IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

ALABAMA DISABILITIES ADVOCACY PROGRAM, **Plaintiff,**	:	
v.	:	**CIVIL ACTION NO. 13-0519-CG-B**
SAFETYNET YOUTHCARE, INC., **Defendant.**	:	
SAFETYNET YOUTHCARE, INC., **Third Party Plaintiff,**	:	
v.	:	
ALABAMA DEPARTMENT OF HUMAN RESOURCES, **Third Party Defendant.**	:	

DEPARTMENT OF JUSTICE STATEMENT OF INTEREST

Federal law is clear that protection and advocacy organizations ("P&As") are entitled to reasonable unaccompanied access to residential programs that provide care and treatment to individuals with mental illness. Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI Act"), 42 U.S.C. §§ 10801–10851 (1991); 42 C.F.R. § 51.42 (1997). The PAIMI Act regulations define what constitutes a "facility," what it means to provide "care and treatment," and who is an "individual with a mental illness." 42 C.F.R. § 51.2 (1997). Once a residential treatment program falls within the scope of the applicable federal regulations, the treatment

program's access obligation is triggered and the treatment program must allow the P&A to have access to the facility and its residents.

Defendant SafetyNet Youthcare, Inc. ("SafetyNet")[1] operates a residential treatment facility that fits squarely within the PAIMI Act regulations. SafetyNet provides care and treatment for a variety of mental health and emotional disorders. Indeed, SafetyNet has already conceded that plaintiff Alabama Disabilities Advocacy Program ("ADAP") is entitled to access the part of its facility called the "Intensive Program." Nevertheless, SafetyNet denied ADAP access to its "Moderate Program," arguing that the children in it have less serious mental health and emotional disabilities than the children in the Intensive Program.

SafetyNet's position is based on a misinterpretation of the PAIMI Act that would undermine the ability of P&As to protect individuals confined in residential treatment facilities. SafetyNet concedes it provides mental health care to some individuals: the children in the Intensive Program. Once the court finds as a matter of law that SafetyNet is a facility providing care and treatment to some individuals with mental illness, the PAIMI Act applies to SafetyNet and SafetyNet must comply in all respects.

This case presents a straightforward application of the PAIMI Act that is appropriate for disposition as a matter of law. SafetyNet exists for one purpose: to provide care and treatment for children with mental health and emotional disorders. Once a residential facility falls within the ambit of the PAIMI Act, the facility must provide access to all areas that "provide overnight care accompanied by treatment services . . . including all general areas as well as special mental health or forensic units." 42 C.F.R. § 51.2. There could of course be situations in which a

[1] SafetyNet claims it acted on the advice of the Alabama Department of Human Resources ("DHR") and filed a third-party complaint against DHR for indemnification and contribution. SafetyNet Third Party Complaint at ¶¶ 12-14, 16-17. For simplicity, we refer to SafetyNet and DHR collectively as "SafetyNet."

covered facility includes such distinct and unrelated functions that those distinct functions might fall outside the purview of the PAIMI Act – for example, a general hospital that includes a psychiatric ward and also wards for completely separate patients not receiving mental health care. This is not such a case. SafetyNet's Intensive and Moderate Programs both exist to provide for the care and treatment of children with mental health and emotional disabilities, and SafetyNet is the type of facility Congress envisioned that the PAIMI Act would cover. The PAIMI Act regulations should be interpreted to mean exactly what they say, and ADAP should be granted reasonable unaccompanied access to SafetyNet's facilities and residents.

INTEREST OF THE UNITED STATES

The United States submits this Statement of Interest pursuant to 28 U.S.C. § 517 (1966),[2] because this litigation involves the proper interpretation and application of federal law. As the United States has made clear in litigation across the country,[3] it has a strong interest in the interpretation of the PAIMI Act, 42 U.S.C. §§ 10801–10851. People living in psychiatric residential treatment facilities are isolated from their families and communities, and their ability to contact outside advocates is restricted. In addition, they are often unfamiliar with their rights – including the right under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101

[2] Section 517 provides that the "Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517. A submission by the United States pursuant to this provision does not constitute intervention under Rule 24 of the Federal Rules of Civil Procedure.

