

PLACEMENT REVIEW HEARINGS UNDER AS 47.10.087

PRE-HEARING PREPARATION

Review the department's request for hearing, if one is filed.

Timing of Hearing. A hearing to authorize a child's future placement in a secure residential psychiatric treatment center (RTC) must be held prior to the child's placement in such a facility. A hearing reviewing a child's placement at North Star Hospital must be held within 30 days of the child's admission to North Star as required by the permanent injunction issued in *Native Vill. of Hooper Bay v. Lawton, et al.*, 3AN-14-5238 CI (October 31, 2022)(J. Marston)(state enjoined from holding any child under the care of OCS for longer than 30 days at North Star Hospital without conducting an .087 type of hearing)(Order attached). Following the reasoning of *Native Vill. of Hooper Bay*, all placements of children in acute psychiatric hospitals should be reviewed within 30 days of a child's admission.

Rights of the Child. Is the child present? CINA R. 3(a), (b). Did the child receive proper notice? CINA R. 3(a), (b). Should an attorney be appointed to represent the expressed interests of the child? AS 47.10.050; CINA R. 12.1.

Determine whether hearing will be open or closed. See AS 47.10.070(c)(3); CINA R. 3(f)(2)(C), 3(f)(6)(B), (C). Consider the likelihood that the child's healthcare information will be discussed or presented as evidence and the child's psychotherapist-patient privilege under CINA Rule 9(b). If non-parties are permitted to be present, order them not to disclose the identity of the child. AS 47.10.070(f).

PERSONS ENTITLED TO NOTICE AND PARTICIPATION - CINA R. 3(a), (b) & 2(l)

- ✓ Child – At each hearing the court **shall determine** if the child has received notice of the hearing and may continue the hearing if notice was not provided. CINA R. 3(a).
 - For a child 10 years of age or older, the child must be directly notified of the hearing by the child's attorney or GAL. The right to be present may be waived by the child through the child's attorney or GAL. CINA R. 3(a), (b).
 - For a child under 10, notice of the hearing must be provided by OCS to the placement, and the child's presence may be waived by the GAL. CINA R. 3(a), (b).
- ✓ Parents whose rights are not terminated. See also 25 U.S.C. § 1903(9) (defining "parent" under ICWA).
- ✓ Legal guardian
- ✓ Indian custodian
- ✓ Indian child's tribe, if it has intervened
- ✓ OCS protective services specialist
- ✓ GAL/CASA
- ✓ Out-of-home care provider and grandparents
- ✓ Intervenor
- ✓ Parties' attorneys

APPOINTMENT OF COUNSEL FOR CHILD – AS 47.10.050, CINA R. 12.1, 25 U.S.C. § 1912(b)

Consideration of appointment of counsel should be made for all children subject to placement under AS 47.10.087. Any party, including the child, may request the appointment of an attorney for the child either in writing or orally on the record. The court may also make an appointment on its own initiative. AS 47.10.050 (court may appoint counsel for a child in its discretion if the court concludes the child's welfare would be promoted).

Mandatory Appointments – CINA R. 12.1 (b)(1)

Appointment of counsel for a child is **mandatory** if the child is 10 years of age or older and:

- **The child does not consent to placement in a psychiatric hospital or residential treatment center;**
- **The child does not consent to administration of psychotropic medication;**
- **The child objects to disclosure of psychotherapy information or records under CINA Rule 9(b);**
- The court has been asked to issue a stay in placement order under AS 47.10.141(c); or
- The child who is the subject of the case is pregnant or has custody of a minor child.

Discretionary Appointments - CINA R. 12.1 (b)(2)

Other circumstances in which the court may appoint counsel include, but are not limited to:

- the child and the GAL are not in agreement regarding placement, family/sibling contact, permanency plan, case plan, or another important issue,
- the child would benefit from a confidential relationship with an attorney, or
- the child is not living at the OCS designated placement.

Appointments Under ICWA – 25 U.S.C. § 1912(b)

Under ICWA, the court may exercise discretion to appoint counsel for a child if such appointment is in the child’s best interests.

