UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DISABILITY RIGHTS NEW YORK,

Plaintiffs,

-against-

NORTH COLONIE BOARD OF EDUCATION,
North Colonie Central Schools, and
Mr. D. Joseph Corr, in his official capacity as the Superintendent of North Colonie Central Schools,

Defendants.

Statement of Interest
of the United States
Case No: 1:14-cv-744 (DNH/RFT)

TABLE OF CONTENTS

STATEMENT OF INTEREST OF THE UNITED STATES ..………………………1

INTRODUCTION .…………………………………………………………...2

STATUTORY BACKGROUND ……………………………………………..4

ARGUMENT ………………………………………………………………....6

A. P&As Perform an Essential Function in Protecting the Rights of Individuals with Mental Illness in Their Communities ………………………6
B. The PAIMI Act Applies to Schools Providing Special Education to Individuals with Mental Illness ………………………………………………7
C. P&As Have Authority to Investigate All Forms of Abuse and Neglect ……..11
D. The PAIMI Act Contemplates a Comprehensive System of Access in Order to Fully Protect the Rights of Individuals with Mental Illness ………..13
   1. The P&A has exclusive authority to determine when investigation is appropriate ……………………………………………………………15
   2. The PAIMI Act vests P&A's with monitoring authority as a critical component of protecting the rights of Individuals with Mental Illness …18
   3. Requiring court orders to access facilities would significantly impair enforcement ……………….………………………………………..19

CONCLUSION ………………………………………………………………20

STATEMENT OF INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517,[1] because this litigation involves the proper interpretation and application of federal law. As the United States has made clear in litigation across the country, it has a strong interest in the interpretation of the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI Act"), 42 U.S.C. §§ 10801–10851. *See, e.g.*, Statement of Interest of the United States, *Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.*, No. 1:06-cv-1816 (S.D. Ind. June 16, 2008); Brief for the United States Dep't of Educ. and Dep't of Health and Human Servs. as Amici Curiae, *Conn. Office of Prot. & Advocacy For Persons With Disabilities v. Hartford Bd. of Educ.*, 464 F.3d 229 (2d Cir. 2006) (No. 05-1240-CV). Children and adolescents with mental illness are particularly vulnerable and may have limited capacity to communicate about their treatment or assert their rights, and Protection and Advocacy systems are mandated by law to protect them. 42 U.S.C. § 10801(b). The Department of Justice has authority to enforce Title II of the ADA, 42 U.S.C. §§ 12133, 12134. The national network of Protection and Advocacy systems (P&As) plays a significant role in ensuring compliance with these laws. *See* U.S. Dep't of Justice, *Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and* Olmstead v. L.C. (June 22, 2011), http://www.ada.gov/olmstead/q&a_olmstead.htm (providing guidance for ADA and *Olmstead* enforcement).

---

[1] Section 517 provides that the "Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517.

INTRODUCTION

Congress created a system of independent Protection and Advocacy organizations in response to a history of widespread abuse and neglect of individuals with disabilities by the facilities charged with their care. Following the creation of the nationwide P&A system through passage of the Developmentally Disabled Assistance and Bill of Rights Act in 1975, Pub. L. No. 94-103, 89 Stat. 486 (1975) (originally codified at 42 U.S.C. §§ 6041-6043 and currently at 42 U.S.C. §§ 15041-15045), Congress has continued to expand the authority of P&As to protect individuals with disabilities. The Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI Act"), Pub. L. No. 99-319, 100 Stat. 478 (1986) codified at 42 U.S.C. §§ 10801-1085, extended the P&As' role to include protection of persons with mental illness. Amendments to the PAIMI Act in 2000 further ensured that P&As protect individuals with mental illness who reside in the community, including their own homes. Children's Health Act of 2000, Pub. L. No. 106-310, Div. B, Title XXXII, § 3206(b)(1)(B), 114 Stat. 1101 (codified at 42 U.S.C. § 10802(4)(B)(ii)). The P&A system was designed to ensure that individuals with disabilities, some of the most vulnerable members of society, have access to independent advocates and are protected from abuse and neglect wherever they receive care or treatment.

To ensure that P&As are capable of carrying out their federal mandate to protect and advocate for individuals with disabilities, the PAIMI Act and parallel P&A statutes define certain key aspects of the P&As' authority.[2] P&As have the right to access

[2] Authority under those provisions is in addition to authority to represent clients on civil rights claims grounded in other federal statutes, including, for example, the Americans

facilities, records, and individuals in order to investigate possible abuse and neglect, to conduct monitoring activities, and to educate individuals about their rights. 42 U.S.C. §§ 10801(b)(2), 10805; 42 C.F.R §51.42. Key to P&As' ability to fulfill their function, the statute authorizes P&As to exercise their authority independently. 42 U.S.C. § 10805(a)(2).

