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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV10- 2181

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AM, a minor, by her next friend CB Mobley; :
M.M., a minor, by his next friend Cynthia Godsoe; :
and S.M., a minor, by his next friend Kinda Serafi; :
on behalf of themselves and all others similarly :
situated, :

10 Civ. _____

**CLASS ACTION
COMPLAINT**

Plaintiffs, :

vs. :

COGAN, J.

JOHN B. MATTINGLY, in his official capacity as :
Commissioner of the New York City :
Administration for Children's Services, :

Defendant.

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Plaintiffs A.M., M.M., and S.M. ("Plaintiffs"), by and through their attorneys, the
Legal Aid Society and Patterson Belknap Webb & Tyler LLP, for their complaint against
Defendant John Mattingly, in his official capacity as Commissioner of the New York City
Administration for Children's Services ("ACS"), hereby allege as follows:

PRELIMINARY STATEMENT

1. This case involves children in the custody of ACS who are in New York City's foster care system and who have been or will be brought to psychiatric hospitals for emergency admission, and are kept confined in these hospitals for prolonged periods of time, even after the hospitals find them ready for discharge.

2. Plaintiffs and members of the proposed class ("Proposed class members") are children in foster care under eighteen years old who are or will be in the New York City foster care system, which is controlled and administered by the Defendant. Plaintiffs and the vast majority of Proposed class members were placed in the custody of ACS by New York City Family Court judges. ACS has custody of these children and is legally responsible for the care, housing, education, and other needs of Plaintiffs. While ACS delegates the Plaintiffs' day-to-day care to various contracted foster care agencies, ACS remains ultimately responsible under the law for these children's welfare. Among numerous other obligations, ACS is required to place Plaintiffs in the "least restrictive" and "most homelike" environment suitable to their needs, and must provide them with medical and mental health care that is appropriate to their needs.

3. While under the care of ACS and its contract foster care agencies, children in foster care and Proposed class members have been and continue to be brought to acute care psychiatric hospitals and are kept hospitalized in this highly-restrictive setting past the time when the hospitals find them ready for discharge to a less-restrictive setting. For some of these children, there was or is no legitimate need for them to be in a hospital at all, as they lack mental health needs of the requisite severity or have behavior problems more properly managed by other means.

4. On information and belief, ACS and some of its contract agencies are using certain psychiatric hospitals as if they are detention centers, to house children whose

behavior they see as difficult to control. For instance, some Proposed class members were brought to psychiatric hospitals for admission by their contract foster care agencies, not for symptoms of serious mental illness and instability requiring immediate hospitalization, but rather, as a result of behavior or disciplinary issues occurring in their foster home or congregate care placements where they were housed, such as breaking curfew, running away or being “absent without leave,” or even mere “failure to adjust” to a group home setting.

5. Despite being perceived as “difficult” children or even having real mental health needs, many of the Plaintiffs and Proposed class members do not have mental illness and instability so severe that it requires the drastic step of confinement in a psychiatric hospital and the extreme deprivation of liberty such confinement entails.

6. Following ACS’s or its agents’ application for admission of Plaintiffs to psychiatric hospitals, Plaintiffs have each languished in a hospital for weeks or months, even after hospital staff themselves declared Plaintiffs ready for discharge, because ACS has not provided them with a placement in a less restrictive setting as required by law.

7. Indeed, despite the fact that ACS could provide Plaintiffs and Proposed class members with housing and care in its Manhattan-based “Children’s Center” if ACS has not found an appropriate less-restrictive placement by the time the children are found ready for discharge from the hospital, ACS has an ongoing practice of refusing to permit children to be discharged from psychiatric hospitals to its Children’s Center. As a consequence of ACS’s refusal to find Plaintiffs a place to live, and because they are children in foster care who cannot go home to their parents, they simply have nowhere to go and remain confined in psychiatric hospitals even after the hospitals themselves have confirmed that there is no medical reason for them to be there.

8. Far from placing them in the “least restrictive environment” as required by law, ACS has subjected these children, without justification, to the most restrictive environment conceivable – an acute care psychiatric hospital, not designed for long-term living. Because of ACS’s refusal to place Plaintiffs in the less restrictive settings that they require, their confinement is ongoing, despite the pleas of Plaintiffs, their family members, their attorneys, and even officials in the psychiatric hospitals that house them.

9. During Plaintiffs’ extended confinement in these psychiatric hospitals, they have been and continue to be subject to extreme deprivations of their liberty. While hospitalized, Plaintiffs and Proposed class members are rarely permitted to leave the hospital even temporarily. The children’s movement is restricted, they are regularly administered psychotropic medications, and some children are also physically restrained. Their daily activities are seriously limited. They are removed from school and given little or no academic instruction in the hospitals. Their contact with family members and visitors is severely curtailed. In short, every day that it continues, Plaintiffs’ extended, wrongful confinement in these institutions is causing them irreparable damage.

10. Regardless of the knowledge that these hospital admissions are acute in nature and should last only long enough to treat and stabilize an unstable child, ACS and its contract agencies often prolong Plaintiffs’ stays in hospitals by waiting until the hospitals determine that a child in foster care is ready for discharge before beginning their exploration of a less restrictive foster care placement.

11. ACS’s wrongful, prolonged confinement of the Plaintiff children in psychiatric hospitals violates the Americans with Disabilities Act (the “ADA”), the Rehabilitation Act, numerous provisions of the New York Social Services Law and its

implementing regulations, and the Due Process clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 6 of the New York State Constitution.

12. Plaintiffs seek immediate release from their wrongful confinement in acute care psychiatric hospitals and immediate transfer to appropriate foster care placements as required by law. On information and belief, the wrongful, extended confinement of children in foster care in these psychiatric hospitals is a systemic problem affecting numerous children in foster care in addition to the named Plaintiffs. Therefore, Plaintiffs also seek class treatment and prospective relief to prevent ACS and its contract agencies from continuing their illegal pattern and practice of “dumping” children in foster care in psychiatric hospitals and refusing to let them out.

