UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

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

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO JEFFREY A. MEYERS'S MOTION TO DISMISS

PRELIMINARY STATEMENT

The New Hampshire Department of Health and Human Service (the "State") is withholding timely due process hearings from people who are involuntarily detained in hospital emergency rooms. Lacking bed space and community-based mental health services, the State relies on hospitals to serve as makeshift, temporary involuntary detention centers for individuals who may (or may not) be experiencing mental conditions that pose a danger to themselves or others. Even though the State has created this psychiatric boarding crisis, the State has taken the position that these patients are not entitled to due process while they are involuntarily detained and waiting in hospital emergency rooms for beds to become available in Designated Receiving Facilities ("DRFs") like New Hampshire Hospital—which can take up to several weeks. Since the filing of the Amended Complaint on July 19, 2019, the waitlist has once again ballooned to forty-one adults and eight children as of October 28, 2019.

As alleged in the Amended Complaint, the State's own involuntary emergency admission ("IEA") statute requires the State to *immediately* transfer a patient to a DRF upon completion of an IEA certificate and provide a probable cause hearing within three days of the completion of that IEA certificate. But instead of complying with this statute, the State requires hospitals to continuously renew patients' IEA certificates every three days under the theory that this enables the hospitals to indefinitely detain patients against their will. In a separate habeas action brought by Plaintiff Charles Coe, the Merrimack Superior Court rejected this scheme. Nevertheless, the State continues to refuse to provide these patients with timely due process. In short, the State takes the troubling—and incorrect—legal position in this case that it has no responsibility to patients waiting in hospital emergency rooms. This failure by the State to safeguard patients' due process rights plainly violates the requirements of the U.S. Constitution, the New Hampshire Constitution, and the IEA statute itself.

The Commissioner seeks to avoid review of the State's unlawful and unconstitutional scheme by depicting this litigation as a case against New Hampshire hospitals ("Hospitals"). In the Commissioner's view, Plaintiffs' allegations exclusively involve the conduct of the Hospitals that detained Plaintiffs, and those Hospitals are not state actors. This contention misses the point. Counts I, II, and III of Plaintiffs' Amended Complaint are against *the State*, not individual Hospitals. Indeed, the State's misconduct sits at the core of Plaintiffs' claims in these counts because the State is directly responsible for withholding due process from individuals involuntarily detained in hospital emergency rooms. Plaintiffs have also alleged that the Hospitals are engaged in actions that are attributed to the State: the Hospitals have detained patients in emergency rooms at the direction of the State, they are engaged in joint action with the State in its scheme to involuntarily detain patients awaiting admission to DRFs, and they carry out traditional state functions by detaining people against their will.

The Commissioner effectively ignores these well-pleaded allegations. Plaintiffs' Amended Complaint is more than adequate at this stage, where this Court must "take the complaint's well-pleaded facts as true" and "draw all reasonable inferences in the plaintiff[s'] favor." *Barchock v. CVS Health Corp.*, 886 F.3d 43, 48 (1st Cir. 2018). Because Plaintiffs seek injunctive relief to remedy the unconstitutional conduct of the State, and because the Hospitals are collectively engaged in actions attributed to the State, the Court should deny the Commissioner's Motion to Dismiss.

STATEMENT OF FACTS

New Hampshire's IEA statute sets forth procedures for the involuntary emergency admission of patients to the State's mental health services system. Admission to the system begins in the Hospitals. The IEA statute instructs physicians and Advanced Practice Registered Nurses ("APRNs") to carry out a mental examination and complete an IEA certificate when they suspect

a 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, -C:28. The State prepares and publishes the forms that the Hospitals must use when performing those functions. *See* Mot. Dismiss, Ex. A, ECF No. 103-2. Through this statutory scheme, the State encourages the Hospitals to complete IEA certificates and involuntarily detain patients who appear to be a threat to themselves or others.

The statute mandates that "[w]ithin 3 days after an involuntary emergency admission, not including Sundays and holidays . . . there shall be a probable cause hearing in the district court having jurisdiction to determine if there was probable cause for involuntary emergency admission." RSA 135-C:31, I. The legislative history of the IEA statute demonstrates that New Hampshire lawmakers intended that probable cause hearings should be held within three days of a patient's initial detention. When the state legislature amended RSA 135-C:27 in 1997 to add subsection (d)—which includes an additional criteria for determining whether a person is a danger—lawmakers emphasized the importance of holding these due process hearings within three days. The bill's main sponsor, Rep. Manning, explained that "within 3 days" of the completion of an IEA petition, a patient must have a "medical appearance with a court appointed lawyer, then another court appearance in 10 days." *Hearing on H.B. 448 Before H. Comm. on Health, Human Servs. & Elderly Affairs*, 1997 Sess. (N.H. Feb. 5, 1997), attached as Exhibit A. This appearance, as Rep. Manning explained, serves as a safeguard to ensure "that somebody doesn't just get put away." *Hearing on H.B. 448 Before S. Comm. on Pub. Insts./Health & Human Servs.*, 1997 Sess. (N.H. Apr. 22, 1997), attached as Exhibit B.

Today, however, the State has created a psychiatric boarding crisis by refusing to provide this critical due process safeguard to patients within three days of the completion of IEA certificates. The IEA statute provides that once an IEA certificate has been completed, "any law

enforcement officer shall . . . take custody of the person to be admitted and immediately deliver him to the receiving facility identified in the certificate." RSA 135-C:29, I. In the past, when an IEA certificate was completed, a patient would be "'immediately delivered' to a DRF in the care of the State" where the patient would receive a due process hearing within three days. Am. Compl. ¶ 73, ECF No. 78. But as the waitlist for DRF beds has grown in recent years, the State has resorted to using the Hospitals to involuntarily detain patients until DRF beds become available. *Id.* The State now requires patients to remain in hospital emergency rooms that are not necessarily equipped to treat them—often for weeks at a time—without providing the patients with counsel or the ability to contest their detention. *Id.* ¶ 71.