[3] *See, e.g.*, Statement of Interest of the United States, Disability Rights Miss. v. Miss. Children's Home Servs., 3:13-CV-547-HTW-LRA, (S.D. Miss. Feb. 5, 2014); Statement of Interest of the United States, Ga. Advocacy Office, Inc., v. Shelp 1:09-CV-2880-CAP (N.D. Ga. June 10, 2010); Statement of Interest of the United States, Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin., No. 1:06-cv-1816 (S.D. Ind. June 16, 2008); Brief for Intervenor United States, Iowa Prot. & Advocacy Servs., Inc. v. Tanager Place, No. 04-4074 (8th Cir. May 11, 2005).

(2008) ("ADA"), to avoid unnecessary institutionalization. *See Olmstead v. L.C.*, 527 U.S. 581, 607 (1999). The Department of Justice has authority to enforce Title II of the ADA (42 U.S.C. §§ 12133, 12134) and the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 et seq. The national network of P&As with "access to facilities in the State providing care or treatment" (42 U.S.C. § 10805), play a significant role in ensuring compliance with those laws. S*ee* ADA.gov, Statement of the Department of Justice on the Integration Mandate of Title II of the ADA and *Olmstead v. L.C.*, http://www.ada.gov/olmstead/q&a_olmstead.htm#_ftn10 (last updated June 22, 2011) (providing guidance for ADA and *Olmstead* enforcement). Therefore, the United States offers the court its understanding of the statutes and regulations at issue in this case.

FACTS

ADAP is Alabama's designated federally funded program authorized to protect and advocate for the civil rights of persons with disabilities in the state. Complaint at ¶ 5; Plaintiff ADAP's Motion for Summary Judgment at ¶ 1 (filed Sept. 19, 2014) ("ADAP Motion").

Defendant SafetyNet is a licensed child care institution for males 10-18 years old. Defendant SafetyNet's Response to Request for Admission No. 21 (Ex. A to ADAP Motion) ("SafetyNet Admission"). According to SafetyNet's web site,[4] it "provides psychiatric residential treatment services" and is a "residential program that offers long-term treatment for youth ages 10 to 18 with ongoing behavioral, emotional and/or psychiatric needs." *Safetynetbhc.com*, http://safetynetbhc.com/about-us.html (last visited Oct. 2, 2014).

[4] The court may take judicial notice of SafetyNet's web site pursuant to Fed. R. Evid. 201. *See Francarl Realty Corp. v. Town of E. Hampton*, 628 F. Supp. 2d 329, 332 (E.D.N.Y. 2009) (court may take judicial notice of the contents of a website if its authenticity has not been challenged and it is capable of accurate and ready determination), *affirmed in part, vacated in part on other grounds*, 375 F. App'x 145 (2d Cir. 2010).

A. SafetyNet Children Receive Care in a Residential Setting for Diagnosed Mental Health or Emotional Disorders.

SafetyNet offers an Intensive Program and a Moderate Program on its Minter, Alabama site. The Intensive Program houses 40 children and the Moderate Program houses 20 children. *Safetynetbhc.com*, http://safetynetbhc.com/locations.html (last visited Oct. 2, 2014). Both programs serve children with a variety of mental health and emotional disorders and provide an array of treatment services. *Safetynetbhc.com*, http://safetynetbhc.com/intensive-treatment-programs.html (last visited Oct. 2, 2014); SafetyNet Admission Nos. 10, 13, 14, 17, 19, 20. A child's treatment team can "at any time" determine a child's placement, which "could mean a step up to an acute setting or a step down to a less restrictive setting." Third Party Defendant DHR's Brief in Support of Motion for Summary Judgment at ¶ 23 (filed Sept. 19, 2014) ("DHR Brief"); *see also* DHR Brief at 10 (the child's treatment team "makes a determination of the continuing necessity for and appropriateness of the child's placement").