EVIDENTIARY CONSIDERATIONS

Burden of Proof/Standard: The Department bears the burden of proof, by clear and convincing evidence. *Tuluksak Native Cmty. v. State, Dep’t of Health & Soc. Serv. Off. of Child. Serv.*, 530 P.3d 359, 372 (Alaska 2023).

Statements: Any party or witness upon whom the court relies in reaching its findings must be sworn in and testify under oath. *See Diego K. v. State, Dep’t of Health & Soc. Serv. Off. of Child. Serv.*, 411 P.3d 622, 629 (Alaska 2018)(By relying upon unsworn statements at status hearings in removal findings, court committed legal error.).

Hearsay: Hearsay may be admissible if it is probative of a material fact, has circumstantial guarantees of trustworthiness, and the appearing parties are given a fair opportunity to meet it. *Tuluksak Native Cmty. v. State, Dep’t of Health & Soc. Serv. Off. of Child. Serv.*, 530 P.3d 359, 369-70 (Alaska 2023).

Mental Health Professional: The mental health professional called by the Department to testify must have sufficient personal knowledge of the youth’s mental health condition and treatment that their testimony is informed and credible enough to be meaningful. Additionally, the opposing party must have the opportunity to meet the proffered evidence through cross-examination or other means. The mental health professional may not testify merely as a conduit for another mental health professional’s opinion. *Tuluksak Native Cmty.*, 530 P.3d at 370-71.

Psychotherapist-Patient Privilege: There may be evidentiary considerations under CINA R. 9(b)(child’s psychotherapist-patient privilege).

ICWA: If the child is an Indian child, the court must consider the ICWA placement preferences and determine whether there is good cause to deviate from ICWA’s placement preferences, if applicable. *Tuluksak Native Cmty.*, 530 P.3d at 376-78.

REQUIRED FINDINGS AND ORDERS

INITIAL HEARING

The court may authorize the department to place a child in a secure residential psychiatric facility if:

- OCS proves by clear and convincing evidence that:
 - The child is in the custody of the department under AS 47.10.080(c)(1) or (3) or 47.10.142; and
 - Based upon the testimony of a **mental health professional** that:
 - The child is **gravely disabled** (as a result of a mental illness) or is suffering from **mental illness** and, as a result, is likely to cause serious harm to the child or to another person. AS 47.10.087(a)(1). *See* AS 47.10.990 and AS 47.30.915.
 - There is no reasonably available, appropriate, and **less restrictive alternative** for the child's treatment or that less restrictive alternatives have been **tried and failed**. AS 47.10.087(a)(2).
 - There is reason to believe that the child's mental condition **could be improved** by the course of treatment or **would deteriorate** if untreated. AS 47.10.087(a)(3).

If one of the above-listed findings cannot be made, the child cannot be placed or remain in the placement.

ICWA: For an Indian child, the court is required to inquire into and make findings regarding ICWA placement preferences and whether good cause exists to deviate from them. *Tuluksak Native Cmty.*, 530 P.3d 359, 376-78 (Alaska 2023).

SUBSEQUENT HEARINGS

If placement in a secure residential psychiatric treatment center is authorized, that placement must be reviewed at least every 90 days. AS 47.10.087(b).

At subsequent hearings, the department must prove by clear and convincing evidence and based upon the testimony of a **mental health professional** that:

- The conditions or symptoms that resulted in the initial order have **not ameliorated** to such an extent that the child's needs can be met in a **less restrictive setting**; and
- The child's mental condition **could be improved** by the course of treatment or **would deteriorate** if untreated. AS 47.10.087(b).

ICWA: For an Indian child, the court is required to inquire into and make findings regarding ICWA placement preferences and whether good cause exists to deviate from them. *Tuluksak Native Cmty.*, 530 P.3d 359, 376-78 (Alaska 2023).

