

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

NATIVE VILLAGE OF HOOPER BAY )  
on its own behalf and as *parens* )  
*patriae* on behalf of its members, and )  
NATIVE VILLAGE OF )  
KONGIGANAK, on its own behalf )  
and as *parens patriae* on behalf of its )  
members, )

Plaintiffs, )

vs. )

CHRISTY LAWTON, in her official )  
Capacity as Director of the Office of )  
Children's Services, Alaska )  
Department of Health and Social )  
Services, and FRONTLINE HOSPITAL, )  
LLP d/b/a NORTH STAR )  
BEHAVIORAL HEALTH SYSTEM, a )  
Delaware limited liability corporation, )

Defendants. )

RECEIVED

FEB 13 2015

ALASKA LEGAL SERVICES CORP

Case No. 3AN-14-5238CI

**ORDER REGARDING DEFENDANT CHRISTY LAWTON'S MOTION TO  
DISMISS AND MOTION TO DISMISS FOR SOVEREIGN IMMUNITY AND  
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

Plaintiffs Native Village of Hooper Bay and Native Village of Kongiganak moved for a preliminary injunction seeking to prevent placement of children in state custody into North Star Hospital. Defendants Frontline Hospital, LLP (d/b/a North Star Behavioral Health System) and Defendant Christy Lawton opposed the injunction. Christy Lawton, in her official capacity as the Director of the Office of Children's Services (OCS), moved

to dismiss all of Plaintiffs' claims. She further moved to dismiss Plaintiffs' statutory claims as barred by sovereign immunity.

### STATEMENT OF FACTS

Plaintiffs are two federally recognized tribes. They brought this action against Christy Lawton in her capacity as director of the Office of Children's Services (OCS) and against North Star Behavioral Health System on behalf of the tribes' children who are in the care of OCS and have been committed to North Star Hospital. This action seeks to prevent OCS from committing foster children to North Star Hospital without a judicial hearing. Plaintiffs allege that Defendants have violated AS 47.10.087 (requiring a judicial hearing before placement of foster children in a secure residential treatment center), AS 47.10.084 (requiring parental consent for treatment of foster children except in emergencies), the due process clause of the United States Constitution, and due process under the Alaska Constitution.

There are two types of psychiatric care facilities for youths in Alaska: secure residential treatment centers and acute psychiatric hospitals. Jennifer Swigart, a psychiatric nurse working for OCS, explained that acute psychiatric care is used to address "immediate needs."<sup>1</sup> Admission to an acute psychiatric hospital requires: suicidal ideation, homicidal ideation, and/or to be gravely disabled ("disabling behaviors related to a mental disorder").<sup>2</sup> Length of stay varies "depending on when stabilization

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<sup>1</sup> Def.'s Ex. 2 ¶ 3 (Aff. of Jennifer Swigart) to Mem. in Supp. of Mot. to Dismiss and Opp'n to Mot. for Prelim. Inj. (hereinafter "Swigart Aff.").

<sup>2</sup> Swigart Aff. at ¶ 3.

can be reached and maintained.”<sup>3</sup> While acute psychiatric hospitals are for short-term emergency care, residential psychiatric treatment centers provide long-term care for “serious, but not acute” conditions.<sup>4</sup> Length of stay is usually 1 year to 24 months.<sup>5</sup> Failed placement and/or lack of placement may not be used for admission to an acute psychiatric hospital, but is a factor considered for a residential program.<sup>6</sup>

North Star Health Systems has two facilities for minors. One is North Star Hospital, the facility at issue in this case. North Star Hospital is licensed as an acute psychiatric hospital.<sup>7</sup> According to its website, North Star Hospital is “for intensive short-term treatment to begin the healing process and then return home.”<sup>8</sup> The other facility is North Star Residential Treatment, designed for longer-term care where the residents “learn the skills needed for emotional and social stability and security.”<sup>9</sup> Plaintiffs argue that North Star Hospital qualifies as a residential treatment center under the statute, while Defendants argue that it does not.

Plaintiffs point to three specific situations to illustrate that OCS is improperly placing children in North Star Hospital. One of these is the case of C.A., who was

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<sup>3</sup> Swigart Aff. at ¶ 3.

<sup>4</sup> Swigart Aff. at ¶ 4.

