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**Testimony of Beth Haroules On Behalf of the New York Civil Liberties Union  
Before the New York City Council Committees on Public Safety, Mental  
Health, Disabilities and Addiction, Fire and Emergency Management and  
Hospitals Regarding Oversight -- Mental Health Involuntary Removals and  
Mayor Adams' Recently Announced Plan.**

**February 6, 2023**

The New York Civil Liberties Union (NYCLU) appreciates this opportunity to submit the following testimony regarding Mayor Adams' new directive on "mental health involuntary removals" (the "NYC Mental Health Involuntary Removals Policy").<sup>1</sup>

The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices throughout the state and over 85,000 members and supporters. The NYCLU defends and promotes the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, including the right of every New Yorker to enjoy life, liberty, due process, and equal protection under law. This includes our work in pursuit of community safety, and our work to advance the rights of New Yorkers with disabilities and New Yorkers who are unhoused.

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<sup>1</sup> On November 29, 2022, Mayor Adams held a press conference to "Address [...] the Mental Health Crisis in New York City." See Transcript, <https://www.nyc.gov/office-of-the-mayor/news/871-22/transcript-mayor-eric-adams-delivers-address-mental-health-crisis-new-york-city-holds>.

There was a 5 page directive released at this press conference captioned *Mental Health Involuntary Removals, as of 11/28/2022*, <https://www.nyc.gov/assets/home/downloads/pdf/press-releases/2022/Mental-Health-Involuntary-Removals.pdf> (the "Policy Directive").

The only other publicly available document relating to the NYC Mental Health Involuntary Removals Policy is an NYPD FINEST message dated December 6, 2022 (FINEST message). The FINEST message was filed in the electronic case docket in *Baerga et al. v. NYC et al.*, 21-cv-05762 (SDNY)(PAC) at ECF/Docket # 123-1. A copy of the FINEST message is attached to this testimony.

No other information has been made available by any of the other City agencies, including FDNY/EMS, DSS, DOHMH, and the NYC Sheriff, as well as H+H and the MTA and MTA Police, that have all been directed to initiate this new policy.

Our comments today will address the following matters with respect to the NYC Mental Health Involuntary Removals Policy:

- the NYC Mental Health Involuntary Removals Policy **directs resources into a failed strategy** of involuntary psychiatric hospitalization and forced treatment, at a time when the City has continued to reduce or eliminate investment in effective strategies that connect people to long term treatment and care
- the NYC Mental Health Involuntary Removals Policy, as written and as discussed by Mayor Adams and Governor Hochul, **allows removals that are not justified** under the U.S. Constitution or New York State Mental Hygiene Law
- the NYC Mental Health Involuntary Removals Policy, as written and as discussed by Mayor Adams and Governor Hochul, **reflects and will exacerbate bias** against unhoused people and people with mental illness and will disproportionately burden New Yorkers of color
- as with many of this Administration’s immoral initiatives directed at people who are unhoused and at people with disabilities, there has been from the start **a complete lack of transparency, clear processes, and failure of data collection and reporting**; rather information is released via press conference and via highly controlled and selective disclosure to chosen media outlets.

Finally, we offer brief comments with respect to Int. 0273-2022 and Int. 0706-2022 which are also on the agenda for today’s hearing.

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## **Introduction**

With the NYC Mental Health Involuntary Removals Policy, the Adams Administration is playing fast and loose with the legal rights of New Yorkers and is not dedicating the resources necessary to address the mental health crises that affect our communities. The federal and state constitutions impose strict limits on the government’s ability to detain people experiencing mental illness – limits that the Mayor’s new initiative is likely to violate.

Forcing people into treatment is a failed strategy for connecting people to long-term treatment and care. Unless we adequately invest in the long-term health and well-being of New Yorkers facing mental illness and our chronic lack of housing, the current mental health crisis will continue. The decades-old practice of sweeping deep-seated problems out of public view may play well for the politicians, but the problems will persist – for vulnerable people in desperate need of government services and for all New Yorkers.

The Mayor’s attempt to police away homelessness and sweep individuals out of sight is a page from the failed playbook of countless Mayoral administrations before his. With no real plan for housing, services, or supports, the administration is choosing handcuffs and coercion. It is magical thinking to assume that the subways and the streets will not function as housing when the City and state simply offer nothing other than involuntary transport to a psychiatric facility for “observation” under threat of compelled inpatient psychiatric treatment. The broader housing goals offered, last year and this year, by Governor Hochul and Mayor Adams will take far longer to implement while NYPD enforcement activities have essentially ramped up overnight.

We urge the City Council to continue to keep intense focus on the investment of resources and connection of people with consensual care – proven approaches to help people in the long term. And we urge the City Council to push back against what appears to be the Mayor’s and Governor’s intent to recraft a mental health system to permit easier removal and forced treatment of people without addressing systematic dysfunctionality – the lack of supportive housing and culturally appropriate supports and services. Short-term forced treatment and criminalization are demonstrably ineffective approaches to meaningful change. New Yorkers need more direct access to economic, health and care resources -- not more police.

### **1. The NYC Mental Health Involuntary Removals Policy Directs Resources into a Failed Strategy of Involuntary Psychiatric Hospitalization and Forced Treatment, at a Time When the City has Continued to Reduce or Eliminate Investment in Effective Strategies that Connect People to Long Term Treatment and Care**

Individuals with lived experience, service providers and advocacy groups, all too numerous to detail here, have cautioned that increasing involuntary commitments will actually hinder, rather than improve, the City’s ability to successfully connect people with care.<sup>2</sup>

This is not a new issue and we and countless advocates in this field can point the Council to over forty years of research demonstrating the success of modes of engagement with unhoused individuals experiencing mental health challenges that does result in consensual participation in treatment that is delivered in non-inpatient institutional settings and in the least restrictive setting appropriate to a person’s needs.

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<sup>2</sup> See, e.g. Fountain House Calls for Comprehensive Mental Health Care in Response to Mayor Adams’ Directive on Involuntary Removals, December 1, 2022. “[T]he approaches announced this week will not address the revolving doors to hospitals and jails, and can further stigmatize and isolate people living with serious mental illness.” <https://www.fountainhouse.org/news/fountain-house-statement-on-mayor-adams-directive-to-expand-involuntary-removals>; Anthony Almojera, I’m an N.Y.C. Paramedic. I’ve Never Witnessed a Mental Health Crisis Like This One, The New York Times (guest essay), December 7, 2022, <https://www.nytimes.com/2022/12/07/opinion/nyc-paramedic-mental-health-crisis.html?smid=nytcore-ios-share&referringSource=articleShare>. Mr. Almojera emphasized the need to develop therapeutic alliances, noting “[t]rust between a medical responder and the patient is crucial. Without it, we wouldn’t be able to get patients to talk to us, to let us touch them or stick needles filled with medications into their arms. But if we bundle people into our ambulances against their will, that trust will break.”

Yet, even assuming a person requires and would benefit from a short period of acute inpatient psychiatric stabilization services, there is a shortage of inpatient psychiatric beds in New York City. Governor Hochul, in fact, took the private hospitals to task at last week’s press conference discussing her “Cops, Cameras, Care” initiative, as the Subway Safety Plan was rebranded. She noted that the care connection piece was lagging because hospitals, who received significant rate adjustments in last year’s budgets, tend to shun Medicaid patients to receive services in the few private inpatient psychiatric settings, which can make it harder to find beds for homeless people. The January 27, 2023 press conference is <https://www.governor.ny.gov/news/governor-hochul-and-mayor-adams-announce-significant-progress-subway-and-transit-public-safety>.