Motivated by an interest in protecting all individuals with disabilities from abuse and neglect, Congress vested P&As with the authority to monitor and investigate all facilities that provide care or treatment to individuals with mental illness. 42 U.S.C. § 10805(a)(3). This includes residential and non-residential facilities, 42 U.S.C. § 10802, and facilities providing all forms of care or treatment. 42 C.F.R. §51.2. The P&As' right of access protects the many children with disabilities who receive care or treatment in schools. *See Connecticut Office of Prot. & Advocacy For Persons With Disabilities v. Hartford Bd. of Educ.*, 464 F.3d 229, 240 (2d Cir. 2006). Facilities that perform additional functions or provide services in support of another goal, such as providing education, are not exempted from P&As' authority. Similarly, the PAIMI Act protects individuals from abuse and neglect of all forms, including abuse and neglect resulting in physical, mental, emotional, and legal injuries. 42 U.S.C. § 10802(1), (5); 42 CF.R. § 51.2. To hold otherwise would leave many vulnerable individuals susceptible to abuse and neglect and unable to adequately assert their rights. Such a result is wholly inconsistent with Congress' intent in establishing the P&A system.

Congress also vested P&As with comprehensive authority to investigate abuse and neglect whenever the P&A receives a complaint or determines probable cause. 42

---

with Disabilities Act 42 U.S.C. §§ 12101 *et seq*. ("ADA") and the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq*.

U.S.C. § 10801(b)(2)(B). To ensure a swift and adequate investigation, P&As have the sole discretion to determine probable cause and facilities must provide P&As with prompt access when requested. 42 C.F.R. § 51.42(b). P&As may also monitor facilities, a vital function for prevention and early detection of abuse and neglect. 42 C.F.R. § 51.42(c). To require court approval before granting a P&A access to a facility could jeopardize the ability of a P&A to carry out its statutory mandate and place vulnerable individuals at risk.

STATUTORY BACKGROUND

The PAIMI Act was passed to protect the rights of people with mental illness. Together with the Developmental Disabilities Assistance and Bill of Rights Act ("DD Act"), 42 U.S.C. §§ 15001-15083, and the Protection and Advocacy of Individual Rights Act ("PAIR Act"), 29 U.S.C. § 794e, the PAIMI Act requires state recipients of federal funding to establish protection and advocacy systems ("P&As") with authority to protect the rights of individuals with mental illness and to investigate and remedy abuse or neglect.[3] 42 U.S.C. § 10805(a)(1).

Congress passed the PAIMI Act to address findings that "individuals with mental illness are vulnerable to abuse and serious injury," and that "[s]tate systems for monitoring compliance with respect to the rights of individuals with mental illness vary widely and are frequently inadequate." 42 U.S.C. § 10801(a). Congressional staff investigations of psychiatric facilities across the country found evidence of physical

[3] While this brief addresses the PAIMI Act, Plaintiffs' right of access is substantially similar under the three statutes. As observed by the Seventh Circuit, "[t]he DD Act, the PAIMI Act and the PAIR Act establish separate but largely parallel regimes to serve particular populations of people with disabilities." *Disability Rights Wis., Inc. v. Wis. Dep't of Pub. Instruction*, 463 F.3d 719, 724 (7th Cir. 2006).

abuse, verbal threats, regular harassment, self-harm and suicide attempts, and reliance on seclusion and restraints. *Care of Institutionalized Mentally Disabled Persons: Joint Hearings Before the S. Subcomm. on the Handicapped of the S. Comm. on Labor & Human Res. and on Labor, Health & Human Servs., Educ. & Related Agencies of the S. Comm. on Appropriations,* 99th Cong. 99-50 Pt. 2, at 2, 39-75 (1985) (*Staff Report on the Institutionalized Mentally Disabled*). Congressional Staff determined that monitoring conducted by the states and other accreditation bodies was not sufficient to prevent and remedy the violations of law. *Id.* at 5, 76-114. In response, the PAIMI Act was designed "to ensure that the rights of individuals with mental illness are protected and to assist States to establish and operate a protection and advocacy system that will (1) protect and advocate for the rights of those individuals; and (2) investigate incidents of abuse and neglect." H.R. Rep. No. 102-319, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 777, 778. To achieve this goal, the law provides funding and authority for a system of independent P&As across the country.

