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Testimony of the New York Civil Liberties Union
Before the Joint Legislative Budget Hearing on Mental Hygiene

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The New York Civil Liberties Union (NYCLU) submits the following testimony for the Joint Legislative Budget Hearing on Mental Hygiene.

The NYCLU, the New York state affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across the state and over 180,000 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 through an integrated program of litigation, legislative advocacy, public education, and community organizing. This includes our work in pursuit of community safety, and our work to advance the rights of New Yorkers who live with mental health challenges. The NYCLU is also class counsel in the Willowbrook case,[1] where we advocate for the rights of New Yorkers with intellectual and developmental disabilities (I/DD) to quality services provided in the least restrictive setting appropriate to their needs. The NYCLU also was a member of the recently convened New York State Bar Task Force on Mental Health and Trauma Informed Representation that explored, studied, and evaluated the intersection between the mental health crisis and our civil and criminal justice systems. This Task Force issued an extensive report and series of recommendations, intended to inform the New York State budget process, in June 2023.[2]

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[1] The NYCLU is lead class counsel in the Willowbrook class action litigation that was filed 50 years ago in the United States District Court for the Eastern District of New York. New York State Assoc. for Retarded Children v. Cuomo, Nos. 72 Civ. 356/7 (E.D.N.Y., Hon. Brian M. Cogan) ("Willowbrook"). The NYCLU, with others, commenced the Willowbrook lawsuit in 1972 to correct the inhumane institutional conditions suffered by the residents of the infamous Willowbrook State School.; *see generally* Beth Haroules, *50 Years After A Landmark Lawsuit, How Does NY Treat People with Developmental Disabilities?* NYCLU, Oct. 19, 2022, https://www.nyclu.org/en/news/50-years-after-landmark-lawsuit-how-does-ny-treat-people-developmental-disabilities.

[2] This NYSBA Task Force Report called for "seamless systems" between the mental health, criminal justice, and civil justice systems. A "seamless system" would permit an individual to enter the system at any point and access the full range of service instead of being left, as they are today, to navigate separate and complex programs. The Report and its extensive set of recommendations, which appear to have been largely left unnoted by the Governor in her budget proposal, is available at https://nysba.org/app/uploads/2023/06/final-report-Task-Force-on-Mental-Health-and-Trauma-Informed-Representation-June-2023.pdf.

I. New Yorkers Seeking Mental Health Services, From Preventative to Crisis to Post-Crisis Stabilization and Wrap Around Services, Deserve the Care and Support of Trained, Community-Based, Culturally Competent Health Professionals.

The Governor claims that her projected budget will strengthen the state's continuum of mental health care and drastically reduce the number of New Yorkers with unmet mental health needs. The Governor's programmatic choices expressed in her mental health budget, however, are a hodgepodge that do not accomplish the breadth of systemic reform that is necessary. While the budget is intended to expand some quantum of community-based, voluntary, outpatient services, potentially lead to the development of specialized housing units to serve individuals with mental illness and potentially increase private insurance coverage, the plan still calls for a significant expansion of inpatient psychiatric treatment capacity and continues the inappropriate role of law enforcement in response to people in mental health and/or substance use crisis.

New Yorkers seeking mental health services, from preventative, to crisis to post-crisis stabilization and wrap around services, deserve the care and support of trained, community-based, culturally competent health professionals. New Yorkers deserve a well-funded system of respite care centers, mental health urgent care centers, drop-in centers for those with mental health concerns and safe havens for people with mental health concerns. These services must be easy to access, open to the public 24/7, and prioritize serving those neighborhoods that struggle most with crises. A service delivery system of this sort would provide people with mental health conditions resources and support that can stop crisis situations from emerging. Development, and investment, in community-based organizations that improve overall quality of life will subsequently improve statewide mental health and must be prioritized.

Even if an individual is connected to mental health services, the mental health care that is currently delivered, especially for people reliant on the public mental health system, is routinely second-rate, dismissive of choice or convenience, difficult to obtain in many neighborhoods and rarely linguistically competent, culturally competent, gender competent, or, in any way, person-centered. Preventive care will keep people healthy and well through the provision of social supports, starting with economic security, safe affordable housing, available employment, meaningful social connections, and the ability to access beneficial services in one's own community.

The communities disproportionately impacted by mental health concerns are integral to the development of an action plan that focuses both on the systems at work, together with the underlying social determinants of health which undermine mental health care: lack of accessible services, limited housing options, virtually non-existent social supports, high unemployment and underemployment, racism, and police violence. Notably, those with the highest needs, including people who are homeless or incarcerated, have the least access to care.