Families and advocates have long pointed out that many people simply languish in psychiatric emergency rooms for longer. The fundamental systemic issue, however, is that there are inadequate services and support for patients following their discharge from inpatient settings. Andy Newman and Joseph Goldstein, Can New York’s Plan for Mentally Ill Homeless People Make a Difference?, New York Times, December 15, 2022, <https://www.nytimes.com/article/nyc-homeless-mental-health-plan.html>.

The Bazelon Center issued a report objecting to the NYC Mental Health Involuntary Removals Policy that provides citations to a raft of research that indicates the success to be found with high-quality engagement of homeless people with mental health conditions.<sup>3</sup> One such successful approach is that deployed by the New York’s Street Homeless Advocacy Project, a peer-led street engagement process that has successfully connected street homeless people to supportive services.<sup>4</sup> Safe, stable, and affordable housing, provided with voluntary supports, has always been shown to help unhoused New Yorkers with mental health challenges, and others, stabilize and avoid hospitalization and incarceration.<sup>5</sup> A menu of longer-term services, such as assertive community treatment (ACT), supported employment, and peer support services—delivered not in the hospital, but in the person’s own home and community—have been shown to break the cycle of institutionalization.<sup>6</sup> Low barrier/no barrier supportive housing is also a critical part of the equation.<sup>7</sup>

Regrettably, the City has actually reduced the scope of effective evidence-based strategies that would better address mental health crises. We respectfully direct the Council’s attention to the report issued by New York City’s Public Advocate in November 2022.<sup>8</sup> The Public Advocate’s comprehensive report notes that there are now only four community- and peer-led Respite Care

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<sup>3</sup> Judge David L. Bazelon Center for Mental Health Law, *Mayor Adams’ Plan Will Not Help New Yorkers With Mental Disabilities*, December 22, 2022, <http://www.bazelon.org/wp-content/uploads/2022/12/BC-NYC-Statement-12-2-22.pdf>. See also Center for Court Innovation, *The Myth of Legal Leverage?* (“Studies of therapeutic intervention strongly suggest that the quality of the human interaction outweighs the importance of any particular protocol or approach....” “factors like goal consensus, empathy, alliance, and positive regard are significantly greater than, say, model fidelity,” and “a robust therapeutic relationship is less a matter of dosage and more a matter of engagement.”), [https://www.courtinnovation.org/sites/default/files/media/documents/2020-04/report\\_the\\_myth\\_of\\_legal\\_leverage\\_04232020.pdf](https://www.courtinnovation.org/sites/default/files/media/documents/2020-04/report_the_myth_of_legal_leverage_04232020.pdf)

<sup>4</sup> See Forum Staff, *City Launches Homeless Advocacy Project*, The Forum (Jul. 21, 2022), <http://theforumnewsgroup.com/2022/07/21/city-launches-homeless-advocacy-project/>.

<sup>5</sup> S. Tsemberis & R.F. Eisenberg, *Pathways to Housing: Supported Housing for Street-dwelling Homeless Individuals with Psychiatric Disabilities*, *Psychiatric Services* Vol. 51, Issue 4, 487-93 (2000), <https://doi.org/10.1176/appi.ps.51.4.487>.

<sup>6</sup> Bazelon Center for Mental Health Law, *Diversion to What? Evidence-Based Mental Health Services that Prevent Needless Incarceration* (September 2019), [http://www.bazelon.org/wp-content/uploads/2019/09/Bazelon-Diversion-to-What-Essential-Services-Publication\\_September-2019.pdf](http://www.bazelon.org/wp-content/uploads/2019/09/Bazelon-Diversion-to-What-Essential-Services-Publication_September-2019.pdf).

<sup>7</sup> See Coalition for the Homeless, *State of the Homeless 2022: New York at a Crossroads*, <https://www.coalitionforthehomeless.org/state-of-the-homeless/>. The report by the Coalition for the Homeless, the plaintiff in the *Callahan* case establishing the right to shelter in New York City, offers a robust menu of housing types that are necessary to meet the needs of unhoused New Yorkers.

The Council is no doubt aware that Governor Hochul’s recently released budget proposal setting out funding for a variety of supportive housing opportunities raises more questions than it answers. It is unclear how this proposal fits into or advances last year’s launch of a comprehensive, \$25 billion housing plan which then included a \$25 billion, five-year housing plan intended to create or preserve 100,000 affordable homes across New York, including 10,000 with support services for vulnerable populations. See e.g. <https://www.governor.ny.gov/news/governor-hochul-announces-launch-comprehensive-25-billion-housing-plan-historic-fy-2023-budget>.

This year’s proposal is to create some 3,500 new housing units for individuals with mental illness. The proposed units are largely transitional housing, not stable long-term or permanent opportunities; nor are they no-barrier or low-barrier. There is also a 5 year development time attached to the scatter site housing opportunities which represent more than 50% of the units proposed to be created.

<sup>8</sup> Office of the Public Advocate, *Improving New York City’s Response to Individuals in Mental Health Crisis 2022 Update 3* (November 2022) at pg. 3, [https://advocate.nyc.gov/static/assets/Mental\\_Health\\_Updates\\_2022c.pdf](https://advocate.nyc.gov/static/assets/Mental_Health_Updates_2022c.pdf).

Centers in the five boroughs of the city, down from eight such centers in 2019. There are only 19 behavioral health mobile crisis teams (MCTs) that can respond to calls for help instead of the police, serving the entire city in 2022, down from 24 teams in 2019.<sup>9</sup> And, while the City has a pilot program to send teams of alternative first responders to 911 calls related to mental health crises, these “B-HEARD” teams have a limited scope and capacity. B-HEARD teams responded to only 16 percent of 911 calls related to mental health crises in the few Manhattan neighborhoods where they are being piloted, and they have a response time that is not even comparable with that of the police.<sup>10</sup>

The Public Advocate’s report found that the city is “lagging behind in providing supportive housing, with an often-delayed application process,”<sup>11</sup> and “lagging in the inclusion of peers with lived-in experiences into the city’s mental health programs.”<sup>12</sup> NAMI-NYC has noted that “the City has the power to provide onsite treatment, as well as treatment in homeless shelters or supported housing, but has chosen not to.”<sup>13</sup> The Correct Crisis Intervention Today - New York City (CCIT-NYC) coalition, which is made up of civil rights and human service organizations (including the NYCLU), people with lived experience with mental health crises, family members, and other advocates, has advocated for a decade to increase the availability of evidence-based, peer-led responses to mental health crises.<sup>14</sup> “Daniel’s Law,” of course, is an example of a statewide initiative that would provide the opportunity to meet this moment with a bold new vision for community safety that starts with removing police as the default solution to address mental health needs, placing the power to design, implement, and monitor peer-infused crisis response systems.<sup>15</sup>

We also respectfully direct the Council’s attention to a comprehensive report from the United States Interagency Council on Homelessness titled *All In: The Federal Strategic Plan to Prevent and End Homelessness*.<sup>16</sup> The Interagency Council notes that local officials have responded to a rise in the number of people living in unsheltered locations “not always in the most effective ways” through “out of sight, out of mind” policies that displace people without successfully connecting them to evidence-based services.<sup>17</sup> This is precisely a description of the City’s NYPD-led homeless sweeps initiatives to date, initiatives that clearly fall within the parameters of criminalization of homelessness which the Interagency Council notes is a completely counterproductive approach to a pressing social issue.

Importantly, these “out of sight out of mind” policies take away resources from constructive solutions to homelessness, create trauma, can erect financial and criminal legal barriers for

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<sup>9</sup> *Id.* at 5.

<sup>10</sup> *Id.* at 7-8.

<sup>11</sup> *Id.* at 5.

<sup>12</sup> *Id.* at 10.