In 2000, Congress amended the PAIMI Act to explicitly cover individuals with mental illness who "live[ ] in a community setting, including their own home." Children's Health Act of 2000, Pub. L. No. 106-310, Div. B, Title XXXII, § 3206(b)(1)(B), 114 Stat. 1101 (codified at 42 U.S.C. § 10802(4)(B)(ii)). This statutory change was part of a set of amendments intended to strengthen community-based mental health services and enable children with severe emotional disturbances to "remain in local communities rather than being sent to residential facilities." S. Rep. No. 106-196, at 6 (1999).

ARGUMENT

A. P&As Perform an Essential Function in Protecting the Rights of Individuals with Mental Illness in Their Communities.

In the thirty years following the PAIMI Act's passage, P&As have used their authority to address abuse and neglect of individuals with mental illness in a wide range of settings. A recent report on the PAIMI Act enforcement highlighted the scope and importance of the work of P&A's on behalf of vulnerable people. *See* Substance Abuse and Mental Health Servs. Admin., HHS Pub. No. PEP12-EVALPAIMI, *Evaluation of the Protection and Advocacy for Individuals With Mental Illness (PAIMI) Program, Phase III: Evaluation Report* (2011). As identified in the report, eighty-five percent of P&As include monitoring and investigation of the treatment of children and adolescents in schools among their priority objectives. *Id.* at 69.

The priority focus on the treatment of children in schools reflects the risks faced by this population and the important role of schools in providing care. Approximately 13.3 percent of school-age children nationwide receive treatment for a serious mental, behavioral, or emotional disorder. Mark Olfson, Benjamin G. Druss & Steven C. Marcus, *Trends in Mental Health Care among Children and Adolescents*, 372 NEW ENG. J. MED. 2029 (2015). *See also*, President's New Freedom Comm'n on Mental Health, HHS Pub. No. SMA-03-3832, *Achieving the Promise: Transforming Mental Health Care in America* 2 (2003) (hereinafter "Transforming Mental Health Care in America"). Many of these children spend most of their day under the care and supervision of teachers, counselors, nurses, and other professionals at schools. As the President's New Freedom Commission on Mental Health observed in 2003, schools are a critical locus of screening and support services for children with mental illness. *Transforming Mental Health Care*

in America at 58, 62-64. While schools play an important role in providing care, when school programs are not properly administered, children may be placed at risk. For example, a 2009 Government Accountability Office ("GAO") Report found "hundreds of cases of alleged abuse and death related to the use of [restraint and seclusion] on school children" over two decades. U.S. Gov't Accountability Office, GAO-09-719T, *Seclusion and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers* (2009). The GAO report observes that restraint and seclusion "techniques can be dangerous because they may involve struggling, pressure on the chest, or other interruptions in breathing" and that "children are subjected to restraint or seclusion at higher rates than adults and are at greater risk of injury." *Id.* at 1; *see also Transforming Mental Health Care in America* at 34. This is precisely the type of abuse P&As were established to address.

While the Department of Justice plays a major role in the enforcement of the U.S. Constitution and federal law protecting individuals with mental illness, *see, e.g.*, 42 U.S.C. §§ 1997-1997j, 12133-12134, the P&As are critical partners in that work. Given the enforcement demands and finite resources, it is not possible for the Department to investigate all allegations of abuse and neglect and to monitor all facilities across the country. For these reasons, it is imperative that P&As are able to monitor facilities and investigate claims of abuse and neglect and represent clients in seeking to correct those violations of their civil rights under federal law.

B. The PAIMI Act Applies to Schools Providing Special Education to Individuals with Mental Illness.

Congress intended the PAIMI Act to protect individuals with mental illness, including those who reside in their own homes, from abuse and neglect in all settings in

which they receive care or treatment. This protection extends to children with mental illness who receive care or treatment in school special education programs. Courts have consistently recognized the authority of P&As to access schools providing special education services under the PAIMI Act and other P&A statutes. *See Connecticut Office of Prot. & Advocacy For Persons With Disabilities v. Hartford Bd. of Educ.*, 464 F.3d 229, 240 (2d Cir. 2006) (Sotomayor, J.) (school constituted a facility to which P&A must have reasonable access under PAIMI Act); *Disability Law Ctr. of Alaska, Inc. v. Anchorage Sch. Dist.*, 581 F.3d 936, 939-40 (9th Cir. 2009) (P&A obtained access to intensive special needs education class at school under PAIMI Act and DD Act); *Disability Rights Wis., Inc. v. Wis. Dep't of Pub. Instruction*, 463 F.3d 719, 726 (7th Cir. 2006) (school providing special education program "easily meets the definition of a facility" providing care and treatment under the DD Act). The Second Circuit in *Hartford Board of Education*, 464 F.3d at 233, considered circumstances squarely analogous to the facts in this case—whether the PAIMI Act authorized the P&A to access a public school providing a therapeutic educational program for children identified as requiring special education or related services under the IDEA. The Second Circuit held unequivocally that the P&A must have access to the school under the PAIMI Act. *Id.* at 240.