A. New York State Should Not Be Funding Psychiatric Hospital Bed Expansion.

The Governor's proposed budget continues New York State's dependence on the delivery of inpatient psychiatric services. The proposed budget would add 200 more psychiatric inpatient beds to the mental health system. These 200 beds are in addition to last year's budgetary allocations to add 150 new state psychiatric hospital beds and to restore some 850 psychiatric beds back online in community hospitals.

There are insignificant increases in funding afforded Certified Community Behavioral Health Clinics, Assertive Community Treatment teams, Comprehensive Psychiatric Emergency Programs (CPEPs), Critical Time Intervention, Crisis Stabilization Centers, Safe Options Supports (SOS), the peer-led INSET program, and 3,500 units of housing. Funding for increased psychiatric service beds should be redirected to promote the systematic expansion of community-based prevention, crisis support and hospital diversion models, including the use of INSET peer led engagement teams, appropriate support for the 988 crisis line to ensure that there is a non-police response to individuals contacting the 988 crisis line to access community-based mental health and/or substance use support resources, crisis stabilization, respite and residential programs and clubhouse-model or drop- in services. Inpatient psychiatric service delivery results in more trauma than more recovery and results in countless failed discharge plans and remarkably high rates of recidivism, homelessness and incarceration.[3]

B. Police are Not the Answer to Mental Health Crises.

As noted, a public health response to emotional distress and mental health emergencies cannot be limited solely to a perceived or actual emergency, but must include a continuum of services encompassing preventive, emergency response, and longer-term support services.

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[3] We welcome that the proposed budget affords heightened commitment to discharge planning processes and connection to meaningful community-based supportive services for people receiving inpatient psychiatric services, including screening for social determinants of health and the presence of complex conditions. We are, however, quite concerned that the requirement for violence assessment will predispose discharge planners to look for violent tendencies that do not exist and that will lead to more people being consigned to more highly restrictive settings and supports that would not be appropriate under an *Olmstead*/Most Integrated Setting analysis.

The predictive validity of structured risk assessment instruments intended to assist clinicians assessing the risk of their patient acting violently is simply not well established. There are particular concerns with respect to risk assessment tools that are used to predict risk in the adolescent population, in a female population vs. a male population, and, of course, in patients of color. These risks are amplified when applied to forensic vs. non-forensic populations. *See, e.g.*, Desmarais, S. L., Zottola, S. A., Duhart Clarke, S. E., & Lowder, E. M. (2021). Predictive Validity of Pretrial Risk Assessments: A Systematic Review of the Literature. Criminal Justice and Behavior, 48(4), 398-420. https://doi.org/10.1177/0093854820932959 findings suggest that pretrial risk assessments predict pretrial outcomes with acceptable accuracy, but also emphasize need for continued investigation of predictive validity across gender and racial/ethnic subgroups). *See also* Ben Greer, Rachael W. Taylor, Matteo Cella, Richard Stott, Til Wykes, The contribution of dynamic risk factors in predicting aggression: A systematic review including inpatient forensic and non-forensic mental health services, Aggression and Violent Behavior, Volume 53, 2020, 101433, ISSN 1359-1789, https://doi.org/10.1016/j.avb.2020.101433 (Aggression in inpatient mental health services is more likely when dynamic risk factors escalate, but there has been no systematic review of individual factors and their relevance in different inpatient settings; there is a lack of evidence from the perspectives of patients and service user).

Police must stop being the first to respond to the scene of someone in a mental health crisis. Police are not mental health counselors or social workers; they lack the comprehensive training and skills needed to provide the safe and appropriate response to those in distress.[4] Moreover, the presence of armed police officers too frequently escalates crisis situations. In worst-case scenarios, officers use force in response to a person in crisis, resulting in unnecessary and unjust serious bodily injury and death to those who simply need the care and support of trained health professionals (e.g. social workers and psychologists).

Sadly, the Governor's proposed budget includes significant funding for so-called Crisis Intervention training for New York State law enforcement entities. Law enforcement officers' training is fundamentally incompatible with a public health response to people in crisis. When New York State dedicates additional, scarce mental health financial resources to policing instead of to actual health professionals, it just doubles down on maintaining and embedding law enforcement's outsize and unwarranted role in mental health crisis response. This policy choice to dedicate funds to ensure the entrenchment of law enforcement in mental health crisis response in New York flies in the face of significant other nationwide initiatives to fundamentally transform the role of policing.

New York must fundamentally transform the role of policing in our state – and we must start by ending our over-reliance on police as first responders in every crisis. When our friends, neighbors, or community members are experiencing a mental health crisis, they deserve to be treated with compassion, care, and understanding – not police and the threat of jail. With "Daniel's Law," (S.2398 (Brouk) / A.2210 (Bronson)) the legislature has an 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.