<sup>5</sup> Swigart Aff. at ¶ 4.

<sup>6</sup> Swigart Aff. at ¶¶ 3-4.

<sup>7</sup> Def.’s Ex. 3-4 to Mem. in Supp. of Mot. to Dismiss and Opp’n to Mot. for Prelim. Inj.

<sup>8</sup> Def.’s Ex 1 to Mem. in Supp. of Mot. to Dismiss and Opp’n to Mot. for Prelim. Inj.

<sup>9</sup> Def.’s Ex 1 to Mem. in Supp. of Mot. to Dismiss and Opp’n to Mot. for Prelim. Inj.

brought to the Yukon-Kuskokwim Health Corporation emergency room, purportedly for a suspected Zoloft overdose.<sup>10</sup> A bottle of Zoloft was missing, although C.A. did not have any physical symptoms of any overdose.<sup>11</sup> OCS decided to send C.A. to North Star Hospital, although the reason for this decision is unclear.<sup>12</sup> The following day, the Zoloft was discovered by C.A.'s foster mother and a kitchen knife was found under a bed in C.A.'s room.<sup>13</sup> OCS appeared to believe that the knife was a threat to C.A. and/or others, although the .087 hearing judge<sup>14</sup> could not determine who had put the knife under the bed or why it was there.<sup>15</sup> C.A. was then transferred to North Star Hospital. Her behavior for the first week or two was stable, with no demonstration of self-harm or aggressive behaviors according to a North Star Hospital clinician.<sup>16</sup> The .087 hearing judge found no evidence to support C.A.'s restraint at YKHC nor to support a transfer to North Star Hospital.<sup>17</sup> The court denied OCS' request to place C.A. at North Star

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<sup>10</sup> Pl.'s Ex. 1, at 4 (Order on Placement at North Star Pursuant to AS 47.010.087, *I.M.O. C.A.*, Case No. 4BE-13-13CN) to Certificate of James J. Davis, Jr. (hereinafter "*I.M.O. C.A.*").

<sup>11</sup> *I.M.O. C.A.* at 4.

<sup>12</sup> *I.M.O. C.A.* at 4-5.

<sup>13</sup> *I.M.O. C.A.* at 4.

<sup>14</sup> OCS maintains that .087 hearings for foster children admitted to North Star Hospital goes beyond what the law requires; they have in the past held what have been called ".087 hearings" for foster children after emergency commitment to North Star Hospital (*see* Pl.'s Ex. 6-8 to Certificate of Sydney Tarzwell in Supp. of Pl.'s Reply to Opp. to Mot. for Prelim. Inj. and Opp. to the State's Mot. to Dismiss (hereinafter "Tarzwell Certificate").

<sup>15</sup> *I.M.O. C.A.* at 4-5.

<sup>16</sup> *I.M.O. C.A.* at 5-6.

<sup>17</sup> *I.M.O. C.A.* at 7.

Hospital about a month after she had arrived.<sup>18</sup>

The other two illustrative cases involve D.S. and J.S. D.S. and J.S.'s foster mother refused to keep them in her home due to their disruptive behavior and their attempts to avoid treatment and spread their scabies.<sup>19</sup> Originally, the plan was to send the older girl to a stabilization level 2 facility and the younger girl to a therapeutic foster home.<sup>20</sup> When AAG Cometa was contacted, she said to try to place the girls in a therapeutic home.<sup>21</sup> The OCS worker called several facilities, but North Star Hospital was the only one available that weekend to take the girls.<sup>22</sup> From the OCS worker's notes, the reason that North Star Hospital accepted them appeared to be to stabilize their scabies.<sup>23</sup> According to her North Star Hospital psychological evaluation, the reason for J.S.' admission was "increasing aggression, high-risk behaviors, and impulsivity."<sup>24</sup>

#### STANDARD OF REVIEW

Defendant seeks to dismiss Plaintiffs' claims pursuant to Alaska Civil Procedure Rule 12(b)(6) for failure to state a claim upon which relief can be granted. "Motions to dismiss under Rule 12(b)(6) are viewed with disfavor and, 'unless it appears beyond

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<sup>18</sup> *I.M.O. C.A.* at 8.

<sup>19</sup> Pl.'s Ex 19 to Tarzwell Certificate.

<sup>20</sup> Pl.'s Ex 19 to Tarzwell Certificate.