This precedent follows plainly from the language of the PAIMI Act, its legislative history, and purpose. To protect the rights of individuals with mental illness, the PAIMI Act provides that P&As shall "have access to facilities in the State providing care or treatment" to individuals with mental illness. 42 U.S.C. § 10805(a)(3). To protect individuals living in their own home, 42 U.S.C. § 10802(4)(B)(ii), the P&A's access authority encompasses both residential and non-residential facilities. The Act's definition

of "facilities" is open-ended, 42 U.S.C. § 10802(3), and from its inception, Congress intended the PAIMI Act to provide protections to people with mental illness in a broad range of settings. The Conference Committee Report on the original legislation explained that, "[i]t is the intent of the conferees that this legislation focus on abuse and neglect of mentally ill individuals and not on the particular residential facility in which they reside." H.R. Conf. Rep. 99-576, at 16 (1986). The subsequent PAIMI Act amendments to cover individuals living at home were part of an effort to enable children with severe emotional disturbance to "remain in local communities rather than being sent to residential facilities," and to ensure that P&As would "work on behalf of [mentally ill] persons living at home." S. Rep. No. 106-196, at 26, 39 (1999).

Consistently, the Department of Health and Human Services ("HHS") "reasonably interprets the investigatory authority of a P&A pursuant to the PAIMI Act as extending to any facility providing care and treatment to the mentally ill, regardless of whether the facility is residential." *See* U.S. Br. at 10, *Hartford Bd. of Educ.*, 464 F.3d 229 (2d Cir. 2006) (No. 05-1240-CV). Defendants' contrary reliance on HHS's 1997 regulations is misplaced. Defs.' Br. Summ. J. 7, 8, ECF No. 61. As recognized by HHS and by the Second Circuit, "the regulatory interpretation of 'facilities' HHS promulgated in 1997 is no longer consistent with PAIMI after the 2000 amendments." *Hartford Bd. of Educ.*, 464 F.3d at 240. Congress was clear in its intent to cover facilities that treat and care for young persons in the community when it expanded the PAIMI Act in 2000, and the predominant facility for the care of children in every community is the school.

Defendants also contend incorrectly that the PAIMI Act limits protections based upon the primary purpose of the care or treatment that a facility provides. Defs.' Br.

Summ. J. 14-19. P&As have authority to access "facilities in the State providing care or treatment" to individuals with mental illness. 42 U.S.C. § 10805(3). The PAIMI Act makes no distinction among facilities based upon either the type of care or treatment provided or whether providing care or treatment is the exclusive or primary function of the facility. This is consistent with Congress' purpose "that this legislation focus on abuse and neglect," wherever it may occur. H.R. Conf. Rep. 99-576, at 16 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1377, 1378.

The implementing regulations likewise do not narrowly define the authority of P&As. The regulatory list of services constituting "care or treatment" is non-exhaustive and encompasses the spectrum of services that may be provided, from prevention and identification through stabilization. 42 C.F.R. § 51.2. Because these agency regulations illuminate and give force to the statute, they are afforded great deference. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.").

As demonstrated by the facts of this case, schools frequently provide a variety of forms of care and treatment, including those specifically contemplated in the PAIMI Act regulations. The regulatory definition specifically includes "special education and rehabilitation," as well as "mental health screening, evaluation, counseling, biomedical, behavioral and psychotherapies, supportive or other adjunctive therapies, medication supervision." 42 C.F.R. § 51.2. Here, Plaintiffs assert that Blue Creek Elementary School administers a self-contained class for students with significant disabilities and behavioral

needs, including mental illness, and provides services such as performing functional behavioral assessments, providing counseling, and dispensing medication.[4] *See* Pls.' Br. Summ. J. 16. These are the types of services expressly included in the regulatory definition. They are also services commonly provided by schools.

There is no indication, as the District suggests, that Congress intended to exclude from review facilities that provide care or treatment while also providing access to education. To hold otherwise would allow facilities to remove themselves—and the individuals they serve—from the ambit of the law's protection through the facilities' self-defined purpose. This outcome would be clearly contrary to Congress' intent to protect children with mental illness, including those who reside at home. Instead, as the Second Circuit has held, the PAIMI Act does protect children while at school. *See Hartford Bd. of Educ.*, 464 F.3d 229, 240.

