
Docket No. 06-1880

**IN THE UNITED STATES DISTRICT COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

AUTISM SOCIETY OF MICHIGAN and
MICHIGAN PROTECTION AND ADVOCACY SERVICE, INC.

Plaintiffs-Appellants

v.

RONALD FULLER, et al.

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
CIVIL ACTION FILE NO. 5:05-CV-00073-GJQ

***AMICUS CURIAE* BRIEF OF
NATIONAL DISABILITY RIGHTS NETWORK
URGING REVERSAL IN SUPPORT OF
PLAINTIFF-APPELLANT MICHIGAN PROTECTION
AND ADVOCACY SERVICE, INC.**

Of Counsel:
Joan Magagna,
Deputy Executive Director for Legal
Services
Jane Hudson,
Senior Staff Attorney
Elizabeth Greczek,
Staff Attorney
National Disability Rights Network
900 Second Street, N.E., Suite 211
Washington, D.C. 20002

MORGAN, LEWIS & BOCKIUS LLP
Miriam G. Bahcall
77 West Wacker Drive, Sixth Floor
Chicago, Illinois 60601
(312) 324-1135
Rachelle Barstow*
Julia Miller*
Adriana Martinez*
101 Park Avenue
New York 10178
(212) 309-6000
*Attorneys for Amicus Curiae
National Disability Rights Network*

*Not admitted in the Sixth Circuit

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**DISCLOSURE OF CORPORATE AFFILIATIONS AND
FINANCIAL INTEREST**

Pursuant to 6th Cir. R. 26.1, National Disability Rights Network makes the following disclosures:

Is National Disability Rights Network a subsidiary or affiliate of a publicly owned corporation?

NO

Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

NO

Miriam G. Bahcall

August 28, 2006

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INTRODUCTION AND SUMMARY OF ARGUMENT

The National Disability Rights Network (“NDRN”) submits this *amicus curiae* brief in support of the appeal of Plaintiff-Appellant Michigan Protection and Advocacy Service, Inc. (“MPAS”) from the District Court’s dismissal of MPAS’s Second Amended Complaint (the “Complaint”), which sought declaratory and injunctive relief arising from Defendants-Appellees’ use of physical restraints against students with disabilities in violation of their liberty interests. The District Court improperly dismissed MPAS’s Complaint for lack of standing, holding that: (1) MPAS failed to identify any constituent on whose behalf it could pursue legal remedies, and (2) even if it had identified such a constituent, no constituent faces a “real and immediate” threat of injury as a result of the use of physical restraint.

The District Court’s reasoning is at odds with the allegations in MPAS’s Complaint and the legal requirements for associational standing as set forth in Article III of the Constitution and Hunt v. Washington State Apple Adver. Comm’n, 432 U.S. 333 (1977). MPAS’s Complaint in fact identifies several constituents – children with autism and their guardians – for whom the threat of restraint at school is a very real, immediate, and likely harm.

Further, the ongoing danger that restraint poses to people with disabilities is shocking. Between 50 and 100 people die *each year* as a result of restraint procedures. See Eric Weiss et al., Deadly Restraint, The Hartford Courant, Oct. 11, 1998, at A1 (attached as Ex. 1 to the Addendum submitted herewith). This brief will address the importance of standing for Protection and Advocacy (“P&A”) agencies such as MPAS, particularly where the liberty interest of children

with disabilities is at stake. Denial of associational standing in the present case would undermine the very purpose for which the P&A network was created.

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

NDRN, formerly the National Association of Protection and Advocacy Systems, is the membership association of protection and advocacy agencies which are located in all 50 states, the District of Columbia, Puerto Rico, and the territories.