In fact, in Kafkaesque fashion, the State has directed the Hospitals to engage in a practice of continuously renewing patients' IEA certificates every three days based on the theory that these renewals enable the Hospitals to detain patients indefinitely. *Id.* ¶ 72; Intervenors' Am. Compl. ¶ 41, ECF No. 77. As Plaintiffs have alleged, "rather than provide due process to these patients as legally required, 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." Am. Compl. ¶ 72. Despite using the Hospitals to detain patients indefinitely, the State persists in refusing to provide patients in emergency rooms with probable cause hearings.

ARGUMENT

When deciding a Rule 12(b)(6) motion, a court assesses whether the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The court must "accept the truth of all well-pleaded facts and draw all reasonable inferences therefrom in the pleader's favor." *Garcia-Catalan v. United States*, 734 F.3d 100, 102 (1st Cir. 2013). Moreover, "[t]o avoid dismissal, a complaint must provide 'a short and plain

statement of the claim showing that the pleader is entitled to relief.'" *Id.* (quoting Fed. R. Civ. P. 8(a)(2)).

I. The State Created and Administers a System Through Which It Deprives Patients Involuntarily Detained in Emergency Rooms of Timely Due Process.

The State is responsible for creating a psychiatric boarding crisis in New Hampshire's non-DRF emergency rooms. Facing a shortage of DRF beds and lack of community-based mental health services, the State has required the Hospitals to continuously renew IEA certificates every three days. This practice allows the State to maintain institutional custody of patients while they await admission to DRFs. In effect, the State has created a backlog of patients awaiting admission to DRFs and is now relying on the Hospitals to serve as detention centers for involuntarily detained patients. Having recruited the Hospitals to facilitate its IEA process, the State cannot now claim that it has no responsibility to provide due process hearings to patients involuntarily detained in non-DRF emergency rooms.

Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State" deprives another "of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured." 42 U.S.C. § 1983. This provision "was intended not only to 'override' discriminatory or otherwise unconstitutional state laws, and to provide a remedy for violations of civil rights 'where state law was inadequate,' but also to provide a federal remedy 'where the state remedy, though adequate in theory, was not available in practice.'" *Zinermon v. Burch*, 494 U.S. 113, 124 (1990) (quoting *Monroe v. Pape*, 365 U.S. 167, 173–74 (1961)). Therefore, to state a claim under § 1983, all that a plaintiff must show is "the existence of a federal constitutional or statutory right, and a deprivation of that right by a person acting under color of state law." *Rockwell v. Cape Cod Hosp.*, 26 F.3d 254, 256 (1st Cir. 1994).

"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*, 494 U.S. at 125; *see also* U.S. Const. amend. XIV, § 1 (prohibiting states from depriving "any person of . . . liberty . . . without due process of law"). Indeed, "[t]here is no question that involuntary confinement for compulsory psychiatric treatment is a 'massive curtailment of liberty.'" *Rockwell*, 26 F.3d at 256. The Supreme Court "repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979); *see also Zinermon*, 494 U.S. at 131 ("[T]here is a substantial liberty interest in avoiding confinement in a mental hospital."). Moreover, the Commissioner does not dispute that Plaintiffs have been involuntarily detained—and thereby deprived of their liberty—without due process of law. The Commissioner's only retort is that the State's failure to provide due process in a timely manner supposedly does not constitute "state action." Mot. Dismiss 19–21.

But the State is certainly acting under color of law when it compels patients to be detained in emergency rooms, deprives these individuals of timely due process hearings, and refuses to promptly inform them of their right to counsel. The State and the Commissioner are clearly state actors. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 297 (2001) (noting that "a state agency established by state law" is a "state actor"). And the Commissioner has not disputed that the State has a systemic policy of withholding due process from patients involuntarily detained in hospital emergency rooms under RSA 135-C:27–33. For example, the Commissioner has repeatedly reiterated his (incorrect) legal view that RSA 135-C:27–31 does not require the State to provide a patient with a "probable cause hearing within three days of presenting

to a private hospital emergency room." *See* Mot. Dismiss 20, 35 ("The plaintiffs' reading of RSA 135-C:31 is incorrect as a matter of law."). The State's own website affirms this policy: "Within three days of *admission to [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." Am. Compl., Ex. N, ECF No. 78-2 (emphasis added).[1] And, finally, the State and the Commissioner have pervasively involved themselves in establishing and administering an unconstitutional scheme that deprives people held in emergency rooms of due process.

A. New Hampshire Law Requires the State to Provide Due Process Hearings Within Three Days After an IEA Certificate Is First Completed.

New Hampshire law makes clear that it is *the State's obligation* to provide hearings to people who are involuntarily detained pursuant to IEA certificates. Thus, state action in this case is easily satisfied without any need to address whether the actions of Hospitals are attributable to the State. Am. Compl. ¶ 70. Indeed, the IEA statute provides that "[u]pon completion of an involuntary emergency admission certificate under RSA 135-C:28, any law enforcement officer shall . . . take custody of the person to be admitted and immediately deliver him to the receiving facility identified in the certificate." RSA 135-C:29, I. The statute then provides that "[w]ithin 3 days after an involuntary emergency admission, not including Sundays and holidays . . . there shall be a probable cause hearing in the district court having jurisdiction to determine if there was probable cause for involuntary emergency admission." RSA 135-C:31, I.

[1] The Intervening Hospitals further allege that the State "has advised the Hospitals and the Circuit Court that the three-day period for a probable cause hearing does not commence until an IEA patient arrives at a DRF." *See* Intervenors' Am. Compl. ¶ 39.