In their motions for summary judgment, ADAP and SafetyNet have submitted considerable evidence concerning the characteristics of SafetyNet's Moderate and Intensive Programs. The United States will not repeat those assertions. The parties' evidentiary submissions reveal one key area of agreement, however: All SafetyNet children are there to receive care in a residential setting due to diagnosed mental health or emotional disorders.

B. SafetyNet Has Denied ADAP Access to Residents and Facilities in its Moderate Program.

For over a year, ADAP repeatedly requested access to monitor SafetyNet's facility pursuant to the PAIMI Act. ADAP Motion ¶ 17. Neither SafetyNet nor DHR "contest[ed] ADAP's access to those children in SafetyNet's Intensive Program." DHR Brief at 1.

Nevertheless, SafetyNet denied ADAP access to the Moderate Program. *See* SafetyNet Admission Nos. 5, 6, 7, 9. SafetyNet gave as the grounds for the refusal that "Moderate facilities are not Intensive treatment programs and are not considered a part of the Psychiatric Services for Individuals under the Age of 21." Answer of Defendant SafetyNet at ¶ 30. SafetyNet stated that it would provide conditional access if there was "an incident or complaint made to ADAP as to the SafetyNet's [sic] moderate program; ***or*** . . . there is probable cause to believe an incident has occurred at SafetyNet's moderate program." Exhibit 6 to Complaint (emphasis in original).

ARGUMENT

Congress enacted the PAIMI Act because "individuals with mental illness are vulnerable to abuse and serious injury," and "[s]tate systems for monitoring compliance with respect to the rights of individuals with mental illness vary widely and are frequently inadequate." 42 U.S.C. § 10801. The purpose of the PAIMI Act is "to ensure that the rights of individuals with mental illness are protected and to assist States to establish and operate a protection and advocacy system that will (1) protect and advocate for the rights of those individuals; and (2) investigate incidents of abuse and neglect." H.R. Rep. 102-319, November 15, 1991. It is imperative that P&As are able both to independently monitor facilities and to investigate claims of abuse and neglect, and the PAIMI Act regulations authorize broad access to facilities and their residents.

A. Under the PAIMI Act Regulations, SafetyNet is a Facility Providing Care or Treatment to Individuals with Mental Illness.

The PAIMI Act regulations state that "A P&A system shall have reasonable unaccompanied access to public and private facilities and programs in the State which render care or treatment for individuals with mental illness . . ." 42 C.F.R. § 51.42. In other words, if

SafetyNet is a facility that renders care or treatment for individuals with mental illness, ADAP is entitled to access. The regulations define those terms as follows:

- "Facility includes any public or private residential setting that provides overnight care accompanied by treatment services. Facilities include, but are not limited to the following: general and psychiatric hospitals, nursing homes, board and care homes, community housing, juvenile detention facilities, homeless shelters, and jails and prisons, including all general areas as well as special mental health or forensic units."

- "Individual with Mental Illness means an individual who has a significant mental illness or emotional impairment, as determined by a mental health professional qualified under the laws and regulations of the State and 1) Who is an inpatient or resident in a facility rendering care or treatment . . ."

- "Care or Treatment means services provided to prevent, identify, reduce or stabilize mental illness or emotional impairment such as mental health screening, evaluation, counseling, biomedical, behavioral and psychotherapies, supportive or other adjunctive therapies, medication supervision, special education and rehabilitation, even if only 'as needed' or under a contractual arrangement."

42 C.F.R. § 51.2.

SafetyNet does not dispute that it is a "facility." Nor does it dispute that it provides "care or treatment." SafetyNet's denial of P&A access is premised on the definition of "Individual with Mental Illness." If some children do not meet the definition because their mental illness or emotional impairment is not "significant," SafetyNet reasons, then ADAP cannot have access to those children.

SafetyNet's position rests on a fundamental misunderstanding of the PAIMI Act regulations. The threshold inquiry is whether SafetyNet does or does not fit within the PAIMI Act based on the three definitions. If SafetyNet is operating a "facility" that provides "care or treatment" to "individuals with mental illness," the PAIMI Act applies to SafetyNet. In that event, ADAP is entitled to access consistent with the PAIMI Act regulations.