DEFINITIONS

Mental health professional:

- a licensed psychiatrist or physician;

- a licensed clinical psychologist;
- a licensed psychological associate trained in clinical psychology;
- a licensed advanced practice registered nurse or licensed registered nurse with a master’s degree in psychiatric nursing;
- a licensed marital and family therapist;
- a licensed professional counselor;
- a licensed clinical social worker; and
- a person who:
 - Has a master’s degree in the field of mental health;
 - Has at least 12 months of post-masters working experience in the field of mental illness; and
 - Is working under the supervision of a type of licensee listed above.

See AS 47.30.915(16), (23), AS 47.10.990(21).

Mental illness: An organic, mental, or emotional impairment that has substantial adverse effects on an individual’s ability to exercise conscious control of the individual’s actions or ability to perceive reality or to reason or understand; intellectual disability, developmental disability, or both, epilepsy, drug addiction, and alcoholism do not per se constitute mental illness, although persons suffering from these conditions may also be suffering from mental illness.

See AS 47.30.915(17); AS 47.10.990(22).

Gravely disabled: A condition in which a person as a result of mental illness:

- Is in danger of physical harm arising from such complete neglect of basic needs for food, clothing, shelter, or personal safety as to render serious accident, illness, or death highly probable if care by another is not taken; or
- Is so incapacitated that the person is incapable of surviving safely in freedom.

See AS 47.30.915(11); AS 47.10.990(13).

SCHEDULING ORDERS

Schedule Next Review Hearing. If the court issues an order placing or continuing placement of the child under AS 47.10.087, the court must review the placement *at least once* every 90 days. AS 47.10.087(b).

OTHER CONSIDERATIONS

- Should you hold more frequent hearings for youth in acute care?
- Are psychotropic medications being administered over parental objection? See *Kiva O. v. State, Dep’t of Health & Soc. Serv. Off. of Child. Serv.*, 408 P.3d 1181, 1186 (Alaska 2018) (applying *Meyers* test to parents’ medical decision on behalf of children prescribed psychotropic medications).
- Is discharge planning taking place?

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

NATIVE VILLAGE OF HOOPER BAY, et al.,)		
Plaintiffs,)		Case No. 3AN-14-5238CI
vs.)		
CHRISTY LAWTON, et al.,)		
Defendants.)		

ORDER ACCEPTING STIPULATION FOR FINAL SETTLEMENT OF ALL CLAIMS; DISMISSING CASE

This matter having come before the Court upon the stipulation of the Plaintiffs, Native Village of Hooper Bay and Native Village of Kongiganak, and the Defendant, Frontline Hospital, LLC d/b/a North Star Behavioral Health System to the settlement of the remaining claims of this case,

IT IS HEREBY ORDERED that the *Stipulation of Final Settlement of All Claims* executed by all Parties through counsel is accepted, and is binding on all Parties. The *Order Sealing Record*, and *Stipulated Permanent Injunction* necessary to effect the terms of the *Stipulation* will issue as separate orders, available to the public. All remaining causes of action are dismissed with prejudice, with Parties waiving their right to an appeal. All parties shall bear their own costs.

LAW OFFICES OF
ALASKA LEGAL SERVICES CORPORATION
ANCHORAGE AND STATEWIDE OFFICE
1016 WEST SIXTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1963
PHONE: (907) 272-9431
FAX: (907) 279-7417

DATED 1/19, 2022, at Anchorage, Alaska.

Erin B. Marston

The Honorable Erin B. Marston
Superior Court Judge

I certify that on 1/19/22 a copy
of the above was mailed / faxed / handed to
each of the following:

P. Pickett S. Rose
 R. Chang

A. Conway
Judicial Assistant / In-Court Clerk

LAW OFFICES OF
ALASKA LEGAL SERVICES CORPORATION
ANCHORAGE AND STATEWIDE OFFICE
1016 WEST SIXTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1963
PHONE: (907) 272-9431
FAX: (907) 279-7417

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

NATIVE VILLAGE OF HOOPER BAY, et al.,)
)
 Plaintiffs,)
)
 vs.)
)
 CHRISTY LAWTON, et al.,)
)
 Defendants.)