Under the IEA statute, involuntary emergency admission occurs when an IEA certificate is issued. Although the IEA statute specifies that "[t]he involuntary emergency admission of a person shall be to the state mental health services system under the supervision of the commissioner," the statute does not define the term "state mental health services system." RSA 135-C:28, I. For reasons explained below, the Hospitals are integral to the State's mental health services system and act under the State's direction in the involuntary emergency admission process. As a result, a patient detained in an emergency room pursuant to an IEA certificate has been admitted to the state mental health services system and must receive a due process hearing within three days.

At least one state court has already determined that RSA 135-C:31 requires a probable cause hearing within three days of the completion of an IEA certificate. *Doe v. Concord Hosp.*, No. 2018-CV-448, slip op. at 7 (Merrimack Cty. Super. Ct. Aug. 9, 2018), ECF No. 78-2.[2] Likewise, when the state legislature passed revisions to RSA 135-C:27 in 1997, they repeatedly emphasized the importance of holding due process hearings within three days. The bill's main sponsor, Rep. Manning, pointed to "all of the safeguards that are built into our laws so that somebody doesn't just get put away," including "two or three court appearances with a court lawyer." *Hearing on H.B. 448 Before S. Comm.*, Exhibit B. He explained that "within 3 days" of the completion of an IEA petition, a patient must have a "medical appearance with a court appointed lawyer, then another court appearance in 10 days." *Hearing on H.B. 448 Before H. Comm.*, Exhibit A. In addition, Dr. Thomas Fox, the Medical Director of the Division of Mental Health and Developmental Services, testified that "[j]udicial review of all involuntary admissions

[2] A Massachusetts court has similarly interpreted Massachusetts's involuntary admission statute such that its three-day time limit on detention begins when a patient arrives at a hospital's emergency department. *See In re C.R.*, No. 1801MH0235 (Boston Muni. Ct. App. Div. Sept. 5, 2019), attached at Exhibit C.

to show cause for continuance *within three working days* must be done." *Hearing on H.B. 448 Before S. Comm.*, Exhibit B (emphasis added).

Yet today, the State has created a psychiatric boarding crisis by refusing to provide due process within three days of the completion of IEA certificates, and it relies on a misguided and patently unconstitutional interpretation of the IEA statute to justify indefinite detention of patients in non-DRF emergency rooms. Instead of immediately delivering patients to facilities where they will receive due process hearings within three days of their involuntary emergency admission, the State has chosen to delay due process hearings indefinitely. The State compels patients to remain in hospital emergency rooms—for weeks at a time in many cases—without providing the patients with counsel or the ability to contest their detention. Am. Compl. ¶ 71. Such conduct is unconscionable and unlawful. The Commissioner seeks to evade the State's statutory and constitutional obligations by arguing that involuntary emergency admission does not occur until the State transfers a patient to a DRF. In fact, the State "has advised the Circuit Court that it is unnecessary to hold a probable cause hearing within three days of completion of an IEA certificate." Am. Compl. ¶ 70 (quoting Intervenor Compl. ¶ 36, ECF No. 63). In the State's view, "the three-day period for a probable cause hearing does not commence until an IEA patient is received at a DRF." *Id.* (quoting Intervenor Compl. ¶ 36).

This interpretation is wrong. The Commissioner's flawed reading of the IEA statute hinges on the argument that the term "state mental health services system" only includes DRFs, but the provisions the Commissioner cites, RSA 135-C:2, 135-C:3, and 135-C:26, do not support that contention. *See* Mot. Dismiss 5, 20–21. Instead, RSA 135-C:3 simply states that the State "shall establish, maintain, implement, and coordinate a system of mental health services," and RSA 135-C:2 states that a "[r]eceiving facility" is "a treatment facility which is designated by the

commissioner to accept for care, custody, and treatment persons involuntarily admitted to the state mental health services system." *See also* RSA 135-C:26 (noting that "New Hampshire hospital and any other facility approved by the commissioner shall be designated as receiving facilities"). In other words, these provisions indicate that DRFs *accept* people who *have been* involuntarily admitted—suggesting that involuntary emergency admission may commence *before* people are delivered to DRFs.

The Commissioner further submits that, under RSA 135-C:39, a "person sought to be admitted for treatment on an involuntary basis shall be at liberty pending the hearing." Mot. Dismiss 7–8. But this provision falls within the section of RSA 135-C titled "Nonemergency Involuntary Admissions," RSA 135-C:34–54. Thus, RSA 135-C:39 *does not apply* to the section at issue here—"Involuntary Emergency Admissions," RSA 135-C:27–33. In fact, the Involuntary Emergency Admissions section does not contain *any* similar provision specifying that a person is "at liberty" pending the hearing. This suggests that a patient is no longer at liberty upon completion of the IEA certificate, and the involuntary emergency admission begins immediately. In sum, the State's own statutory scheme dictates that when an IEA certificate is first completed, the State must provide a due process hearing within three days.

B. The State Takes Direct Action by Withholding Timely Due Process Hearings and Directing Hospitals To Detain Patients Involuntarily.

At the pleadings stage, however, where Plaintiffs' allegations must be taken as true, the Court need not decide whether the Commissioner's interpretation is correct. Regardless of what state law requires, the State's affirmative decision not to provide individuals detained in emergency rooms with due process within three days of the completion of their IEA certificates is clearly "state action." The State has established a policy and practice of withholding due process hearings from individuals detained in emergency rooms, and the State acts in accordance with that

policy and practice each time it chooses not to provide due process within three days of an IEA certificate's completion. Am. Compl. ¶¶ 70–71. The State's acts pursuant to this policy and practice constitute direct action.