PARTIES

Plaintiffs

13. Each of the Plaintiffs is a New York City child in foster care, in the custody and care of ACS.

Defendant

14. Defendant John B. Mattingly is the Commissioner of ACS and is sued in his official capacity. ACS is responsible for providing services to children in New York City who are the subjects of abuse or neglect allegations or deemed “persons in need of supervision,” or who are destitute. These services include protective services, preventive services, and foster care placement services.

INDIVIDUAL PLAINTIFFS' FACTS

A.M.

15. A.M. is a nine year-old resident of New York City, who suffers from mild mental retardation. She is currently hospitalized at Holliswood Hospital in Queens, New York.

16. On September 6, 2007, a New York County Family Court judge placed A.M. in the care of the Defendant. The court made neglect and abuse findings against A.M.'s mother. Since being placed in the care of ACS, A.M. has been in numerous foster care placements.

17. A.M. has been hospitalized before. The most recent hospitalization, prior to her current hospitalization, occurred on May 8, 2009. A.M. was hospitalized at St. Vincent's Hospital due to suicidal ideations related to her separation from her biological mother.

18. Prior to being hospitalized at St. Vincent's Hospital, A.M. had regular visits with her biological mother at ACS's contract foster care agency Heartshare Human Services (Heartshare).

19. Prior to being hospitalized at St. Vincent's Hospital, A.M. was receiving in-home mental health services through the Bridges to Health program. Her services included bi-weekly in-home behavior services as well as weekly individual talk therapy.

20. Prior to being hospitalized at St. Vincent's Hospital, A.M. was designated as a child in need of special education services. Her Individualized Education Plan required that she receive counseling and speech/language therapy in connection with her schooling.

21. While at St. Vincent's Hospital, A.M. did not have any visitation with her biological mother because the agency would not escort her mother to St. Vincent's Hospital. The escort was necessary because the judge presiding over A.M.'s Family Court case previously ordered the Heartshare caseworker to supervise all visits closely. At no time did ACS or

Heartshare seek modification of that order so that A.M. would be able to see her mother. This relief was sought by A.M.'s attorney in Family Court.

22. While at St. Vincent's Hospital, A.M. did not receive either behavior therapy or talk therapy.

23. While at St. Vincent's Hospital, A.M. did not receive either educational counseling or speech/language therapy. In fact, while hospitalized, A.M. received only limited schooling.

24. A.M.'s diagnoses included Disruptive Behavior Disorder NOS ("not otherwise specified") and Attention Deficit Hyperactive Disorder NOS. While at St. Vincent's, A.M. stabilized on medication, and the hospital declared her ready for discharge by mid-August 2009, with a discharge recommendation for a therapeutic foster boarding home.

25. Nonetheless, ACS and Heartshare kept A.M. confined at St. Vincent's Hospital throughout August and September 2009, while they searched for a therapeutic foster boarding home. A.M.'s doctor was concerned that A.M. would de-compensate mentally if she were to be confined to the hospital too long, as she risked becoming an institutionalized child who could lose her ability to live in a family and/or the community.

26. After A.M.'s attorney filed a motion in Family Court to get A.M. released from the hospital, ACS located a therapeutic foster boarding home with ACS's contract foster care agency CFHS for Hispanic Families (CFHS).

27. While in her new therapeutic foster boarding home from November 2009 to March 2010, A.M. did not receive essential behavioral and talk therapy services through Bridges to Health or any other similar program.

28. While in this foster home, A.M. was re-evaluated for special educational services. After the evaluations, A.M. was placed in a class with reduced class size and increased adult supervision. She also received counseling in school twice per week.

29. While in this foster home, A.M. resumed visits with her biological mother, which occurred bi-weekly.

30. After a tussle in her foster home between A.M. and the daughter of her foster mother, during which A.M. suffered a black eye, A.M. became verbally aggressive and was hospitalized on March 29, 2010, at Holliswood Hospital. A.M. was declared ready for discharge soon after, so long as ACS provided a therapeutic foster boarding home where A.M. could receive community-based mental health services via the Bridges to Health program.

31. On information and belief, neither ACS nor CFHS sought a community-based mental health evaluation or other services for A.M. prior to bringing her to Holliswood Hospital for admission in March 2010.

32. On at least one occasion, Holliswood Hospital staff have chemically restrained A.M. by injecting her with Zydys, an anti-psychotic medication, to tranquilize her.

33. Since being hospitalized, A.M. has not received educational services to which she is entitled.

34. Since being hospitalized, A.M. has not had consistent visits with her biological mother. She has not had any visits with her two brothers, who are also in foster care in the care of Defendant.

35. To date, neither Defendant nor ACS's agent CFHS has identified a foster home to which to move A.M. out of the acute hospital to a less-restrictive setting.

36. A.M. has remained in the hospital for more than a month after she was found ready for discharge to a less-restrictive setting.

M.M.

37. M.M. is a thirteen-year-old resident of New York City. He is currently hospitalized at South Oaks Hospital in Amityville, New York.

38. On December 14, 2009, a Kings County Family Court judge placed M.M. in the care of the Defendant based on allegations against his mother. M.M. was placed in foster care, in the care of ACS's contract agency Little Flower Children and Family Services (Little Flower).

39. Prior to his current hospitalization, M.M. was having regular visits with his family members.

40. Prior to his current hospitalization, M.M. was in school in a general education program in the New York City school system.

41. Prior to his current hospitalization, M.M. was placed in several foster boarding homes before a one-day acute psychiatric stay in Brookdale Hospital for observation in early January, 2010. The hospital recommended that M.M. be discharged to a therapeutic foster boarding home.

42. Brookdale Hospital could not keep M.M., who was transferred to St. Vincent's Hospital in New York City to remain near his family. M.M.'s mother did not consent for M.M. to remain in the hospital, as his needs could be met in the community.