Congress established the P&A system for individuals with developmental disabilities in 1975 after it learned about the inhumane and despicable conditions at New York's Willowbrook State School for persons with mental retardation.¹ It later extended protection and advocacy services to individuals with mental illness after finding that these individuals were also subject to abuse, serious injury and neglect.² Protection and advocacy services were subsequently expanded to individuals who had disabilities other than developmental disabilities or mental illness.³ In fiscal year 2005, P&As served over 73,000 persons with disabilities through individual case representation and systemic advocacy. The P&A system comprises the nation's largest provider of legally based advocacy services for persons with disabilities.

¹ Developmental Disabilities Assistance and Bill of Rights Act ("DD Act"), 42 U.S.C. § 15001-15115.

² Protection and Advocacy for Individuals with Mental Illness ("PAIMI") Act, 42 U.S.C. § 10801-10851.

³ Protection and Advocacy for Individual Rights ("PAIR") Act, 29 U.S.C. § 794e.

As the membership association of P&A agencies, NDRN has a particular interest in ensuring that P&As such as MPAS have standing to bring lawsuits to redress issues of abuse, neglect, discrimination, and other rights violations that impact persons with disabilities. The issue of standing is critical because, for a number of reasons, people with disabilities may be unable to play a direct role in lawsuits. It is the Congressionally-mandated obligation of P&As to intervene in such cases as unbiased parties and to provide their expertise in defining the disability issues. Given the United States Supreme Court's relative silence in recent years on the issue of standing, it is now particularly imperative for P&As to effectively establish standing on a consistent basis in order to fulfill their purpose.

NDRN is concerned that the District Court's denial of MPAS's standing in the present case will undermine the Congressional intent to combat widespread discrimination and abuse of persons with disabilities. The persons with disabilities at the heart of the present case – children who continue to be subject to the use of physical restraints in schools – are exactly the type of people on whose behalf P&As were intended to advocate.

Because the issue of standing is critical to P&As' ability to protect the legal rights of persons with disabilities, NDRN has a vital interest in this case, and NDRN believes that its views may assist the Court in resolving the issues before it.

STATEMENT OF FACTS

NDRN adopts the Statement of Facts of Plaintiffs-Appellants in the underlying pleadings. To highlight the concerns of NDRN with respect to P&A

standing, NDRN presents an abridged summary of those facts it views as most pertinent to MPAS's claims.

MPAS brings the present lawsuit as a consequence of the events resulting in the death of a 15-year-old child with autism, M.R.L., under the auspices of Parchment Public High School ("PHS" or "Parchment") in Kalamazoo County, Michigan. Compl. at ¶ 32. On August 25, 2003, M.R.L. was subjected to 60-70 minutes of physical restraint following a seizure. *Id.* at ¶¶ 38-40. M.R.L. was restrained in the "prone" position: he was placed on the floor, on his stomach, with as many as four school officials at one time holding his shoulders and legs down, his hands behind his back, and placing a knee in his lower back. *Id.* at ¶¶ 41, 48. After 45 minutes of such restraint, M.R.L. stopped breathing. *Id.* at ¶ 45. Two hours following the initiation of the restraint procedure, M.R.L. was pronounced dead. *Id.* at ¶ 55. The cause of M.R.L.'s death was determined by the coroner to be prolonged physical restraint in the prone position associated with extreme mental or motor agitation, which resulted in M.R.L.'s heart failure. *Id.* at ¶ 56.

Plaintiff-Appellant MPAS has brought the current suit to protect the rights of children like M.R.L who are still subject to the use of physical restraints in public schools. The PHS staff involved in M.R.L.'s restraint lacked training in the use of personal restraint, employed no alternative method of behavior control, and failed to promptly contact emergency personnel once M.R.L. became non-responsive. M.R.L.'s prolonged restraint resulted in his death at the hands of those entrusted with his care. Despite the death of M.R.L., the Parchment Board Policy continues

to allow school employees to use force upon a pupil to maintain order and control in a school or school-related setting. Id. at ¶ 66.