C. P&As Have Authority to Investigate All Forms of Abuse and Neglect.

The PAIMI Act also does not limit the scope of its protections to cover only some forms of abuse and neglect. P&As have broad authority under the PAIMI Act "to investigate incidents of abuse and neglect of individuals with mental illness." 42 U.S.C. § 10805(1)(A). The Congressional investigation leading to the passage of the Act identified limited investigative authority under then-existing state definitions of abuse and neglect as "a serious impediment to effective protection of patients." S. Rep. No. 99-

[4] Schools also frequently provide services that are funded by the Medicaid Act and covered by the Early Periodic Screening and Diagnostic and Treatment ("EPSDT") provisions of the Medicaid Act, including home health services, private duty nursing, personal care services, and day treatment services. The EPSDT mandate requires the State to provide services to Medicaid-eligible children under the age of twenty-one for all medically necessary treatment services, even if the State has not otherwise elected to provide such coverage to other populations. *See* 42 U.S.C. § 1396a(a)(43); 42 U.S.C. § 1396d(a)(4); 42 U.S.C. §§ 1396d(r)(1)-(5).

109, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1361, 1363. In contrast, the PAIMI Act does not narrowly define abuse or neglect, but instead provides non-exhaustive lists of examples. 42 U.S.C. § 10802.

Plaintiffs' filings reflect that they have received a number of allegations of actions or inactions that place children at risk of physical harm and clearly fall within the statutory definitions of abuse and neglect. These alleged actions and failures to act include the use of bodily restraints in a manner that violates state law, permitting untrained staff to conduct physical restraints, the failure to provide a safe classroom environment, and the failure to maintain adequate numbers of trained staff to support students. *See* Pls.' Br. Summ. J. 12-13, EFC No. 52-17; 42 U.S.C. § 10802(1), 10802(5)

The PAIMI Act also does not confine P&As' investigatory authority to abuse and neglect that results in physical injury, as Defendants argue. Defs.' Br. Summ. J. 28. The regulations include within the definition of abuse "verbal, nonverbal, mental and emotional harassment; and any other practice which is likely to cause immediate or long-term psychological harm or result in long-term harm is such practices continue." 42 C.F.R. § 51.2.[5] In notice and comment rulemaking, HHS articulated its purpose and intent in including psychological harm within the definition of abuse. As HHS explained:

> in discussing abuse related to child abuse, the courts and Congress have included verbal, nonverbal, mental and emotional harassment and mental and psychological injury. (See e.g. 18 U.S.C. 3509.) This was done in recognition of the fact that such abuse has as much, and in many cases, even more lasting effect on individuals than physical abuse. The Department can do no less for individuals who are mentally ill, and therefore it is changing the regulation to add the definition of abuse as in the statute and to amend that definition to include "verbal, non-verbal, mental and emotional harassment and psychological harm."

---

[5] These agency regulations are entitled to considerable deference. *Chevron*, 467 U.S. at 843-44.

Requirements Applicable to Protection and Advocacy of Individuals with Mental Illness, 62 Fed. Reg. 53548-01 (Oct. 15, 1997) (codified at 42 C.F.R. § 51.1. *et seq.*). Accordingly, actions resulting in mental and psychological injuries are encompassed within the definition of abuse under the PAIMI Act.

Repeated violation of individual statutory or constitutional rights may also constitute "abuse" as defined by the PAIMI Act, contrary to Defendants' assertion. Defs.' Br. Summ. J. 18. As HHS stated in responses provided through notice and comment rulemaking, while not every violation of a right will constitute abuse, "when an individual's rights . . . are repeatedly and/or egregiously violated, this constitutes abuse." Requirements Applicable to Protection and Advocacy of Individuals with Mental Illness, 62 Fed. Reg. at 53551. Further, the determination of when a violation of rights rises to the level of abuse is left to the individual P&As. As HHS reasoned:

> The Department declines the opportunity [ ] of defining the threshold at which a violation of an individual's rights constitutes abuse, leaving that decision to the systems which will have intimate knowledge of the situation based on its monitoring of facilities and its discussion with individuals with mental illness.

Id.

This regulatory language and stated legislative purpose to more broadly protect individuals with mental illness authorizes P&As to investigate all forms of abuse and neglect, including those that may result in non-physical injuries to individuals' mental and emotional wellbeing, as well as violation of individual rights.