The court should reject SafetyNet's novel proposal that P&A access depends on evaluating the diagnoses of residents one-by-one. Nothing in the PAIMI Act compels a court to

parse the residents of a facility into groups depending on the severity of their mental illness, and doing so would be impractical and counterproductive. That is especially so when SafetyNet can "at any time" change a child's placement, which "could mean a step up to an acute setting or a step down to a less restrictive setting." DHR Brief at ¶ 23; *see also* DHR Brief at 10 (the child's treatment team "makes a determination of the continuing necessity for and appropriateness of the child's placement"). Conditioning ADAP's access on SafetyNet's constantly shifting placement decisions would undermine ADAP's ability to perform functions such as monitoring and providing information to residents.[5]

With a correct interpretation of the PAIMI Act regulations, this case can be decided as a matter of law without resolving the parties' disagreement over the severity of each child's mental health condition. SafetyNet concedes that the children in its Intensive Program "have been determined to have severe problems." DHR Brief at 40. SafetyNet also concedes that ADAP is entitled to access the Intensive Program. DHR Brief at 1. Once SafetyNet's facility fits within the PAIMI Act regulations, there is no need to parse children based on their disability or current program placement because the PAIMI Act regulations grant ADAP access to facility "residents."

B. A P&A Is Entitled to Access if Some Facility Residents Fall Within the PAIMI Act.

SafetyNet's admission that the PAIMI Act applies to its Intensive Program is dispositive of the cross-motions for summary judgment. Once the court concludes that "some" of a

[5] P&As are authorized to, among other things, provide information to residents, monitor and take photographs. 42 C.F.R. § 51.42(c)(1-3). ADAP might wish to speak to groups of residents in a cafeteria or observe children in class, for example. Allowing access to some residents but not others based on SafetyNet's dynamic classifications of the children's conditions would make these P&A tasks difficult or impossible and introduce needless confusion and disruption.

facility's residents are covered by the PAIMI Act, that finding triggers the P&A's access as a matter of law without a showing that all of the residents are covered.

Courts that have considered the issue in the context of records access have rejected the argument that access can be denied because only some residents have a serious mental illness. In *Office of Protection and Advocacy for Persons with Disabilities v. Armstrong*, 266 F. Supp.2d 303, 314 (D. Conn. 2003), the state Department of Corrections denied records access to a P&A on the ground that the P&A could not establish that the inmates in question "fit the definition of 'individuals with a mental illness.'" *Id*. at 314. The *Armstrong* court rejected the idea that the P&A must make a threshold showing of mental illness to obtain access to inmates. Instead, "evidence that a facility has previously housed individuals who are mentally ill, as well as evidence that *some current residents may be mentally ill* is sufficient under PAIMI to merit access by [P&As]." *Id*. at 314 (emphasis added).

The court in *Michigan Protection & Advocacy Service, Inc. v. Miller*, 849 F. Supp. 1202, 1208 (W.D. Mich. 1994), also rejected the argument that access should be denied because only some residents had a mental illness. There, the Michigan Department of Social Services denied P&A access because "the youth in the system have not recently been determined to be mentally ill or emotionally impaired by a mental health professional." *Id.* at 1207. The P&A offered evidence that many Michigan state facilities had in the past housed minors with mental illness as well as recent evidence that "*some* current [Department of Social Services] residents may be mentally ill." *Id*. (emphasis added). The court granted "full access" to the P&A because the state's policy "defeats the very purpose of [PAIMI] . . . to provide effective protection and advocacy services to mentally ill . . . individuals." *Id*.

The heart of SafetyNet's argument is that it can deny access if some residents do not have a significant mental health illness, even if other residents do. Defendants are incorrect as a matter of law. *Armstrong* and *Miller* establish that if "some" facility residents have a mental illness, that triggers the P&A's right of access to monitor the entire facility and its residents to the extent the PAIMI Act regulations allow. In this situation, ADAP is entitled as a matter of law to monitor all areas of SafetyNet's facility to which residents have access, including the Moderate Program.