<sup>21</sup> Pl.'s Ex 19 to Tarzwell Certificate.

<sup>22</sup> Pl.'s Ex 19 to Tarzwell Certificate.

<sup>23</sup> Pl.'s Ex 19 to Tarzwell Certificate.

<sup>24</sup> Pl.'s Ex 20 at 2 to Tarzwell Certificate.

doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,' the motion should be denied."<sup>25</sup> Dismissal by the trial court for failure to state a claim should rarely be granted.<sup>26</sup>

"In determining the sufficiency of the stated claim, it is enough that the complaint set forth allegations of fact consistent with some enforceable cause of action on any possible theory."<sup>27</sup> The Court is instructed to "construe complaints liberally and give the complaint the benefit of the doubt" in determining whether a legitimate claim exists in this case.<sup>28</sup>

## ANALYSIS

### A. AS 47.10.087

AS 47.10.087 provides judicial oversight for the commitment of foster children to secure residential psychiatric treatment centers. Under the statute, a court may authorize the placement of a foster child in a secure residential psychiatric treatment center if certain criteria are met.<sup>29</sup> A court must review the placement at least once every 90 days.<sup>30</sup> There is no provision in the statute regarding acute psychiatric hospitals. All the parties agree that OCS may not place foster children in secure residential treatment

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<sup>25</sup> *Division of Family and Youth Serv. v. Native Village of Curyung*, 151 P.3d 388, 396 (Alaska 2006) (citing *Martin v. Mears*, 602 P.2d 421, 429 (Alaska 1979)).

<sup>26</sup> *Knight v. American Guard & Alert, Inc.*, 714 P.2d 788, 791 (Alaska 1986).

<sup>27</sup> *Native Village of Curyung* at 396 (citing *Reed v. Municipality of Anchorage*, 741 P.2d 1181 (Alaska 1987)).

<sup>28</sup> *Reed*, 741 P.2d at 1185.

<sup>29</sup> AS § 47.10.087(a).

<sup>30</sup> AS § 47.10.087(b).

centers without prior court authorization. The issue before the Court is whether North Star Hospital is considered a secure residential treatment center under the statute.

The plain meaning of AS 47.10.087 is that it only applies to secure residential psychiatric treatment centers. In interpreting statutory language, the Court must begin with the plain meaning of the statutory text.<sup>31</sup> Legislative history may be used to interpret a statute, but “the plainer the language of the statute, the more convincing contrary legislative history must be.”<sup>32</sup> Somewhat contrary legislative history does not overcome the plain meaning.<sup>33</sup>

AS 47.10.087 was created by House Bill 16.<sup>34</sup> House Bill 16 was an update to Alaska’s Juvenile Delinquency statutes. The Bill created secure residential psychiatric treatment programs in Alaska.<sup>35</sup> They were established to treat “less severe mental health problems, and substance abuse” in a less restrictive but still secure facility.<sup>36</sup> According to the House of Representatives’ talking points, the Bill was designed to increase treatment options by enhancing the continuum of care, expanding semi-secure care, and creating a new secure psychiatric residential treatment center category.<sup>37</sup> Kathy Cronen,

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<sup>31</sup> *Hendricks-Pearce v. State, Dep’t of Corrections*, 323 P.3d 30, 35 (Alaska 2014).

<sup>32</sup> *Id.* (citing *Ward v. State, Dep’t of Pub. Safety*, 288 P.3d 94, 98 (Alaska 2012), internal quotations omitted).

<sup>33</sup> *Oels v. Anchorage Police Dep’t Employees Ass’n*, 279 P.3d 589, 597 (Alaska 2012).

<sup>34</sup> Def.’s Ex. 9 at 3 to Mem. in Supp. of Mot. to Dismiss and Opp’n to Mot. for Prelim. Inj. (hereinafter “House Bill 16”).

<sup>35</sup> House Bill 16 at 3.

<sup>36</sup> House Bill 16 at 3.

<sup>37</sup> House Bill 16 at 8-9.