43. M.M. was discharged from St. Vincent's Hospital on January 6, 2010, to a therapeutic foster boarding home in Long Island, New York, a significant distance from his

family. M.M. remained in this home for a few days and then was admitted to Stony Brook Hospital in Suffolk County, New York.

44. After an incident in his foster home, M.M.'s foster mother contacted the Suffolk County police who brought M.M. to Stony Brook Hospital seeking admission on January 10, 2010.

45. M.M. was transferred from Stony Brook Hospital to South Oaks Hospital on January 11, 2010, where M.M. was diagnosed with Mood Disorder NOS but was not placed on any medication. M.M. was found ready for discharge on January 26, 2010, with a recommendation that he be placed in a therapeutic foster boarding home and a statement from the doctor that M.M. could be adequately treated on an outpatient basis.

46. Until early May 2010, neither ACS nor Little Flower had found a foster home for M.M., nor had they made efforts to transfer M.M. to a New York City hospital so that he could be closer to his family.

47. Since being hospitalized at South Oaks, M.M. has not been able to have regular visits with his mother, stepfather or siblings due to the distance between their home and jobs and South Oaks Hospital.

48. At the hospital, M.M. is allowed to attend school for only two hours per day, where he is mostly given worksheets and puzzles.

49. Since being hospitalized at South Oaks M.M. has been chemically restrained on approximately two occasions by hospital staff who used injectable medication to tranquilize him. Shortly after each injection, M.M. fell asleep.

50. Given his negative experiences at home and in foster care, M.M. expressed uncertainty about leaving the hospital. Since being hospitalized, neither a social

worker nor a therapist from ACS or Little Flower has met regularly with M.M. to help him with his ambivalence about leaving the hospital setting.

51. Little Flower botched an effort to match M.M. with a therapeutic foster home. The agency sent a prospective foster mother to the hospital to meet M.M., but the agency sent her on her own, without facilitation on the Defendant's or Little Flower's part to assist with this possible transition. This foster parent rejected the idea of having M.M. in her home.

52. Little Flower waited until on or about March 18, 2010, to acknowledge that it did not have a placement for M.M., at which point the agency informed the Defendant of the need to search outside Little Flower for a therapeutic foster boarding home.

53. To date, neither ACS nor Little Flower is ready to move M.M. into a therapeutic home. Defendant belatedly asked another contract agency, Mercy First, to locate a foster home for M.M.. On information and belief, Mercy First in early May 2010 offered to locate a foster home for M.M., and has now identified a possibility, but has not yet moved M.M. out of the hospital..

54. M.M. has remained in the hospital for more than three months after he was found ready for discharge to a less restrictive setting.

S.M.

55. Plaintiff S.M. is a six-year-old resident of New York City. He is currently hospitalized at Four Winds Hospital in Katonah, New York.

56. On April 24, 2009, a New York County Family Court judge approved the voluntary placement of S.M. into the care of the Defendant by his guardian. S.M. is placed with ACS in foster care with ACS's contract agency SCO Family of Services (SCO).

57. S.M. was hospitalized for only several days on two occasions prior to being placed in ACS's care. Since being placed in the Defendant's care, S.M. has been placed in two different therapeutic foster boarding homes. His first placement lasted only four months.

58. Since starting kindergarten in a New York City Department of Education (DOE) school, S.M. was designated a child in need of special education services, and he currently has an Individualized Education Plan (IEP). The special education services on his IEP include being placed in a reduced class size and receiving individual and group therapy.

59. After misbehavior in his foster home, S.M. was psychiatrically hospitalized on January 5, 2010, at Four Winds Hospital. S.M. was stabilized at Four Winds Hospital and has been ready for discharge since on or about April 2, 2010.

60. Since being hospitalized, S.M. has not received any special education services. In fact, while at Four Winds Hospital, S.M. only attends school for one hour and fifteen minutes per day. On information and belief, ACS has not provided the hospital with a copy of S.M.'s IEP.

61. Since being hospitalized four months ago, S.M. has only been visited approximately two times by a staff member of SCO, the foster care agency responsible for his care.

62. Four Winds Hospital recommends that S.M. be discharged to a therapeutic foster boarding home or a family-based treatment home through the Office of Mental Health.

63. Until May 6, 2010, SCO had not provided Four Winds Hospital with any information about a possible therapeutic foster homes for S.M..

64. For several months after S.M. was hospitalized – until late April, 2010 – Defendant had not completed the application to the State Office of Mental Health which is required to obtain a family-based treatment home for S.M..

65. S.M. has remained in the hospital for more than five weeks after he was found ready for discharge to a less restrictive setting.

FACTS COMMON TO THE PROPOSED PLAINTIFF CLASS

66. The Proposed plaintiff class members include all children under 18 years old who are or will be in foster care in the custody of ACS, and who have been or will be brought to an acute care psychiatric hospital for admission by ACS or one of its contract agencies.

67. Plaintiffs' experiences of being hospitalized unnecessarily because Defendant has failed to provide them with a less restrictive foster care setting are not unique. They are part of a system-wide practice by Defendant.

68. As of February 2010, more than 16,040 children, ranging in age from birth until 21, are in foster care in the care of the Defendant.

69. According to a recent study by Children's Rights, Inc., 14% of a sample of children in the Defendant's care were admitted to a psychiatric hospital in a one-year period.

70. Defendant and ACS's contract foster care agencies do not use the means at their disposal to find less restrictive placements for children including the Plaintiffs and Proposed class members, who as a result languish in acute psychiatric hospitals for long periods of time.

71. One un-used resource available to Defendant, when ACS has failed to find less restrictive foster care placements once children are ready for discharge from psychiatric

hospitals, is ACS's own "Children's Center" in New York, New York. Despite the fact that ACS could provide Plaintiffs and Proposed class members with housing and care in its the Children's Center, ACS has an ongoing practice of refusing to permit children to be discharged from psychiatric hospitals to its Children's Center.