D. The PAIMI Act Contemplates a Comprehensive System of Access in Order to Fully Protect the Rights of Individuals with Mental Illness.

To fulfill their mandate, the PAIMI Act gives P&As comprehensive access authority. The Act requires that P&As "shall . . . have access to facilities in the State

providing care or treatment" as well as to records and individuals. 42 U.S.C. § 10805 (emphasis added). Implementing regulations set out several distinct bases upon which a P&A has authority to access a facility, including "at all times necessary to conduct a full investigation of an incident of abuse or neglect," for the purpose of "[p]roviding information and training on, and referral to programs addressing the needs of individuals with mental illness, and information and training about individual rights and the protection and advocacy services," "[m]onitoring compliance with respect to the rights and safety of residents;" and "[i]nspecting, viewing and photographing all areas of the facility which are used by residents or are accessible to residents." 42 C.F.R. § 51.42.

"Courts have recognized that P&A access is fundamental, and P&A agencies have almost universally prevailed in litigation based on access." *Ala. Disabilities Advocacy Program v. SafetyNet Youthcare, Inc.*, No. 13-0519-CG-B, 2014 WL 7012710, at *10 (S.D. Ala. Dec. 12, 2014) (compiling case law); *see also Hartford Bd. of Educ.,* 464 F.3d at 238-45 (P&A right of access to facilities, students, and records); *Prot. & Advocacy for Pers. with Disabilities v. Mental Health & Addiction & Advocacy Servs.,* 448 F.3d 119, 124-28 (2d Cir. 2006) (P&A right of access to records); *Ind. Protection & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.,* 603 F.3d at 375, (7th Cir.2010) (P&A right of access to records); *Wis. Dep't of Pub. Instruction,* 463 F.3d at 725 (P&A right of access to student records); *Mo. Prot. & Advocacy Servs. v. Mo. Dep't of Mental Health,* 447 F.3d 1021, 1022-24 (8th Cir.2006) (P&A right of access to records); *Pa. Protection & Advocacy, Inc. v. Houstoun,* 228 F.3d 423, 426-28 (3d Cir.2000) (P&A right of access to records). *Cf. Anchorage Sch. Dist.,* 581 F.3d 936, 938-39 (P&A right of access to student records under DD Act).

1. The P&A has exclusive authority to determine when investigation is appropriate.

The PAIMI Act provides authority to P&As to "investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred." 42 U.S.C. § 10801(b)(2)(B); *see also* § 10805(a)(1)(A). When a P&A requests access to a facility to investigate an incident of abuse and neglect, "such access shall be afforded" when

> (1) An incident is reported or a complaint is made to the P&A system;
> (2) The P&A system determines there is probable cause to believe that an incident has or may have occurred; or
> (3) The P&A system determines that there is or may be imminent danger of serious abuse or neglect of an individual with mental illness.

42 C.F.R. § 51.42(b). A P&A is not required to determine the ultimate question of whether abuse or neglect has actually occurred, only whether it has received a complaint or has probable cause to warrant further inquiry. *See, e.g.*, *Ala. Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.*, 894 F. Supp. 424, 429 (M.D. Ala. 1995), *aff'd*, 97 F.3d 492 (11th Cir. 1996) (a showing of probable cause "does not involve establishing what actually happened but presenting evidence in the record that supports allegations of abuse and neglect").

Either the receipt of a complaint or a determination of probable cause is sufficient to warrant P&A access. *Cf. J.S. Tarwater Developmental Ctr.*, 97 F.3d at 498 (discussing the separate basis for seeking access to records under the DD Act); *Equip for Equal., Inc. v. Ingalls Mem'l Hosp.*, 292 F. Supp. 2d 1086, 1095 (N.D. Ill. 2003) (recognizing that a P&A has "broad access to patients and facilities" as the result of "an investigation, a reported incident, a complaint, the existence of probable cause of abuse, or the existence of imminent danger of serious abuse or neglect").

In this case, Plaintiffs have received six complaints alleging abuse and neglect, which provide a basis to investigate. Pls.' Br. Summ. J. 10. Further, where a P&A seeks access on the basis of probable cause, it is well settled that the P&A is the final arbiter of determining whether probable cause exists to investigate abuse and neglect. *See, e.g.*, *Prot. & Advocacy Sys., Inc. v. Freudenthal*, 412 F. Supp. 2d 1211, 1219 (D. Wyo. 2006); *Prot. & Advocacy For Pers. With Disabilities v. Armstrong*, 266 F. Supp. 2d 303, 321 (D. Conn. 2003); *Ctr. For Legal Advocacy v. Earnest*, 188 F. Supp. 2d 1251, 1257 (D. Colo. 2002), *rev'd on other grounds*, 320 F.3d 1107 (10th Cir. 2003); *Iowa Prot. & Advocacy Servs., Inc. v. Rasmussen*, 206 F.R.D. 630, 638 (S.D. Iowa 2001); *Arizona Ctr. for Disability Law v. Allen,* 197 F.R.D. 689, 693 (D. Ariz. 2000).