North Star's CEO at the time, testified about the proposed amendments to HB 16.<sup>38</sup> Ms. Cronen expressed a need for residential treatment centers in Alaska, explaining that there was a population of children whose needs were not being met by the acute care hospitals.<sup>39</sup>

This legislative history confirms the plain language of the statute. Under its plain language, the statute applies to secure residential psychiatric treatment centers, not any other facility. The legislative history shows that acute care hospitals already existed at the time that secure residential psychiatric treatment centers were established by House Bill 16. House Bill 16 created AS 47.10.087 to govern admittance to the new secure residential psychiatric treatment centers. Nothing in the legislative history suggests that AS 47.10.087 was meant to apply to the acute care hospitals.

Plaintiffs argue that the characteristics of North Star Hospital meet the statutory definition of a residential psychiatric treatment center: (a) a "secure or semi-secure facility"; (b) that "provides, under the direction of a physician"; (c) "psychiatric diagnostic, evaluation, and treatment services" (d) "on a 24-hour-a-day basis" (e) "to children"; (f) "with severe emotional or behavioral disorders."<sup>40</sup> North Star Hospital meets this description. It is a locked and secure facility<sup>41</sup> that provides 24-hour services

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<sup>38</sup> House Bill 16 at 10.

<sup>39</sup> House Bill 16 at 10.

<sup>40</sup> AS 47.10.990(29); AS 47.32.900(19).

<sup>41</sup> Pl.'s Ex. 2, Dukoff Dep. 48:6-48:13 to Tarzwell Certification.



under the care of a psychiatrist<sup>42</sup> to children<sup>43</sup> with severe emotional and behavioral disorders.<sup>44</sup> Because North Star meets the definition of a secure residential psychiatric treatment center, Plaintiffs say that it should be considered one under AS 47.10.087.

Although North Star may fit under the definition of “residential psychiatric treatment center,” it also fits under the definition of “hospital”: (a) “a public or private institution or establishment” (b) “devoted primarily to providing diagnosis, treatment, or care over a continuous period of 24 hours each day” (c) “for two or more unrelated individuals” (d) “suffering from illness, physical or mental disease, injury or deformity, or any other condition for which medical or surgical services would be appropriate.”<sup>45</sup> Moreover, acute care hospitals and residential treatment centers are considered distinct entities under regulatory schemes. They have different licenses,<sup>46</sup> different regulations,<sup>47</sup> different treatment under Medicaid,<sup>48</sup> and different Certificate of Need standards.<sup>49</sup> AS 47.10.087 is part of this larger regulatory framework. The legislative history and the

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<sup>42</sup> Aff. of Laura McKenzie ¶ 6.

<sup>43</sup> Def.’s Ex. 1 to Mem. In Supp. of Mot. to Dismiss and Opp’n to Mot. for Prelim. Inj.

<sup>44</sup> Aff. of Laura McKenzie ¶ 3.

<sup>45</sup> AS § 47.32.900(13).

<sup>46</sup> 7 AAC 12.215 for psychiatric hospitals and 7 AAC 50.800 *et seq* for residential psychiatric treatment centers.

<sup>47</sup> *E.g.*, 7 AAC 12.215 (psychiatric hospitals require certain staffing levels); 7 AAC 50.865 (residential psychiatric treatment centers do not have the same staffing requirements, but do have a set child-to-caregiver ratio).

<sup>48</sup> *See*, Def.’s Ex. 6 to Mem. in Supp. of Mot. to Dismiss and Opp’n to Mot. for Prelim. Inj., 9-10.; 7 AAC 140.365 (inpatient psychiatric hospital payment rates) and 7 AAC 145.620 (residential psychiatric treatment center payment rates).

<sup>49</sup> *See*, Def.’s Ex. 8 to Mem. in Supp. of Mot. to Dismiss and Opp’n to Mot. for Prelim. Inj., 13-20.

regulatory scheme suggest that acute care hospitals are defined under “hospital” and not “residential psychiatric treatment centers.”

OCS’ conduct does not violate AS 47.10.087 as written. The plain language of the law and legislative history demonstrate that AS 47.10.087 only applies to secure residential treatment centers. Acute care hospitals are not covered under AS 47.10.087. Since North Star Hospital is not a secure residential treatment center, OCS does not have to comply with AS 47.10.087 when having foster children admitted to North Star Hospital. Plaintiffs’ claims under AS 47.10.087 are DISMISSED.