ARGUMENT

I. MPAS HAS ASSOCIATIONAL STANDING TO REPRESENT ITS CONSTITUENTS IN THE PRESENT SUIT

As set forth in Plaintiffs-Appellants' Brief, MPAS has satisfied the three-part test of Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977), which held that organizations have associational standing under Article III of the Constitution where: (1) their members would otherwise have standing to sue in their own right, (2) the interests they represent are germane to the organization's purpose, and (3) the participation of the relevant individual members is not required.⁴ To satisfy the first element of the Hunt test, an organization is required to identify constituents who have suffered an injury in fact (*i.e.* an injury that is concrete, particularized, and actual or imminent) that is capable of redress. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

The District Court improperly dismissed MPAS's Complaint on the grounds that MPAS had not satisfied the first prong of the Hunt test, holding that:

(1) MPAS had not identified a constituent who attends PHS on whose behalf it is entitled to pursue legal remedies, and (2) even if it had, the possibility that an MPAS constituent might be improperly restrained at PHS does not constitute a

⁴ In 1996, the Supreme Court modified the Hunt standards, holding that Article III limitations on associational standing require the satisfaction of only the first two prongs of the Hunt test. United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 554-56 (1996).

“real and immediate” threat of injury sufficient to confer standing. Autism Soc’y of Mich., et al. v. Fuller, et al., No. 05:05-CV-73, 2006 WL 1519966, at *10 (W.D. Mich. May 26, 2006). Rather, the District Court deemed the possibility of injury to be merely speculative. Id.

The District Court’s conclusions are at odds with the allegations in MPAS’s Complaint and the legal requirements for associational standing. In this brief, NDRN primarily addresses the existence of MPAS constituents on whose behalf MPAS is entitled to pursue legal remedies, as well as the actual and imminent threat of injury from physical restraint that exists at Parchment. NDRN adopts the arguments set forth in Plaintiffs-Appellants’ main brief concerning the satisfaction of the remaining requirements to establish standing.

A. MPAS Has Identified Constituents On Whose Behalf It Is Entitled To Pursue Legal Remedies

MPAS’s Complaint makes explicit reference to “at least five (5) families from Kalamazoo County whose children have received special education services through KRESA [the Kalamazoo Regional Educational Service Agency, which administers programs for children with disabilities]” four of whom have been restrained at school, and two of whom have attended the Autistic-Impaired (“AI”) room at PHS. Compl. at ¶ 27. MPAS’s Complaint further identifies Bruce Mills and Ann Yurcek, the parents of children with autism who fear the threat of restraint at PHS, and who, in the case of Ms. Yurcek, has a daughter previously restrained at Parchment Middle School. Id. at ¶¶ 21-23. Since MPAS serves as the P&A

system for the entire state of Michigan, these individuals, as Michigan residents, are clearly identifiable constituents on whose behalf MPAS seeks legal remedies.

In addition, MPAS's Complaint identifies its constituents as those "persons with mental illness and developmental disabilities" for whom MPAS advocates by providing "information," "referrals," "training" and "investigation" with respect to the use of "restraints in schools." *Id.* at ¶ 26. By highlighting its efforts regarding "restraints in schools," MPAS clearly identifies those persons affected by physical restraints as the specific "persons with mental illness and developmental disabilities" on whose behalf MPAS currently seeks legal remedies.

1. MPAS Is Statutorily Entitled to Bring Claims on These Constituents' Behalf

MPAS is statutorily entitled to advocate for each of the constituents identified in its Complaint. In concluding otherwise, the District Court viewed the MPAS constituency too narrowly and engaged in a flawed analysis of the provisions and requirements of the three qualifying statutes: the DD Act, PAIMI, and PAIR. These statutes clearly confer authority on MPAS to bring claims on behalf of children with disabilities, including autism, facing restraint in school.

MPAS' constituents are all children with disabilities in the Parchment School District who are at risk of being injured – and even killed – because the district has no policies to limit the use of seclusion and restraint and has not trained its teachers about alternatives to seclusion and restraint or how to seclude and restrain children with disabilities safely. Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss Second Amended Complaint ("Opposition"), Ex.

