

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE**

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,

Plaintiffs,

v.

JEFFREY A. MEYERS,
Commissioner of the New Hampshire
Department of Health and Human Services,
in his official capacity,

Defendant,

and

SOUTHERN NEW HAMPSHIRE
MEDICAL CENTER,

CONCORD HOSPITAL,

ST. JOSEPH'S HOSPITAL, and

MEMORIAL HOSPITAL,

Defendants,

and

DAVID D. KING, Administrative Judge of
the New Hampshire Circuit Court, in
his official capacity,

Necessary Third-Party Pursuant
to Rule 19(a).

No. 1:18-cv-01039-JD

**JURY DEMAND AS TO
COUNTS IV, V, VI, and VII**

**AMENDED CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE
RELIEF AND COMPLAINT FOR DAMAGES**

Plaintiffs John Doe, Charles Coe, Jane Roe, and Deborah A. Taylor (as guardian for Scott Stephen Johnstone) file this action against Jeffrey A. Meyers, Commissioner of the New Hampshire Department of Health and Human Services (“DHHS”), in his official capacity, and Southern New Hampshire Medical Center (“SNHMC”), Concord Hospital, St. Joseph’s Hospital in Nashua, and Memorial Hospital in North Conway. This case is about the State’s systemic failure to provide probable cause hearings to patients being involuntarily detained and boarded in hospital emergency rooms within three days of the patient’s admission to the hospital. This case is also about how New Hampshire hospitals systemically and unlawfully continue to detain these patients after the three-day deadline has come and gone for these probable cause hearings.

As of the filing of this lawsuit on November 10, 2018, DHHS and SNHMC were unlawfully detaining Plaintiff John Doe by having failed to provide him a hearing to determine whether there is probable cause to believe that he is in such a mental condition as a result of mental illness to pose a likelihood of danger to himself or others. Such a hearing should have occurred by November 8, 2018, which was three days after his initial involuntary emergency admission (“IEA”) certificate was completed on November 5, 2018. Mr. Doe was ultimately involuntarily detained for approximately five days, as SNHMC transferred him to voluntary status almost immediately after this lawsuit was filed.

Beginning on July 25, 2018, Plaintiff Charles Coe was involuntarily detained for 15 days, without a probable cause hearing, by DHHS and Concord Hospital pursuant to an IEA certificate. Mr. Coe ultimately filed a petition for a writ of habeas corpus in Merrimack Superior Court, which likely led to Concord Hospital’s decision to release him on August 8, 2018.

Beginning on September 21, 2018, Plaintiff Jane Roe was involuntarily detained for 20

days, without a probable cause hearing, by DHHS and St. Joseph's Hospital in Nashua pursuant to an IEA certificate.

And, beginning on July 17, 2018, Scott Stephen Johnstone, who is represented in this case by his mother and legal guardian Plaintiff Deborah A. Taylor, was involuntarily detained for 27 days, without a probable cause hearing, by DHHS and Memorial Hospital in North Conway pursuant to an IEA certificate.

These detentions without probable cause are both unconscionable and unlawful. Probable cause hearings are mandated within three days of the completion of an IEA certificate by (i) the procedural due process guarantees of the Fourteenth Amendment to the United States Constitution, (ii) the procedural due process guarantees of Part I, Article 15 of the New Hampshire Constitution, and (iii) RSA 135-C:31, I. As the State held no hearing within three days of the completion of Plaintiffs' initial IEA certificates, as legally required, Plaintiffs should have been immediately released.

With respect to Counts I, II, and III, Plaintiffs John Doe, Charles Coe, Jane Roe, and Deborah A. Taylor, individually and on behalf of themselves and all others similarly situated, bring this Class Action Complaint for Declaratory and Injunctive Relief pursuant to the Declaratory Judgments Act, 28 U.S.C. § 2201, and the Civil Rights Act of 1871, 42 U.S.C. § 1983, against Jeffrey A. Meyers, Commissioner of the New Hampshire Department of Health and Human Services, in his official capacity. With respect to the class action relief sought in Counts I, II and III of this Complaint, the Honorable David D. King, in his official capacity as the Administrative Judge of the New Hampshire Circuit Court, is joined because, in his absence, this Court "cannot accord complete relief among existing parties." *See* Fed. R. Civ. P. 19(a)(1)(A). Defendants SNHMC, Concord Hospital, St. Joseph's Hospital, and Memorial

Hospital are Defendants as to Counts IV, V, VI, and VII, respectively, which are brought in Plaintiffs' respective individual capacities and allege the state common law tort of false imprisonment. These claims are brought because these hospitals continued to involuntarily detain each Plaintiff without legal authority, despite the fact that each Plaintiff had not been provided a probable cause hearing within three days of the completion of their respective IEA certificates.

INTRODUCTION

There is a systemic pattern and practice in New Hampshire where people who may be experiencing mental health crises are involuntarily detained in hospital emergency rooms in excess of three days without the State providing them with any due process, appointed counsel, or opportunity to contest their detention. This practice is known as "psychiatric boarding." As of October 31, 2018, approximately 46 adults and 4 children were being involuntarily "boarded" in emergency rooms under RSA 135-C:27-33 while awaiting admission to a Designated Receiving Facility ("DRF"). As of July 16, 2019, the number of waiting adults was 16. The number of those waiting can fluctuate, as it is often both cyclical and seasonal. Though emergency room wait times can vary, they can last up to four weeks.

The State has incorrectly interpreted RSA 135-C:31, I to provide due process only within three days *after* the patient is formally admitted to a DRF. The end result of this regime is that, while these patients are involuntarily detained in hospital emergency rooms for weeks awaiting admission to a DRF, they receive no lawyer, no hearing, and no opportunity to be heard to contest their detention. To make matters worse, because these emergency rooms are not community-based mobile crisis centers or DRFs designed to treat those involuntarily admitted under Chapter 135-C, many of these detained individuals may also not be receiving the medical

and psychiatric care they need to address the mental health crises they may be experiencing. In short, the State is not complying with its constitutional and statutory obligation to provide process to these individuals within three days of the completion of an IEA certificate.

This problem has become worse in recent years. In the last three years before this lawsuit was filed in November 2018, the number of adults being detained without process in emergency rooms while awaiting DRF admission had increased by over 350%. 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 Institute, Final Report: Evaluation of the Capacity of the New Hampshire Behavioral Health System (Dec. 22, 2017), at p. 4 (emphasis added), *available at* <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.

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 have been "boarded" in excess of three days without any due process. Under RSA 135-C:31, I, the Plaintiffs should have received a hearing within three days of the completion of their initial IEA certificates, 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. However, no such due process was timely provided. Instead, the hospitals boarding the

Plaintiffs, often along with local community mental health centers, simply “renewed” their respective IEA certificates every three days to restart the three-day clock in order to buy time for DRF bed space to become available.

Plaintiffs in this case are not asking this Court to remedy the DRF waitlist or address the State’s failure to “immediately deliver” individuals to DRFs under RSA 135-C:29—a problem that is complex and beyond the scope of this narrow lawsuit.¹ Rather, this case only asks this Court to require the State to perform its constitutionally required obligation to provide due process protections to individuals who are involuntarily detained in emergency rooms within three days of the completion of an IEA certificate.² The State has failed to meet this most basic obligation. Accordingly, Plaintiffs and the Plaintiff Class seek declaratory and injunctive relief against the State’s violation of the Fourteenth Amendment’s procedural due process guarantee. Plaintiffs and the Plaintiff Class further seek declaratory and injunctive relief against the State’s violation of the due process guarantees in Part I, Art. 15 of the New Hampshire Constitution, as well as RSA 135-C:31, I. Finally, Plaintiffs seeks relief against Defendants SNHMC, Concord Hospital, St. Joseph’s Hospital, and Memorial Hospital, respectively, for the state common law tort of false imprisonment.

Plaintiffs further allege as follows:

THE PARTIES

1. Plaintiff John Doe³ resides in Hillsborough County, New Hampshire. He was

¹ 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 in *Amanda D. v. Hassan*, No. 1:12-cv-53-SM. These responses will reduce the need for inpatient beds and the incidence of emergency room boarding.

² DHHS had devised such a plan to provide due process using video conference technology. However, hospitals resisted efforts to provide due process to those they are involuntarily detaining.

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

detained at Southern New Hampshire Medical Center on November 5, 2018 pursuant to a Petition and Certificate for Involuntary Emergency Admission. Under RSA 135-C:31, I, Plaintiff should have received a hearing by November 8, 2018, at which time a Circuit Court judge would have determined whether there was probable cause to believe that he was in such mental condition as a result of mental illness as to create a potentially serious likelihood of danger to himself or to others. The State did not provide him this hearing to determine whether he met the criteria for involuntary admission.