**B. AS 47.10.084**

AS 47.10.084 provides that when parental rights have not been terminated by a court decree, the parents maintain residual rights, including a right to “consent to major medical treatment except in cases of emergency.”<sup>50</sup> A foster child is committed to North Star Hospital when an intake physician determines that there is an emergency. Plaintiffs provided the examples of C.A., D.S., and J.S. to demonstrate that an emergency situation may not exist for every foster child admitted to North Star Hospital. The Court finds below that psychiatrists are suitable neutral fact-finders in the initial commitment. Even if they misdiagnose an emergency in some cases, that is not enough to invalidate their finding of an emergency for the purposes of AS 47.10.084. An emergency would be presumed to exist until a post-commitment judicial hearing found otherwise. It is reasonable for OCS to rely on the psychiatrists’ findings of an emergency to determine

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<sup>50</sup> AS § 47.10.084(c).

whether they must gain consent from the parents. Since it is deemed an emergency when a minor is committed to North Star Hospital, parental consent is unnecessary. Plaintiffs' claims under AS 47.10.084 are DISMISSED.

### C. United States Constitutional Claims

The United States Supreme Court found in *Parham v. J.R.* that commitment of children does not require prior judicial overview.<sup>51</sup> This includes children who are wards of the State.<sup>52</sup> *Parham* is controlling law; OCS' commitment of foster children to North Star Hospital without prior judicial approval does not violate the due process protections provided by the U.S. Constitution.

The necessary procedures for *continuing* care for wards of the State was left open by the Supreme Court. The Supreme Court noted that "the issue of what process is due to justify continuing a voluntary commitment" must be considered on remand, and the lower court "might well consider whether wards of the State should be treated with respect to continuing therapy differently from children with natural parents."<sup>53</sup> Although the initial placement of foster children into North Star Hospital does not violate the U.S. Constitution, their continued stay without judicial oversight may violate the due process clause of the U.S. Constitution. Plaintiffs' claims regarding due process violations of the

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<sup>51</sup> *Parham v. J.R.*, 442 U.S. 584, 607, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979).

<sup>52</sup> *Id.* at 617.

<sup>53</sup> *Id.* at 619.

U.S. Constitution as to admittance are DISMISSED, but dismissal as to continued commitment is DENIED.

#### **D. State Constitutional Claims**

Plaintiffs contend that due process requires a judicial hearing before commitment of foster children into North Star Hospital. Defendants strenuously object to the necessity of pre-commitment hearings. Defendants do not believe any judicial hearing is necessary for proper due process. They believe the current commitment process is sufficient to protect the children's due process rights. Currently, the decision to admit a child to North Star Hospital is made by a psychiatrist who holds North Star Hospital Medical Staff privileges.<sup>54</sup> There are nine psychiatrists, two of whom are North Star Hospital employees.<sup>55</sup> In addition, foster children have appointed representation in the form of a guardian ad litem. Once admitted, it is unknown how long a foster child may remain.<sup>56</sup> OCS has placed children at North Star Hospital for longer than 30 days.<sup>57</sup> OCS' decisions to hold children at North Star past 30 days suggests that it is not committing them under the statute that allows parents or guardians to commit a minor for

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<sup>54</sup> Aff. of Laura McKenzie ¶ 7.

<sup>55</sup> Oral Argument 2:27:43-2:27:53, Oct. 30, 2014.

<sup>56</sup> Oral Argument 2:06:39-2:09:04, Aug. 19, 2014 (OCS' counsel, when asked this question, responded: "I think it's unclear how long the – a child could be held at the acute care hospital." OCS' counsel then suggested that it would not be more than 30 days and that it certainly would not be months, but was unable to articulate a firm timeline.).

<sup>57</sup> See, Pl.'s Ex. 17-21 to Tarzwell Certificate (D.S. admitted to North Star on 1/20/13 and left on 2/26/13 for a total of 38 days; J.S. admitted to North Star on 1/20/13 and left on 3/7/13 for a total of 46 days).

30 days.<sup>58</sup> There is no apparent cap on the length of a foster child's commitment at North Star.