4, Ronald Fuller at TR 33-36. As MPAS stated in its Complaint, it advocates for all persons with mental illness and developmental disabilities in the state. Compl. at ¶ 26. This advocacy includes providing information on how to reduce the use of seclusion and restraint, training schools on the proper use of seclusion and restraint, investigation into abuse, and participation in the Michigan Department of Education's work group to develop policies, procedures and legislation regarding the use of seclusion and restraint in schools. Id. The P&A's advocacy benefits all students with disabilities in Michigan, including the two children who have attended the AI classroom at Parchment and the four children who have been personally restrained at school. Id. at ¶ 27.

Furthermore, children with autism who are at risk of seclusion and restraint in the Parchment School District and who are eligible for P&A services under the federal P&A statutes are specific constituents of MPAS in the present case. Under the DD Act, the children with autism spectrum disorder in the Parchment School District who are eligible for P&A services are children who have a severe, chronic disability that (i) is attributable to a mental or physical impairment or combination thereof, (ii) is manifested before the age of 22, (iii) is likely to continue indefinitely, (iv) results in substantial functional limitations in three or more areas of major life activity and (v) reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic services, individualized supports, or other forms of assistance that are of lifelong or extended duration and are individually planned and coordinated. 42 U.S.C. § 15002(8)(A)(i)-(v).

Moreover, the legislative history of the DD Act indicates that Congress explicitly intended to include persons with autism within the scope of the law’s protections. The DD Act was first enacted by Congress in 1975. The definition of “developmental disability” that appears in the Act’s most recent incarnation, 42 U.S.C. § 15002(8)(A) (2000), was incorporated into the original statute by a 1978 amendment, (Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, Sec. 503, 42 U.S.C. § 6001, 92 Stat. 2955 (1978)), and was intended to expand the former definition that had specifically limited “disability” to conditions “attributable to mental retardation, cerebral palsy, epilepsy, or *autism*.” DD Act, Pub. L. No. 94-103, Sec. 125, 42 U.S.C. § 6001, 89 Stat. 496 (1975) (emphasis added). The Conference Report accompanying the 1978 disability definition states that the new definition is “intended to cover everyone currently covered under the [prior] definition and is also intended to add other individuals with similar characteristics.” H.R. Rep. No. 95-1780, at 104 (1978) (Conf. Rep.), as reprinted in 1978 U.S.C.C.A.N. 7375, 7415. Thus, children with autism are clearly constituents of MPAS under the DD Act if they meet the other eligibility criteria set forth above.

In addition, some children with autism who are also diagnosed with a mental illness may also be eligible for P&A services under PAIMI. The District Court erroneously concluded that PAIMI’s protection does not extend to incidents that occur during attendance at schools. Specifically, the Court found that PAIMI only applies to “matters that occurred within 90 days after the date the constituent was discharged from a facility providing mental illness treatment for the constituent,”

suggesting that a public school is not a “facility providing mental illness treatment.” Fuller, 2006 WL 1519966, at *11.

In fact, a district court in Connecticut and interpretations by the federal agencies charged with administering and enforcing PAIMI take the contrary view. In State of Conn. Office of Prot. & Advocacy for Persons with Disabilities v. Hartford Bd. of Educ., 355 F. Supp. 2d 649, 659-60 (D. Conn. 2005), a non-residential transitional learning academy maintained by a Connecticut school district for children with special needs was held to be a “facility providing care or treatment” of persons with mental illnesses, to which the Connecticut Office of Protection and Advocacy for Persons and Disabilities (OPA) had access under PAIMI. The court further held that the exclusion of this private, non-residential school from the statute’s definition of “facility” would subvert the intent of PAIMI, which is “to protect and advocate the rights of all individuals with mental illness, regardless of whether they are treated as inpatients or outpatients.” Id. at 659. This case currently is on appeal to the Second Court of Appeals. State of Conn. Office of Prot. and Advocacy for Persons with Disabilities v. Hartford Bd. of Educ., No. 05-1240-CV (2d Cir. filed Mar. 9, 2005). The Second Circuit invited the agency responsible for administering and enforcing PAIMI, U.S. Department of Health and Human Services (“HHS”), to file an amicus brief on several issues, including whether a non-residential public school constitutes a “facility” under PAIMI. In its joint brief with the Department of Education, HHS interpreted PAIMI as covering non-residential facilities. Brief for Amici Curiae Dep’t of