72. On information and belief, ACS and some of its contract agencies also use certain psychiatric hospitals as if they are detention centers, to house children whose behavior the agencies see as difficult to control. For instance, some Proposed class members are brought to psychiatric hospitals for admission by their contract foster care agencies, not for symptoms of serious mental illness and instability requiring immediate hospitalization, but rather, as a result of behavior or disciplinary issues occurring in their foster home or congregate care placements where they were housed, such as breaking curfew, running away or being "absent without leave," or even mere "failure to adjust" to a group home setting.

73. Staff from certain contract foster care agencies confirm that the agencies have "special relationships" with certain psychiatric hospitals, permitting them to bring for admission and house "difficult" children in those hospitals with few questions asked. In fact, several children in foster care have been taken by their foster care agencies to multiple psychiatric hospitals in turn, each of which rejected the child as *not* being in need of psychiatric hospitalization, before ultimately being brought to a psychiatric hospital with which the contract agency had a "special relationship."

74. Common questions of law and fact predominate among the Proposed class members, in that Defendant is legally required to provide appropriate care to all of these children, and to provide it in the least restrictive, most integrated setting. The Plaintiffs' and

Proposed class members' injuries all derive from Defendant's course of conduct in violation of Defendant's legal duties.

75. The claims of the Plaintiffs are typical of those of the Proposed class members. Each Plaintiff has been, and each Proposed class member has been or may be, wrongfully kept in a psychiatric hospital by ACS in violation of federal and state laws.

76. The Plaintiffs will fairly and adequately protect the interests of the Proposed class, in that Plaintiffs' interests are not antagonistic to those of the Class members, and Plaintiffs' counsel are qualified, experienced, and able to conduct this litigation.

77. The result of Defendant's failures to plan and to provide appropriate less restrictive settings is that many children in Defendant's care are and continue to be hospitalized unnecessarily and suffer severe harm.

JURISDICTION AND VENUE

78. This court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337.

79. Venue in this judicial district is proper under 28 U.S.C. § 1391(b)(1) because Defendant maintains offices in this district, and under 28 U.S.C. § 1391(b)(2) because a substantial part of the events complained of took place in this district.

FACTUAL BACKGROUND

80. Plaintiffs are children in foster care under the age of 18 residing in New York City. Their parents are deceased or otherwise unable to care for them. Plaintiffs are in the care of ACS, and most have been placed in the Defendant's care by judges of the New York State Family Court in New York City.

81. Foster care placements fall along a continuum from the least restrictive (the most "homelike") to the most restrictive (the least "homelike"). *See* 18 N.Y.C.R.R.

§ 430.11. On one end of the continuum, traditional foster boarding homes are considered the least restrictive foster care placements. Somewhat more restrictive are “therapeutic” foster boarding homes, which are maintained by specially trained foster parents for the benefit of children needing special care or services. Next most restrictive are “congregate care” placements such as group homes, which are structured settings housing a number of children in foster care together. Next come other congregate placements such as residential treatment centers, where children in foster care are subject to more intense supervision and treatment than in group homes, and then “residential treatment facilities,” which are still more restrictive. While in foster care, some children are temporarily hospitalized when necessary, but such hospitalizations are not foster care placements.

82. Before being brought to acute psychiatric hospitals, Plaintiffs lived in various foster boarding homes, therapeutic foster homes, group homes, and/or residential treatment centers.

83. Plaintiffs and Proposed class members are brought to acute care psychiatric hospitals by or on the instructions of ACS’s contract foster care agency personnel or foster parents.

84. For example, S.M. was brought to Four Winds Hospital on January 5, 2010, after misbehavior in his foster home.

85. During Plaintiffs’ and Proposed class members’ extended confinement in these psychiatric hospitals, they have been subject to extreme deprivations of their liberty.

86. Plaintiffs and Proposed class members are rarely permitted to leave the hospital even temporarily.

87. Many Plaintiffs and Proposed class members have been chemically and physically restrained and these children are regularly administered psychotropic medications.

88. Plaintiffs' and Proposed class members' daily activities are regimented in minute detail and their range of activities has been seriously limited.

89. Plaintiffs' and Proposed class members' contact with family members and visitors has been severely curtailed.

90. Plaintiffs and Proposed class members have been removed from school and given little or no academic instruction that could lead to school credit or a diploma. Those who are in need of special education and services have not received all of the needed services.

91. Plaintiffs and Proposed class members spend weeks and at times months in acute care psychiatric hospitals, awaiting appropriate less restrictive foster care placements. ACS and its contract agencies have a practice of waiting until a hospital specifically states that a child is ready for discharge before beginning to locate an appropriate least restrictive placement.

92. Attorneys and social workers who represent children in foster care must regularly argue with the Defendant and ACS's contract agencies to attempt to have their clients discharged to a less restrictive placement, even though the Defendant and ACS's contract agencies are aware the children are medically ready for discharge.

93. Attorneys for children in foster care have filed numerous motions before New York City Family Court judges seeking orders to have their clients released from acute psychiatric hospitals because Defendant has failed to move the children to less restrictive settings, even though the hospitals have informed the Defendant and ACS's contract agencies that the children are medically ready for discharge.

94. Despite the hospitals' medical decision that Plaintiffs are ready for discharge from confinement in psychiatric hospitals, ACS has refused to provide them with placement in a less restrictive setting as required by law.

95. For instance, despite Plaintiff A.M.'s being medically ready for discharge, Defendant has not provided her with a less restrictive placement for more than a month. Plaintiff M.M. has been ready for discharge for three months, yet Defendant has not provided him with a less restrictive placement. And although Four Winds Hospital notified ACS and its contract agency five weeks ago that S.M. should be discharged, ACS has not secured a less restrictive placement for him. As a result, all three Plaintiffs have languished in acute psychiatric hospitals after the hospital determined that there was no medical reason for them to be there.