Case No. 3AN-14-5238CI

OCT 11 2022

STIPULATED PERMANENT INJUNCTION

With this Order, the court enters a permanent injunction against Defendant Kim Guay, in her official capacity as the director of the Office of Children's Services, and her successors:

The Office of Children's Services is enjoined from holding any child under the care of OCS for longer than 30 days at North Star Hospital without conducting an AS

47.10.087-type of hearing:

- The hearing must be held within 30 days of the admission to North Star Hospital.
- The hearing cannot be delayed because parties wish to have more time to prepare or review the case.
- The hearing cannot be avoided because parties agree to the admission of the child to North Star Hospital.

LAW OFFICES OF
ALASKA LEGAL SERVICES CORPORATION
ANCHORAGE AND STATEWIDE OFFICE
1016 WEST SIXTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1963
PHONE: (907) 272-9431
FAX: (907) 279-7417

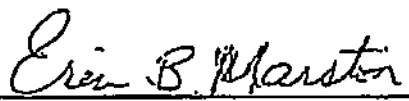
LAW OFFICES OF
ALASKA LEGAL SERVICES CORPORATION
ANCHORAGE AND STATEWIDE OFFICE
1016 WEST SIXTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501-1963
PHONE: (907) 272-9491
FAX: (907) 279-7417


- Evidence must be presented at the hearing; for hearings where admission is non-contested, affidavits may be entered as evidence, but a hearing cannot proceed on affidavits alone if any party wishes to cross-examine a witness.

As with the preliminary injunction, this permanent injunction does not lie against Defendant Frontline Hospital, LLP d/b/a North Star Behavioral Health System.

This Order is not confidential. This Order continues indefinitely unless otherwise ordered by the court.

DATED Oct 31, 2022, at Anchorage, Alaska.


The Honorable Erin B. Marston
Superior Court Judge

10/31/22


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.)

Case No. 3AN-14-5238CI

**ORDER REGARDING TIME LIMIT FOR HOLDING A JUDICIAL HEARING
AND PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

Plaintiffs Native Village of Hooper Bay and Native Village of Kongiganak moved for a preliminary injunction to prevent placement of children in state custody into North Star Hospital without prior judicial authorization. Defendant 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. The court previously addressed those motions, reserving judgment on the time period within which a judicial hearing must be held after commitment of a child in state custody.

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. Plaintiffs sought to prevent OCS from committing foster children to North Star Hospital without a pre-commitment judicial hearing. Plaintiffs alleged that Defendants 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. The court previously addressed those allegations, resolving all but the issue of how long OCS may place a foster child in an acute psychiatric hospital, as permitted under the due process clause of the U.S. Constitution and due process under the Alaska Constitution.

With regard to commitment of minors without judicial review, Plaintiffs pointed to three cases in order to illustrate that OCS improperly placed foster children in North Star Hospital. One of these is the case of C.A., who was brought to the Yukon-Kuskokwim

Health Corporation emergency room, purportedly for a suspected Zoloft overdose.¹ A bottle of Zoloft was missing, although C.A. did not have any physical symptoms of any overdose.² OCS decided to send C.A. to North Star Hospital, although the reason for this decision is unclear.³ 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.⁴ OCS appeared to believe that the knife was a threat to C.A. and/or others, although the .087 hearing judge could not determine who had put the knife under the bed or why it was there.⁵ 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.⁶ The .087 hearing judge found no evidence to support C.A.'s restraint at YKHC nor to support a transfer to North Star Hospital.⁷ The court denied OCS' request to place C.A. at North Star Hospital about a month after she arrived.⁸

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

¹ 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.*").

² *I.M.O. C.A.* at 4.

³ *I.M.O. C.A.* at 4-5.

⁴ *I.M.O. C.A.* at 4.

⁵ *I.M.O. C.A.* at 4-5.

⁶ *I.M.O. C.A.* at 5-6.

⁷ *I.M.O. C.A.* at 7.