Educ. & Dep't Health & Human Servs. at 8 (2d Cir. 2006) (No. 05-1240-CV) (Addendum, Ex. 2).

Finally, and again contrary to the District Court's determination, even if children with autism did not meet the eligibility requirements of the DD or PAIMI Acts, they might be eligible for P&A services, and thus be constituents of MPAS, under PAIR. 29 U.S.C. § 705(9)(B). To be eligible for P&A services under PAIR, an individual must have a disability that is a physical or mental impairment that substantially limits one or more major life activities, and the individual must be ineligible for P&A services under the DD and PAIMI Acts. 29 U.S.C. § 794e(a)(1)(B)(i)-(ii); 29 U.S.C. § 705(9)(B); and 34 C.F.R. § 381.5(b). Indeed, the provisions and definitions of PAIR are by far the broadest of the three statutes at issue here. See Hartford, 355 F. Supp. 2d at 655 (PAIR "applies to individuals with disabilities who are not entitled to protection or services under either the Protection and Advocacy for Mentally Ill Individuals Act [PAIMI] or the DD Act"). As stated in the seminal case on P&A associational standing, Doe v. Stincer, 175 F.3d. 879, 883 (11th Cir. 1999), "Congress enacted PAIR in 1992" to "supplement[] PAMII's [sic] protections. ... PAIR authorizes protection and advocacy organizations...to provide services to individuals with disabilities who are not eligible for services under pre-existing protection and advocacy legislation." Thus, the law is clear that PAIR was enacted for the express purpose of supplementing PAIMI and the DD Act, such that the three statutes together would encompass any and all persons with disabilities.

On motions to dismiss, courts are required to accept the factual allegations in the complaint as true. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). The district court failed to do this. As long as current and future students in the Parchment School District meet the eligibility requirements of one or more P&A Acts and as long as they are at risk of harm because of the lack of seclusion and restraint policies at Parchment, they are constituents of MPAS.

2. MPAS Need Not Identify Constituents by Name

MPAS's references to its constituents throughout the Complaint constitute more than adequate identification of individuals on whose behalf MPAS asserts standing. The District Court suggests that MPAS should name a specific individual in this suit. Fuller, 2006 WL 1519966, at *11 n.4. Yet, "nothing in the PAMII Act [sic] requires a P&A to name a specific individual in bringing suit to redress violations of the rights of individuals with mental illness." Iowa Prot. & Advocacy Servs., Inc. v. Gerard Treatment Programs, LLC, 152 F. Supp. 2d 1150, 1158 (N.D. Iowa 2001) (citing Stincer, 175 F.3d. at 884). Stincer, in fact, discusses this point in detail, holding that "nothing in PAMII [sic] can reasonably be read to require the Advocacy Center to name a specific individual in bringing suit to redress violations of the rights of individuals with mental illness." Id. "Moreover, under *Article III's established doctrines of representational standing, we have never held that a party suing as a representative must specifically name the individual on whose behalf the suit is brought* and we decline to create such a requirement in PAMII [sic]." Id. (emphasis added). MPAS's Complaint, therefore, clearly meets the standards for the identification of its constituents.