2. Plaintiff Charles Coe⁴ 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. Under RSA 135-C:31, I, Plaintiff should have received a hearing by July 28, 2018, at which time a Circuit Court judge would have determined whether there was probable cause to believe that he was in such mental condition as a result of mental illness as to create a potentially serious likelihood of danger to himself or to others. The State did not provide him this hearing to determine whether he met the criteria for involuntary admission.

3. Plaintiff Jane Roe⁵ 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. Under RSA 135-C:31, I, Plaintiff should have received a hearing by September 25, 2018, at which time a Circuit Court judge would have determined whether there was probable cause to believe that she was in such mental condition as a result of mental illness as to create a potentially serious likelihood of danger to herself or to others. The State did not provide her this hearing to determine whether she met the criteria for

⁴ A Motion to Proceed Anonymously is being filed contemporaneously with this Amended Complaint.

⁵ A Motion to Proceed Anonymously is being filed contemporaneously with this Amended Complaint.

involuntary admission.

4. 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. Under RSA 135-C:31, I, Johnstone should have received a hearing by July 20, 2018, at which time a Circuit Court judge would have determined whether there was probable cause to believe that he was in such mental condition as a result of mental illness as to create a potentially serious likelihood of danger to himself or to others. The State did not timely provide him this hearing to determine whether he met the criteria for involuntary admission.

5. Defendant Jeffrey A. Meyers is the Commissioner of the New Hampshire Department of Health and Human Services (“DHHS”). As Commissioner, Mr. Meyers oversees all DHHS programs, including its program of mental health services and its Medicaid program. His 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. As Commissioner, his obligation is to ensure that the State of New Hampshire is providing appropriate procedural due process to individuals who are being involuntarily detained under RSA 135-C:27-33. Commissioner Meyers is sued in his official capacity. Commissioner Meyers, personally and through the conduct of his agents, servants, and employees, acted under color of state law at all times relevant to this action.

6. Defendant Southern New Hampshire Medical Center (“SNHMC”) is a New Hampshire hospital with a principal place of business at 8 Prospect Street, Nashua, NH 03060. Plaintiff John Doe sues SNHMC as a Defendant in Count IV, which alleges the common law tort

of false imprisonment. As the Hospital Intervenors have stated: “During calendar year 2017, SNHMC boarded 188 IEA patients waiting for admission to a DRF for an average of 4.5 days. From January 1 through December 18, 2018, SNHMC boarded 137 IEA patients for an average length of five days. In 2018, greater than thirty-nine percent of the patients SNHMC was forced to board remained there for at least six days awaiting a vacant bed at the appropriate DRF. Between November 1 and December 31, 2018, SNHMC was forced to board at least one IEA patient on thirty-one dates. On twelve of those dates, SNHMC was forced to board between three and eight IEA patients.” *See Hospitals’ Compl. in Intervention* ¶ 60 (Docket No. 63).

7. Defendant Concord Hospital is a New Hampshire hospital with a principal place of business at 250 Pleasant Street, Concord, NH 03301. Plaintiff Charles Coe sues Concord Hospital as a Defendant in Count V, which alleges the common law tort of false imprisonment. As the Hospital Intervenors have stated: “On every date between November 1 and December 31, 2018, Concord was forced to board at least two and as many as eleven IEA patients. During those dates, an average number of six IEA patients were boarded at Concord.” *See Hospitals’ Compl. in Intervention* ¶ 50 (Docket No. 63).

8. Defendant St. Joseph’s Hospital is a New Hampshire hospital with a principal place of business at 172 Kinsley Street, Nashua, NH 03060. Plaintiff Jane Roe sues St. Joseph’s Hospital as a Defendant in Count VI, which alleges the common law tort of false imprisonment.

9. Defendant Memorial Hospital is a New Hampshire hospital with a principal place of business at 3073 White Mountain Highway, North Conway, NH 03860. Plaintiff Deborah Taylor, as guardian for Scott Stephen Johnstone, sues Memorial Hospital as a Defendant in Count VII, which alleges the common law tort of false imprisonment.

10. The Honorable David D. King is the Administrative Judge of the New Hampshire Circuit Court. He is joined in this case not in his judicial capacity, but rather in his official administrative capacity. In this official administrative capacity, he 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 32 Circuit Court District Division locations around the state. Plaintiff joins the Honorable David D. King only as a party to Class Action Counts I, II, and III because, in his absence, this Court “cannot accord complete relief among existing parties.” *See* Fed. R. Civ. P. 19(a)(1)(A). The Honorable David D. King, personally and through the conduct of his agents, servants, and employees, acted under color of state law at all times relevant to this action.

JURISDICTION AND VENUE

11. The federal claim in Class Action Count I arises under the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983. This Court therefore has subject-matter jurisdiction under 28 U.S.C. § 1331.

12. The state law claims against Defendant Commissioner in Class Action Counts II and III arise under this Court’s supplemental jurisdiction. *See* 28 U.S.C. § 1367(a). Similarly, the state law claims against Defendants SNHMC, Concord Hospital, St. Joseph’s Hospital, and Memorial Hospital in Counts IV, V, VI, and VII, respectively, arise under this Court’s supplemental jurisdiction. *See* 28 U.S.C. § 1367(a) (“Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.”); *see also Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 587 (2005) (“The Court is unanimous in reading § 1367(a) to permit pendent-party jurisdiction in federal-question cases”).

13. Declaratory relief is authorized by 28 U.S.C. § 2201 and 28 U.S.C. § 2202.
14. Venue in the District of New Hampshire is based on 28 U.S.C. § 1391(b).

CLASS ACTION ALLEGATIONS

15. 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 other individuals who are currently being, have been, or will be involuntarily detained in a non-DRF hospital under RSA 135-C:27–33 without having been given a probable cause hearing by the State of New Hampshire within three days (not including Sundays and holidays) of the completion of an involuntary emergency admission certificate. These individuals are at serious risk of institutionalization at New Hampshire Hospital and other DRF hospitals.

16. 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. 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 a person's behavior indicates that he or she 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. As is well documented, negative attitudes and beliefs toward people who have a mental health condition are very common.

17. Prior to admission to a DRF, the State provides these individuals with no procedural due process—including a lawyer or a hearing—to contest whether they meet the criteria for involuntary admission under RSA 135-C:27. This period without process can last up to four weeks until DRF admission. Plaintiffs seek declaratory and injunctive relief individually

and on behalf of the class to remedy this procedural due process violation and violation of RSA 135-C:31, I.

18. The Plaintiff Class is so numerous that joinder of all members is impracticable. As of October 31, 2018, the class consisted of at least 50 individuals (46 adults and 4 children) being involuntarily detained in emergency rooms without due process while awaiting DRF admission, as well as those individuals who will be involuntarily detained at non-DRF facilities in the future. As of July 16, 2019, the number of waiting adults was 16.

19. There are questions of law and fact common to the Plaintiff Class, which includes whether the State of New Hampshire is violating the procedural due process protections of the Fourteenth Amendment and Part I, Article 15 of the New Hampshire Constitution—as well as RSA 135-C:35, I—by failing to, within three days of the completion of an IEA certificate, provide due process to individuals who are being involuntarily detained under RSA 135-C:27-33 and are awaiting involuntary admission to a DRF.

20. 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.

21. New Hampshire has administered its mental health system in a way that fails to provide necessary process within three days of the completion of an IEA certificate to individuals who are being involuntarily detained in non-DRF hospitals under RSA 135-C:27–33 and are awaiting involuntary admission to a DRF. Therefore, New Hampshire has 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 Plaintiff and Plaintiff Class seek certification pursuant to Fed. R. Civ. P. 23(b)(2).

STATEMENT OF FACTS

I. The Plaintiffs' Experience

A. John Doe

22. Plaintiff John Doe is 26 years old. He has been married for 5 years to his wife, with whom they have two biological girls, ages 3 and 4. Doe is the breadwinner for the family, and the family is dependent on his income to survive. Though low income, Doe is steadily employed as a plasterer.

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

24. 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.”

25. However, Doe was willing to undergo treatment for any mental health issues, including taking medication and receiving out-patient care. Doe strenuously 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.

26. 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 as to create a potentially serious likelihood of danger to himself or to others. No such hearing occurred. Instead, SNHMC renewed this IEA Petition on November 8, 2018.⁶

27. At the time this lawsuit was filed on the early morning of Saturday, November 10, 2018, Doe has 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.