The implementing regulations charge the P&A specifically with determining whether probable cause exists. *See* 42 C.F.R. § 51.41(b)(3) ("the P&A system has determined that there is probable cause to believe that the individual has been or may be subject to abuse or neglect"); 45 C.F.R. § 1386.22(a)(2)(iii)("the system has probable cause . . . to believe that such individual has been subject to abuse or neglect"); *see also* 42 C.F.R. § 51.31(g) (P&A system may determine probable cause from monitoring and other activities). This exclusive authority is necessary for the P&A to function "independent of any agency in the State which provides treatment or services (other than advocacy services) to individuals with mental illness." 42 U.S.C. § 10805 (a)(2).

Upon a P&A's request, the expectation, as embodied in the statute and regulations, is that a facility must provide access and must do so promptly. *See* 42 C.F.R. § 51.42; Requirements Applicable to Protection and Advocacy of Individuals with Mental Illness, 62 Fed. Reg. at 53560-53561 ("Access should be as prompt as necessary

to conduct full investigations of abuse and neglect when an incident has been reported to the system or when the system has determined probable cause." . . . "[W]here a system believes that an individual with mental illness is, or may be, in imminent danger of serious harm, the system should investigate as quickly as possible and [], as written, the regulations do provide for prompt access"). Regulations requiring a facility to document in writing the reason for any denial or delay in access are intended to further protect the P&A's right of access. The regulations provide:

> If a P&A system's access to facilities, programs, residents or records covered by the Act or this part is delayed or denied, the P&A system shall be provided promptly with a written statement of reasons, including, in the case of a denial for alleged lack of authorization, the name, address and telephone number of the legal guardian, conservator, or other legal representative of an individual with mental illness. Access to facilities, records or residents shall not be delayed or denied without the prompt provision of written statements of the reasons for the denial.

42 C.F.R. § 51.43. These regulations do not confer to facilities the right to deny access. Rather, when a facility delays or denies access, it is required to provide promptly a written statement of reasons. *Id.* As the regulatory commentary cited by Defendants makes clear, the requirement of a written statement of reasons is intended to protect the P&A's right of access. HHS explained:

> if and when access is denied to records, facilities, and residents, it is critical that the P&A be protected from dealing with lengthy denial processes; therefore, this section requiring that a facility provide a prompt written justification when denying access will remain [in the regulations]

Requirements Applicable to Protection and Advocacy of Individuals with Mental Illness, 62 Fed. Reg. at 53562.

In sum, a P&A has broad authority to determine when an investigation of abuse and neglect is appropriate and the PAIMI Act provides that P&As must be afforded the access necessary to conduct an investigation.

2. *The PAIMI Act vests P&As with monitoring authority as a critical component of protecting the rights of Individuals with Mental Illness.*

P&A access is not limited to investigations of abuse and neglect. When establishing the protection and advocacy system, Congress recognized that P&As must be empowered to regularly monitor facilities providing treatment to people with disabilities in order to detect and deter abuse and neglect in facilities that might not otherwise come to the attention of the advocates. The PAIMI Act provides that P&As shall "have access to facilities in the State providing care or treatment." 42 U.S.C. § 10805(a)(3). This provision stands in addition to, and independent of, the statute's provision for conducting investigations of abuse allegations, indicating that the two afford distinct enforcement authorities.

The implementing regulations make clear that protection and advocacy organizations need not be conducting an investigation of a specific allegation in order to access a covered facility. The regulations provide that for purposes of education, training, monitoring, and inspection, "a P&A system shall have reasonable unaccompanied access to facilities . . . and their residents at reasonable times, which at a minimum shall include normal working hours and visiting hours." 42 C.F.R. § 51.42(c). The plain language of the regulation reaffirms that a P&A must be afforded reasonable unaccompanied access to facilities and residents for the purpose of monitoring and education even where there is no allegation of abuse or neglect.