<sup>13</sup> National Alliance on Mental Illness – NYC, NAMI-NYC Calls for Comprehensive, Person-Centered Behavioral Health Care for People Living with Serious Mental Illness, November 29, 2022, <https://naminycmetro.org/involuntaryremoval/>.

<sup>14</sup> See <https://www.ccitnyc.org/>.

<sup>15</sup> “Daniel’s Law,” A.2210 (Bronson) / S.2398 (Brouk), <https://legislation.nysenate.gov/pdf/bills/2023/S2398>.

<sup>16</sup> United States Interagency Council on Homelessness, *All In: The Federal Strategic Plan to Prevent and End Homelessness* (December 2022) <https://www.usich.gov/All-In-The-Federal-Strategic-Plan-to-Prevent-and-End-Homelessness.pdf>.

<sup>17</sup> *Id.* at 20.

people seeking pathways out of housing insecurity and homelessness, and disproportionately burden already-marginalized communities including people of color, LGBTQI+ people and people with disabilities.<sup>18</sup>

The NYC Mental Health Involuntary Removals Policy must be assessed in the context of the City's enormous significant cuts to critical services and safety net programs New Yorkers need, while simultaneously funding NYPD overspending and enabling NYPD impunity by decreasing funding for police oversight and accountability.

We need the Speaker and City Council to ensure that the FY24 Budget restores and protects critical services and programs that our communities rely on and that are essential for the full recovery of our city, which has resulted in the inaccessibility of low-cost care and long waiting lists. Since Mayor Adams took office he has been steadily cutting personnel, positions and funding from our public schools, homeless and housing services, police oversight, libraries, mental health services, services for the aging, and other critical programs. Concurrently, he has continued to expand the NYPD's resources to advance discriminatory policing practices that fail to meaningfully and systemically address safety concerns of New Yorkers, while working to increase the role of the NYPD in providing social and health services that are best handled by care workers and other expert professionals.

New Yorkers need more direct access to economic, health and care resources -- not more police.

## **2. The Federal and State Constitutions Impose Strict Limits on the Government's Ability to Detain People Experiencing Mental Illness – Limits that the NYC Mental Health Involuntary Removals Policy Violates.**

A highly complex web of federal and New York State constitutional provisions, various federal and New York State statutes, agency guidance issued by the New York State Office of Mental Health ("OMH") as well as federal court and state court caselaw sets strict parameters to guard individual rights when the government exercises its police power to effect the involuntarily detention and involuntary and forcible treatment of an individual on the basis of their mental health.

Not only is the NYC Mental Health Involuntary Removals Policy approach lacking in substantive merit as detailed above, as written it also flies in the face of these long-established legal protections.<sup>19</sup>

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<sup>18</sup> *Id.* at 20.

<sup>19</sup> We note that the legal analysis we provide, in this section and the following section of our testimony, is based on the extremely limited information currently known about the NYC Mental Health Involuntary Removals Policy, i.e. the Policy Directive, the FINEST message, and the ongoing public discussion of the policy by Mayor Adams and other elected officials. The NYCLU has FOILED all the agencies identified in the Policy Directive for information relating to the NYC Mental Health Involuntary Removals Policy and we have been stonewalled by the agencies, either failing to respond by the dates originally identified or pushing out preliminary response dates to May 1, 2023 (NYPD) and May 4, 2023 (FDNY/EMS). As we will see we end our testimony today urging the Council to ensure there is robust data reported to ensure transparency as to the details of the NYC Mental Health Involuntary Removals Policy and its implementation. The data we urge the Council to require from the Administration is critical

## Background

Article 9 of the New York State Mental Hygiene Law (“MHL”) provides authority for so-called “mental hygiene arrests.” MHL § 9.41 authorizes law enforcement offices, such as the NYPD, to detain and transport people in custody for psychiatric evaluations. MHL § 9.58 authorizes designated clinicians to direct law enforcement officers, such as the NYPD, to carry out the removal of individuals to a hospital for evaluation.

These two provisions, which form the lynchpin of the NYC Mental Health Involuntary Removals Policy, both provide that an involuntary removal may occur when any person “appears to be mentally ill and is conducting himself or herself in a manner which is likely to result in serious harm to the person or others.” MHL §§ 9.41 and 9.58.<sup>20</sup>

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to further analysis as to whether the implementation of the Policy has actually resulted in the legal violations we identify in our testimony.

<sup>20</sup> Like most of the provisions of MHL Article 9 which governs the involuntary admission and treatment of people experience mental health challenges, MHL § 9.41 and MHL § 9.58 rest on the definitional construct of “danger” to self or others.

Section 9.41 provides as follows:

§ 9.41 Emergency assessment for immediate observation, care, and treatment; powers of certain peace officers and police officers

Any peace officer, when acting pursuant to his special duties, or police officer who is a member of the state police or of an authorized police department or force or of a sheriff's department **may take into custody any person who appears to be mentally ill and is conducting himself in a manner which is likely to result in serious harm to himself or others.** “Likelihood to result in serious harm” shall mean (1) substantial risk of physical harm to himself as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that he is dangerous to himself, or (2) a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm. Such officer may direct the removal of such person or remove him to any hospital specified in subdivision (a) of section 9.39 or, pending his examination or admission to any such hospital, temporarily detain any such person in another safe and comfortable place, in which event, such officer shall immediately notify the director of community services or, if there be none, the health officer of the city or county of such action.

MHL § 9.41 (emphasis supplied).

Section 9.58 provides as follows:

§ 9.58 Transport for evaluation; powers of approved mobile crisis outreach teams.

(a) A physician or qualified mental health professional who is a member of an approved mobile crisis outreach team shall have the power to remove, or pursuant to subdivision (b) of this section, to **direct the removal of any person who appears to be mentally ill and is conducting themselves in a manner which is likely to result in serious harm to themselves or others,** to a hospital approved by the commissioner pursuant to subdivision (a) of section 9.39 or section 31.27 of this chapter or where the team physician or qualified mental health professional deems appropriate and where the person voluntarily agrees, to a crisis stabilization center specified in section 36.01 of this chapter.

At the launch of the so-called Subway Safety Program by Mayor Adams and Governor Hochul in February 2022, OMH Commissioner Ann Marie T. Sullivan and Chief Medical Officer Thomas Smith issued interpretive guidance setting forth the circumstances under which courts have determined that the MHL already permits “persons who appear to be mentally ill and who display an inability to meet basic living needs” to be mandated into emergency psychiatric assessments and emergency and involuntary inpatient psychiatric admissions (the “OMH Involuntary Removal Guidance”).<sup>21</sup>

As discussed below, New York courts have addressed the probable cause standard that justifies mental hygiene “arrests” under § 9.41 as well as the due process standards that must be met to permit involuntary retention, admission, and treatment where a person has been deemed to be unable to meet basic needs by reason of mental illness. There is no reported caselaw that addresses whether probable cause is required for a clinically-directed MHL § 9.58 direction to law enforcement to effect a mental hygiene arrest. And, there is no reported caselaw that assesses whether inability to meet basic needs rises to the level of probable cause to justify a mental hygiene arrest under either MHL § 9.41 or MHL § 9.58.

### Constitutional Considerations

In discussing involuntary confinement, the United States Supreme Court has determined that “a State cannot constitutionally confine, without more, a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.” *O’Connor v. Donaldson*, 422 U.S. 563, 576 (1975). The Court further directed that “[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person’s physical liberty.” *Id.* At 575. The Second Circuit has cautioned, in a case concerning the mental hygiene arrest of a woman for psychiatric evaluation, that evidence that the woman appeared irrational, annoyed, and very uncooperative, without more, was insufficient to infer that she was dangerous and, thus, establish probable cause for arrest. *Myers v. Patterson*, 819 F.3d 625, 632 (2d Cir. 2016).