96. As a consequence of ACS's refusal to place Plaintiffs in the less restrictive settings to which they are entitled, Plaintiffs simply have nowhere to go, and remain confined in acute psychiatric hospitals long after the hospitals have confirmed that there is no legitimate reason for them to be there.

97. ACS is capable of finding foster care placements for Plaintiffs in less restrictive settings than acute psychiatric hospitals, but has not done so.

98. Indeed, ACS could accommodate Plaintiffs in its Children's Center in Manhattan while arranging foster care placement, yet ACS has a practice of refusing to permit children to be discharged from psychiatric hospitals to the Children's Center.

99. In previous incidents where other children in foster care under ACS's care have been subject to prolonged unnecessary confinement in acute psychiatric hospitals, attorneys for these children have been required to seek judicial orders compelling the release of these children from the hospitals in order for ACS even to begin to seek a less restrictive setting.

100. On information and belief, unless class treatment and prospective injunctive relief is awarded in this case, ACS will continue its illegal pattern and practice of requiring children in foster care to go to extraordinary lengths to seek their release from acute psychiatric hospitals and compel ACS to place them in the least restrictive setting as required by law.

STATUTORY AND REGULATORY FRAMEWORK

ACS's Duties Under the New York State Social Services Law and Regulations

101. Under Title 6 of the New York Social Services Laws and its implementing regulations under Title 18 of the New York Code of Rules and Regulations, ACS has numerous non-delegable duties to care for and protect children in foster care in New York City.

102. ACS is responsible for the health and welfare of children in foster care in New York City. N.Y. Soc. Serv. Law § 396.

103. ACS is required to place each foster child in “[t]he most appropriate level of placement for each child,” which “will always be considered to be the least restrictive and most homelike setting in which the child can be maintained safely and receive all services specified in his or her service plan.” 18 N.Y.C.R.R. § 430.11 (emphasis added).

104. ACS must develop family service plans to meet the needs of children in foster care, including “identification of necessary and appropriate services and assistance to the child and members of the child’s family.” N.Y. Soc. Serv. Law § 409-e.

105. Family assessment and service plans prepared when the child is moved from one foster care placement to another “must also include but are not limited to . . . the type and level of placement; documentation that the placement has been assessed to be one that can safely provide for the individual needs of the foster child; and the reasons for selecting the

placement if it is not the least restrictive environment.” 18 N.Y.C.R.R. § 428.6 (emphasis added). In many instances, when a child in foster care has been hospitalized, a change in foster care placement follows.

106. ACS must “[p]rovide for expert mental and physical examination of any child whom he has reason to suspect of mental or physical disability or disease and pay for such examination from public funds, if necessary.” N.Y. Soc. Serv. Law § 398(6)(b).

107. ACS must provide “[p]sychiatric, psychological and other essential services...appropriate to the needs of the children in care.” 18 N.Y.C.R.R. § 441.15.

108. ACS is required to “take such steps as may be necessary to make certain that all children in care receive education appropriate to their needs and in accordance with the requirements of the Education Law [and] . . . shall make certain that each child in its care receives appropriate educational and vocational guidance.” 18 N.Y.C.R.R. § 441.13.

ACS’s Duties Under the ADA and Rehabilitation Act

109. Title II of the Americans with Disabilities Act (the “ADA”), 42 U.S.C § 12131, bars public entities from excluding any qualified individual with a disability from participation in or the benefit of the services, programs or activities of the public entity on the basis of disability.

110. Under the ADA, an “individual with a disability” includes an individual who is “regarded as having...an impairment.” 42 U.S.C. § 12102(1)(C).

111. Under Title II of the ADA, “*a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.*” 28 C.F.R. § 35.130(d) (emphasis added).

112. ACS is subject to the requirements of the ADA because it is a “public entity” as defined in the statute. *See* 42 U.S.C. § 12131.

113. Section 504 of the Rehabilitation Act of 1973 (the “Rehabilitation Act”) also prohibits covered entities from discriminating against persons with disabilities in the provision of benefits, services, and or programs. Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a) states:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity

114. Under the Rehabilitation Act, which incorporates by reference the definition of an “individual with a disability” in the ADA, an “individual with a disability” includes an individual who is “regarded as having...an impairment.” 29 U.S.C. 705(20)(B); 42 U.S.C. § 12102(1)(C).

115. And, like the ADA, the Rehabilitation Act requires that “*recipients [of federal financial assistance] shall administer programs or activities in the most integrated setting appropriate to the needs of qualified handicapped persons.*” 28 C.F.R. § 41.51(d) (emphasis added).

116. ACS is subject to the Rehabilitation Act because it receives federal financial assistance.

117. Thus, ACS is prohibited from excluding individuals with disabilities from the participation in or the benefits of any of their programs, activities, and/or services pursuant to Title II of the ADA and Section 504 of the Rehabilitation Act. *See* 42 U.S.C § 12131; 29 U.S.C. § 794; *see also* 28 C.F.R. §§ 35.130(a), 35.130(b), 42.503(a), 42.503 (b)(1)-(2).

118. Furthermore, ACS is required under Title II of the ADA and Section 504 of the Rehabilitation Act to “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d); *see* 28 C.F.R. § 41.51(d).

FIRST CAUSE OF ACTION

Violation of Title II of the Americans with Disabilities Act

119. Title II of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12132, bars public entities from discriminating against any qualified individual with a disability on the basis of disability and from excluding any qualified individual with a disability from “participation in or the benefits of the services, programs or activities of the public entity” on the basis of disability. 42 U.S.C. §§ 12131-12132. “[U]ndue institutionalization,” “unjustified institutional isolation,” and “unjustified segregation” constitute discrimination under the ADA. *Olmstead v. L.C.*, 527 U.S. 581, 597, 600 (1999).

120. In addition, a public entity is required to “administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” 28 C.F.R. § 35.130(d). Thus, it is a violation of Title II of the ADA for a public entity to fail to administer services, programs, or activities to qualified individuals with disabilities in the most integrated setting appropriate to their needs.