B. MPAS Has Alleged That Its Constituents Face The Threat of a “Real and Imminent” Injury From Physical Restraint

In determining that MPAS had not established injury in-fact, the District Court erred in holding that “the possibility that the student may be restrained [at Parchment] does not demonstrate a real and immediate threat of injury sufficient to establish standing.” Fuller, 2006 WL 1519966, at *7. The District Court based this finding largely on City of Los Angeles v. Lyons, 461 U.S. 95 (1983), which the court stated “compel[led]” its conclusion in this case. The District Court, however, was mistaken. Lyons is not dispositive because it is factually distinct from the matter at hand.

Lyons concerned an action brought by the plaintiff, for, among other things, injunctive relief. The case arose out of allegations that Lyons had been stopped by Los Angeles Police Department (“LAPD”) officers for a traffic violation, who, without provocation, applied a chokehold to Lyons. Lyons, 461 U.S. at 97-98. The Court determined that the likelihood that Lyons would be subject again to the same type of treatment at the hands of the LAPD was “speculative,” and that, “[a]bsent a sufficient likelihood that he will again be wronged in a similar way,” Lyons did not have standing to seek injunctive relief. Id. at 111.

Unlike in Lyons, the threat of injury to children with disabilities attending Parchment is far from speculative. Under Michigan law, students must attend public school in the district in which they live. Mich. Comp. Laws Ann. § 380.1147. As such, any child with a disability living within Parchment School District might attend PHS. If it is determined that a child with autism should be

placed in an autism intervention room, the only such room in the Parchment School District is located at Parchment High School. As the Defendants-Appellees have themselves admitted, children with disabilities who attend Parchment will come into contact with Parchment's general staff. Opposition, Ex. 4, Ronald Fuller at TR 33-36.

Parchment School District's policy (attached to MPAS's Complaint) expressly permits children to be physically restrained in a variety of circumstances:

[A] person who is employed by or engaged as a volunteer or contractor by the District may use reasonable physical force upon a pupil as necessary to maintain order and control in a school or school-related setting for the purposes of providing an environment conducive to safety and learning. In maintaining order and control, *the person may use physical force upon a pupil as may be necessary ... [t]o restrain or remove a pupil whose behavior is interfering with the orderly exercise and performance of school district functions within a school or at a school-related activity, if that pupil has refused to comply with a request to refrain from further disruptive acts.*

Parchment Board Policy No. 5150, Compl. at Ex. 2, 1-2 (emphasis added) (Addendum, Ex. 3). The district provided no training to staff or volunteers with respect to the use of physical restraint. (Compl. ¶¶ at 63, 80.)

It is beyond dispute that children with autism are likely to engage in behaviors that are perceived to "disrupt orderly conduct" even though those behaviors may be involuntary or otherwise a manifestation of the disability.⁵ As a

⁵ Michigan law defines "autism spectrum disorder" as including behavior such as "restricted, repetitive, and stereotyped behaviors," such as "stereotyped and repetitive motor mannerisms, for example, hand or finger flapping or twisting, or complex whole-body movements." Mich. Admin. Code r. 340.1715(2)(c). Children with autism also have difficulty with communication, Mich. Admin. Code r. 340.1715(2)(b), and therefore, in many instances, will have difficulty

result, children may be subject to the use of restraint by Parchment High School staff. As the Committee on Educational Interventions for Children with Autism has stated:

Problem behaviors of children with autistic spectrum disorders—and other children—are among the most challenging and stressful issues faced by schools and parents in their efforts to provide appropriate educational programs. Problem behaviors such as property destruction, physical aggression, self-injury, and tantrums are major barriers to effective social and educational development. Such behaviors put young children at risk for exclusion and isolation from social, educational, family, and community activities. Once moderate to severe problem behaviors become an established part of a child’s repertoire, unlike children with typical development, children with autistic spectrum disorders or other disabilities do not usually outgrow them. Without appropriate intervention, these behaviors persist and worsen.⁶

In addition, as discussed supra at 4, the use of physical restraint on M.R.L. followed an involuntary seizure. Approximately one in four children with autism begin to have seizures during puberty. Stephen Edelson, Autism, Puberty, and the Possibility of Seizures (Center for the Study of Autism) available at <http://www.autism.org/seizures.html> (Addendum, Ex. 4).