Following this regulatory language, courts have recognized that the statute unmistakably contemplates access to monitor covered entities. *See, e.g., Freudenthal*, 412 F. Supp. 2d at 1213 ("These acts and their implementing regulations authorize the P & A to investigate allegations of abuse and neglect; to monitor; to provide training on rights

and make referrals and to pursue legal, administrative and other remedies. They also authorize P & A to obtain access to records under specific circumstances."); *Equip for Equality*, 292 F. Supp. 2d at 1095-98, 1100 ("A P&A system must be given the leeway to discover problems or potential problems at a facility"); *Iowa Prot. and Advocacy Servs., Inc. v. Gerard Treatment Programs*, L.L.C., 152 F. Supp. 2d 1150, 1169-70 (N.D. Iowa 2001) (considering access to a psychiatric facility for youth and noting that P&A representatives are empowered to conduct unaccompanied interviews for monitoring purposes).

Courts have explained that curtailing P&As' access would thwart the goals laid out by Congress in the PAIMI Act. *See Equip for Equality*, 292 F. Supp. 2d at 1099 ("requiring tours of a facility to be announced and accompanied would seriously hinder a P&A system's ability to monitor the facility for compliance with the rights and safety of the patients and would thwart the purpose of the federal and state acts."); *Robbins v. Budke*, 739 F. Supp. 1479, 1487 (D.N.M. 1990) (finding hospital's policies limiting P&A's access to patients with mental illness thwarted PAIMI's purpose).

3. Requiring court orders to access facilities would significantly impair enforcement.

Requiring P&As to go to court every time they seek access afforded by the statute would frustrate the goals of PAIMI and unnecessarily burden the courts. *See Advocacy Ctr. v. Stalder*, 128 F. Supp. 2d 358, 364 (M.D. La.1999) ("it cannot be disputed that the delay in getting a court order frustrates the goal of the PAMII Act."); *Okla. Disability Law Ctr., Inc. v. Dillon Family and Youth Servs., Inc.*, 879 F. Supp. 1110, 1112 (N.D. Okla. 1995) ("The timely access guaranteed by the Act should not be stripped of all meaning by requiring advocacy hearings to survive an application for a court order.").

The PAIMI Act does not require P&As to seek court authorization each time they wish to conduct statutorily mandated activities. As a recent evaluation of the PAIMI Act found, "[w]hen forced to litigate access issues, significant portions of [a P&A's] limited resources are consumed – resources that would better be used moving the nation's mental health system forward." Substance Abuse and Mental Health Servs. Admin., HHS Pub. No. PEP12-EVALPAIMI, *Evaluation of the Protection and Advocacy for Individuals With Mental Illness (PAIMI) Program, Phase III: Evaluation Report* 87 (2011). Facilities should not be permitted to circumvent Congress's legislation by requiring a court order before permitting meaningful access as required by law.

CONCLUSION

The PAIMI Act is a critical component in the congressionally-mandated system of legal protections for people with mental illness, and its language, statutory scheme, and judicial interpretation must be given full force and effect. Congress unambiguously afforded P&As the authority to access all facilities in the community serving children with mental illness. The law requires facilities including the schools in this case to permit reasonable access by P&A staff and attorneys who are mandated by Congress to enforce the law.

Respectfully submitted,

RICHARD S. HARTUNIAN
United States Attorney

VANITA GUPTA
Principal Deputy Assistant Attorney General

EVE L. HILL
Deputy Assistant Attorney General

____
THOMAS SPINA, Civil Chief
Bar Roll No.
United States Attorney's Office

*/s/ Sarah Hinger*____________________
ANURIMA BHARGAVA, Section Chief
RENEE WOHLENHAUS, Deputy Chief
SARAH HINGER, Trial Attorney

Northern District of New York
100 South Clinton Street
Syracuse, NY 13261-7198
Telephone:
Facsimile:
thomas.spina@usdoj.gov

Bar Roll No. 4823878
U.S. Department of Justice
950 Pennsylvania Avenue, NW – PHB
Washington, DC 20530
Telephone: 202-514-0969
Facsimile: 202-514-8337
sarah.hinger@usdoj.gov

Of Counsel:

*/s/ William B. Schultz*______________
WILLIAM B. SCHULTZ
General Counsel
D.C. Bar No. 218990
Department of Health & Human Services
Office of the General Counsel
200 Independence Avenue, SW, Room 713F
Washington, DC 20201
Telephone: 202-690-7741
Facsimile: 202-690-7998

Dated: July 2, 2015

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2015 I electronically filed the United States' Statement of Interest with the Clerk of the Court using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

____

THOMAS SPINA, Civil Chief
United States Attorney's Office
Northern District of New York
100 South Clinton Street
Syracuse, NY 13261-7198
Telephone:
Facsimile:
thomas.spina@usdoj.gov