The State also takes direct action by ***expressly directing*** the Hospitals to detain patients for days and weeks on end while they wait for beds to become available in DRFs. As Plaintiffs have alleged, "rather than provide due process to these patients as legally required, 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." Am. Compl. ¶ 72. Furthermore, the Hospitals themselves have alleged that the State "direct[s] Hospitals not to immediately transport IEA patients to a DRF," "requir[es] a Hospital to hold an IEA patient in its [emergency department] until there is space available at a DRF," "requir[es] Hospital physicians or APRNs to file a new IEA certificate every three days until [the State] informs the Hospital that it may transport the IEA patient to a DRF," and "requir[es] Hospital staff to perform a mental and physical examination of an IEA patient for completion of a new IEA certification every three days." Intervenors' Am. Compl. ¶ 41. All of these orders constitute direct action by the State and demonstrate that the State "compels" patients "to detention in non-DRF emergency rooms." Am. Compl. ¶ 71. The State's directions to the Hospitals also show how deeply the State has involved itself in the IEA process from start to finish. In practice, the State uses the Hospitals as involuntary detention centers while patients await admission to DRFs, but it has refused to provide due process to the patients it commanded the Hospitals to detain.

The Commissioner argues that the State's decision to withhold timely due process hearings does not constitute "state action" because the State is purportedly under "no obligation to hold due process hearings simply because an involuntary emergency admission certificate [is] completed

by private individuals at a private hospital." Mot. Dismiss 21. According to the Commissioner, "at no point prior to being taken into custody by law enforcement for delivery to a receiving facility under RSA 135-C:29 were any of the plaintiffs involuntarily admitted 'to the state mental health services system under the supervision of the commissioner.'" *Id.* The Commissioner also contends that the IEA statute "expressly contemplates that a period of time may exist between when an involuntary emergency admission certificate is completed and when law enforcement takes custody of a person for delivery to a receiving facility." *Id.*

But the Commissioner cannot credibly claim that the State has no obligations whatsoever until an involuntarily detained individual is taken to a DRF. The State has established a statutory scheme requiring that, "[u]pon completion of an involuntary emergency admission certificate," law enforcement shall "immediately deliver" the patient to a facility where he or she shall receive a probable cause hearing "[w]ithin 3 days after [the] involuntary emergency admission." RSA 135-C:29, I & 135-C:31, I. As explained above, the involuntary emergency admission begins the moment the IEA petition is completed; thus, the State's obligations are triggered at that time. And even if the statute "contemplates" a period between the completion of the IEA certificate and the actions by law enforcement, it cannot be that the interim period may last for ***days or weeks*** as it often does. Such a reading would render meaningless the requirement that law enforcement "immediately" deliver the patient to a DRF. The statue clearly requires law enforcement to take action promptly after the IEA certificate is signed.

Moreover, the Commissioner's reading of the statute yields a patently unconstitutional result. Even if the statute ***could*** be read to require a due process hearing only after an involuntarily detained patient is eventually transferred to a DRF, the U.S. Constitution requires something more. Federal law dictates that the State must provide a hearing promptly after a patient is involuntarily

detained in a non-DRF emergency room. *See Zinermon*, 494 U.S. at 127 ("[T]he Court usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property.").

In sum, although the State has established a statutory scheme whereby the State must provide due process to people who are involuntarily detained, Plaintiffs' allegations support a reasonable inference that the State has refused to make timely due process hearings "available in practice." *Zinermon*, 494 U.S. at 124. The State's policy or practice of depriving people involuntarily detained under the IEA statute of due process for extensive and indefinite periods of time constitutes direct action for which the State is liable under § 1983. No further inquiry is needed.

II. The Hospitals Involuntarily Detain Patients on the State's Behalf.

As explained above, the State itself has directed the Hospitals to detain individuals under the IEA statute and has chosen to withhold timely due process from those individuals while they are involuntarily detained in emergency rooms. Accordingly, Plaintiffs brought claims under § 1983 against the Commissioner—*not the Hospitals*. Yet the Commissioner seeks to shift the focus away from the State's own actions by arguing that, because Plaintiffs were detained in private hospitals, there has been no "state action." As an initial matter, the issue of whether the Hospitals are state actors is largely irrelevant because the State itself plays an active role in depriving patients of their liberty without due process and the Hospitals have not been sued as state actors under Counts I, II, and III. Even so, the Hospitals are in fact state actors in this case, where their actions can be attributed to the State. Courts in the First Circuit apply "three tests to determine whether a private party fairly can be characterized as a state actor: the state compulsion test, the nexus/joint action test, and the public function test." *Estades-Negroni v. CPC Hosp. San Juan*

Capestrano, 412 F.3d 1, 4–5 (1st Cir. 2005). The Hospitals constitute state actors under all three of those tests.

A. The State Compels Hospitals To Detain Patients Under the IEA Statute.

First, the Hospitals are engaged in state action attributable to the State because the State compels them to participate in an unconstitutional system of involuntarily detaining patients without due process. "Under the state compulsion test, a private party is fairly characterized as a state actor when the state 'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the [challenged conduct] must in law be deemed to be that of the State.'" *Estades-Negroni*, 412 F.3d at 5 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). Here, the State has created and administered a "comprehensive statutory regulatory scheme" that makes the Hospitals "an integral part of the public operation" of involuntarily detaining patients. *See Ruffler v. Phelps Mem'l Hosp.*, 453 F. Supp. 1062, 1069 (S.D.N.Y. 1978) (quoting *Perez v. Sugarman*, 499 F.2d 761, 765–66 (2d Cir. 1974)); *see also Kay v. Benson*, 472 F. Supp. 850, 851 (D.N.H. 1979) (holding that the IEA statute's predecessor "constitute[d] the delegation by the legislature of the State of New Hampshire to a private individual the power of detention of a person against that person's wishes").