C. Because the PAIMI Act Regulations Apply to SafetyNet, ADAP Is Entitled to Reasonable Unrestricted Access to All Facility Residents.

Once the court determines that the PAIMI Act applies to a residential treatment facility, the court must consider the permissible scope and purpose of the P&A's access. The PAIMI Act regulations state that P&As are entitled to "reasonable unaccompanied access" to residents of the facility:

> [A] P&A system shall have reasonable unaccompanied access to facilities including all areas which are used by residents, are accessible to residents, and to programs and their residents at reasonable times, which at a minimum shall include normal working hours and visiting hours. Residents include adults or minors who have legal guardians or conservators. P&A activities shall be conducted so as to minimize interference with facility programs, respect residents' privacy interests, and honor a resident's request to terminate an interview.

42 C.F.R. § 51.42(c).

Put simply, P&A access is meant to encompass all areas of the facility and all its residents. "Facility" means the "residential setting that provides overnight care accompanied by treatment services . . . including all general areas as well as special mental health or forensic units." 42 C.F.R. § 51.2. The regulations do not limit facility access based on the type of or level of disability – the sole consideration is whether the facility exists to provide overnight care

and treatment. So long as the facility provides overnight care accompanied by treatment services, P&As are entitled to access to the residents.

SafetyNet's position that facility "residents" can only mean "residents in the Intensive Program" is counter to the plain language of the regulations. The PAIMI Act regulations specify that access is to "residents." 42 C.F.R. § 51.42. The drafters of the PAIMI Act regulations could have limited access to "individuals with significant mental illness," but instead chose the broadest possible term: "residents." When a court is confronted with a state agency's interpretation of a federal regulation, "the court must first consider whether the federal regulation clearly and unambiguously addresses the question at issue. If it does, then that is the end of the matter and the court must give effect to the unambiguous language of the regulation." *Yelder v. Hornsby*, 666 F. Supp. 1518, 1520 (M.D. Ala. 1987) (finding that the regulatory phrase "actually exists" cannot be interpreted to mean "fictitious" or "imputed"). Because the regulations by the agency entrusted to administer the PAIMI Act program elucidate and give force to the statute, they are afforded great deference. *See Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations."). Here, the plain meaning of "residents" is the children who reside at SafetyNet, and the court should use that meaning in applying the PAIMI Act regulations.

Allowing access to all SafetyNet residents is consistent with the purpose of the PAIMI Act. If courts interpreted "residents" narrowly to mean "only the most severely ill residents," facilities could keep some residents off-limits simply by classifying them differently. Rather than rely on a facility's unilateral determination of which residents will receive protection and

advocacy, the drafters mandated that P&As have access to "residents" of the facility and placed no limitations on that term. This broad coverage is also clear from the PAIMI Act regulations' definition of "care and treatment" to include services to "prevent" mental illness or emotional impairment, including "health screening [and] evaluation." The regulations could have limited covered activities to those responding to existing significant mental illness, but, instead, chose to expand access to services, such as those provided in SafetyNet's Moderate Program, which are designed to prevent children from developing more serious mental illness.

There could, of course, be some types of facilities that serve multiple functions, with some functions that fall within the PAIMI Act and other functions that do not. Hospitals, for instance, could be "facilities" within the PAIMI Act for some functions (e.g. psychiatric services) but outside of the PAIMI Act for other functions (e.g. oncology). In that case, the PAIMI Act would apply to that portion of the facility that provides mental health care, so the P&A would have access to the psychiatric services areas and general areas but could not venture into the oncology department. SafetyNet's division of its facility into Intensive and Moderate Programs for children with mental disorders, however, does not take it outside of the reach of the PAIMI Act because both programs concern overnight care accompanied by mental health treatment services.

D. SafetyNet Cannot Place Conditions on ADAP's Access or Dismiss ADAP's Function as Superfluous.

After disclaiming ADAP's access to the Moderate Program entirely, SafetyNet tried to impose conditions. It proposed that access to the SafetyNet Moderate Program be conditioned upon:

a) an incident or complaint made to ADAP as to SafetyNet's moderate program; **or**

b) there is probable cause to believe an incident has occurred at SafetyNet's moderate program.