⁸ *I.M.O. C.A.* at 8.

avoid treatment and spread their scabies.⁹ Originally, the plan was to send the older girl to a stabilization level 2 facility and the younger girl to a therapeutic foster home.¹⁰ When AAG Cometa was contacted, she said to try to place the girls in a therapeutic home.¹¹ The OCS worker called several facilities, but North Star Hospital was the only one available that weekend to take the girls.¹² From the OCS worker's notes, the reason that North Star Hospital accepted them appeared to be to stabilize their scabies.¹³ According to her North Star Hospital psychological evaluation, the reason for J.S.'s admission was "increasing aggression, high-risk behaviors, and impulsivity."¹⁴

North Star Hospital is the facility at issue in this case. North Star Hospital is licensed as an acute psychiatric hospital.¹⁵ Plaintiffs argued that North Star is a secure residential psychiatric treatment center under the statutory definition of residential psychiatric treatment center. Looking to the statutory language, statutory scheme and legislative history, the court determined that acute psychiatric hospitals qualify as

⁹ Pl.'s Ex 19 to Tarzwell Certificate.

¹⁰ Pl.'s Ex 19 to Tarzwell Certificate.

¹¹ Pl.'s Ex 19 to Tarzwell Certificate.

¹² Pl.'s Ex 19 to Tarzwell Certificate.

¹³ Pl.'s Ex 19 to Tarzwell Certificate.

¹⁴ Pl.'s Ex 20 at 2 to Tarzwell Certificate.

¹⁵ Def.'s Ex. 3-4 to Mem. in Supp. of Mot. to Dismiss and Opp'n to Mot. for Prelim. Inj.

“hospitals” which are treated separately from residential psychiatric treatment centers.¹⁶ The court found that North Star Hospital qualifies as an acute psychiatric hospital, which is not governed by the stricter statutory requirements of secure residential psychiatric treatment centers of AS 47.10.087, and that pre-commitment judicial review is not required.¹⁷

In addition to a claim under .087, Plaintiffs contended that under AS 47.10.084 parental consent is required before OCS may admit a child under its care into North Star Hospital. Plaintiffs argued that language in the statute regarding residual rights of a foster child’s parent whose rights have not been terminated prevent OCS from admitting a child to North Star Hospital without parental consent except in cases of emergency. The court determined that under AS 47.10.084, psychiatrists are suitable neutral factfinders in initial commitment to determine that an emergency exists and that it is reasonable for OCS to rely on the psychiatrists’ finding of an emergency.¹⁸ The court found that since it is deemed an emergency when a minor is committed to North Star Hospital, parental consent is unnecessary, and dismissed Plaintiffs’ claims under AS 47.10.084.¹⁹

Plaintiffs raised a U.S. Constitutional claim, arguing that committing a foster child to North Star Hospital without judicial review violates the due process clause of the U.S.

¹⁶ Order on Def. Lawton’s Mot. to Dismiss and Mot. to Dismiss for Svgn. Immty. and Pl.’s Mot. for a Prelim. Inj. 10.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 11.

Constitution. This court determined *Parham v. J.R.* to be controlling law, in which the U.S. Supreme Court found that commitment of children does not require prior judicial review.²⁰ However, the Supreme Court left open the question of what procedures are necessary for continuing commitment of wards of the State, suggesting that while initial placement of foster children in commitment facilities does not violate due process, continued commitment without judicial oversight may indeed violate the due process clause of the U.S. Constitution. Since the issue of initial commitment without judicial review is resolved but continued commitment without judicial review remains unsettled with regard to due process under the U.S. Constitution, the court dismissed Plaintiffs' claims regarding admittance, but denied dismissal of Plaintiffs' claims as to continued commitment.²¹

In addition to a U.S. Constitutional claim, Plaintiffs contended that due process under the Alaska Constitution requires a judicial hearing before commitment of foster children into North Star Hospital. Applying the *Mathews v. Eldridge* test, the court found that while due process under the Alaska Constitution does not require a pre-commitment hearing, due process does require a post-commitment judicial hearing.²²

The court denied Plaintiffs' motion for a preliminary injunction to stop Defendants from placing children in North Star Hospital without prior judicial authorization.