Federal courts have long read constitutional guarantees of due process into the various provisions of MHL Article 9 as they relate to involuntary admission, retention and treatment. *See e.g.*

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**(b) If the team physician or qualified mental health professional determines that it is necessary to effectuate transport, he or she shall direct peace officers, when acting pursuant to their special duties, or police officers, who are members of an authorized police department or force or of a sheriff's department, to take into custody and transport any persons identified in subdivision (a) of this section.** Upon the request of such physician or qualified mental health professional, an ambulance service, as defined in subdivision two of section three thousand one of the public health law, is authorized to transport any such persons.

MHL § 9.58 (emphasis supplied).

<sup>21</sup> *See* Interpretative Guidance for the Involuntary and Custodial Transportation of Individuals for Emergency Assessments and for Emergency and Involuntary Inpatient Psychiatric Admissions, Date: February 18, 2022, <https://omh.ny.gov/omhweb/guidance/interpretative-guidance-involuntary-emergency-admissions.pdf>.

As noted, this document was issued by OMH in connection with Governor Hochul’s and Mayor Adams’ joint plan to sweep away a variety of people sheltering in the New York City subway system. *See* Subway Safety Plan, <https://www1.nyc.gov/assets/home/downloads/pdf/press-releases/2022/the-subway-safety-plan.pdf>.

*Project Release v. Prevost*, 722 F.2d 960 (2d Cir. 1983). It is well settled that for involuntary removals under Section 9.41 of the MHL, “courts apply the same concepts of probable cause and objective reasonableness as in criminal cases to determine whether the confinement is privileged because the plaintiff’s behavior was likely to result in serious harm.” *Greenaway v. County of Nassau*, 97 F. Supp. 3d 225, 233 (E.D.N.Y. 2015). In doing so, courts treat involuntary removals as “the functional equivalent of [] arrest[s],” *Disability Advocates, Inc. v. McMahon*, 279 F. Supp. 2d 158, 168-69 (N.D.N.Y. 2003), *aff’d*, 124 F. App’x 674 (2d Cir. 2005).

Probable cause for a MHL § 9.41 mental hygiene arrest only “exists if there are reasonable grounds for believing that the person seized is dangerous to herself or to others.” *Guan v. City of New York*, 2020 WL 6365201 (S.D.N.Y. Oct. 29, 2020), *aff’d on other grounds*, 37 F.4th 797 (2d Cir. 2022) (internal citation and quotation omitted); *Anthony v. City of New York*, 339 F.3d 129, 142 (2d Cir. 2003) (citation omitted).<sup>22</sup>

### OMH Involuntary Removal Guidance

Although the OMH Involuntary Removal Guidance does not reference the standards requiring probable cause and danger to self or others that cabins mental hygiene arrests under MHL §§ 9.41 and 9.58, the OMH Involuntary Removals Guidance specifies that for purposes of a 9.41 mental hygiene arrest, “[l]ikelihood of serious harm includes: attempts/threats of suicide or self-injury; threats of physical harm to others; or other conduct demonstrating that the person is dangerous to him or herself, including a person’s refusal or inability to meet his or her essential need for food, shelter, clothing or health care, **provided that such refusal or inability is likely to result in serious harm if there is no immediate hospitalization**” (emphasis added).<sup>23</sup> Whether inadvertent or intentional, this language is not repeated in the OMH Involuntary Removals Guidance relating to MHL § 9.58.

With respect to MHL § 9.41 mental hygiene arrests, the OMH Involuntary Removal Guidance relies on caselaw describing an individual’s inability to meet their essential needs in the context of continued retention or involuntary admission of the person for psychiatric treatment (as opposed to mental hygiene arrests). It notes that in order to satisfy substantive due process requirements, “the continued confinement of an individual must be based upon a finding that the

<sup>22</sup> As noted, there is no reported case law assessing probable cause for a removal directed pursuant to MHL § 9.58.

<sup>23</sup> OMH Involuntary Removals Guidance at 3 (quoting *Matter of Scopes v. Shah*, 59 A.D.2d 203, 398 N.Y.S.2d 911 (3d Dep’t 1977)). In *Matter of Scopes*, the Appellate Division’s Third Department ruled that in order to satisfy substantive due process requirements, “the continued confinement of an individual must be based upon a finding that the person to be committed poses a real and present threat of substantial harm to himself or others.” See also *Matter of Carl C.*, 126 A.D.2d 640 (2d Dept 1987) (“State must prove, by clear and convincing evidence, that the person is mentally ill and that he poses a substantial threat of physical harm to himself (resulting) from a refusal or inability to meet his essential needs for food, clothing or shelter”); *Boggs v. Health Hosps. Corp.*, 132 A.D.2d 340, 523 N.Y.S.2d 71 (1<sup>st</sup> Dept. 1987)(noting that the sole issue before the court is whether, upon clear and convincing evidence, “Ms. Boggs is so severely mentally ill that, unless she continues to receive hospital treatment, she is in danger of doing serious harm to herself”). In the *Boggs* case, the evidence before the court presented a combination of factors that led to the court’s conclusion that there was justification for involuntary retention of Ms. Boggs in a psychiatric facility, i.e. Ms. Boggs was homeless and was allegedly living without sufficient clothing on a sidewalk grate in winter, running into traffic, making verbal threats to passersby, tearing up and urinating on money that passersby gave her, and covering herself in her own excrement.

person to be committed poses a real and present threat of substantial harm to himself or others, but that such a finding does not require proof of a recent overtly dangerous act.”<sup>24</sup>

### As Written, the NYC Mental Health Involuntary Removals Policy Deviates Significantly from the OMH Involuntary Removals Guidelines

The NYC Mental Health Involuntary Removals Policy, as written (and discussed by Mayor Adams) deviates significantly from the standard of proof set forth in caselaw and the OMH Involuntary Removals Guidance that establishes when the “inability to meet essential needs” (or the so-called “basic needs standard”) rises to the level of “likely to result in serious harm.”

The NYC Mental Health Involuntary Removals Policy notes that “case law does not provide extensive guidance regarding removals for mental health evaluations based on short interactions in the field” and then suggests that the following circumstances “could be reasonable indicia”: “serious untreated physical injury, unawareness or delusional misapprehension of surroundings, or unawareness or delusional misapprehension of physical condition or health.” These are vague, broad, and undefined standards untethered to caselaw or the OMH Involuntary Removals Guidelines directives. Moreover, these circumstances do not in fact incorporate the immediacy standard the OMH Involuntary Removals Guidelines require.<sup>25</sup>

The City’s interpretation of the basic needs standard as set forth in the NYC Mental Health Involuntary Removals Policy, presents as patently insufficient to meet the OMH-cited caselaw establishing what constitutes danger to self-standard as measured by the incapacity to survive safely in the community. Given *O’Connor*, application of the basic needs standard absent sufficient indicia of dangerousness raises constitutional concerns. *See also Myers*, 819 F.3d at 632 (holding that a display of irrationality, annoyance, and a lack of cooperation was insufficient to imply dangerousness and to establish that the police acted with probable cause).

The NYC Mental Health Involuntary Removals Policy’s attempt to establish a link between basic needs and conduct likely to result in serious harm is analogous to the police’s unsuccessful attempt to establish a link between dangerousness and behaviors unrelated to harm in *Myers*. The mere fact that an unhoused person cannot, economically, procure housing and chooses the safety of the subway vs. the dangerousness of city congregate shelters does not constitute *per se* evidence of mental illness. Pretextual removals on this ground, as the NYC Mental Health

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<sup>24</sup> OMH Involuntary Removals Guidance at 2 (internal citation and quotation omitted).