121. Furthermore, public entities may not exclude a qualified individual with a disability from participation in or the benefits of their services, programs or activities, whether “directly or through contractual, licensing, or other arrangements.” 28 C.F.R. § 35.130(b)(1); *see also* 28 C.F.R. § 35.130(b)(3).

122. ACS is a “public entity” within the meaning of the ADA. *See* 42 U.S.C. § 12131(1); *LaBella v. New York City Admin. for Children’s Servs.*, 2005 WL 2077192, at *10 (E.D.N.Y. Mar. 28, 2005).

123. Plaintiffs and Proposed class members are each a “qualified individual” within the meaning of the ADA, because they are qualified under New York State law to receive foster care placement and related services from ACS in the least restrictive environment suitable to their needs.

124. Plaintiffs and Proposed class members are each a “qualified individual with a disability” within the meaning of the ADA. Under the ADA, an “individual with a disability” includes an individual who is “regarded as having...an impairment.” 42 U.S.C. § 12102(1)(C). Plaintiffs are undisputedly “regarded as having...an impairment” by ACS, because ACS has brought them to psychiatric hospitals purportedly on the basis of having serious mental illness requiring psychiatric hospitalization.

125. Some Plaintiffs and Proposed class members are also “individual[s] with a disability” within the meaning of the ADA because they have actual impairments.

126. By wrongfully and unnecessarily bringing Plaintiffs and Proposed class members to the most restrictive environment conceivable – acute psychiatric hospitals – ACS has denied them “participation in or the benefits of” the less restrictive foster care placements to which they are entitled, on the basis of perceived or actual mental illness.

127. Furthermore, by wrongfully institutionalizing, segregating, and isolating Plaintiffs and Proposed class members in acute psychiatric hospitals, ACS has excluded them from the educational, social, familial, and other opportunities available to children in its care who are not disabled or regarded as being disabled by mental illness.

128. By wrongfully institutionalizing, segregating, and isolating Plaintiffs and Proposed class members in the least integrated setting conceivable – acute psychiatric hospitals – ACS has utterly failed to provide Plaintiffs and Proposed class members the foster care programs and services to which they are entitled in the most integrated setting appropriate to their needs.

129. Defendant's wrongful institutionalization, segregation, and isolation of Plaintiffs and Proposed class members in psychiatric hospitals, thereby denying them access to the educational, social, familial, and other opportunities available to children in its care in the less restrictive settings services to which Plaintiffs and Proposed class members are entitled, violates 42 U.S.C. § 12132, 28 C.F.R. § 35.130(b)(1), 28 C.F.R. § 35.130(b)(3), and 28 C.F.R. § 35.130(d). This is a continuing violation.

130. Further, in wrongfully institutionalizing, segregating, and isolating named Plaintiffs, Defendant acted with deliberate indifference to their rights under the ADA.

131. ACS knew or had reason to know that such prolonged confinement in an acute psychiatric facility did not constitute placement in the most integrated setting and did not meet expert recommendations for these children's needs. Indeed, ACS has kept each of the Plaintiff children confined in an acute psychiatric hospital for weeks after the hospitals themselves declared them medically ready for discharge.

132. ACS also knew or had reason to know that, in subjecting the Plaintiffs to prolonged confinement in an acute psychiatric facility, it was denying them access to foster care services and community placements available to other foster care children, solely by reason of their disabilities or perceived disabilities.

133. A.M., M.M., and S.M. have been and continue to be harmed by ACS's violation of their rights under the ADA.

SECOND CAUSE OF ACTION

Violation of Section 504 of the Rehabilitation Act

134. Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a) states:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity

135. The Rehabilitation Act states that “recipients [of federal financial assistance] shall administer programs or activities in the most integrated setting appropriate to the needs of qualified handicapped persons.” 28 C.F.R. § 41.51(d).

136. Furthermore, recipients of federal funds may not exclude a qualified individual with a disability from participation in or the benefits of any aid, benefit, or service, whether “directly or through contractual, licensing, or other arrangements.” 28 C.F.R. § 41.51(b)(1); *see also* 28 C.F.R. § 41.51(b)(3).

137. ACS receives federal financial assistance.

138. Plaintiffs and Proposed class members are each a “qualified individual” within the meaning of the Rehabilitation Act, because they are qualified under New York State law to receive foster care placement and related services from ACS in the least restrictive environment suitable to their needs.

139. Plaintiffs and Proposed class members are each a “qualified individual with a disability” within the meaning of the Rehabilitation Act. Under the Rehabilitation Act, an “individual with a disability” includes an individual who is “regarded as having . . . an impairment.” 29 U.S.C. § 705(20)(B); 42 U.S.C. § 12102(1)(C). Plaintiffs are undisputedly “regarded as having . . . an impairment” by ACS, because ACS has brought them to acute

psychiatric hospitals purportedly on the basis of having serious mental illness requiring psychiatric hospitalization.

140. Some Plaintiffs and Proposed class members are also “individual[s] with a disability” within the meaning of the Rehabilitation Act because they have actual impairments.

141. By wrongfully and unnecessarily bringing Plaintiffs and Proposed class members to the most restrictive environment conceivable – acute psychiatric hospitals – ACS has denied them “participation in or the benefits of” the less restrictive foster care placements to which they are entitled, on the basis of perceived or actual mental illness.

142. Further, by wrongfully institutionalizing, segregating, and isolating Plaintiffs and Proposed class members in acute psychiatric hospitals, ACS has excluded them from the educational, social, familial, and other opportunities available to children in its care who are not disabled or regarded as being disabled by mental illness.

143. By wrongfully institutionalizing, segregating, and isolating Plaintiffs and Proposed class members in the least integrated setting conceivable – acute psychiatric hospitals – ACS has utterly failed to provide Plaintiffs and Proposed class members the foster care programs and services to which they are entitled in the most integrated setting appropriate to their needs.