The IEA statute instructs physicians and APRNs to carry out mental examinations and complete IEA certificates when they suspect patients may be a threat to themselves or others. RSA § 135-C:27, -C:28. And the State prepares and publishes the forms that the Hospitals must use when performing those functions. *See* Mot. Dismiss, Ex. A, ECF No. 103-2. In addition, the IEA statute indicates that a justice of the peace "may order the examination" "if the person sought be admitted refuses to consent to a mental examination." RSA 135-C:28, II. In those cases, the justice signs a form "order[ing] any law enforcement officer to *take custody* of [the patient] and . . . deliver him/her to [the hospital emergency room] *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." Am. Compl. ¶ 24 (emphasis added). By establishing this comprehensive statutory scheme, the State has significantly encouraged the Hospitals to complete IEA certificates and involuntarily detain patients as agents of the State.

Furthermore, in stark contrast to the cases the Commissioner cites, the State has plainly directed the Hospitals to detain patients involuntarily while they wait for DRF beds to become available. *Compare Estades-Negroni*, 412 F.3d at 6 (emphasizing that plaintiff "did not allege that the instrumentality or court coerced or encouraged [the hospital or its physicians] to act in connection with her commitment"); *Rockwell v. Cape Cod Hosp.*, 26 F.3d 254, 258 (1st Cir. 1994) (noting that "the Massachusetts statute in this case neither compels nor encourages involuntary commitment"). As discussed above, Plaintiffs and the Hospitals have alleged that the State *requires* the Hospitals to hold IEA patients in their emergency departments indefinitely, complete new IEA certificates for those patients every three days, and perform mental and physical examinations of the IEA patients every three days. Am. Compl. ¶ 72; Intervenors' Am. Compl. ¶ 41. By issuing these directives, the State has clearly "exercised coercive power" over the Hospitals and has overtly provided "such significant encouragement" that the Hospitals' conduct must be deemed to be that of the State.

B. The Hospitals Are Joint Actors in the State's Practice of Depriving Involuntarily Detained Patients of Due Process Rights.

The Hospitals are also engaged in state action attributable to the State because they are joint participants in the State's unconstitutional conduct. The First Circuit has recognized that a court may find that a private party is a state actor where "an examination of the totality of the circumstances reveals that the state has 'so far insinuated itself into a position of interdependence with the [private party] that it was a joint participant in the [challenged activity].'" *Estades-*

Negroni, 412 F.3d at 6 (quoting *Bass v. Parkwood Hosp.*, 180 F.3d 234, 242 (5th Cir. 1999)). Here, the state relies on the Hospitals to hold patients indefinitely and against their will until a bed in a DRF becomes available. In effect, the Hospitals serve as involuntary detention facilities until the State provides the patients with due process hearings as required under RSA 135-C:31.

The State's involuntary commitment scheme fails without the Hospitals' participation. After all, the IEA process begins in the Hospitals. The IEA statute contemplates a process in which a patient receives an exam by a physician or APRN. RSA 135-C:28, I. The statute further provides that a law enforcement officer may take a person believed to be "suffering from a mental illness" into "protective custody," and that "[a]ny person taken into protective custody under this paragraph shall be transported directly to an emergency room of a licensed general hospital." RSA 135-C:28, III. Before the State's shortage of DRF beds and lack of community-based mental health services caused the current emergency room boarding crisis, the "individuals now detained in hospital emergency rooms were previously 'immediately delivered' to a DRF in the care of the State." Am. Compl. ¶ 73.

But as the waitlist for DRF beds has grown in recent years, the State has relied on Hospitals to house patients involuntarily until DRF beds become available. Over the last three years, the average number of adults awaiting admission to DRFs has risen significantly. On average, twenty adults and children were detained in an emergency room while awaiting admission to a DRF at any time in 2015, and by the second quarter of 2018, the average rose to fifty adults and children. Am. Compl. ¶ 67. If the Hospitals ceased holding patients in emergency room facilities while they awaited admission to a DRF, a patient would need to be discharged and later re-evaluated for admission to a DRF once a bed became available. The State intends to avoid such a break in institutional custody. The Commissioner himself admits that it is "best practice for a private

hospital to have an updated certificate to the extent it believes transfer to New Hampshire Hospital or a designated receiving facility is appropriate, and would like to pursue such a transfer." Mot. Dismiss 25.

Not surprisingly, then, the State has directed the Hospitals to engage in a practice of continuously renewing patients' IEA certificates:

> As the emergency room boarding crises began and as the three-day time frame for due process to be provided began lapsing for these patients, the State apparently started "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."

Am. Compl. ¶ 72 (quoting Intervenor Compl. ¶ 37). Although RSA 135-C:31 requires the State to provide a due process hearing within three days of when an IEA certificate is first completed, Am. Compl. ¶ 88, the State seems to believe, based on its flawed interpretation of the statute, that the Hospitals simply need to renew the certificate every three days to continue detaining a patient without providing a due process hearing. This practice extends a patient's period of involuntary detention in a non-DRF emergency room, and thereby prevents a break in the chain of custody from a patient's admission to the emergency room to admission to a DRF. This continuity in custody supports the State's IEA process.

The Hospitals' own allegations further support the inference that the State has insinuated itself in a position of interdependence with the Hospitals. In asserting crossclaims against the State that have since been dismissed, the Hospitals all alleged:

> When [the State] directs a hospital not to immediately transport an IEA patient to a DRF and informs the hospital that it will let the hospital know when the IEA patient may be transported, [the State] compels the hospital to hold and provide services to the IEA patient in its ED until [the State] directs the transfer.

Concord Hospital's Crossclaims ¶ 14, ECF No. 114; St. Joseph Hospital's Crossclaims ¶ 14, ECF No. 109; SNHMC's Crossclaims ¶ 14, ECF No. 116; *see also* Intervenor Compl. ¶ 42 ("In sum,

[the State]'s practice and policy . . . provide that . . . a hospital is required to detain an IEA patient in its ED until there is space available at a DRF."). The Hospitals are best positioned to know what the State has demanded and expects of them. Their allegations show that, as Plaintiffs have alleged, the "State has insinuated itself into a position of interdependence with the hospitals participating in the detention such that the State is a joint participant in both the detention and the failure to provide due process." Am. Compl. ¶ 72.