<sup>25</sup> As you know, FINEST messages are urgent communications to the NYPD force as a whole. The attached FINEST message addresses the NYC Mental Health Involuntary Removals Policy and directs NYPD officers to conduct a mental hygiene arrest when the person appears mentally ill and incapable of meeting basic human needs to such an extent that the person is likely to suffer physical injury or serious harm **without immediate attention** (emphasis supplied). The FINEST message also offers examples (without language of imminence of danger): “an incoherent person may be unable to assess and safely navigate their surroundings (e.g. avoiding oncoming traffic or subway tracks), may suffer from a serious untreated injury, or unable to seek out food, shelter or other things needed for survival” (emphasis supplied).

Unlike the NYC Mental Health Involuntary Removals Policy, the FINEST message both references OMH’s standard of imminent harm and urgency and *O’Connor*’s language with respect to survival. The FINEST message also notes that NYPD Legal Affairs is available to provide some level of support to officers in the field.

Involuntary Removals Policy directs, would be contrary to long established federal and state constitutional rights and norms.

### **3. The NYC Mental Health Involuntary Removals Policy Reflects and Will Exacerbate Bias against Unhoused People and People with Mental Illness and Will Disproportionately Burden People of Color**

There is enormous bias reflected in statements accompanying the Administration’s public discussion of the NYC Mental Health Involuntary Removals Policy – as well as statements concerning the various joint city and state initiatives to sweep New Yorkers, who are disproportionately people of color, who are unhoused or experiencing mental illness out of public sight and into institutional settings and forced treatment.

#### Stoking Bias

It is critically important that the Council focus their attention on the public justifications proffered for this initiative.

Mayor Adams has routinely noted that the administration has a “moral obligation” to connect severely mentally ill New Yorkers to appropriate care and housing. The NYCLU, and likely everyone the Council will hear from during this oversight hearing, agree completely with this unremarkable statement. Society’s shared “moral obligation” derives in large part from the doctrine of *parens patriae*, a legal term referring to the power of the government to act on behalf of people who are unable to care for themselves.<sup>26</sup> Indeed, Article XVII of the New York State Constitution, the “Social Welfare” provision of the state constitution, makes manifest the government’s inherent *parens patriae* power with its mandate that New York must provide ‘aid, care and support of the needy.’<sup>27</sup> Article XVII specifically includes those with mental illness and other disabilities.<sup>28</sup>

But the Adams administration, and the City’s state partners, proffer a second enormously troubling and retrogressive rationale. This rationale repeats unjustified and stigmatizing language that relies upon pernicious stereotypes and exacerbates bias – that New Yorkers who are

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<sup>26</sup> The New York Court of Appeals explained the *parens patriae* doctrine in *Rivers v. Katz*, 67 N.Y.2d 485, 496-97 (N.Y. 1986) as follows: “There is no doubt that the State may have a compelling interest, under its *parens patriae* power, in providing care to its citizens who are unable to care for themselves because of mental illness (*Addington v. Texas*, 441 U.S. 418, 426 [1979]). For the State to invoke this interest, ‘the individual himself must be incapable of making a competent decision concerning treatment on his own. Otherwise, the very justification for the state’s purported exercise of its *parens patriae* power — its citizen’s inability to care for himself [...] would be missing. Therefore, *the sine qua non* for the state’s use of its *parens patriae* power [...] is a determination that the individual [...] lacks the capacity to decide for himself’ (*Rogers v. Okin*, 634 F.2d 650, 657 [1980]; *see also, Matter of K.K.B.*, 609 P.2d 747, 750 [Okla. 1980]. **Such a determination is uniquely a judicial, not a medical function** (*see, Rogers v. Commissioner of Dept. of Mental Health*, 390 Mass. 489 [1983]; *Matter of Roe*, 383 Mass. 415 [1980]” (emphasis supplied).

<sup>27</sup> NY Const art XVII § 1. The Social Welfare provision of the state constitution arose from the crash of the stock market in 1929 and the ensuing depression that wrought unprecedented and widespread devastation for the lives of New Yorkers, and countless millions, across the country. Facing an unprecedented homelessness crisis then, the New York State Constitution was amended to include the social welfare mandate.

<sup>28</sup> NY Const art XVII § 4.

unhoused and/or living with mental health challenges *per se* constitute a direct threat to the personal safety of others.

That a person is unhoused or living with mental health challenges is not indicative of dangerousness to others. Nor is an inability to meet one's own basic needs indicative of dangerousness to others.<sup>29</sup>

Yet the mayor's statements at the November press conference directly draw the line between mental illness and the always present likelihood of violent acts directed by that person towards others:

There's nothing dignified about using a corner of a tent as a restroom or having month-old food sitting there or talking to yourself, being delusional, or waiting until you carry out a dangerous act before we respond. That is just so irresponsible that **we know that this person is about to probably go off the edge and harm someone** but we're going to wait until it happened.<sup>30</sup>

The City's Subway Safety Plan prioritizes the perceptions of the public who have ingrained fear of unhoused people, people with mental illness and, inevitably, people of color:

[O]ur subways must be safe and feel safe for every person who enters them . . . Our city's prosperity depends on everyone feeling confident and secure when they enter a station.<sup>31</sup>

The joint City and State report *Making New York Work for Everyone* specifically offers up the Subway Safety Plan, the ongoing New York City homeless sweeps initiative and the NYC

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<sup>29</sup> Individuals who are homeless have an increased risk of victimization and violence. The prevalence of violence victimization in the homeless population has been estimated to range from 14% to 21% and approximately one-third report having witnessed a physical attack on another person who was. This rate of violence is highly disparate when compared to the general population in which only 2% report experiencing a violent crime. In addition, research has demonstrated that some subpopulations of homeless individuals are at even increased risk of experiencing violence. For instance, those who experience longer bouts of homelessness have increased risk of victimization. Those who have been previously turned away from a shelter or reported committing a crime since becoming homeless are also significantly more likely to experience victimization. *See e.g. Violence and Victims: Exploring the Experiences of Violence Among Individuals Who Are Homeless Using a Consumer-Led Approach, Violence and Victims*, Volume 29, Number 1, 2014, [https://nhchc.org/wp-content/uploads/2019/08/vv-29-1\\_ptr\\_a8\\_122-136.pdf](https://nhchc.org/wp-content/uploads/2019/08/vv-29-1_ptr_a8_122-136.pdf).

People with mental illness are also no more violent than the general population and, are in fact, actually 12 times more likely to be victims of violent crime opposed to perpetrators. *See The Population Impact of Severe Mental Illness on Violent Crime*, Seena Fazel, M.B.Ch.B., M.R.C.Psych., M.D.; Martin Grann, C.Psych., Ph.D., *Am J Psychiatry* 2006;163:1397-1403, <http://ajp.psychiatryonline.org/article.aspx?articleid=96905>. Despite popular perceptions and fears, empirical data connecting even severe mental illness with an increased risk of perpetrating violence towards others is mixed, and an appropriate assessment of dangerousness is necessarily highly individualized. *See, e.g., Violence and Mental Illness: What is the True Story?* Varshney M, Mahapatra A, Krishnan V, et al. , *J Epidemiology & Community Health* 2016; 70:223-225, <https://jech.bmj.com/content/70/3/223>.

<sup>30</sup> "Address on the Mental Health Crisis in New York City," <https://www.nyc.gov/office-of-the-mayor/news/871-22/transcript-mayor-eric-adams-delivers-address-mental-health-crisis-new-york-city-holds>.