144. Defendant’s wrongful institutionalization, segregation, and isolation of Plaintiffs and Proposed class members in psychiatric hospitals, thereby denying them access to the educational, social, familial, and other opportunities available to children in its care in the less restrictive settings services to which Plaintiffs and Proposed class members are entitled, violates 29 U.S.C. § 794, 28 C.F.R. § 41.51(b)(1), 28 C.F.R. § 41.51(b)(3), and 28 C.F.R. § 41.51(d). This is a continuing violation.

145. Further, in wrongfully institutionalizing, segregating, and isolating named Plaintiffs, Defendant acted with deliberate indifference to their rights under the Rehabilitation Act.

146. ACS knew or had reason to know that such prolonged confinement in an acute psychiatric facility did not constitute placement in the most integrated setting and did not meet expert recommendations for the Plaintiffs' needs. Indeed, ACS has kept each of the Plaintiffs confined in an acute psychiatric hospital for weeks after the hospitals themselves declared these children medically ready for discharge.

147. Defendant also knew or had reason to know that, in subjecting the Plaintiffs to prolonged confinement in an acute psychiatric facility, it was denying them access to foster care services and community placements available to other foster care children, solely by reason of their disabilities or perceived disabilities.

148. A.M., M.M., and S.M. have been and continue to be harmed by ACS's violation of their rights under the Rehabilitation Act.

THIRD CAUSE OF ACTION

Violations of N.Y. Social Services Law and Implementing Regulations

149. Plaintiffs and Proposed class members are each children under the age of eighteen in the custody and care of ACS, which is the government agency designated under the laws of the State of New York as responsible for the health and welfare of Plaintiffs and Proposed class members.

150. Under Title 6 of the New York Social Services Laws and its implementing regulations under Title 18 of the New York Code of Rules and Regulations, ACS has numerous non-delegable duties to care for and protect children in foster care in New York City.

151. ACS is required to place each foster child in “[t]he most appropriate level of placement for each child,” which “will always be considered to be the least restrictive and most homelike setting in which the child can be maintained safely and receive all services specified in his or her service plan.” 18 N.Y.C.R.R. § 430.11(d)(1) (emphasis added).

152. ACS must develop family service plans to meet the needs of children in foster care, including “identification of necessary and appropriate services and assistance to the child and members of the child’s family.” N.Y. Soc. Serv. Law § 409-e(1)(d).

153. Family assessment and service plans prepared when the child is moved from a foster care placement to an acute psychiatric hospital “must also include but are not limited to . . . the type and level of placement; documentation that the placement has been assessed to be one that can safely provide for the individual needs of the foster child; and the reasons for selecting the placement if it is not the least restrictive environment.” 18 N.Y.C.R.R. § 428.6(a)(2) (emphasis added).

154. ACS must “[p]rovide for expert mental and physical examination of any child whom he has reason to suspect of mental or physical disability or disease and pay for such examination from public funds, if necessary.” N.Y. Soc. Serv. Law § 398(6)(b).

155. ACS must provide “[p]sychiatric, psychological and other essential services . . . appropriate to the needs of the children in care.” 18 N.Y.C.R.R. § 441.15.

156. ACS is required to “take such steps as may be necessary to make certain that all children in care receive education appropriate to their needs and in accordance with the requirements of the Education Law [and] . . . shall make certain that each child in its care receives appropriate educational and vocational guidance.” 18 N.Y.C.R.R. § 441.13.

157. ACS has violated each and every one of these duties to Plaintiffs and Proposed class members.

158. Plaintiffs and Proposed class members have been harmed by Defendant's violations of their rights under the New York Social Services Law and implementing regulations. Plaintiffs and Proposed class members' harms include, but are not limited to, deprivation of numerous educational, social, and familial opportunities as a result of their wrongful confinement. Plaintiffs and Proposed class members have also suffered psychological, emotional, and reputational damage during the course of their wrongful confinement, and will continue to suffer such harm in the future as a result of the lasting impact and stigma of their wrongful psychiatric institutionalization.

FOURTH CAUSE OF ACTION

Violation of the Fourteenth Amendment to the United States Constitution

159. Plaintiffs and Proposed class members are children under the age of eighteen in the custody and care of ACS, which is the government agency designated under the laws of the State of New York as responsible for the health and welfare of Plaintiffs and Proposed class members.

160. Defendant was at all times relevant hereto acting under color of state law.

161. The Fourteenth Amendment to the United States Constitution, which prohibits the deprivation of "life, liberty, or property without due process of law," guarantees to each child in state custody the substantive right to be free from harm and from undue restraints on their liberty. *Youngberg v. Romeo*, 457 U.S. 307 (1982).

162. Furthermore, "[w]hen individuals are placed in custody or under the care of the government, their governmental custodians are sometimes charged with affirmative duties,

the nonfeasance of which may violate the constitution." *Doe v. N.Y. City Dep't of Soc. Servs.*, 649 F.2d 134, 141 (2d Cir. 1981).

163. Defendant has deprived Plaintiffs and Proposed class members of their liberty without due process by, *inter alia*, (i) wrongfully bringing some children to acute psychiatric hospitals despite the lack of a legitimate medical need for emergency psychiatric hospitalization; (ii) wrongfully keeping them confined in acute psychiatric hospitals long after even these hospitals themselves have ordered their discharge; and (iii) failing to provide foster care placements for them outside of the psychiatric hospitals as required by law.

164. ACS's wrongful, unnecessary, and prolonged confinement of Plaintiffs and Proposed class members in psychiatric hospitals is arbitrary, oppressive, and shocking to the conscience, and manifests deliberate indifference to plaintiffs' constitutional rights.

165. Plaintiffs and Proposed class members have been harmed by Defendant ACS's violations of their rights under the Fourteenth Amendment. Plaintiffs and Proposed class members' harms include, but are not limited to, deprivation of numerous educational, social, and familial opportunities as a result of their wrongful confinement. Plaintiffs and Proposed class members have also suffered psychological, emotional, and reputational damage during the course of their wrongful confinement, and will continue to suffer such harm in the future as a result of the lasting impact and stigma of their wrongful confinement.