Plaintiffs' allegations support the reasonable inference that the State intends for the Hospitals to continue renewing patients' IEA certificates rather than discharging patients when DRF beds do not become available within three days. The Hospitals' indefinite involuntary detention of patients furthers the State's IEA process by maintaining institutional custody over a patient until a DRF bed becomes available. While the IEA statute requires the State to provide for a due process hearing three days from the date on which a hospital first completes an IEA certificate, the State relies on the Hospitals to renew the certificates as a misguided ploy to circumvent this statutory requirement.

In an attempt to argue that the State and the Hospitals are somehow not acting jointly with the State, the Commissioner relies solely on *Estades-Negroni*, *Trimble,* and *Rockwell*. These cases are readily distinguished. The plaintiffs in these cases alleged at most that the state statutes at issue permitted involuntary commitment, that the state regulated involuntary commitment, that private hospitals received public funding, and that hospitals relied on assistance from law enforcement. *See Estades-Negroni*, 412 F.3d at 6; *Rockwell*, 26 F.3d at 258; *Trimble v. Androscoggin Valley Hosp.*, 847 F. Supp. 226, 230 (D.N.H. 1994). It may be true that extensive regulation and funding alone are not sufficient to make a private entity a state actor, but here, Plaintiffs have alleged a far more significant nexus between the private hospitals and the State. The State relies on the

Hospitals to effectuate its scheme of holding patients indefinitely while they await admission to DRFs, and the State has specifically asked the Hospitals to continuously renew IEA certificates to make this possible.

Defendants also attempt to undercut Plaintiffs' state action theory by asserting that Plaintiffs have focused on "the absence of State action." Mot. Dismiss 24. At the outset, it should go without saying that a claim alleging that a government entity has failed to accommodate a constitutionally required right, by definition, constitutes legally cognizable state action. *See Spencer v. Bouchard*, 449 F.3d 721, 731 (6th Cir. 2006) ("The obligation to 'provide' these basic needs would have no meaning if a prison official could fail to provide them and then evade liability simply by pleading that he 'failed to act.'"); *see also Comer v. Cisneros*, 37 F.3d 775, 796 (2d Cir. 1994) (finding Rule 23(b)(2) satisfied where "the plaintiffs seek injunctive relief and they predicate the lawsuit on the defendants' acts *and omissions* with respect to" the class (emphasis added)). Moreover, the State's failure to act—that is, its refusal to provide due process hearings to patients detained in non-DRF emergency rooms—in no way suggests that the Hospitals are not jointly engaged in state action. The Supreme Court has long recognized that the State "[b]y its inaction . . . elect[s] to place its power, property and prestige behind the [unconstitutional conduct]." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961). In other words, where the State has "insinuated itself into a position of interdependence" with a private actor—as the State has done here by relying on Hospitals to detain patients while awaiting admission to DRFs—state action exists even where the State itself has failed to provide timely due process.

C. The Hospitals Are Carrying Out a Function that Traditionally Belongs to the State.

The facts alleged in the Amended Complaint—and likely to be uncovered in the course of discovery—show that the Hospitals' actions can be attributed to the State because they are predominantly serving simply as detention facilities before the state transfers patients to DRFs.

By detaining patients while awaiting transfer to DRFs and ultimately due process hearings, the Hospitals are carrying out an action that traditionally has been exclusively reserved to the state. As the Supreme Court has held, "[w]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." *Evans v. Newton*, 382 U.S. 296, 299 (1966).

Courts have consistently held that the power to detain is traditionally the province of the state. For example, courts have recognized that private prisons are engaged in state action because confinement of a person against his or her will is traditionally a function of the government. *See, e.g.*, *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 461 (5th Cir. 2003) ("We agree with the Sixth Circuit and with those district courts that have found that private prison-management corporations and their employees may be sued under § 1983 by a prisoner who has suffered a constitutional injury. Clearly, confinement of wrongdoers—though sometimes delegated to private entities—is a fundamentally governmental function."); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 81–82 (2001) ("Under 42 U.S.C. § 1983, a state prisoner may sue a private prison for deprivation of constitutional rights . . . ." (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936–937 (1982))).

Likewise, this Court and many others have held that the "power of detention is the type of power normally and historically exercised by sovereign states and other governmental entities." *Kay*, 472 F. Supp. at 851; *see also Rubenstein v. Benedictine Hosp.*, 790 F. Supp. 396, 406 (N.D.N.Y. 1992) ("[A] private hospital and/or private physicians may be subject to § 1983 liability when initiating or executing an involuntary civil commitment."); *Davenport v. Saint Mary Hosp.*, 633 F. Supp. 1228, 1234 (E.D. Pa. 1986) ("Supreme Court decisions suggest that it is exclusively the state's prerogative to confine an individual involuntarily to a mental hospital."); *Brown v.*

Jensen, 572 F. Supp. 193, 197 n. 1 (D. Colo. 1983) ("[W]hen physicians and hospitals confine persons pursuant to a mental commitment statute, they are exercising the power of detention delegated to them by the state. Because this power is one historically exercised by the government, the acts of the physicians and hospitals in this connection constitute state action."); *Ruffler*, 453 F. Supp. at 1069 ("In light of New York's declaration of public policy and governmental responsibility and its extensive regulation of those private agencies engaged in providing mental health services . . . the activities allegedly performed by defendant New York Hospital constituted a 'public function' sufficient to establish the requisite state action.").