28. Doe was frustrated by his involuntary detention. This frustration was understandable. Doe had absolutely no idea when he was going to be released. As SNHMC

⁶ To the extent liability concerns motivated SNHMC to renew its IEA Petition as to Plaintiff John Doe, it is important to note that, under a bill that came into effect on July 1, 2018 (Senate Bill 590), “[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.” *See* RSA 135-C:29-a.

staff told him before this lawsuit was filed, they did not know when the release would occur, and it could be weeks. When someone is indefinitely detained against their will without due process, wishes to see their children, and is worried about the financial security of one's family, such frustration should be sympathized with, especially when the person is kept in a secluded, windowless room. Doe believed that he would have been best served outside this restrictive environment.

29. 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 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.

30. 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.

31. 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. Charles Coe

32. Plaintiff Charles Coe is currently 28 years old. He has been gainfully employed in the meat processing industry for the past 7 years.

33. On July 20, 2018, Coe's family brought him to Defendant 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.

34. 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.

35. 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 is a continued danger.

36. 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.

37. 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 at Exhibit A (without exhibits).

38. Concord Hospital released Coe on August 8, 2018 because, according to the Hospital, Coe’s clinical and mental condition improved. However, this decision was reached after the filing of his petition on August 3, 2018.

39. 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* Aug. 9, 2018 order, at p. 7, attached at Exhibit B.⁷

40. 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

⁷ 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, attached at Exhibit C. 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* Sept. 6, 2018 Order, at p. 7, attached at Exhibit D.

individuals involuntarily detained who were awaiting placement to DRFs.⁸

41. 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. "Yellow pod" contains a common bathroom for all the individuals placed in the block. "Yellow pod" is also locked and kept secure from the rest of the hospital. Though 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 2 to 3 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.

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

43. 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. Jane Roe

44. Plaintiff Jane Roe is 61 years old. She is an administrative support professional

⁸ See Caitlin Andrews, Mental Health Remains a Challenge for N.H. Hospitals, *Concord Monitor* (Aug. 11, 2018) ("Last week, Concord Hospital had about 12 patients waiting in its emergency department; the week before that, it was 15."), available at <https://www.concordmonitor.com/Concord-Hospital-mental-health-patients-bed-overload-19236373>.

and has been gainfully employed in this role for the last 15 years.

45. On Thursday, September 20, 2018, Roe left work because she was experiencing significant stress and anxiety from work and due to the fact that she is the sole caregiver of 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.

46. 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.

47. Roe's next memory is being in the emergency room of Defendant 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.

48. Roe's IEA petition was then successively renewed on six occasions in approximately three-day increments (on September 24, 27, 30, 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.

49. 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.

50. 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 travelling at the time. Roe was then released from New Hampshire Hospital that day after approximately 23 total days of being needlessly involuntarily detained.

51. 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.

52. 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. Moreover, Roe felt that there were not 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 DRF 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.

53. 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.

54. 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 Deborah A. Taylor

55. Scott Stephen Johnstone is 31 years old. Plaintiff Deborah A. Taylor is his mother and legal guardian.

56. On July 17, 2018, Johnstone was involuntarily admitted to the emergency room of Defendant Memorial Hospital in North Conway 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.

57. 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. However, 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.

58. Johnstone stayed at Memorial Hospital on an involuntary basis 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, 28, August 1, 3, 6, 8, 10, and 13.

59. 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 or anything with cords. As a result, Taylor brought Johnstone a laptop with a cordless keyboard and mouse. When the battery ran out, Johnstone had to take it 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.

60. 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. However, Memorial Hospital and the local community mental health center said that this was not an option.

61. As a result, Taylor began to get desperate. She wrote 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.”⁹ The *Conway Daily Sun* also documented this story.¹⁰ Taylor went to the press because she wanted to tell people what happens to the mentally ill, like her son. She wanted to raise awareness of the problem so that it could be corrected.

62. On approximately August 13, 2018, Johnstone was transferred to the DRF New Hampshire State Hospital. A hearing was conducted at which a finding was made that there was probable cause to believe that that Johnstone was in such a 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.

63. Though Taylor was the petitioner in this case, Taylor believes that Johnstone

⁹ See Jennifer Crompton, “Shortage of Mental Health Beds Forces Man Into ER for More Than 3 Weeks,” *WMUR* (Aug. 8, 2018) (“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.”), available at <https://www.wmur.com/article/shortage-of-mental-health-beds-forces-man-into-er-for-more-than-3-weeks/22680883>. *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), available at <https://www.wmur.com/article/mental-health-patients-continue-to-languish-in-nh-emergency-rooms/24868843?src=app>.

¹⁰ See Daymond Steer, “Bartlett Mom Seeks Relief for Mentally Ill Son,” *Conway Daily Sun* (Aug. 8, 2018), available at https://www.conwaydailysun.com/news/local/bartlett-mom-seeks-relief-for-mentally-ill-son/article_63ddd712-9a69-11e8-9179-37823772a3fb.html.

should have been given 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 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.

64. 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.

II. The Systemic Nature of the Problem

65. 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 rooms in excess of three days (not including Sundays and holidays) without the State providing them with any due process, appointed counsel, or opportunity to contest their detention. This practice is known as "psychiatric boarding."

66. As of October 31, 2018, approximately 46 adults and 4 children were being involuntarily "boarded" in emergency rooms under RSA 135-C:27-33 while awaiting admission to a DRF.¹¹ See NAMI-NH, NHH Delay Data, available at <https://goo.gl/o9R1Yv>. As of July

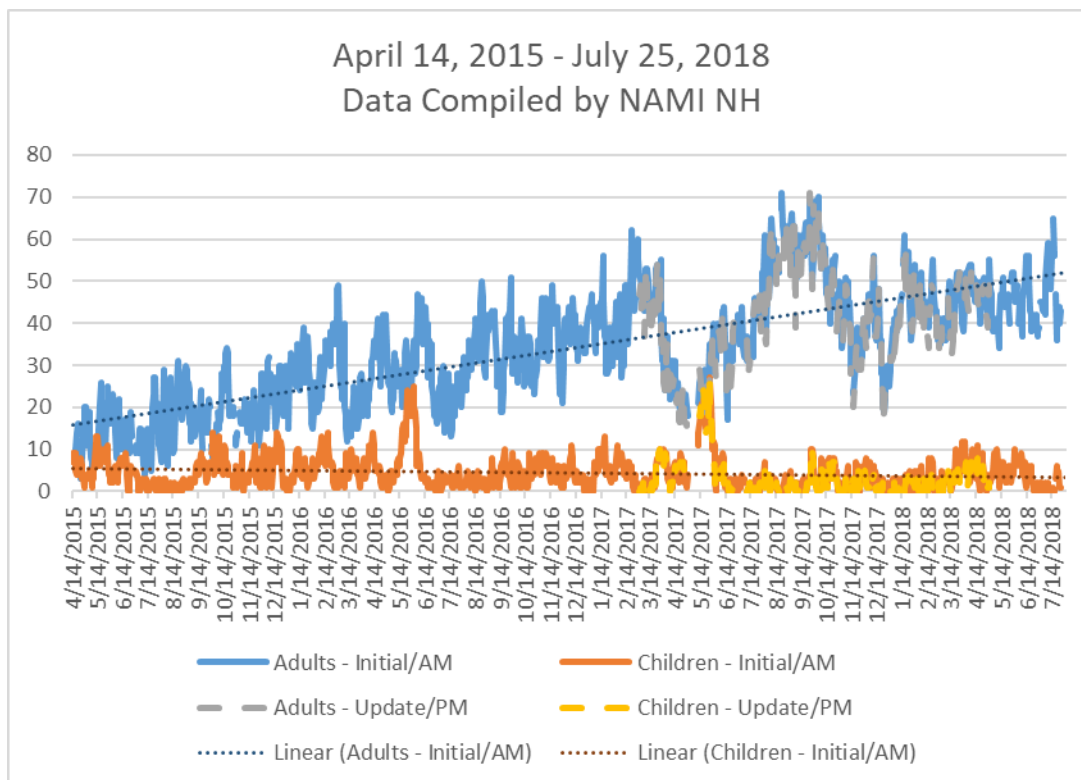
¹¹ There are five DRFs in New Hampshire that accept patients involuntarily admitted under Chapter 135-C. New Hampshire Hospital in Concord has approximately 168 beds available. As of December 2017, the four remaining DRFs have approximately 52 beds available: (i) the Cypress Center/Mental Health Center of Greater Manchester in Manchester (approx. 16 DRF beds available); (ii) the Psychiatric Intensive Care Unit at Elliot Hospital called "Pathways" in Manchester (approx. 14 DRF beds available); (iii) Franklin Regional Hospital in Franklin (approx. 10

16, 2019, the number of waiting adults was 16. The number of those waiting can fluctuate, as it is often both cyclical and seasonal. In short, while these hospitals will adequately treat individuals with cancer, broken bones, or cuts, these hospitals often place individuals experiencing a mental health issue in conditions that are tantamount to solitary confinement while they wait for a bed at a DRF.¹² As these emergency rooms are not community-based mobile crisis centers or DRFs designed to treat those involuntarily admitted under Chapter 135-C, many of these detained individuals may also not be receiving the medical and psychiatric care they need to address the mental health crisis they may be experiencing. It should come as no surprise that solitary conditions combined with a lack of process are likely to exacerbate a mental health crisis.