<sup>31</sup> Subway Safety Plan at 4, <https://www1.nyc.gov/assets/home/downloads/pdf/press-releases/2022/the-subway-safety-plan.pdf>.

Mental Health Involuntary Removals Policy as the most immediate and successful solutions to the alleged dangers of criminally violence behavior presented by New Yorkers who are disproportionately people of color, who are unhoused or experiencing mental illness:

Concerns about safety and quality of life can stymie economic prosperity in terms of investment, revenue, and overall economic activity. We must acknowledge that many residents, commuters, and business owners have been increasingly concerned for their safety and that of their employees as they move around the city<sup>32</sup> [...] as part of the [NYC Mental Health Involuntary Removals Policy] plan, the Mayor issued a directive to outreach workers, City-operated hospitals, and first responders clarifying that they have the legal authority to provide care to New Yorkers when severe mental illness prevents them from meeting their own basic human needs to the extent that they are a danger to themselves **or others** (emphasis added).<sup>33</sup>

Even Governor Hochul, announcing the proposed 2023-2024 budget package largely directed at funding New York City's mental health services, intentionally conflates public discomfort with actual danger, describing "a public safety crisis" stemming from underfunding of mental health services and pointing to the public feeling "anxious" about encountering people with mental health conditions while on the subway.

Right now, nearly 3,200 New Yorkers struggling with severe mental illness or addiction are living on the street and subways. At the same time, we have insufficient levels of inpatient psychiatric beds and outpatient services [...] We have underinvested in mental health care for so long, and allowed the situation to become so dire, that it has become a public safety crisis, as well [...] New Yorkers are feeling anxious on the subway when they encounter people who struggle with mental illness and need help.<sup>34</sup>

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<sup>32</sup> *Making New York Work for Everyone*, December 2022, at pg. 42, [https://edc.nyc/sites/default/files/2022-12/New-NY-Action-Plan-Making New York Work for Everyone.pdf](https://edc.nyc/sites/default/files/2022-12/New-NY-Action-Plan-Making%20New%20York%20Work%20for%20Everyone.pdf).

We note that the *Making New York Work for Everyone* report appears to be the culmination of months of collaboration of a panel of "top business and community leaders under the stewardship of two former Deputy Mayors." See *Making New York Work for Everyone* at 4. Regrettably this constellation of "civil leaders and industry experts" included NO people with lived experiences, NO experts in mental health treatment or leaders of disability advocacy organizations, and NO experts in housing for people with disabilities or leaders of housing and homeless advocacy organizations.

The disability justice community has long advocated "nothing about us without us," calling for policy making that ensures the full and direct participation of members of the group/s affected by that policy. Regrettably, City and state leaders routinely show scant commitment to inclusive decision relating to people with disabilities, including people with mental illness, and people who are unhoused, much less New Yorkers from impacted communities of color.

<sup>33</sup> *Making New York Work for Everyone* at 44.

<sup>34</sup> Destra, Shantel, "Lawmakers welcome Hochul's \$1 billion to address mental health," City & State NY, Jan. 11, 2023. <https://www.cityandstateny.com/policy/2023/01/lawmakers-welcome-hochuls-1-billion-address-mental-health/381708/>.

This type of verbiage from Mayor Adams and his state and local partners is extraordinarily harmful and have the effect of perpetuating grossly retrospective bias against New Yorkers living with mental illness and New Yorkers who are unhoused.<sup>35</sup>

### The NYC Mental Health Involuntary Removals Policy Also Implicates Disability and Other Operative Anti-Discrimination Laws and Caselaw

Beyond the constitutional concerns occasioned by the NYC Mental Health Involuntary Removals Policy, City, State, and Federal statutes and interpretive caselaw prohibit discrimination on a variety of bases, including disability (which itself includes mental illness and substance use disorders), and require the City and other government entities to provide reasonable accommodations to people with disabilities. The NYC Mental Health Involuntary Removals Policy, as written, appears to violate this well-developed anti-discrimination rights regimen.<sup>36</sup>

For example, the NYC Mental Health Involuntary Removals Policy would appear to deny people access to public spaces such as the subway and the streets, based on their actual or perceived mental illness, in violation of the Americans with Disabilities Act (ADA).<sup>37</sup>

To the extent that the NYC Mental Health Involuntary Removals Policy would sweep New Yorkers into institutional settings and forced treatment, the NYC Mental Health Involuntary Removals Policy would appear also to violate the ADA “integration mandate” established by *Olmstead v. L.C.*, 527 U.S. 581 (1999). In *Olmstead*, the Supreme Court held that unnecessary

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<sup>35</sup> We direct the Council’s attention to the Making New York Work for Everyone report, which was the culmination of months of collaboration of a panel of “top business and community leaders under the stewardship of two former Deputy Mayors.” See “Making New York Work for Everyone” at 4. Regrettably this constellation of “civil leaders and industry experts” included NO people with lived experiences, NO experts in mental health treatment or leaders of disability advocacy organizations, and NO experts in housing for people with disabilities or leaders of housing and homeless advocacy organizations.

The disability justice community has long espoused the demand: “nothing about us without us,” calling for no policy making by any entity without the full and direct participation of members of the group/s affected by that policy. Yet City and State leaders routinely show scant commitment to inclusive decision relating to people with disabilities, including people with mental illness, and people who are unhoused.

<sup>36</sup> Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, provides: “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” The City’s Human Rights Law further provides: “it is an unlawful discriminatory practice for any person prohibited by the provisions of this section from discriminating on the basis of disability not to provide a reasonable accommodation to enable a person with a disability to . . . enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity.” N.Y.C. Admin. Code § 8-107(15)(a).

<sup>37</sup> Of course, the ADA explicitly does not require an entity to include an individual who presents a “direct threat” meaning “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.” 42 U.S.C. § 12182(3). But, for all of the reasons set forth above, the NYC Mental Health Involuntary Removals Policy would appear to cover a significant range of situations that cannot be categorized as falling within this particular provision of the ADA.

institutionalization of people with disabilities constitutes discrimination under the ADA.<sup>38</sup> The ADA’s integration mandate “requires that individuals with disabilities receive services in the most integrated setting appropriate to their needs.”<sup>39</sup> A variety of NYS agencies, including the Office for People with Developmental Disabilities<sup>40</sup> as well as OMH<sup>41</sup> have acknowledged that this mandate necessitates a shift in New York’s state mental health services towards greater community-based services.

To the extent that the NYC Mental Health Involuntary Removals Policy would sweep New Yorkers, who are disproportionately people of color, who are unhoused or experiencing mental illness, out of public sight and into institutional settings and forced treatment, this initiative is the latest of the Mayor’s initiatives that burdens New Yorker’s so-called “right to remain” in the public domain, as explained by the Supreme Court decades ago in *City of Chicago v. Morales*, 527 U.S. 41, 53–54 (1999). In *Morales*, the Supreme Court held that “the freedom to loiter for innocent purposes is part of the ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment.... Indeed, it is apparent that an individual’s decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is a part of our heritage.” (plurality opinion) (emphasis added) (internal quotation marks and citations omitted)). to endanger other constitutional freedoms, *see, e.g., Jones v. City of Los Angeles*, 444

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<sup>38</sup> It is important to note that the plaintiffs in *Olmstead* themselves had cycled in and out of psychiatric hospitalization, in large part due to the absence of appropriate supports and services in community-based settings. The Supreme Court stated in *Olmstead* that “unjustified institutional isolation of persons with disabilities is a form of discrimination” in part because “[i]n order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice.” *Olmstead.*, 527 U.S. at 600-601.

<sup>39</sup> *See Serving People with Disabilities in the Most Integrated Setting: Community Living and Olmstead*, U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR), <https://www.hhs.gov/civil-rights/for-individuals/special-topics/community-living-and-olmstead/index.html>.