Although a number of courts have held in recent years that private hospitals and physicians may not be held liable under § 1983 for exercising their professional judgment in connection with involuntary detention, this Court's logic in *Kay*—that detention is fundamentally a state function—still applies when, as here, hospitals simply detain individuals on behalf of the state for indefinite periods of time without any due process. As Judge Posner has recognized, "[t]o allow family members, physicians, and other private persons to exercise the commitment power without safeguards . . . including a provision for a hearing eventually—and sooner rather than later—would be monstrous." *Spencer v. Lee*, 864 F.2d 1376, 1381 (7th Cir. 1989).

In this case, Plaintiffs allege that the State has delegated to the Hospitals its traditional authority to detain patients against their will. In response to this allegation, the Commissioner again relies on *Estades-Negroni*, *Rockwell*, and *Trimble* to suggest that involuntary commitment is not a traditional state function. Mot. Dismiss 25–29. These decisions offer little guidance, however, because the plaintiffs in these cases asserted claims related to the mental health services provided by the private hospitals and physicians, not claims alleging due process violations. Indeed, *Estades-Negroni*, *Rockwell*, and *Trimble* did not directly concern the constitutionality of

an involuntary and indefinite detention imposed on a patient while awaiting a due process hearing. Rather, the courts took up the question of whether involuntary commitment and the provision of mental health services was traditionally a state function. *Rockwell*, 26 F.3d at 258–60; *Estades-Negroni*, 412 F.3d at 8, *Trimble*, 847 F. Supp. at 228. In *Trimble*, the plaintiff asserted claims broadly arising from the hospital and physicians' judgment and practices in committing and treating the plaintiff's decedent. As the court explained:

> The dispositive issue in this case is reasonably straight-forward: Do private hospitals and private physicians act 'under color of state law' for purposes of section 1983 liability when *they exercise professional judgment in connection with, or deliver professional services related to, the involuntary hospitalization of persons thought to be in need of treatment due to mental illness*?

Trimble, 847 F. Supp. at 228 (emphasis added).

Here, in stark contrast, the Amended Complaint poses the question of whether the detention of an individual awaiting a due process hearing is a function traditionally reserved to the state. Courts have recognized that "the power of detention of a person against that person's wishes" is "the type of power normally and historically exercised by sovereign states and other governmental entities." *Kay*, 472 F. Supp. at 851; *Rubenstein*, 790 F. Supp. at 406 ("[T]he power of depriving liberty is one reserved to the State, under either its *parens patriae* or police power."). The Amended Complaint asserts claims arising from the Hospitals' involuntary detention of Plaintiffs and the State's failure to provide them timely due process hearings, not the nature of the mental health services provided. Detaining people against their will before the State has determined whether it has probable cause to involuntarily commit them is unquestionably a public function.

III. The Commissioner's Arguments for Dismissing the State Law Claims Fail.

Under 28 U.S.C. § 1367(a), in any action in which the Court has original jurisdiction, the Court has "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." The

Commissioner does not dispute that Plaintiffs' state law claims are so related to the federal claim that they form part of the same case or controversy. *See* Mot. Dismiss 32. Because the federal claim should not be dismissed, the Court should also maintain supplemental jurisdiction over the state law claims.

Nonetheless, the Commissioner argues that, because "the New Hampshire Supreme Court uses the same three tests discussed above . . . when determining whether 'state action' exists for purposes of the State Constitution," Plaintiffs' "state constitutional claims in Count II must also be dismissed for lack of state action." *Id.* at 33. As previously explained, however, the State has taken direct action by withholding timely due process hearings and directing the Hospitals to hold patients in their emergency rooms and renew IEA petitions every three days. Moreover, Plaintiffs have clearly and sufficiently alleged that the Hospitals themselves are state actors.

The Commissioner also argues that Plaintiffs' claim under RSA 135-C:31, I should be dismissed because the IEA statute purportedly "does not require that a person receive a probable cause hearing within three days of presenting to a private hospital emergency room." Mot. Dismiss 33–35. To be clear, the IEA statute requires a due process hearing within three days of "when the *initial IEA certificate* is completed in the hospital emergency room," not within three days of a patient's arrival at the emergency room. Am. Compl. ¶ 124 (emphasis added). And Plaintiffs explained above why the Commissioner's reading of the IEA statute—which permits the State to withhold due process hearings indefinitely—is inconsistent with a plain reading of the statute, state courts' interpretation of the statute, and the legislative history.

IV. The Amended Complaint Contains a Short and Plain Statement of the Claims to Relief as Required by Rule 8(a)(2).

In yet another effort to avoid the key issues in this case, the Commissioner contends that "the Court should dismiss the plaintiffs' amended complaint for failing to comply with Rule 8."

But dismissal under Rule 8 is "usually 'reserved for those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised.'" *Miranda v. United States*, 105 F. App'x 280, 281 (1st Cir. 2004) (per curiam) (quoting *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988)). Indeed, the Commissioner himself concedes that "verbosity and length are generally insufficient grounds for dismissal." Mot. Dismiss 15 (quoting *Currier v. Town of Gilmanton*, No. 18-CV-1204-LM, 2019 WL 3779580, at *2 (D.N.H. Aug. 12, 2019)).

Only complaints that are "unnecessarily lengthy, repetitive, convoluted, or otherwise difficult to comprehend may be dismissed," and even then, courts almost always dismiss the complaints *without* prejudice and grant plaintiffs leave to amend. *Currier*, 2019 WL 3779580, at *2, *4; *see also Salahuddin*, 861 F.2d at 43 (holding that "dismissal for noncompliance with Rule 8 without leave to amend was an abuse of discretion" because the complaint was "neither vague nor incomprehensible" and "clearly plead[ed] at least some claims that cannot be termed frivolous on their face"). This is because "[t]he purpose of Fed. R. Civ. P. 8(a) is to give 'fair notice [to the defendants] of the claim asserted.'" *L'Heureux v. Whitman*, 125 F.3d 841 (1st Cir. 1997) (per curiam) (quoting *Simmons v. Abruzzo*, 49 F.3d 83, 86 (2d Cir. 1995)); *accord Chalifoux v. Chalifoux*, No. 14-CV-136-SM, 2014 WL 1681626, at *1 (D.N.H. Apr. 25, 2014) (granting leave to file third amended complaint because prior complaint "fail[ed] to provide a concise statement of plaintiff's claims in a manner that would notify defendants regarding which particular aspects of their conduct form the basis for each of plaintiff's claims").