The Alaska Constitution provides greater protection than the minimum level set by the U.S. Constitution.<sup>59</sup> The Alaska Constitution may require different due process protections for children committed to mental health institutions than *Parham* requires. But that does not necessarily mean that due process under the Alaska Constitution demands pre-commitment judicial hearings. "Due process does not require any specific type of hearing."<sup>60</sup> At times, it may require a judicial hearing. At other times, like in *Parham*, a qualified psychiatrist, even a staff psychiatrist, is sufficient as a neutral and detached trier of fact.<sup>61</sup>

For non-emergency mental health situations, the Alaska legislature and Supreme Court favor a judicial hearing before action is taken.<sup>62</sup> In emergency situations, this is not necessarily true.<sup>63</sup> In addition, commitment of children by their parent or guardian is

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<sup>58</sup> AS § 47.30.690.

<sup>59</sup> *Myers v. Alaska Psychiatric Institute*, 138 P.3d 238, 245 (Alaska 2006); see also *Valley Hosp. Ass'n, Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963, 967-68 (Alaska 1997).

<sup>60</sup> *Patrick v. Municipality of Anchorage, Anchorage Transportation Commission*, 305 P.3d 292, 299 (Alaska 2013).

<sup>61</sup> *Parham*, 442 U.S. at 607-08.

<sup>62</sup> See AS 47.10.087 (requiring a pre-admission judicial hearing for placement in secure residential treatment centers – a nonemergency commitment); *Myers*, 138 P.3d at 254 (the Alaska Supreme Court held that for authorization of psychotropic drugs, there must be "an independent judicial determination of an incompetent mental patient's best interests" when no emergency exists.).

<sup>63</sup> See *Myers*, 138 P.3d at 242 (expressly stating that its opinion that authorization of psychotropic drugs requires an independent judicial determination "does not extend to the use of psychotropic medication in crisis or emergency situations.").

not subject to a pre-commitment judicial hearing, even in non-emergencies.<sup>64</sup> This is because commitment of a minor by a parent or guardian is considered a voluntary commitment.

To determine due process requirements, the Alaska Supreme Court applies the *Mathews v. Eldridge* test.<sup>65</sup> The *Mathews* test requires consideration of three factors: (1) “the private interest that will be affected by the official action”; (2) “the risk of an erroneous deprivation of such interest through the procedures used”; and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”<sup>66</sup>

In applying the first *Mathews* factor, the Court agrees with the *Parham* court that children have a “substantial liberty interest in not being confined unnecessarily.”<sup>67</sup> In addition, the foster children have an interest in a “prompt judicial review of [their] emergency detention and evaluation.”<sup>68</sup>

In applying the second *Mathews* factor, the risk of an erroneous deprivation through the current procedures is severe. It is concerning that foster children may be

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<sup>64</sup> AS § 47.30.690.

<sup>65</sup> *Patrick v. Municipality of Anchorage, Anchorage Transportation Commission*, 305 P.3d 292, 299 (Alaska 2013).

<sup>66</sup> *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976).

<sup>67</sup> *Parham*, 442 U.S. at 600.

<sup>68</sup> *In re Daniel G*, 320 P.3d 262, 272 (Alaska 2014) (declining “to parse the magnitude of the liberty interest at stake in a 72-hour evaluation that followed from an uncontested emergency detention,” but finding that the private interest of a prompt judicial review was at stake).

placed at North Star indefinitely without any judicial hearing taking place.<sup>69</sup> However, this does not mean that a pre-commitment judicial hearing is necessary. The Alaska Supreme Court has held that due process does not require a pre-commitment judicial hearing for an adult's emergency mental health detention.<sup>70</sup> In an emergency situation, a neutral physician may make the commitment decision. After commitment, a judicial hearing is necessary.

In applying the third *Mathews* factor, the State has a substantial interest in protecting the children in their care. Admission for a minor to an acute psychiatric hospital requires the minor to be a danger to himself or others (suicidal/homicidal ideation) and/or to be gravely disabled. There is a compelling state interest to get children in these emergency situations prompt psychiatric care. However, as time passes, the emergency likely subsides as the child is stabilized. While the State continues to have a strong interest in safeguarding the children in its care, this must be weighed against the children's private interests.

Pre-commitment judicial hearings are not necessary in an emergency situation. Psychiatrist review is sufficient for the initial commitment. Due process in this instance requires *post*-commitment judicial review. Post-commitment judicial review will balance the children's private interests with the State interest of providing prompt psychiatric

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<sup>69</sup> .087 hearings have been held for foster children committed to North Star Hospital at times, but there is no requirement in place that OCS do so and there is no specific timeline.