<sup>40</sup> The Council may know that the NYCLU has long led the *Willowbrook* case, a landmark class-action litigation on behalf of people with intellectual disabilities initiated in 1972, that was in the vanguard of the civil rights movement for people with disabilities. Well before the *Olmstead* decision in 2009, New York State recognized the right of people with disabilities in the *Willowbrook* case to be afforded the “least restrictive and most normal living conditions possible.” *See NYSARC et al. v. NYS, Parisi et al. v. NYS et al.*, 72 Civ. 356, 357 (U.S. District Court for the Eastern District of New York)(RJD)..

<sup>41</sup> *See e.g.* New York State Home and Community-Based Services Settings (“HCBS”) Transition Plan (2018) at pg. 195, [https://www.health.ny.gov/health\\_care/medicaid/redesign/hcbs/docs/2018-05-18\\_hcbs\\_final\\_rule.pdf](https://www.health.ny.gov/health_care/medicaid/redesign/hcbs/docs/2018-05-18_hcbs_final_rule.pdf). For example, New York’s HCBS Transition Plan notes the pressing need for New York’s mental health system to come into compliance with *Olmstead* and the ADA integration mandate:

The legal system’s expansion of civil rights to include people with mental illness, as part of *Olmstead* Legislation and Americans with Disabilities Act, has begun to move policy from the concept of least restrictive setting to full community inclusion. However, New York currently exceeds both the national average inpatient utilization rate at state-operated Psychiatric Centers (PCs), and per capita inpatient census levels at state-operated PCs in other urban states and all Mid-Atlantic States [...] OMH is in the process of creating the mental health system that New York needs in the 21st Century—a system focused on prevention, early identification and intervention, and evidence-based clinical services and recovery supports. OMH is rebalancing the agency’s institutional resources to further develop and enhance community-based mental health services which are also consistent with the Americans with Disabilities Act (ADA). The US Supreme Court’s 1999 *Olmstead* decision held that the ADA mandates that the State’s services, programs, and activities for people with disabilities must be administered in the most integrated setting appropriate to a person’s needs.

F.3d 1118, 1120 (9th Cir.2006) (striking down as a violation of the Eight Amendment's bar against punishing status rather than conduct a city ordinance that states that "no person shall sit, lie or sleep in or upon any street, sidewalk or public way").

The New York City Human Rights Law also contains a strong prohibition of so-called bias-based policing.<sup>42</sup> "Homeless sweeps" by the City including move along orders, property seizure and destruction, and arrest or threats of arrest, all to present forms of prohibited bias-based policing directed at New Yorkers on the basis of their actual or perceived status as persons with disabilities, persons who are unhoused and, of course, persons of other protected classes.<sup>43</sup> To the extent that the NYC Mental Health Involuntary Removals Policy would sweep New Yorkers, who are disproportionately people of color, who are unhoused or experiencing mental illness, out of public sight and into institutional settings and forced treatment, the NYC Mental Health Involuntary Removals Policy would violate the bias-based policing provisions of the Human Rights Law.

### Disproportionate Effects on Communities of Color

The NYC Mental Health Involuntary Removals Policy also implicates the City's obligations to refrain from engaging in practices that have disparate effect on people of color. Data suggests policies like the NYC Mental Health Involuntary Removals Policy are likely to disproportionately impact Black and brown New Yorkers.

It is well documented that Black and brown people with disabilities are overrepresented in the population of individuals experiencing homelessness, and so are more likely to be involuntarily hospitalized under this initiative.<sup>44</sup> Black New Yorkers already make up 44% of the people currently receiving court-mandated treatment under one state law, though they are less than a quarter of the city's population. In New York City, 44% of current assisted outpatient treatment (AOT) recipients are Black and 32% are Latinx.<sup>45</sup> The OMH data suggests that Black

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<sup>42</sup> See NYC Admin Code 14-151. That section prohibits "bias-based profiling" defined as "an act of a member of the force of the police department or other law enforcement officer that relies on actual or perceived race, national origin, color, creed, age, immigration or citizenship status, gender, sexual orientation, disability, or housing status as the determinative factor in initiating law enforcement action against an individual, rather than an individual's behavior or other information or circumstances that links a person or persons to suspected unlawful activity."

<sup>43</sup> The Council may be aware that the New York City Human Rights Commission issued a "Notice of Probable Cause Determination and of Intention to Proceed to Public Hearing" in June 2020 relating to a challenge the NYCLU brought to the NYPD's targeted homeless sweeps activity in the 125<sup>th</sup> Street corridor adjacent to the MetroNorth Station. See *Picture The Homeless et al. v NYPD*, M-I-J-17-08068 ("Specifically, there is Probable Cause that Respondent [NYPD] has engaged in an unlawful discriminatory practice of bias-based profiling based on the actual or perceived housing status of Complainants [and other] members of the public").

<sup>44</sup> Basic Facts about Homelessness, Coalition for the Homeless, updated December 2022, <https://www.coalitionforthehomeless.org/basic-facts-about-homelessness-new-york-city/>. See also Stacy M. Brown, *Blacks Hit Hardest as NYC's Homeless Population Grows Amid Mental Health Crisis* (Mar. 23, 2022), <https://www.washingtoninformer.com/blacks-hit-hardest-as-nycs-homeless-population-grows-amid-mental-health-crisis/>.

<sup>45</sup> See e.g. NYS Office of Mental Health AOT/Kendra's Law Portal Page, <https://my.omh.ny.gov/analytics/saw.dll?dashboard>. See also Ethan Geringer-Sameth, *What's Behind the Increased Use of Kendra's Law in New York City?*, Gotham Gazette, September 27, 2022, [https://www.gothamgazette.com/state/11599-increase-kendras-law-new-york-city?utm\\_source=The+Marshall+Project+Newsletter&utm\\_campaign=703deaa159-](https://www.gothamgazette.com/state/11599-increase-kendras-law-new-york-city?utm_source=The+Marshall+Project+Newsletter&utm_campaign=703deaa159-)

and brown New Yorkers are, inevitably, much more likely to be subjected to forced removals from public spaces than white New Yorkers.

#### **4. The Council must Ensure that this Administration Provides Robust and Complete Data concerning the NYC Mental Health Involuntary Removals Policy**

As with many of this Administration's completely immoral initiatives directed at people who are unhoused who are, more often than not, people with disabilities, there has been a complete lack of transparency, clear processes, and failure of data collection and reporting with respect to the NYC Mental Health Involuntary Removals Policy. Information concerning this troubling initiative has been released only via press conference and via highly controlled and selective disclosure to chosen media outlets.

We urge that the Council insist on ongoing and frequent data reporting and detail concerning the execution of the NYC Mental Health Involuntary Removals Policy. First off, of course, the Council must understand the Administration's criteria for the identification of individuals to evaluate for transport under MHL § 9.41 or § 9.58 under the NYC Mental Health Involuntary Removals Policy. Once that information is made available, we suggest that the list of data points reported by the Administration include, but not be limited to, the following areas. Further, for each category, the demographic information of the impacted individuals should be provided.