Last year, as part of the state budget, this Legislature passed a law creating the "Daniel's Law Task Force." That task force is supposed to work to identify programs throughout the country that could serve as a model for building effective systems to respond to people experiencing mental health and substance use crises. That task force will also identify potential funding sources for expanding crisis response services. We are advocating for the task force to submit a comprehensive report – informed by peers with lived mental health and substance use experience – before the budget is finalized this year. We ask the Legislature to honor the memory of Daniel Prude and prevent more unnecessary and tragic deaths at the hands of police by passing and funding Daniel's Law.

[4] Police have limited options, all grounded in traditional policing models of command, control and coercion principles, when responding to a person in crisis. They may arrest the individual; refer the person to mental health services or transport the person for an involuntary psychiatric evaluation; resolve the situation informally, for example, asking the individual to leave the scene; or if the individual is a crime victim, take a report and perhaps provide assistance.

II. Proposed Changes to Article 9 of the N.Y. Mental Hygiene Law, including the Definitional Changes Proposed to § 9.01 are Overbroad and Would Result in Erroneous Hospitalization of Non-Dangerous and Non-Mentally Ill Individuals – An Unconstitutional Deprivation Of Individual Liberty that Will Inevitably Open the Door to Significant and Protracted Litigations in Federal and New York State Courts.

We also wish to express the NYCLU's grave concerns regarding lurking proposed changes to Article 9 of the N.Y. Mental Hygiene Law, including the definitional changes proposed to § 9.01 and the changes proposed to § 9.60 (a/k/a "Kendra's Law") that are set forth in New York City Mayor Eric Adams so-called "Supportive Interventions Act," as encapsulated in A. 812 (Braunstein)/S. 5508 (Scarcella-Spanton).

You will recall that Governor Hochul attempted to pursue similar changes in 2022 in her so-called "Public Safety Package." This year, the Governor's State of the State speech, and some of the budget priorities set forth in the Governor's proposed budget, rest on the repugnant presumption that people living with mental illness are criminals. That presumption is both morally and factually wrong. People with mental illness are more likely to be victims of crime than perpetrators of it.[5] At a time when communities are demanding resources to address mental health, homelessness, and economic crises, the Governor's plan focuses on criminalization and forced treatment.

The Legislature has been asked before, and Mayor Eric Adams is asking again, to expand the standard of "harm to self" set forth in Article 9 of the Mental Hygiene Law. Creating a broader dragnet to force people into treatment is a provably failed strategy for connecting people to long-term effective treatment and care. And this newly named "Supportive Interventions Act" would do nothing to further public safety.

New York State Office of Mental Health ("OMH") Commissioner Ann Marie T. Sullivan and OMH Chief Medical Officer Thomas Smith have already issued targeted guidance explaining how the Mental Hygiene Law 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.[6] The Governor's prior efforts and Mayor Adams' renewed efforts inexplicably

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[5] "While the renewed focus and media attention on the importance of mental health in the aftermath of such tragedies is a positive development, the relationship between mental illness and criminality is too often conflated. The popular belief is that people with mental illness are more prone to commit acts of violence and aggression. The public perception of psychiatric patients as dangerous individuals is often rooted in the portrayal of criminals in the media as "crazy" individuals. A large body of data suggests otherwise. People with mental illness are more likely to be a victim of violent crime than the perpetrator. This bias extends all the way to the criminal justice system, where persons with mental illness get treated as criminals, arrested, charged, and jailed for a longer time in jail compared to the general population." See Ghiasi N, Azhar Y, Singh J. Psychiatric Illness and Criminality. (Updated 2022 Jan 15), https://www.ncbi.nlm.nih.gov/books/NBK537064/.

[6] *See Interpretative Guidance for the Involuntary and Custodial Transportation of Individuals for Emergency Assessments and for Emergency and Involuntary Inpatient Psychiatric Admissions,* to: NYS Public Mental Health Providers, From: Ann Marie T. Sullivan, MD, Commissioner, NYSOMH, & Thomas Smith, MD, Chief Medical

propose an unconstitutionally broad and vague standard for involuntary admission to a psychiatric inpatient setting based on prediction of future harm to an individual who appears to be unable to meet basic living needs, such as meeting their needs for food, clothing, shelter or medical care.