166. Defendant has deprived Plaintiffs and Proposed class members of their liberty without due process of law by not providing Plaintiffs and Proposed class members with the least restrictive, most home-like foster care setting appropriate to meet their needs.

167. Plaintiffs and Proposed class members accordingly seek redress pursuant to 42 U.S.C. § 1983.

FIFTH CAUSE OF ACTION

Violation of Article I, § 6 of the New York Constitution

168. Plaintiffs and Proposed class members are each children under the age of eighteen in the custody and care of ACS, which is the government agency designated under the laws of the State of New York as responsible for the health and welfare of Plaintiffs and Proposed class members.

169. Article I, section 6 of the New York State Constitution, which prohibits the deprivation of “life, liberty, or property without due process of law,” guarantees to each child in state custody the substantive right to be free from harm and from undue restraints on their liberty.

170. Furthermore, “[w]hen individuals are placed in custody or under the care of the government, their governmental custodians are sometimes charged with affirmative duties, the nonfeasance of which may violate the constitution.” *Doe v. N.Y. City Dep’t of Soc. Servs.*, 649 F.2d 134, 141 (2d Cir. 1981).

171. Defendant has deprived Plaintiffs and Proposed class members of their liberty without due process by, *inter alia*, (i) wrongfully bringing some children to acute psychiatric hospitals despite the lack of a legitimate medical need for emergency psychiatric hospitalization; (ii) wrongfully keeping them confined in acute psychiatric hospitals long after even these hospitals themselves have ordered their discharge; and (iii) failing to provide foster care placements for them outside of the psychiatric hospitals as required by law.

172. ACS’s wrongful, unnecessary, and prolonged confinement of Plaintiffs and Class members in acute psychiatric hospitals is arbitrary, oppressive, and shocking to the conscience, and manifests deliberate indifference to plaintiffs’ constitutional rights.

173. Plaintiffs and Class members have been harmed by Defendant ACS's violations of their rights under Article I, section 6 of the New York State Constitution. Plaintiffs and Class members' harms include, but are not limited to, deprivation of numerous educational, social, and familial opportunities as a result of their wrongful confinement. Plaintiffs and Class members have also suffered psychological, emotional, and reputational damage during the course of their wrongful confinement, and will continue to suffer such harm in the future as a result of the lasting impact and stigma of their wrongful confinement.

PRAYER FOR RELIEF

FOR ALL THESE REASONS, Plaintiffs demand judgment against Defendant and respectfully request that this Court order the following relief:

- A. An order certifying this action as a class action;
- B. A declaration that Defendant's acts, omissions, policies, and practices causing the wrongful, prolonged confinement of Plaintiffs and Proposed class members in psychiatric hospitals, violate rights guaranteed to Plaintiffs and Proposed class members by the Americans with Disabilities Act (42 U.S.C. § 12132), the Rehabilitation Act (29 U.S.C. § 794), the New York Social Services Law and implementing regulations, the Fourteenth Amendment to the United States Constitution, and Article I, § 6 of the New York State Constitution;
- C. Preliminary injunctive relief, including an order enjoining Defendant from continuing to confine Plaintiffs in acute psychiatric hospitals despite their readiness for discharge, and enjoining Defendant from failing to provide them with the least restrictive placement suitable to their needs, as is required by law;
- D. Permanent injunctive relief, including: (i) enjoining Defendant from bringing children in foster care to psychiatric hospitals unless such intervention is medically

necessary, and unless ACS has certified that less restrictive settings have been tried and have proved unsuccessful; (ii) requiring Defendant, within 24 hours of learning that a child in ACS's care is ready to be discharged from a psychiatric hospital, to make available a foster care placement in the least restrictive setting suitable to such child's needs or, if none is available, to house and provide services to the child at the ACS Children's Center before making an appropriate foster care placement available; (iii) requiring Defendant to keep complete and accurate records regarding placement of children in ACS's care in psychiatric hospitals and to update that information daily; (iv) requiring Defendant to develop and implement written plans for scheduled family visitation of children in ACS's care in psychiatric hospitals; (v) requiring Defendant to provide training to ACS staff and the staff of its contract foster care agencies regarding inappropriate confinement of children in foster care to psychiatric hospitals; and (vi) requiring Defendant to develop and implement new policies and protocols regarding commitment of children in ACS care to psychiatric hospitals designed to ensure that children in foster care are not improperly brought to acute psychiatric hospitals, and that children are discharged to lawful, least restrictive foster care placements immediately upon being found medically ready for discharge;

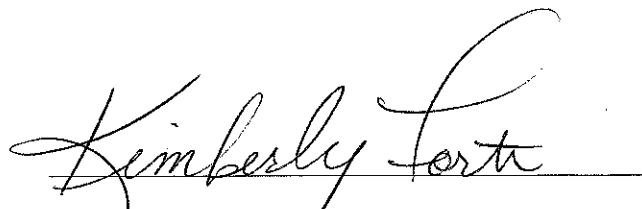
E. For Plaintiffs A.M., M.M., and S.M., an award of compensatory damages to each, together with interest, costs, disbursements, attorneys' fees, and other expenses, the amount to be established at trial;

F. For Plaintiffs A.M., M.M., and S.M., an award to each of prejudgment interest;

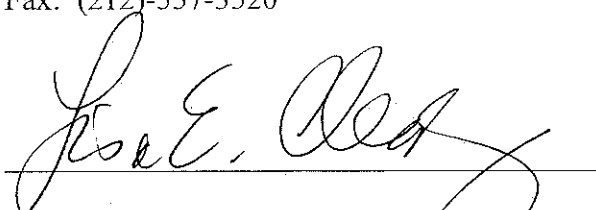
G. An award of costs and attorneys' fees in prosecuting this action; and

H. Such other and further relief as the Court deems just and proper.

Dated: New York, New York
May 12, 2010



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