67. This problem has gotten worse in the past three years. According to data collected by 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 at Exhibit E. Shortly before this lawsuit was filed in November 2018, the number of adults being detained had increased by over 350% to the 50s on average. A chart prepared by NAMI-NH highlights this significant increase:

DRF beds available); and (iv) Portsmouth Regional Hospital (approx. 12 DRF beds available). *See* Human Services Research Institute, Final Report: Evaluation of the Capacity of the New Hampshire Behavioral Health System (Dec. 22, 2017), at p. 55 and 57 (Exhibit 25), available at <https://www.hsri.org/publication/evaluation-of-the-capacity-of-the-new-hampshire-behavioral-health-system>. No DRF beds are available for individuals being involuntarily admitted in the North Country after the closure of Androscoggin Valley Hospital. New Hampshire Hospital is also one of the few options available for children in psychiatric crisis. DRF capacity on a given day depends, in part, on patient mix. Patient mix may impede full utilization of the 52 beds available at the non-New Hampshire Hospital DRF facilities.

¹² *See* Gali Katznelson and J. Wesley Boyd, “Solitary Confinement: Torture, Pure and Simple,” *Psychology Today* (Jan. 15, 2018) (“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.”), available at <https://www.psychologytoday.com/us/blog/almost-addicted/201801/solitary-confinement-torture-pure-and-simple>.



See *id.* at Slide 1.¹³ The greatest number of waiting adults reached 71 (on August 21, 2017) and the greatest number of waiting children reached 27 (on May 25, 2017). See *id.* at Slide 2; NAMI-NH, NHH Delay Data, available at <https://goo.gl/o9R1Yv>. The second quarter of 2018 was the second highest on average for waiting adults and waiting children combined (50 total). See July 2018 NAMI-NH Data, Slide 4, attached at *Exhibit E*.¹⁴ A chart further summarizing the waiting list from April 14, 2015 to June 30, 2019 is below:

¹³ See also Human Services Research Institute, Final Report: Evaluation of the Capacity of the New Hampshire Behavioral Health System (Dec. 22, 2017), at p. 20 (Exhibit 1 documenting waitlist numbers from April 2015 to September 2017), available at <https://www.hsri.org/publication/evaluation-of-the-capacity-of-the-new-hampshire-behavioral-health-system>.

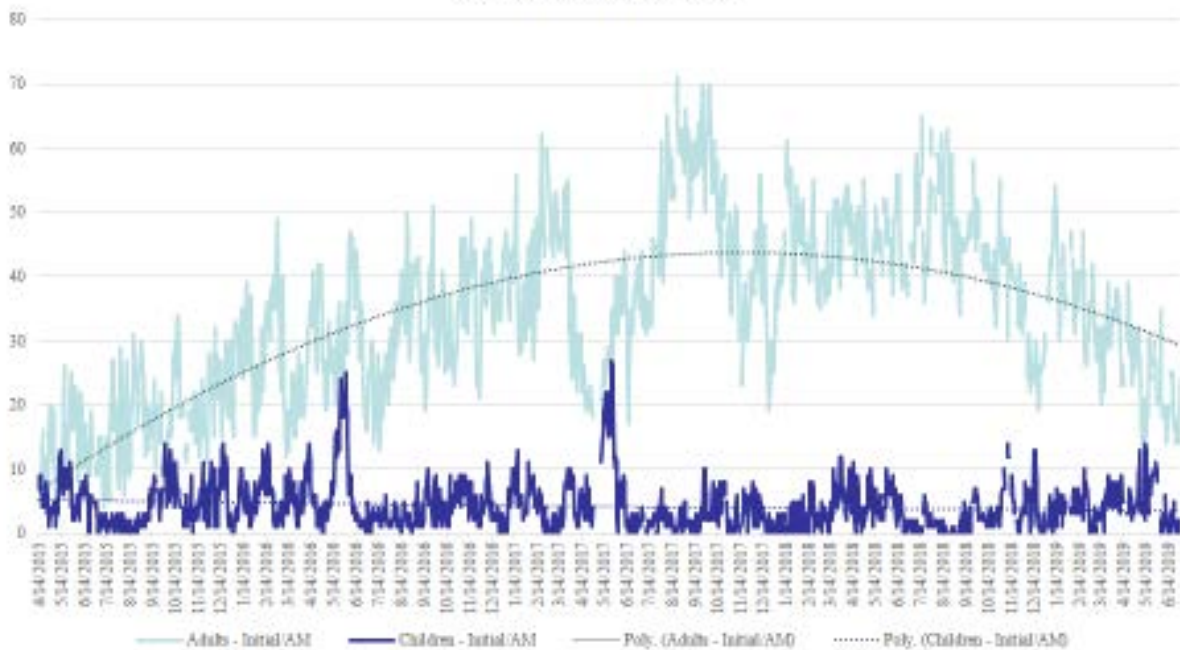
¹⁴ As the Human Services Research Institute’s December 22, 2017 report entitled “Evaluation of the Capacity of the New Hampshire Behavioral Health System” explained: “*There has been a steady increase in the number of individuals experiencing boarding in New Hampshire ERs.* On September 24, 2017 there were 70 people waiting for admission. The greatest total number of individuals at one time was 72.” See Human Services Research Institute, Final Report: Evaluation of the Capacity of the New Hampshire Behavioral Health System (Dec. 22, 2017), at p. 4 (emphasis added), available at <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.*



NHH Waiting List

April 14, 2015 - June 30, 2019

Data Compiled by NAMI NH



NAMI New Hampshire

68. Though emergency room wait times can 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, waited 27 days in an emergency room 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, attached at Exhibit C. New Hampshire Circuit Court Administrative Judge Edwin W. Kelly also documented three individuals who were held in emergency rooms from 14 to 15 days before being transferred to a DRF. *See* Nov. 17, 2016 Kelly, J. Interlocutory Transfer Statement Order, p. 3-4, attached at Exhibit F. From July 11, 2017 to September 6,

2017, emergency room wait times usually exceeded three days on average. *See* July 2018 NAMI-NH Data, Slide 6 (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), attached at Exhibit E. During this wait time, the State has established a policy, practice, and custom of failing to, within three days of the completion of an involuntary emergency certificate (not including Sundays or holidays), provide a probable cause hearing where such individuals can challenge their involuntary detention.

III. This Practice is the Result of State Action

69. The failure to provide due process as alleged in this lawsuit is the direct result of state action.

70. *First*, RSA 135-C:31 itself makes clear that it is the State’s obligation to provide probable cause hearings within three days of the patient becoming the subject of an IEA certificate (regardless of the patient’s location). And here, it is the State that is failing to comply with this obligation directed by the legislature. In short, the core of this case is about State action—namely, the State’s failure to provide due process as required by the Constitution and New Hampshire law. Indeed, the State’s failure to provide due process is a matter of official State policy and is not isolated to certain hospitals. As the Hospital Intervenors note, “DHHS has 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. According to DHHS, the three-day period for a probable cause hearing does not commence until an IEA patient is received at a DRF.” *See* Hospitals’ Compl. in Intervention ¶ 36 (Docket No. 63). The State’s policy is further confirmed by its admission that it (incorrectly) construes RSA 135-C as only requiring the State

to provide probable cause hearings with three days of a patient's admission to a DRF. *See* Docket No. 67-1, at p. 23. This official policy is also on the DHHS's website, where it states: "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 Exhibit N*, <https://www.dhhs.nh.gov/dcbcs/nhh/eligibility.htm> (emphasis added). In short, the State concedes that it has a policy of not providing due process to the Plaintiff Class.

71. *Second*, through this practice, the State abandons these patients and compels them to detention in non-DRF emergency rooms—like Defendants 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 a lawyer or ability to contest their detention. Through this weeks-long abandonment, the State is avoiding its obligations to make treatment "immediately" available to these individuals in DRFs—responsibilities that are exclusively reserved to it—by delegating them to non-DRF hospitals that may not have the resources to provide adequate medical and psychiatric treatment. Non-DRF hospitals like Defendants SNHMC, Concord Hospital, St. Joseph's Hospital, and Memorial Hospital are compelled to provide State functions through this boarding. Such care is traditionally a public function of DHHS. This practice is not only wrong, but it violates one of the bedrock principles in the Fourteenth Amendment: that a person's liberty should not be involuntarily taken away without the State giving that person the opportunity to be heard. In short, the State has exercised coercive power or has provided such significant encouragement, either overt or covert, that the challenged conduct here—namely, the failure to provide timely due process—must be deemed to

be that of the State, especially where RSA 135-C:31 requires *the State* to provide such process.