This language would upend a standard that New York courts have long held comports with constitutional guarantees of due process,[7] would undoubtedly be litigated, and would throw the entirety of the involuntary admission process into constitutional doubt. Because the § 9.01 definitional construct of "danger" to self or others is the operative standard that underpins all the provisions of the Mental Hygiene Law governing involuntary and emergency psychiatric admissions, this proposed amendment to § 9.01 may very well result in the invalidation of all the involuntary and emergency admission provisions of Article 9 of the Mental Hygiene Law as unconstitutional violations of a person's due process rights.[8]

Officer, NYSOMH, Date: February 18, 2022, https://omh.ny.gov/omhweb/guidance/interpretative-guidance-involuntary-emergency-admissions.pdf. This document was issued by OMH, at the Governor's behest, on February 18, 2022 ("OMH Guidance"), in connection with Governor Hochul's and New York City Mayor Eric Adams' unveiling of their joint plan to roust people from the New York City subway system. *See The Subway Safety Plan*, https://www1.nyc.gov/assets/home/downloads/pdf/press-releases/2022/the-subway-safety-plan.pdf. The Subway Safety Plan represents, for all intents and purposes, a policing response to addressing New Yorkers experiencing homelessness, mental health challenges and/or economic crises.

[7] *See, e.g., Project Release v. Prevost*, 722 F.2d 960 (2d Cir. 1983). In *Project Release*, the federal Second Circuit Court of Appeals upheld the constitutionality of New York's voluntary, involuntary, and emergency commitment procedures contained in sections 9.13, 9.27, 9.37 and 9.39 of the Mental Hygiene Law. The Second Circuit concluded: "We are acutely aware of the severe curtailment of liberty which involuntary confinement in a mental institution can entail, and of the process that must be accorded to those who may be affected by such action of the state. We are also mindful of the state interests served in providing care for those in need of treatment for mental illness and in maintaining order and preventing violence to self and others. With these concerns in mind, and having considered the New York M.H.L. in its entirety, our inquiry leads us to conclude that the statute does meet the minimum facial requirements of due process — both substantive and procedural." *Id.* at 975.

[8] The proposed amendments to N.Y. Mental Hygiene Law §§ 9.01 and 9.39 rest on a redefinition of the defined term "likelihood to result in serious harm" or "likely to result in serious harm." As defined in MHL § 9.01(a), that term currently provides that the "risk of physical harm to the person" must be "manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that the person is dangerous to himself or herself." The proposed legislation proposes to provide a new definition: "likely to result in serious harm" means presenting a substantial risk of physical OR MENTAL harm to the person as manifested by […] substantial interference with the person's ability to meet the person's needs for food, clothing, shelter or medical care." Crucially, a change to the definition of "likelihood to result in serious harm" or "likely to result in serious harm" set forth in § 9.01 actually changes multiple other provision of Article 9 of the Mental Hygiene Law beyond § 9.39. This term is used in the following sections of Article 9:

- § 9.37 - Involuntary admission on certificate of a director of community services or his designee.
- § 9.39 - Emergency admissions for immediate observation, care, and treatment.
- § 9.40 - Emergency observation, care and treatment in comprehensive psychiatric emergency programs.
- § 9.41 - Emergency admissions for immediate observation, care, and treatment; powers of certain peace officers and police officers.
- § 9.43 - Emergency admissions for immediate observation, care, and treatment; powers of courts.
- § 9.45 - Emergency admissions for immediate observation, care, and treatment; powers of directors of community services.
- § 9.57 - Emergency admissions for immediate observation, care and treatment; powers of emergency room physicians.
- § 9.58 - Transport for evaluation; powers of approved mobile crisis outreach teams.

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The NYCLU thanks the Legislature for the opportunity to provide testimony and for your work on the budget. We stand ready to work with the members of these Committees and all appropriate partners to advance meaningful policy changes that will improve the lives of New Yorkers confronting disability, housing, mental health and/or substance use challenges.

Moreover, the proposed legislation changes both the due process definitional standard set forth in § 9.01 and also introduces a new standard for "need for retention" to include a prediction of the person's "preparedness […] to adhere to essential outpatient treatment." This predictive standard also deviates significantly from the due process standard for detention for purposes of involuntary institutional emergency or involuntary psychiatric treatment established over decades by New York State and Federal courts.

The proposed standards are overbroad and would result in erroneous hospitalization of non-dangerous and non-mentally ill individuals – an unconstitutional deprivation of individual liberty. The vagueness will inevitably result in the arbitrary application of the statute due to the unreliability of psychiatric prediction of "substantial risk of physical harm to self within the reasonably foreseeable future" – language which does not reflect a clinical standard. The proposed alterations to §§ 9.01 and 9.39 will inevitably open the door to significant and protracted litigations in the federal and New York State Courts.