- The number of individuals identified for evaluation for potential transport under MHL § 9.41 or § 9.58 under the NYC Mental Health Involuntary Removals Policy since the initiative was announced, or went live if a different date
- The number of encounters that have not resulted in transport
- The number of encounters that have resulted in connection to housing/other services
- The number of willing transports that have occurred
- The number of involuntary transports for assessment/evaluation that have occurred
- Identification of the facilities to which have individuals been transported for assessment
  - Including how many individuals have been transported to each identified facility<sup>46</sup>
- The number of individuals who have had actual Article 9 status conferred on them as a result of the transport for evaluation<sup>47</sup>
- The number of individuals who have been brought in and detained in a CPEP or other psychiatric setting for up to 72 hours but who have been released at or before the 72 hour mark
- The lengths of stay for individuals who are brought in for observation and assessment:
  - i. before they are assessed;

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[EMAIL\\_CAMPAIGN\\_2022\\_12\\_16\\_05\\_14&utm\\_medium=email&utm\\_term=0\\_5e02cdad9d-703deaa159-%5B%5D](mailto:EMAIL_CAMPAIGN_2022_12_16_05_14&utm_medium=email&utm_term=0_5e02cdad9d-703deaa159-%5B%5D).

<sup>46</sup> The original directive indicates that EMT must “transport the individual to the closest appropriate hospital” – what does that mean? Are these CPEPs or other OMH certified settings, H=H non-CPEP/OMH certified settings, any medical hospital.

<sup>47</sup> “Status” means being admitted under the Article 9 provisions of the MHL, i.e. the provisions of MHL actually do not become operative with various rights conferred on the person, including having access to counsel from the Mental Hygiene Legal Service and the right to actual discharge planning for connection to appropriate community services under MHL § 29.15

- ii. before they are admitted;
- iii. before they are released or discharged.
- The number of individuals who have been subjected to involuntary treatment while they are awaiting or under observation and assessment, including involuntary medication and/or restraint or seclusion
- The number of individuals who have been admitted for medical/clinical services but not mental health services [ie open wounds/other medical conditions – diabetes, cardio, substance/detox]
- The number of individuals who have had discharge planning accomplished for them as a result of the NYC Mental Health Involuntary Removals Policy
- The number of individuals who cannot be discharged because discharge planning and/or connection to appropriate community-based services cannot be accomplished
- The number of individuals who have had a Kendra’s law order petition filed against them
- What kind of record keeping and data tracking is NYC, including the NYC Well apparatus, conducting with respect to all individuals who are being brought in for assessment and observation under the NYC Mental Health Involuntary Removals Policy

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#### Comments on Int. 0273-2022 and Int. 0706-2022

We offer brief comments on the two pieces of legislation that are on the hearing agenda.

**Int. 273** would require that NYPD provide officers with training related to recognizing and interacting with individuals with autism spectrum disorder. Such training would include: (i) enhancing awareness and a practical understanding of autism spectrum disorder; (ii) development of the interpersonal skills to safely respond to emergencies involving someone with autism spectrum disorder; and (iii) instruction on interview and investigative techniques to utilize in cases involving individuals with autism spectrum disorder.

This bill, as well meaning as it is, is targeted only at NYPD training as it relates to autism spectrum disorder (“ASD”).<sup>48</sup> ASD is only one specific type of developmental disability, which includes intellectual disabilities, cerebral palsy, Down syndrome, autism spectrum disorders, Prader-Willi syndrome and other neurological and cognitive impairments.

The bill leaves unprotected a large number of New Yorkers with developmental disabilities, other than ASD, whose interactions with law enforcement are potentially as equally problematic and dangerous. The bill also fails to consider the broad range of New Yorkers with disabilities, including those who are deaf/limited hearing, mental illness, substance, diabetic shock, and age-

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<sup>48</sup> Int. 273 defines the “term ‘autism’ [as] a range of conditions characterized by challenges with social skills, repetitive behaviors, speech and nonverbal communication, as well as other unique conditions which may be caused by different combinations of genetic and environmental influences. This definition is both overly inclusive and underly inclusive; it does not comport with generally understood definitions of ASD, as defined in the American Psychiatric Association fifth edition of its Diagnostic and Statistical Manual of Mental Disorders (DSM-5) and, as a result, may lead to enormous confusion in any training modules that may be developed. *See* ASD as defined in the DSM-5, <https://www.autismspeaks.org/autism-diagnosis-criteria-dsm-5>.

related dementia, as well as those New Yorkers with limited English proficiency at risk of grievous harm occurring due to their interactions with law enforcement.

With respect to the training curriculum, the bill also vests the NYPD with complete discretion with respect to the training to be conducted. Moreover the bill contemplates that any training may simply be one-time training module offered during the officer's time at the NYPD Academy.<sup>49</sup>

We applaud the Council for its efforts to ensure that people with ASD do not have negative, or fatal, experiences with law enforcement. But there is much more work that the Council could do to ensure that NYPD has meaningful and regular training sessions for its personnel concerning disabilities and clear guidelines for interacting with people with disabilities. Organizations and individuals representing a wide range of disciplines and perspectives and with a strong interest in improving law enforcement encounters with people with disabilities should be convened to work together in one or more groups to help guide NYPD's training and implementation efforts.<sup>50</sup>

**Int. 706** would require the Mayor's Office of Community Mental Health ("MOCMH") to create an online portal and a written resource guide of available mental health services. The portal and guide would organize services by population and then by type of service. The information is intended to be available in the citywide languages as designated in NYC Admin. Code § 23-1101. The bill would also require the Office to conduct outreach on the portal and the guide and ensure the portal is secure and confidential to protect the privacy of individuals accessing the portal.

We would ask that the Council consider ensuring that MOCMH is able to reach all New Yorkers in analogue form of the catalogue resources because we still have a massive digital divide in this city.<sup>51</sup> Moreover, we ask that the Council consider ensuring that in assembling the required information about mental health services available in the City, MOCMH is mandated to receive inputs and participate in meaningful engagement with community-based organizations. MOCMH is an interagency mental health council comprised almost entirely of city employees. Planning

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<sup>49</sup> Int. 273 directed that the NYPD "shall train patrol officers in recognizing and responding to individuals with autism as part of their academy training. The training shall be sensitive to a wide variation in challenges and strengths possessed by each individual with autism."

<sup>50</sup> The United States Department of Justice Bureau of Justice Assistance offers many resources that would be useful for the Council to review. See e.g. *Police-Mental Health Collaboration (PMHC) Toolkit*, <https://bja.ojp.gov/program/pmhc/learning/essential-elements-pmhc-programs/1-collaborative-planning-and-implementation>. The PMHC Toolkit provides resources for law enforcement agencies to partner with service providers, advocates, and individuals with mental illness and/or intellectual and developmental disabilities (I/DD). The goal of these partnerships is to ensure the safety of all, to respond effectively, and to improve access to services and supports for people with mental illness and I/DD.

<sup>51</sup> The bill appears to suggest that only certain people would receive a paper copy of the resource guide. As the Council is well aware, predictably, the brunt of the digital divide falls on particular communities. The Council has reported, for example, that the most impacted communities are home to individuals who disproportionately live at the intersection of poverty and structural racism. About a quarter of New York City households lack a broadband subscription at home and the percentage is even higher for Black, Hispanic, low-income, and senior households. For some community districts — many in the Bronx and high-poverty areas — over 40% of households do not have high-speed broadband service. Between 11 and 13 percent of NYC DOE students in each borough lack access to adequate internet at home during remote learning. See, e.g., *Broadband and Equal Access to the Internet in New York City*, <https://council.nyc.gov/data/internet-access/>.

appears to originate in a top down fashion conducted entirely by city employees who are not likely to have any meaningful connection to the impacted neighborhoods and the people most in need. The communities disproportionately impacted by mental health concerns are integral to the development, and distribution, of services resources.

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In closing, the NYCLU thanks the Committees for the opportunity to provide testimony on these critical issues. We stand ready to working with the members of the Committees conducting this oversight hearing, and all appropriate partners, to advance meaningful policy changes that will improve the lives of New Yorkers confronting housing, mental health and/or substance use challenges.