DRF beds become available, *see* Obj. 11, make Plaintiffs' direct state action theory plausible. At this stage, to survive a motion to dismiss, Plaintiffs have no obligation to plead in detail every way in which the State directs the Hospitals to act.

2. The IEA statute requires the State to provide a due process hearing within three days of completion of an IEA certificate. Plaintiffs maintain—as the Merrimack County Superior Court has already concluded—that RSA 135-C:31, I requires the State to provide a due process hearing within three days of the completion of a patient's initial IEA certificate. A patient is not free to leave a hospital once the IEA certificate issues. The State has expressly directed the Hospitals to <u>*involuntarily detain*</u> patients while they await admission to a DRF. *See* Obj. 10–13. By holding

patients against their will pursuant to the State's statutory scheme and direction, the Hospitals effectuate "involuntary emergency admission[s]" for the State, triggering the requirement that patients receive due process hearings within three days.

In response, the Commissioner contends that "involuntary emergency admission" only means admission to a DRF, yet fails to identify any specific language in the statute saying as much. The Commissioner has repeatedly pointed to RSA 135-C:3 and RSA 135-C:26 to suggest that the statute somehow limits the "state mental health services system" to New Hampshire Hospital and private hospitals designated as DRFs. Reply ¶ 4; Mot. Dismiss 20. But as Plaintiffs have shown, these provisions say no such thing. Indeed, neither RSA 135-C:3 nor RSA 135-C:26 defines the term "state mental health services system." Neither states that the term only encompasses New Hampshire Hospital and other DRFs. *See* Obj. 9.

The Commissioner relies on strained interpretations of the statutory text because, at a broader level, the statute does not support the State's policy and practice of withholding hearings. The legislative history makes that clear. As Rep. Manning explained in 1997, a "medical appearance with a court appointed lawyer" must occur "within 3 days" of an IEA petition to ensure "that somebody doesn't just get put away." Obj. 3. This history shows that the legislature intended for the State to provide a hearing within three days of issuance of the IEA certificate, not three days following a long-delayed transfer to a DRF. In addition, the Merrimack County Superior Court has confirmed that the IEA statute requires the State to provide a due process hearing within three days of the completion of an IEA certificate. *See id.* at 8. Both the legislative history and state court's decision demonstrate that the Commissioner's interpretation of the statute is wrong.

3. The State's failure to provide timely due process gives rise to liability under § 1983. Plaintiffs have explained that the State itself takes an affirmative act each time it withholds due

process from an individual detained in an emergency room pursuant to an IEA certificate. Obj. 10–11. The Commissioner mischaracterizes this argument as "nothing more than the type of inaction-as-state-action theory that the Supreme Court has repeatedly rejected." Reply ¶ 9. But even if Plaintiffs had only alleged inaction, which is not the case, the Commissioner has not pointed to any authority stating that inaction by the state may never form the basis of a § 1983 claim. In fact, the one case the Commissioner cites in support of her contention simply provides that "[a]ction taken *by private entities* with the mere approval or acquiescence of the State is not state action." *Am. Mfrs. Mut. Ins. v. Sullivan*, 526 U.S. 40, 52 (1999) (emphasis added). Plaintiffs allege the State does far more than merely approve or acquiesce to the Hospitals' actions.

The First Circuit has held that a plaintiff may state "a viable section 1983 claim" by identifying "an act *or omission* undertaken under color of state law." *Aponte-Torres v. Univ. of P.R.*, 445 F.3d 50, 55 (1st Cir. 2006) (emphasis added) (quoting *Rogan v. City of Bos.*, 267 F.3d 24, 27 (1st Cir. 2001)). Procedural due process claims, by their very nature, almost always involve omissions undertaken under color of state law. "In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). In other words, the state violates a person's procedural due process rights by failing to provide the due process to which the person is entitled. Here, Plaintiffs allege the State violated their procedural due process rights by refusing to provide them with due process hearings within three days of the completion of their IEA certificates.

4. Plaintiffs need not allege individual actions by the Commissioner to state a claim under § 1983. The Commissioner also claims that "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."

Reply ¶ 13 (quoting *Iqbal*, 556 U.S. at 676). According to the Commissioner, plaintiffs have failed to allege that the Commissioner, "through his or her own individual actions, violated the plaintiffs' constitutional rights." *Id.* But the Commissioner misunderstands both Plaintiffs' claims and § 1983 litigation. Plaintiffs are attributing liability to the State—through the Commissioner in her official capacity—for an unconstitutional policy, practice, and custom under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). As the First Circuit has explained, under *Monell*, governments and their officials "can be liable for constitutional violations" when those violations occur "pursuant to an official policy or custom." *See Welch v. Ciampa*, 542 F.3d 927, 941 (1st Cir. 2008); *accord Bordanaro v. McLeod*, 871 F.2d 1151, 1156 (1st Cir. 1989); *Martin v. Evans*, 241 F. Supp. 3d 276, 284 (D. Mass. 2017).

Plaintiffs have alleged that the State has a *policy, practice, and custom* of refusing to provide due process hearings to individuals involuntarily detained in emergency rooms within three days of the completion of their initial IEA certificates. *See* Am. Compl. ¶ 70 ("[T]he State's failure to provide due process is a matter of official State policy . . . ."); *id.* ¶ 65 (alleging "a systemic pattern and practice in New Hampshire"); *id.* ¶¶ 66–68, 74, 101, 102, 113, 114, 126. Instead of disputing these allegations, the Commissioner zealously defends the State's policy, practice, and custom. The Commissioner has repeatedly reiterated the (incorrect) legal view that 135-C:27–33 "does not require that a person receive a probable cause hearing within three days of presenting to a private hospital emergency room." *See* Mot. Dismiss 20, 35, ECF No. 103-1. And the State's own website confirms the policy, stating that "[w]ithin three days of *admission to [DRF New Hampshire Hospital]* . . . a court hearing is scheduled to consider whether there was reasonable cause to confine the person." Am. Compl., Ex. N, ECF No. 78-14 (emphasis added).

CONCLUSION

For the foregoing reasons, the Commissioner's motion to dismiss should be denied.

Respectfully submitted,

John Doe, Charles Coe, Jane Roe, and Deborah A. Taylor as guardian of Scott Stephen Johnstone, individually and on behalf of themselves and all others similarly situated,

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

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

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

Dated: January 17, 2020

CERTIFICATE OF SERVICE

I, Gilles R. Bissonnette, hereby certify that a copy of the foregoing document, filed through the CM/ECF system, will be sent electronically to all counsel of record.

/s/ Gilles R. Bissonnette
Gilles R. Bissonnette, Esq.