72. *Third*, the State cannot abdicate its responsibility to provide due process to these patients simply because the detention is occurring at a private hospital. This is because 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. The State has been intimately involved in this process. 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.” See Hospitals’ Compl. in Intervention ¶ 37 (Docket No. 63). Put another way, 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. 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 statute’s requirement that due process be provided *by the State within three days of the initial involuntary admission*. This policy, in which the State and the hospitals have collaborated, is not only unlawful, but it also shows that this scheme constitutes a joint action in which the State is and has been intimately involved.

73. *Fourth*, the hospitals engaging in the involuntary detention at issue here are effectively State actors because they are performing a public function that has been traditionally the exclusive prerogative of the State. Until the emergency room boarding crisis began, the individuals now detained in hospital emergency rooms were previously “immediately delivered” to a DRF in the care of the State. See RSA 135-C:29 (requiring “immediate[] deliver[y]” to

DRF); 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 [DHHS] commissioner.”). Thus, the hospitals now detaining these individuals in their emergency rooms without due process as a result of the DRF waitlist are currently performing a public function that had been, until the boarding crisis, exclusively bestowed upon the State.

IV. Due Process is Both Legally Required and Critical

74. The State’s policy, practice, and custom of failing to provide timely due process is inconsistent with New Hampshire law. The State has interpreted the law as providing due process to these individuals only *after* a bed becomes available at a DRF and within three days of that individual being formally admitted to that DRF for involuntary treatment, excluding Sundays and holidays. Again, DHHS has communicated this interpretation to hospitals. *See Hospitals’ Compl. in Intervention* ¶ 37 (Docket No. 63).

75. This is an incorrect interpretation of the law, which requires process “[w]ithin 3 days of an involuntary emergency admission”—here, within three days of when the initial IEA certificate is completed in the hospital emergency room at the non-DRF hospital. *See* RSA 135-C:31, I (providing process “[w]ithin 3 days of an involuntary emergency admission”).

76. 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 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* Aug. 9, 2018 order, at p. 7, attached at *Exhibit B*. In this decision, Coe is called “John Doe.”

77. Neither the State nor New Hampshire hospitals are complying with this legal interpretation of the Merrimack County Superior Court. While the State fails to provide this due

process within three days, New Hampshire hospitals continue to detain individuals under color of law after three days have elapsed without a probable cause hearing.

78. Due process is critical. According to data from DHHS, in 2017, of 1290 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 rooms before placement to a DRF, many of these patients may have been released sooner had they received timely due process in the hospital emergency room as required.

79. The importance of 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 last 15 days and did not end until he filed a habeas corpus petition in Merrimack Superior Court.

80. Simply put, this is not a matter of the State providing deficient process to those individuals being involuntarily detained while awaiting admission to a DRF. Rather, this is a matter of the State providing *no* process to these individuals.

81. Moreover, hospitals in New Hampshire continue to unlawfully—and falsely imprison—these individuals under color of law after the three-day deadline to provide a probable cause hearing has expired despite the fact that the twenty (20) hospitals that have intervened in this case believe that New Hampshire law requires a probable cause hearing within three days of

the completion of the Petition and Certificate for Involuntary Emergency Admission, as opposed to within three days of the patient's transfer to the DRF. *See* Hospitals' Compl. in Intervention ¶¶ 34 ("A probable cause hearing must be held in the Circuit Court within three days of an IEA."), 34 (alleging that DHHS "facilitates the Circuit Court's failure to provide IEA patients with probable cause hearings within the three-day deadline") (Docket No. 63). Defendants SNHMC, Concord Hospital, and the 18 remaining intervening hospitals apparently agree with Plaintiffs' (and the Merrimack Superior Court's) interpretation of RSA 135-C:31, I.

V. The State is Aware of This Problem and Has Failed to Solve It

82. On November 17, 2016, Circuit Court Chief Judge Kelly issued an extraordinary and commendable order with respect to three individuals who ultimately waited 17 to 20 days between the date of their initial emergency room detention and the date of their probable cause hearings challenging their involuntary detention. *See id.*; Nov. 16, 2016 Supplemental Order, attached at Exhibit G. 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* Nov. 17, 2016 Kelly, J. Interlocutory Transfer Statement Order, p. 8, attached at Exhibit F.

83. 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 p. 11. The Court explained that, while a person is being involuntarily detained in an emergency room prior to involuntary DRF admission, the Court "[is] not aware that the person [is] the subject of a petition." *Id.* at p. 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 rooms for a period of time prior to admission to a DRF without any 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 p. 11.¹⁵

84. As a result of Circuit Court Chief Judge Kelly’s order and the work of advocacy organizations, a bill was enacted in 2017—House Bill 400—that, in part, required the Defendant 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 process of RSA 135-C who are awaiting transfer to a designated receiving facility.” *See* 2017 House Bill 400, p. 2, Section 112:3, as *Exhibit J*.¹⁶

85. In response to House Bill 400, on August 31, 2017, Defendant Commissioner issued a report proposing a 90-day pilot program in which four hospitals (Catholic Medical

¹⁵ 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 p. 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 p. 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* Dec. 7, 2016 Attorney General Objection, attached at *Exhibit H*. On December 8, 2016, the New Hampshire Supreme Court denied the Circuit Court’s interlocutory transfer statement. *See* Dec. 8, 2016 Sup. Ct. Order, attached at *Exhibit I*.

¹⁶ 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).

Center in Manchester, Dartmouth Hitchcock Medical Center in Lebanon, Defendant SNHMC in Nashua, and Spere 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 Defendant 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* Aug. 31, 2018 Pilot Project Proposal, attached at Exhibit K. As the Commissioner's August 31, 2017 letter reported, as part of this pilot program, individuals involuntarily detained would receive, among other things, a hearing conducted via video link and telephone, the right to legal counsel, and the right to adequate and humane treatment while in an emergency room awaiting DRF placement. *See id.*, Aug. 31, 2017 Letter. The pilot project was scheduled to run from Nov. 1, 2017 to Jan. 31, 2018.

86. 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 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* Commissioner Dec. 21, 2017 Letter, attached at Exhibit L. The hospitals' concerns consisted of "security concerns," the fear of "[l]iability associated with a plan to conduct hearings outside of statutory authority,"¹⁷ and staffing needs. *Id.*

87. The 2017 budget also approved funding for 20 more DRF beds, but

¹⁷ 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 — here, within three days of when the initial IEA certificate is completed in the hospital emergency room at the non-DRF hospital.

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.¹⁸ As the pilot project collapsed because of the concerns raised by hospitals, the Defendant Commissioner, in December 2017, 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 too was not successful.¹⁹

88. 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 Court explained in a later September 6, 2018 order that the hospital in that case, 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* Sept. 6, 2018 Order, at p. 7, attached at *Exhibit D*. 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 p. 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, this legal ruling is simply not being complied with by the State

¹⁸ *See* Dave Solomon, "'Back door' Approach to Shortage of Mental Health Beds Has Some Success," *Union Leader*, Dec. 17, 2017.

¹⁹ 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 are 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) ("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."), available at <https://www.wmur.com/article/officials-not-enough-transitional-housing-for-psychiatric-patients/22692452>.

and New Hampshire hospitals, and there is no vehicle to enforce it except in individual, non-binding cases that will not bring systemic relief.

89. It should be noted that the State of New Hampshire has recently enacted Senate Bill 11, which is designed to create incentives for hospitals to add DRF capacity. *See* Senate Bill 11, attached at *Exhibit M*. However, this bill, though well-intentioned, is inadequate to address the issues raised in this case. Senate Bill 11 does not provide a mechanism to ensure that individuals who are currently being held in hospital emergency rooms immediately receive any due process—including appointed counsel and an opportunity to contest their detention—while they wait for placement at a DRF. These individuals cannot afford to wait another two years to see whether Senate Bill 11 successfully addresses the emergency room boarding crisis. These individuals need due process now, and Senate Bill 11 provides no immediate help to these patients.²⁰

90. With other avenues having failed to address this obvious and systemic due process problem, Plaintiffs have nowhere else to turn but this Court through this Class Action Complaint.