In this case, the Amended Complaint clearly provides fair notice to Defendants of the claims asserted against them and is not "so confused, ambiguous, vague, or otherwise unintelligible that its true substance . . . is well disguised." *Miranda*, 105 F. App'x at 281. Rather,

the Commissioner was easily able to determine the substance of the claims against him and the facts underlying those claims. The Commissioner writes: "[T]he plaintiffs contend that they are entitled under the Fourteenth Amendment, Part I, Article 15, and RSA 135-C:31, I to appointed counsel and due process hearings within three days of the completion of an involuntary emergency admission certificate," Mot. Dismiss 16, which demonstrates that the Commissioner understands the facts and the claims alleged in the Amended Complaint. Moreover, the Commissioner's contention that it will be "extremely burdensome for the defendants to answer" the Amended Complaint, Mot. Dismiss 2, is belied by the fact that all of the hospital defendants have already filed answers to the Amended Complaint without objection, *see* Memorial Hospital's Answer, ECF No. 107; St. Joseph's Hospital's Answer, ECF No. 109; Concord Hospital's Answer, ECF No. 114; Southern New Hampshire Medical Center's Answer, ECF No. 116.

The Commissioner is correct that the Amended Complaint is 57 pages long and contains a significant number of paragraphs. But that is precisely because of the "the nature of the action, the relief sought and a number of other pragmatic matters." *Currier*, 2019 WL 3779580, at *2 (quoting *Carney v. Town of Weare*, No. 15-CV-291-LM, 2016 WL 320128, at *4 (D.N.H. Jan. 26, 2016)). The Amended Complaint added no new counts against the State, and is not, as the Commissioner contends, "unnecessarily lengthy, repetitive, and convoluted." Mot. Dismiss 16. This case involves a complex statutory scheme for involuntarily admitting patients to hospitals—the proper interpretation of which is hotly disputed. It also involves the State's policies and practices of withholding timely due process hearings from patients detained in non-DRF emergency rooms and the State's actions in directing the Hospitals to renew IEA certificates every three days in lieu of due process. It also involves four newly added hospital defendants that falsely imprisoned the named Plaintiffs based on the State's directions. In contrast to cases upon which

the Commissioner relies, this action is "legally [and] factually complex." *Currier*, 2019 WL 3779580, at *2.

In addition, because this action is brought on behalf of a putative class, Plaintiffs needed to plead sufficient facts to demonstrate "numerosity, commonality, typicality, and adequacy of representation," *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010), and to plausibly demonstrate that the Commissioner "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole," Fed. R. Civ. P. 23. Furthermore, the Amended Complaint asserts claims on behalf of four different named Plaintiffs, three of whom were newly added in the amendment. Each of those named Plaintiffs was subjected to the same governmental policy and practice, which applies uniformly to every member of the putative class. Nevertheless, for each named Plaintiff, the Amended Complaint had to describe the facts of the individual Plaintiff's detention, the applicable hospital's actions in falsely imprisoning the Plaintiff, and the State's refusal to provide the Plaintiff with timely due process. Describing those facts with sufficient particularity to survive a motion to dismiss understandably required considerable space.

The Commissioner argues that the Amended Complaint is difficult to understand because it contains "repeated references to exhibits" and "other pleadings and links to internet sources." Mot. Dismiss 18. The First Circuit has made clear, however, that a court deciding a motion to dismiss may draw on "documents annexed to [the complaint] or fairly incorporated into it, and matters susceptible to judicial notice." *Centro Medico del Turabo, Inc. v. Feliciano de Melecio*, 406 F.3d 1, 5 (1st Cir. 2005). Given that the Court may rely on exhibits and other sources in deciding the motion to dismiss, there is no credible basis for the Commissioner's argument that it was improper to include them in the Amended Complaint. Far from creating confusion, the

exhibits, pleadings, and other sources provide greater clarity on and support for Plaintiffs' allegations and claims to relief.

Finally, relying on out-of-circuit cases, the Commissioner complains that the Amended Complaint supposedly contains "stories," "argument," introductory paragraphs, "case citations and substantive footnotes," numbered paragraphs with "multiple sentences," "attempts to negate possible defenses," "charts," "evidence," and "summaries." Mot. Dismiss 17–18. As the Commissioner's cases explain, these devices are sometimes disfavored because "a complaint must only set forth the *alleged facts* in support of a plaintiff's claims and *need not include any documentary evidence,* which may be presented at a later point in the case." *Lance v. Commerce Tr. Co.*, No. 2:15-CV-0341-GEB-KJN, 2015 WL 1530674, at *4 (E.D. Cal. Apr. 3, 2015). But the mere fact that a complaint "need not include" summaries, charts, case citations, introductions, or evidence does not mean that a complaint should be dismissed because it contains those elements. What matters is whether the defendants and the court are "able to understand plaintiffs' claims and the facts in support of those claims." *Lance*, 2015 WL 1530674, at *4; *see also L'Heureux*, 125 F.3d at 841 ("The purpose of Fed. R. Civ. P. 8(a) is to give 'fair notice [to the defendants] of the claim asserted.'"). There can be no serious debate here that the Commissioner understands the claims alleged in the Amended Complaint.

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,

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Dated: November 1, 2019

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.