Ex. 6 to Complaint (emphasis in original).

SafetyNet's position rests on a misreading of the regulations. One PAIMI Act regulation does grant access to P&As to investigate if there has been a reported incident, a complaint, probable cause or imminent danger. *See* 42 C.F.R. § 51.42(b). That access in subsection (b) is *in addition to* subsection (c) access for other purposes, such as monitoring and providing information to residents. *See* 42 C.F.R. § 51.42(c) (allowing access "*[i]n addition to* access as prescribed in paragraph (b) of this section . . .") (emphasis added). Thus, ADAP is entitled to reasonable unaccompanied access for the purposes outlined in subsection (c) – providing information and training, monitoring compliance, and inspecting, viewing and photographing – without proof of an incident, complaint, probable cause or imminent danger that would trigger an investigation under subsection (b).[6]

SafetyNet's position is also at odds with the purpose of the PAIMI Act. The Act was intended to protect individuals with mental illness by affording broad access rights to protection and advocacy organizations. A central function of these organizations is to conduct monitoring, even in the absence of abuse and neglect complaints from residents. Monitoring activities include facility visits and also unaccompanied opportunities to speak with residents of the facilities. The PAIMI Act is undermined if P&As are denied these rights, if they must litigate

[6] SafetyNet cites *Alabama Disabilities Advocacy Program v. J.S. Tarwater Dev. Ctr.*, 97 F.3d 492 (11th Cir. 1996), as the basis for its demand that ADAP demonstrate probable cause or receipt of a complaint. DHR Brief at 35. In *Tarwater*, the P&A sought access to records, which by statute is limited to situations in which the P&A demonstrates probable cause or receipt of a complaint. *Id.* at 497. ADAP is seeking access to monitor and does not seek records, so *Tarwater* does not justify the conditions SafetyNet has imposed.

each time they seek access to a facility and its residents, or if facilities can avoid access by characterizing some residents as less seriously ill than others.

Despite the compelling need articulated by Congress for P&As to monitor facilities that provide care or treatment for individuals with mental illness, SafetyNet suggests that any monitoring ADAP might do is superfluous. SafetyNet argues that the involvement of parents, social workers and government is adequate protection for those children it has admitted for residential treatment – but whose issues SafetyNet deems to be only mild to moderate in severity. DHR Brief at 40-41. SafetyNet's opinion about the merits of ADAP's oversight is beside the point. Congress passed the PAIMI Act in 1991 to prevent the terrible abuses that can occur in facilities absent effective protection and advocacy. *See* H.R. Rep. 102-319, November 15, 1991. The need for thorough and active monitoring is as important now as it was then, and facilities cannot block PAIMI Act access simply because they claim no abuse is occurring.

CONCLUSION

The PAIMI Act is a critical component in the system of legal protections for people with disabilities and its words must be given full force and effect. Congress unambiguously afforded protection and advocacy organizations the authority to access the facilities serving people with disabilities and the individuals themselves. This court should affirm that the PAIMI Act and regulations require facilities to permit reasonable unaccompanied access to all areas that are used by or are accessible to residents if the facility provides care and treatment to individuals with mental illness.

Respectfully submitted,

MOLLY J. MORAN
Acting Assistant Attorney General

EVE L. HILL
Deputy Assistant Attorney General

/s/ Cynthia Coe
JONATHAN M. SMITH, Section Chief
MARY BOHAN, Deputy Chief
CYNTHIA COE, Trial Attorney
District of Columbia Bar No. 438792
U.S. Department of Justice
950 Pennsylvania Avenue, NW – PHB
Washington, DC 20530
Telephone: 202-303-1121
cynthia.coe@usdoj.gov

For the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2014 I electronically filed the United States' Statement of Interest with the Clerk of the Court using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

/s/ Cynthia Coe

CYNTHIA COE, Trial Attorney
District of Columbia Bar No. 438792

Special Litigation Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW – PHB
Washington, DC 20530
Telephone: 202-303-111
cynthia.coe@usdoj.gov