91. It is important to note that the failure to resolve this problem cannot be solely placed on the Defendant Commissioner. In response to House Bill 400, the Commissioner spent countless hours attempting, in good faith, to devise a video-conferencing solution to this problem in collaboration with the Circuit Court system and the New Hampshire hospitals who are boarding these patients. The hospitals backed away from this proposal thoughtfully developed

²⁰ As part of the 2019 budget, the Governor commendably proposed a one-time \$1,000,000 annual appropriation to help address this due process issue. The budget passed by the Legislature and presented to the Governor lowered this amount to \$750,000. On July 1, 2019, the Governor vetoed the budget the Legislature had passed for reasons unrelated to this proposed appropriation. *See* <https://www.governor.nh.gov/news-media/press-2019/documents/20190628-budget-veto.pdf>. As Plaintiffs understand it, budget negotiations between the Governor and Legislature are ongoing.

by the Commissioner. But—regardless of the Commissioner’s good faith, yet unsuccessful, effort to resolve this crisis—the responsibility to fix this problematic practice continues to be the State’s.

92. Given this continued constitutional violation at the hands of the State, immediate judicial action is required.

VI. The Necessity of the Circuit Court’s Involvement in This Case

93. If the Honorable David D. King—acting not in his judicial capacity but in his official capacity as Administrative Judge of the New Hampshire Circuit Court—is not a party in this case as to Counts I, II, and III, then this Court “cannot accord complete relief among existing parties.” *See* Fed. R. Civ. P. 19(a)(1)(A).

94. The New Hampshire Circuit Court administers the very probable cause hearings that are directly at issue in this case, including their location, when they are conducted, and how they are conducted. Currently, the Circuit Court, consistent with the State’s (incorrect) legal interpretation, administers probable cause hearings only *after* a detainee is transported to a DRF. Presumably this is because the Circuit Court currently only becomes aware of a patient’s involuntary 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.* *See* Nov. 17, 2016 Kelly, J. Interlocutory Transfer Statement Order, p. 8, attached at *Exhibit F*. In any event, the Circuit Court’s failure to timely conduct these hearings violates the protections of due process and RSA 135-C:31, both of which at least require a hearing to be held within three days of when the IEA certificate is completed while the patient is in an emergency room. In sum, the Circuit Court’s administrative and logistical ability to conduct these probable cause hearings is directly

connected to the State's unlawful and unconstitutional action.²¹ Accordingly, Plaintiffs name the Honorable David D. King as a necessary party in his capacity as chief administrator of the Circuit Court.

95. The Circuit Court has refused to agree that—if ordered by this Court or agreed upon by the remaining parties in this case pursuant to Plaintiffs' Counts I-III—it will make the necessary arrangements to administer probable cause hearings under RSA 135-C:27-33 within three days of the completion of an IEA certificate, regardless of the patient's location and including if the patient is in an emergency room. Significantly, the Circuit Court's pleadings in this case have not committed to providing the administratively or logistically necessary arrangements to ensure that probable cause hearings are conducted promptly if the Circuit Court receives a request to do so through the submission of a Petition and Certificate for Involuntary Emergency Admission while the patient is admitted in an emergency room before the patient has been transferred to a DRF. Moreover, the Circuit Court has not agreed, as a third party to this litigation, to waive any argument that making the administratively or logistically necessary arrangements to ensure that probable cause hearings are held within three days of the completion of an IEA certificate is too burdensome to be conducted or is not feasible and therefore is not constitutionally required. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (noting that a consideration in determining whether due process is required is the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail).

96. Here, involvement of the Circuit Court in this case is critical, especially where the

²¹ Further, as the Hospital Intervenors allege, "DHHS has 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. According to DHHS, the three-day period for a probable cause hearing does not commence until an IEA patient is received at a DRF." *See Hospitals' Compl. in Intervention* ¶ 36 (Docket No. 63).

Circuit Court has declined to commit to making the administrative and logistical arrangements necessary to ensure that probable cause hearings can be conducted consistent with the law or any resolution negotiated by the remaining parties. Of course, whatever relief this Court imposes concerning the scheduling of probable cause hearings would be administered by the Circuit Court. If, for example, this Court orders the establishment of probable cause hearings within three days of when a patient becomes subject to an IEA certificate (including while the patient is in a hospital emergency room), it is the Circuit Court that would principally administer this remedy by conducting the hearings in question. However, if the Circuit Court, as a non-party, refuses to make the administrative and logistical arrangements necessary to carry out this remedy, then the Circuit Court must be in this case as a party so this Court can ensure that any remedy it imposes concerning probable cause hearings is administratively and logistically effectuated. Without the Circuit Court, this Court's orders and any relief therein may be meaningless, as the Circuit Court has given no indication that they would be followed.

CLAIMS FOR RELIEF

Count I

Class Action Count

**(Fourteenth Amendments to the U.S. Constitution, as enforced by 42 U.S.C. § 1983 –
PROCEDURAL DUE PROCESS)**

**All Plaintiffs, Individually and on Behalf of Plaintiff Class, Against Defendant DHHS
The Hon. David D. King is a Party Pursuant to Rule 19(a)**

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

98. 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.

99. Under 42 U.S.C. § 1983, the Defendant Commissioner is a “person” liable for unconstitutional policies, practices, and customs.

100. 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.

101. The State of New Hampshire has a policy, practice, or custom of failing to provide procedural due process within three days of the completion of an IEA certificate (not including Sundays and holidays) to individuals who are being involuntarily detained in non-DRF hospitals under RSA 135-C:27-33 and are awaiting involuntary admission to a DRF.

102. The State of New Hampshire has known or should have known about the existence of this policy, practice, or custom.

103. The named Plaintiffs and the members of the Plaintiff Class are currently being, have been, or will be involuntarily detained while awaiting admission to a DRF pursuant to the involuntary emergency admission process in RSA 135-C:27-33.

104. 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).

105. However, while being detained awaiting admission to a DRF, the named Plaintiffs and the members of the Plaintiff Class have not been provided a lawyer, let alone a hearing to establish whether there is probable cause to involuntarily admit them under RSA 135-C:27-33.

106. As a result of this policy, practice, or custom, the named Plaintiffs have suffered and the members of the Plaintiff Class will continue to suffer irreparable harm—namely being deprived of their right to procedural due process.

107. Unless restrained from doing so, the State will continue to violate the Fourteenth Amendment by enforcing this policy, practice, or custom.

108. Unless enjoined, the State’s continued enforcement of this statute will continue to inflict injuries for which the named Plaintiffs and the members of the Plaintiff Class have no adequate remedy at law.

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

Count II
Class Action Count
(N.H. Const. Part I Article 15 –PROCEDURAL DUE PROCESS)

All Plaintiffs, Individually and on Behalf of Plaintiff Class, Against Defendant DHHS
The Hon. David D. King is a Party Pursuant to Rule 19(a)

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

111. Part I, Article 15 of the New Hampshire Constitution provides that “[n]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.”

112. The New Hampshire Supreme Court has held that “law of the land” means “due process of law.” *Gantert v. Rochester*, 168 N.H. 640, 647 (2016).

113. The State of New Hampshire has a policy, practice, or custom of failing to provide procedural due process within three days of the completion of an IEA certificate (not

including Sundays and holidays) to individuals who are being involuntarily detained in non-DRF hospitals under RSA 135-C:27-33 and are awaiting involuntary admission to a DRF.

114. The State of New Hampshire has known or should have known about the existence of this policy, practice, or custom.

115. The named Plaintiffs and the members of the Plaintiff Class are currently being, have been, or will be involuntarily detained while awaiting admission to a DRF pursuant to the involuntary emergency admission process in RSA 135-C:27-33.

116. 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).

117. However, while being detained awaiting admission to a DRF, the named Plaintiffs and the members of the Plaintiff Class have not been provided a lawyer, let alone a hearing to establish whether there is probable cause to involuntarily admit them under RSA 135-C:27-33.

118. As a result of this policy, practice, or custom, the named Plaintiffs have suffered and the members of the Plaintiff Class will continue to suffer irreparable harm—namely being deprived of their right to procedural due process.

119. Unless restrained from doing so, the State will continue to violate Part I, Article 15 of the New Hampshire Constitution by enforcing this policy, practice, or custom.

120. Unless enjoined, the State’s continued enforcement of this statute will continue to inflict injuries for which the named Plaintiffs and the members of the Plaintiff Class have no adequate remedy at law.

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

Count III
Class Action Count
(Violation of RSA 135-C:31, I)

All Plaintiffs, Individually and on Behalf of Plaintiff Class, Against Defendant DHHS
The Hon. David D. King is a Party Pursuant to Rule 19(a)

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

123. The State has interpreted the law as providing due process to individuals detained in emergency rooms under Chapter 135-C:27-33 only after a bed becomes available at a DRF and within three days of that individual being formally admitted to that DRF for involuntary treatment (excluding Sundays and holidays).