<sup>70</sup> *In re Daniel G*, 320 P.3d at 273.

care. Plaintiffs' claims regarding due process violations of the Alaska Constitution as to admittance are DISMISSED, but dismissal as to continued commitment is DENIED.

The Court does not at this time decide the time period in which such a review must occur. The parties are invited to file briefing within thirty days to address the issue of how long a foster child may be placed at an acute psychiatric hospital without judicial review. Amicus briefing by interested groups would be welcome.

#### **E. Sovereign Immunity**

Defendant Christy Lawton moved to dismiss Plaintiffs' claims under AS 47.10.087 and AS 47.10.084 as barred by sovereign immunity. Since the Court has already dismissed Plaintiffs statutory claims, the issue of sovereign immunity is MOOT.

#### **F. Preliminary Injunction**

Plaintiffs moved the court for a preliminary injunction to stop the Defendants from placing children in North Star Hospital without prior judicial authorization. A preliminary injunction is not appropriate for admittance of foster children to North Star Hospital. OCS is allowed by statute and the U.S. and Alaska Constitutions to admit foster children to North Star Hospital in emergency situations. However, a preliminary injunction is appropriate for continued stay at North Star. OCS is enjoined from keeping children in its care at North Star Hospital for over 30 days without a court hearing.<sup>71</sup>

Plaintiffs advocate the "balance of hardships" test for a preliminary injunction, while the Defendants advocate a "clear showing of probable success on the merits" test.

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<sup>71</sup> As noted above, the appropriate time period for judicial review will be established after input by the parties.



Since the Plaintiffs face danger of irreparable harm through deprivation of due process and the State's interests can be adequately protected, the proper test is "balance of hardships."<sup>72</sup> "Balance of hardships" is a three-part test: "(1) the plaintiff must be faced with irreparable harm; (2) the opposing party must be adequately protected; and (3) the plaintiff must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.'"<sup>73</sup>

Plaintiffs are faced with irreparable harm by foster children being held at North Star Hospital for an indefinite period of time. Continuing treatment of foster children without a judicial hearing raises the question of a violation of the fundamental right to due process. As to adequate protection, it exists when either the injury can be indemnified by a bond or the injury is relatively slight compared to the injury caused to the party seeking the injunction if it is denied.<sup>74</sup> The Defendants are adequately protected, as they should suffer no harm by keeping children at North Star Hospital for no longer than 30 days without a judicial hearing. Foster children that need non-emergency, long-term psychological care may be placed in a secure residential psychiatric treatment center after an AS 47.10.087 hearing. The harm caused to the Defendants by granting the injunction is negligible compared to the injuries caused to the Plaintiffs if the injunction is denied. Lastly, Plaintiffs have raised serious and substantial questions that are

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<sup>72</sup> *State, Division of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005).

<sup>73</sup> *State v. Kluti Kaah Native Village of Cooper Center*, 831 P.2d 1270, 1273 (Alaska 1992) (quoting *Messerli v. Dep't of Natural Resources*, 768 P.2d 1112, 1122 (Alaska 1989)).

<sup>74</sup> *State, Division of Elections v. Metcalfe*, 110 P.3d 976, 978-9 (Alaska 2005)(quoting *State v. United Cook Inlet Drift Ass'n*, 815 P.2d 378, 378-79 (Alaska 1991)).

certainly not frivolous. Therefore, a preliminary injunction is GRANTED against the Defendants. The Defendants are enjoined from holding any child under the care of OCS for longer than 30 days at North Star Hospital without conducting a .087 type of hearing. Because the Defendants are not likely to incur or suffer any damages from this injunction, the Court in its discretion deems that no security bond is necessary.<sup>75</sup>

### CONCLUSION

Plaintiffs' Motion to Dismiss is GRANTED in part and DENIED in part. A preliminary injunction is GRANTED.

IT IS SO ORDERED.

Dated at Anchorage, Alaska this 12<sup>th</sup> day of February 2015.



Erin B. Marston  
Superior Court Judge

I certify that on 2/12/15  
a copy of this notice was mailed to:

J. Davis	J. Woodman
S. Bookman	B. Zan Nault
S. Rose	T. Daniel

  
K. Griffith, Judicial Assistant

<sup>75</sup> Alaska R. Civ. P. 65(c).