²⁰ *Parham v. J.R.*, 442 U.S. 584, 607, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979).

²¹ Order on Def. Lawton's Mot. to Dismiss and Mot. to Dismiss for Svgn. Imnty. and Pl.'s Mot. for a Prelim. Inj. 11-12.

Granting Plaintiffs' motion for a preliminary injunction regarding the maximum time period for which foster children may be committed in an acute psychiatric hospital without judicial review, the court enjoined OCS from committing children in its care to North Star Hospital for more than 30 days without a court hearing. In issuing the preliminary injunction, the court found that Plaintiffs are faced with irreparable harm by foster children being held at North Star Hospital for an indefinite period of time as compared to negligible harm that Defendants will face. Based on the court's order, Defendants are currently 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. The court requested additional briefing on the issue of how long OCS may place a child at North Star Hospital without a .087 type hearing.

STATE CONSTITUTIONAL CLAIM AND TIME LIMIT FOR JUDICIAL REVIEW

The Alaska Constitution provides greater protection than the minimum level set by the U.S. Constitution.²³ The Alaska Constitution may require different due process protections for children committed to mental health institutions than *Parham* requires. To determine due process requirements, the Alaska Supreme Court applies the *Mathews v. Eldridge* test.²⁴ 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

²³ *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).

²⁴ *Bigley v. Alaska Psychiatric Inst.*, 208 P.3d 168, 181 (Alaska 2009).

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.”²⁵ With regard to this case, there is no precise time limit within which a judicial hearing must be held so the court considers the appropriate time length through the application of the *Mathews* test.²⁶

In supplemental briefing Plaintiffs argue that a judicial hearing should be held within 72 hours of OCS’ placement of a foster child into an acute psychiatric hospital to ensure they are not unnecessarily committed for 27 extra days.²⁷ Defendant North Star argues that the length of stay should be determined by the patient’s medical needs and that a 30-day time limit is not inconsistent with current practice.²⁸ Defendant Lawton argues that a 72-hour rule should not apply and that 30 days is the appropriate timeframe within which judicial review should occur, as 30 days will give the State time to prepare for a hearing and to ensure that the child’s medical needs have been adequately addressed.

²⁵ *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976).

²⁶ This is normally the province of the legislature. However, in the absence of a statute on point the court must apply procedural due process considerations to determine the appropriate time period within which a judicial hearing must be held.

²⁷ Pl.’s Suppl. Br. 5.

²⁸ Def. NS’ Suppl. Br. 2.

Applying the first *Mathews* factor, the Court agrees with the *Parham* court that children have a “substantial liberty interest in not being confined unnecessarily.”²⁹ In addition, the foster children have an interest in a “prompt judicial review of [their] emergency detention and evaluation.”³⁰ Considering the potential harm children may face by being confined unnecessarily for long periods of time, the interest is great. Thus, with regard to the first factor, foster children have a significant interest in having their case reviewed promptly to ensure they are not confined longer than medically necessary.

Applying the second *Mathews* factor, the court finds the risk of erroneous deprivation through current procedures is severe. It is concerning that foster children may be placed at North Star indefinitely and have been held for longer than 30 days without any judicial hearing taking place.³¹ Once admitted, it is unknown how long a foster child may remain.³² Given the illustrative cases presented by Plaintiffs, it appears that based on history, foster children may be placed into psychiatric care for issues unrelated to mental health or without sufficient cause and have no guarantee that their placement will be

²⁹ *Parham*, 442 U.S. at 600.

³⁰ *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).

³¹ .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. Some children have been held at North Star for longer than 30 days for as long as 46 days. *See*, Pl.’s Ex. 17-21 to Tarzwell Certificate.

³² 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.).

timely reviewed by a neutral factfinder.³³ Further, on average, the length of stay at North Star for OCS children is two weeks longer than the length of stay for non-OCS children.³⁴ There is no apparent cap on the length of a foster child's commitment at North Star. This distinct lack of formal requirements for judicial review over commitment of foster children at acute psychiatric hospitals, like North Star, makes the risk of erroneously depriving these children of their interest in being free from unnecessary confinement significant.