124. This is an incorrect interpretation of the law, which requires process “[w]ithin 3 days of an involuntary emergency admission”— here, within three days of the completion of when the initial IEA certificate is completed in the hospital emergency room at the non-DRF hospital. *See* RSA 135-C:31, I (providing process “[w]ithin 3 days of an involuntary emergency admission”). In an August 9, 2018 decision, the Merrimack County Superior Court held that RSA 135-C:31 requires 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* Aug. 9, 2018 order, at p. 7, attached at Exhibit B.

125. The State of New Hampshire is not complying with this legal interpretation of the Merrimack County Superior Court.

126. The State of New Hampshire has a policy, practice, or custom of failing to provide procedural due process within three days of the completion of an IEA certificate (not

including Sundays and holidays) as is required under RSA-C:31, I to individuals who are being involuntarily detained in non-DRF hospitals and are awaiting involuntary admission to a DRF.

127. As a result of this policy, practice, or custom, the named Plaintiffs have suffered and the members of the Plaintiff Class will continue to suffer irreparable harm—namely being deprived of their rights under RSA 135-C:31, I.

128. Unless restrained from doing so, the State will continue to violate RSA 135-C:31, I by enforcing this policy, practice, or custom.

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

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

Count IV
(State Common Law False Imprisonment Claim)

Plaintiff John Doe Against Defendant SNHMC

131. Plaintiff John Doe realleges and incorporates by reference the allegations contained in the preceding paragraphs.

132. Defendant SNHMC involuntarily detained Plaintiff John Doe after November 8, 2018, despite the fact that the State had not provided him a timely probable cause hearing within three days of the completion of an IEA certificate on November 5, 2018, as is required under RSA 135-C:31, I. This involuntary detention lasted 5 days.

133. In an August 9, 2018 decision, the Merrimack County Superior Court held 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* Aug. 9, 2018 order, at p. 7, attached at Exhibit B. Defendant SNHMC, as well as other New Hampshire

hospitals, are not complying with this legal interpretation of the Merrimack County Superior Court when they continue the involuntary detention of individuals who have not been provided a probable cause hearing within the three-day deadline.

134. Defendant SNHMC acted with the intent of confining Plaintiff John Doe within the boundaries fixed by Defendant SNHMC when SNHMC renewed Doe's IEA Petition on November 8, 2018 and continued to involuntarily detain him after the three-day deadline for a due process hearing had passed.

135. Defendant SNHMC's acts directly or indirectly resulted in Plaintiff John Doe's confinement.

136. Plaintiff John Doe was conscious of or harmed by the confinement.

137. Defendant SNHMC, in confining Plaintiff John Doe, acted without legal authority by continuing to confine Doe—in violation of RSA 135-C:31, I—after the State failed to give him a due process hearing within three days of the completion of the original IEA certificate.

138. Because Plaintiff John Doe had not been provided a probable cause hearing by November 8, 2018, Defendant SNHMC should have, by that date, released Doe so he could seek out-patient care.

139. Defendant SNHMC unlawfully and falsely imprisoned Plaintiff John Doe after the three-day deadline to provide a probable cause hearing had expired.

140. For these reasons, Defendant SNHMC committed the state common law tort of false imprisonment. *See Ojo v. Lorenzo*, 164 N.H. 717, 726 (2013) (reciting elements); *see also MacKenzie v. Linehan*, 158 N.H. 476, 482 (2009).

141. Indeed, New Hampshire hospitals continue to unlawfully and falsely imprison individuals after the three-day deadline despite the fact that the twenty (20) hospitals that have

intervened in this case (including Defendant SNHMC) believe that New Hampshire law requires a probable cause hearing within three days of the completion of the Petition and Certificate for Involuntary Emergency Admission, as opposed to within three days of the patient's transfer to the DRF. *See* Hospitals' Compl. in Intervention ¶¶ 34 ("A probable cause hearing must be held in the Circuit Court within three days of an IEA."), 34 (alleging that DHHS "facilitates the Circuit Court's failure to provide IEA patients with probable cause hearings within the three-day deadline") (Docket No. 63). In short, Defendant SNHMC and the 19 remaining intervening hospitals agree with Plaintiffs' (and the Merrimack Superior Court's) interpretation of RSA 135-C:31, I.

142. Plaintiff John Doe is not seeking damages in this count for any medical injury.

Count V
(State Common Law False Imprisonment Claim)

Plaintiff Charles Coe Against Defendant Concord Hospital

143. Plaintiff Charles Coe realleges and incorporates by reference the allegations contained in the preceding paragraphs.

144. Defendant Concord Hospital involuntarily detained Plaintiff Charles Coe after July 28, 2018, despite the fact that the State had not provided him a timely probable cause hearing within three days of the completion of an IEA certificate on July 25, 2018, as is required under RSA 135-C:31, I. This involuntary detention lasted 15 days before he was released following the filing of a habeas corpus petition in Merrimack Superior Court.

145. In an August 9, 2018 decision issued after Plaintiff Charles Coe filed his habeas corpus petition, the Merrimack County Superior Court held 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* Aug. 9, 2018 order, at p. 7, attached

at *Exhibit B*. Defendant Concord Hospital, as well as other New Hampshire hospitals, are not complying with this legal interpretation of the Merrimack County Superior Court when they continue the involuntary detention of individuals who have not been provided a probable cause hearing within the three-day deadline.

146. Defendant Concord Hospital acted with the intent of confining Plaintiff Charles Coe within the boundaries fixed by Defendant Concord Hospital when Concord Hospital renewed Coe's IEA Petition on July 28, 2018 and continued to involuntarily detain him after the three-day deadline for a due process hearing had passed.

147. Defendant Concord Hospital's acts directly or indirectly resulted in Plaintiff Charles Coe's confinement.

148. Plaintiff Charles Coe was conscious of or harmed by the confinement.

149. Defendant Concord Hospital, in confining Plaintiff Charles Coe, acted without legal authority by continuing to confine Coe—in violation of RSA 135-C:31, I—after the State failed to give him a due process hearing within three days of the completion of the original IEA certificate.

150. Because Plaintiff Charles Coe had not been provided a probable cause hearing by July 28, 2018, Defendant Concord Hospital should have, by that date, released Coe so he could seek out-patient care with the help of his family.

151. Defendant Concord Hospital unlawfully and falsely imprisoned Plaintiff Charles Coe after the three-day deadline to provide a probable cause hearing had expired.

152. For these reasons, Defendant Concord Hospital committed the state common law tort of false imprisonment. *See Ojo v. Lorenzo*, 164 N.H. 717, 726 (2013) (reciting elements); *see also MacKenzie v. Linehan*, 158 N.H. 476, 482 (2009).

153. Indeed, New Hampshire hospitals continue to unlawfully and falsely imprison individuals after the three-day deadline despite the fact that the twenty (20) hospitals that have intervened in this case (including Defendant Concord Hospital) believe that New Hampshire law requires a probable cause hearing within three days of the completion of the Petition and Certificate for Involuntary Emergency Admission, as opposed to within three days of the patient's transfer to the DRF. *See* Hospitals' Compl. in Intervention ¶¶ 34 ("A probable cause hearing must be held in the Circuit Court within three days of an IEA."), 34 (alleging that DHHS "facilitates the Circuit Court's failure to provide IEA patients with probable cause hearings within the three-day deadline") (Docket No. 63). In short, Defendant Concord Hospital and the 19 remaining intervening hospitals agree with Plaintiffs' (and the Merrimack Superior Court's) interpretation of RSA 135-C:31, I.

154. Plaintiff Charles Coe is not seeking damages in this count for any medical injury.

Count VI
(State Common Law False Imprisonment Claim)

Plaintiff Jane Roe Against Defendant St. Joseph's Hospital

155. Plaintiff Jane Roe realleges and incorporates by reference the allegations contained in the preceding paragraphs.

156. Defendant St. Joseph's Hospital involuntarily detained Plaintiff Jane Roe after September 25, 2018, despite the fact that the State had not provided her a timely probable cause hearing within three days of the completion of an IEA certificate on September 21, 2018, as is required under RSA 135-C:31, I. This involuntary detention lasted 20 days.

157. In an August 9, 2018 decision, the Merrimack County Superior Court held 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* Aug. 9,

2018 order, at p. 7, attached at Exhibit B. Defendant St. Joseph's Hospital, as well as other New Hampshire hospitals, are not complying with this legal interpretation of the Merrimack County Superior Court when they continue the involuntary detention of individuals who have not been provided a probable cause hearing within the three-day deadline.