Alternatively, the risk of erroneously depriving these children of appropriate medical treatment is low given a 30-day time frame whereas a shorter time period could increase that risk significantly.³⁵ Given that it often takes weeks to ensure that a child is stabilized, the risk of depriving a child of proper care and treatment would be too high with a time period as short as 72 hours.³⁶ Thirty days would give OCS and North Star enough time to ensure that the child is stabilized, to enable the facility to gather complete information on the child's condition and to prepare for and be available for a hearing. With regard to erroneously depriving foster children of their liberty for 27 extra days due to improper commitment, after the child has been committed the child's guardian *ad litem* may petition for judicial review before thirty days, which will help reduce that risk.

³³ Pl.'s Ex 19 to Tarzwell Certificate.

³⁴ Def. NS' Suppl. Br. 15.

³⁵ Def. OCS' Suppl. Br. 12-13.

³⁶ Def. OCS' Suppl. Br. 12; Def. NS' Suppl. Br. 11.

Applying the third *Mathews* factor, the State has a substantial interest in protecting the children in their care. Admission of a minor to an acute psychiatric hospital requires the minor to be a danger to him/herself 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. The State has a much lower interest in keeping these foster children confined when there is no longer an emergency. The State has little interest in keeping children committed for longer than 30 days without a judicial hearing when considering the slight burden of holding a hearing within 30 days to ensure that continued commitment is appropriate. 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 and the burden of substitute procedures.

Post-commitment judicial review within 30 days will balance the children's private interests with the State interest of providing prompt and adequate psychiatric care. Given the severe risk of erroneous deprivation through current procedures and the substantial interests of foster children weighed against OCS' interest and the burden of holding a judicial hearing, the court finds that judicial review must occur within 30 days.

PERMANENT INJUNCTION

Plaintiffs moved the court for a preliminary injunction to prevent the Defendants from placing children in North Star Hospital without prior judicial authorization. The court found that while a preliminary injunction is not appropriate for admittance of foster

children to North Star Hospital, a preliminary injunction is appropriate for continued commitment at North Star. Applying the “balance of hardships” test, the court found that Plaintiffs are entitled to a preliminary injunction.³⁷

Addressing the current preliminary injunction and whether an injunction remains appropriate, since the Plaintiffs face danger of irreparable harm through deprivation of due process and the State’s interests can be adequately protected, the court applies the “balance of hardships” test.³⁸ “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.’”³⁹

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 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

³⁷ Order on Def. Lawton’s Mot. to Dismiss and Mot. to Dismiss for Svgn. Immt. and Pl.’s Mot. for a Prelim. Inj. 17.

³⁸ *State, Division of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005).

³⁹ *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)).

injunction if it is denied.⁴⁰ 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 certainly not frivolous.

Having determined due process mandates a judicial hearing be held within 30 days such that an injunction remains appropriate, the preliminary injunction against the Defendants remains in effect until further action from the court. 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.⁴¹

The court requests that the parties submit motions with regard to the preliminary injunction on whether a permanent injunction should be issued, as well as on any remaining issues.

⁴⁰ *State, Division of Elections v. Metculfe*, 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)).

⁴¹ Alaska R. Civ. P. 65(c).

CONCLUSION

The preliminary injunction remains in effect.

IT IS SO ORDERED.

Dated at Anchorage, Alaska this 17th day of September 2015.

Erin B. Marston

Erin B. Marston
Superior Court Judge

I certify that on 9/17/15
a copy of this notice was mailed to:

J. Davis, Jr./S. Tazewell/P. Pickett - ALSC,
T. Daniel, S. Bookman, J. Woodmen,
M. Grisham/R. Cheng, B. Zah Nault/S. Rose,
M. Regan/L. Jaehning/J. Cahoon, S. Orlansky/T. Stenson

K. Griffith
K. Griffith, Judicial Assistant