158. Defendant St. Joseph's Hospital acted with the intent of confining Plaintiff Jane Roe within the boundaries fixed by Defendant St. Joseph's Hospital when St. Joseph's Hospital renewed Roe's IEA Petition and continued to involuntarily detain her after the three-day deadline for a due process hearing had passed.

159. Defendant St. Joseph's Hospital's acts directly or indirectly resulted in Plaintiff Jane Roe's confinement.

160. Plaintiff Jane Roe was conscious of or harmed by the confinement.

161. Defendant St. Joseph's Hospital, in confining Plaintiff Jane Roe, acted without legal authority by continuing to confine Roe—in violation of RSA 135-C:31, I—after the State failed to give her a due process hearing within three days of the completion of the original IEA certificate.

162. Because Plaintiff Jane Roe had not been provided a probable cause hearing by September 25, 2018, Defendant St. Joseph's Hospital should have, by that date, released her.

163. Defendant St. Joseph's Hospital unlawfully and falsely imprisoned Plaintiff Jane Roe after the three-day deadline to provide a probable cause hearing had expired.

164. For these reasons, Defendant St. Joseph's Hospital committed the state common law tort of false imprisonment. *See Ojo v. Lorenzo*, 164 N.H. 717, 726 (2013) (reciting elements); *see also MacKenzie v. Linehan*, 158 N.H. 476, 482 (2009).

165. Plaintiff Jane Roe is not seeking damages in this count for any medical injury.

Count VII
(State Common Law False Imprisonment Claim)

Plaintiff Deborah A. Taylor, as Guardian for Scott Stephen Johnstone, Against Defendant Memorial Hospital

166. Plaintiff Deborah Taylor realleges and incorporates by reference the allegations contained in the preceding paragraphs.

167. Defendant Memorial Hospital involuntarily detained Scott Stephen Johnstone after July 20, 2018, despite the fact that the State had not provided him a timely probable cause hearing within three days of the completion of an IEA certificate on July 17, 2018, as is required under RSA 135-C:31, I. This involuntary detention lasted 27 days.

168. In an August 9, 2018 decision, the Merrimack County Superior Court held 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* Aug. 9, 2018 order, at p. 7, attached at Exhibit B. Defendant Memorial Hospital, as well as other New Hampshire hospitals, are not complying with this legal interpretation of the Merrimack County Superior Court when they continue the involuntary detention of individuals who have not been provided a probable cause hearing within the three-day deadline.

169. Defendant Memorial Hospital acted with the intent of confining Scott Stephen Johnstone within the boundaries fixed by Defendant Memorial Hospital when Memorial Hospital renewed Johnstone's IEA Petition and continued to involuntarily detain him after the three-day deadline for a due process hearing had passed.

170. Defendant Memorial Hospital's acts directly or indirectly resulted in Scott Stephen Johnstone's confinement.

171. Scott Stephen Johnstone was conscious of or harmed by the confinement.

172. Defendant Memorial Hospital, in confining Scott Stephen Johnstone, acted without legal authority by continuing to confine Johnstone—in violation of RSA 135-C:31, I—after the State failed to give him a due process hearing within three days of the completion of the original IEA certificate.

173. Because Scott Stephen Johnstone had not been provided a probable cause hearing by July 20, 2018, Defendant Memorial Hospital should have, by that date, released him so he could seek care with the assistance of his mother and legal guardian Plaintiff Deborah Taylor.

174. Defendant Memorial Hospital unlawfully and falsely imprisoned Scott Stephen Johnstone after the three-day deadline to provide a probable cause hearing had expired.

175. For these reasons, Defendant Memorial Hospital committed the state common law tort of false imprisonment. *See Ojo v. Lorenzo*, 164 N.H. 717, 726 (2013) (reciting elements); *see also MacKenzie v. Linehan*, 158 N.H. 476, 482 (2009).

176. Plaintiff Deborah Taylor is not seeking damages in this count for any medical injury to Johnstone.

REQUEST FOR RELIEF

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

- a) Certify this case as a class action pursuant to Fed. R. Civ. P. 23;
- b) Declare that the State of New Hampshire's policy, practice, or custom of failing to provide procedural due process within three days of the completion of an IEA certificate (not including Sundays and holidays) to individuals who are being involuntarily detained in non-DRF hospitals under RSA 135-C:27-33 and are awaiting involuntary admission to a DRF violates the Fourteenth Amendment to the United States Constitution;

c) Declare that the State of New Hampshire's policy, practice, or custom of failing to provide procedural due process within three days of the completion of an IEA certificate (not including Sundays and holidays) to individuals who are being involuntarily detained in non-DRF hospitals under RSA 135-C:27-33 and are awaiting involuntary admission to a DRF violates Part I, Article 15 of the New Hampshire Constitution;

d) Declare that the State of New Hampshire's policy, practice, or custom of failing to provide procedural due process within three days of the completion of an IEA certificate (not including Sundays and holidays) to individuals who are being involuntarily detained in non-DRF hospitals under RSA 135-C:27-33 and are awaiting involuntary admission to a DRF violates RSA 135-C:31, I;

e) Preliminarily and permanently enjoin the State of New Hampshire from failing to provide procedural due process within three days of the completion of an IEA certificate (not including Sundays or holidays) to individuals who are awaiting involuntary admission to a DRF;

f) Require the State to provide procedural due process to individuals who are awaiting involuntary admission to a DRF within three days of the completion of an IEA certificate;

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

h) Award Plaintiffs their costs of suit; and

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

WHEREFORE, as to the relief sought in Count IV against Defendant SNHMC by Plaintiff John Doe in his individual capacity, Plaintiff John Doe respectfully requests the following relief:

a) Declare and issue a Judgment that Defendant SNHMC's involuntary detention of Plaintiff John Doe without a probable cause hearing after November 8, 2018—which was in excess of three days following the November 5, 2018 completion of the Petition and Certificate for Involuntary Emergency Admission—was without legal authority and constituted false imprisonment;

b) Award Plaintiff John Doe compensatory damages for the violation of his common law right against false imprisonment;

c) Award Plaintiff John Doe attorneys' fees and costs where applicable; and

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

WHEREFORE, as to the relief sought in Count V against Defendant Concord Hospital by Plaintiff Charles Coe in his individual capacity, Plaintiff Charles Coe respectfully requests the following relief:

a) Declare and issue a Judgment that Defendant Concord Hospital's involuntary detention of Plaintiff Charles Coe without a probable cause hearing after July 28, 2018—which was in excess of three days following the July 25, 2018 completion of the Petition and Certificate for Involuntary Emergency Admission—was without legal authority and constituted false imprisonment;

b) Award Plaintiff Charles Coe compensatory damages for the violation of his common law right against false imprisonment;

c) Award Plaintiff Charles Coe attorneys' fees and costs where applicable; and

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

WHEREFORE, as to the relief sought in Count VI against Defendant St. Joseph's Hospital by Plaintiff Jane Roe in her individual capacity, Plaintiff Jane Roe respectfully requests the following relief:

a) Declare and issue a Judgment that Defendant St. Joseph Hospital's involuntary detention of Plaintiff Jane Roe without a probable cause hearing after September 25, 2018—which was in excess of three days following the September 21, 2018 completion of the Petition and Certificate for Involuntary Emergency Admission—was without legal authority and constituted false imprisonment;

b) Award Plaintiff Jane Roe compensatory damages for the violation of her common law right against false imprisonment;

c) Award Plaintiff Jane Roe attorneys' fees and costs where applicable; and

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

WHEREFORE, as to the relief sought in Count VII against Defendant Memorial Hospital by Plaintiff Deborah Taylor, as guardian of Scott Stephen Johnstone, in her individual capacity, Plaintiff Deborah Taylor respectfully requests the following relief:

a) Declare and issue a Judgment that Defendant Memorial Hospital's involuntary detention of Scott Stephen Johnstone without a probable cause hearing after July 20, 2018—which was in excess of three days following the July 17, 2018 completion of the Petition and Certificate for Involuntary Emergency Admission—was without legal authority and constituted false imprisonment;

b) Award compensatory damages for the violation of Johnstone's common law right against false imprisonment;

- c) Award Plaintiff Deborah Taylor attorneys' fees and costs where applicable; and
- d) Grant such other and further relief as this Court deems just and proper in the circumstances.

Respectfully submitted,

John Doe, Charles Coe, Jane Roe, and Deborah A. Taylor as Guardian to Scott Stephen Johnstone in their individual capacities and on behalf of themselves and all others similarly situated,

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

/s/ Gilles R. Bissonnette

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* Admitted *Pro Hac Vice*

Dated: July 19, 2019

CERTIFICATE OF SERVICE

I, Gilles 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 Bissonnette

Gilles Bissonnette, Esq.