“comply[ing] with a request to refrain from further disruptive acts.” Mich. Comp. Laws Ann. § 380.1312(4)(a).

⁶ National Research Council Division of Behavioral and Social Sciences and Education, Committee on Educational Interventions for Children with Autism, Educating Children with Autism 115 (Catherine Lord & James P. McGee eds. National Academy Press. 2001) available at <http://www.nap.edu/books/0309072697/html/R1.html> (internal citations omitted) (Addendum, Ex. 5).

Several cases have found a threat of imminent harm where, as here, the plaintiff's actions are involuntary, since the plaintiff's inability to control his actions makes it more likely that the conduct will occur again. See Church v. City of Huntsville, 30 F.3d 1332, 1338 (11th Cir. 1994) (“[b]ecause of the allegedly involuntary nature of their condition [homelessness], the plaintiffs cannot avoid future ‘exposure to the challenged course of conduct’ in which the [defendant] allegedly engages”) (internal citation omitted); see also Honig v. Doe, 484 U.S. 305, 320 (1988) (based on prior history, student unable to govern his impulsive actions was likely to again engage in classroom misconduct). In Lynch v. Baxley, 744 F.2d 1452, 1454 (11th Cir. 1984), plaintiffs sought to enjoin the defendant officials of the state of Alabama from detaining in county jails persons awaiting mental illness involuntary commitment proceedings. The court granted standing to the class representative, Percy, on the basis that he would likely face a “repetition of his experiences”:

Percy has ... mental problems which require and benefit from the treatment which comes with commitment but which are subject to reoccurrence. There is every indication that the named plaintiff could continue to be the subject of involuntary commitment petitions and thereby subject to emergency detention.... In addition, there is every likelihood that any petition filed against Percy would result in his incarceration in the Lee County jail.

Id. at 1456-57

PHS's endorsement of a policy of physical restraint further supports MPAS's position that there is a likelihood of recurring injury. See DeShawn E. v. Safir, 156 F.3d 340, 345 (2d Cir. 1998) (where the challenged interrogation

methods were “officially endorsed policies,” there was a likelihood of recurring injury); see also, Armstrong v. Davis, 275 F.3d 849, 861 (9th Cir. 2001) (“where the harm alleged is directly traceable to a written policy, there is an implicit likelihood of its repetition in the immediate future”) (internal citation omitted).

Thus, the present situation is clearly distinguishable from Lyons. Unlike Lyons, who could control his conduct and may never have come into contact with the LAPD again, children are required to go to school. Children who attend public school, must, as a general rule, attend their local public school. The local school for children with disabilities who reside in Parchment is the Parchment School District. The District’s policy permits the use of physical force by untrained employees and volunteers when students engage in the very types of involuntary behaviors that are common to children with autism. Students with disabilities at Parchment therefore face, on an ongoing basis, the very conditions and circumstances surrounding the death of M.R.L.

Though past wrongs are not sufficient in and of themselves to show an injury-in-fact, “[p]ast wrongs do constitute evidence bearing on whether there is a real and immediate threat of repeated injury which could be averted by the issuing of an injunction.” Lynch at 1456 (citation omitted). The circumstances that resulted in M.R.L.’s death are still in existence at Parchment and, as discussed in detail below, physical restraints such as those in use at PHS have resulted in literally hundreds of other deaths.

It is certainly everyone’s hope that, when physical restraint is used again at Parchment, no injury or harm will result. However, the denial of standing to

MPAS cannot rest on mere wishful thinking in the face of a clear and immediate danger. The potential for a repetition of the harm that occurred to M.R.L. is hardly “speculative” when the district continues to espouse a policy allowing children with disabilities to be physically restrained.

II. THE PREVALENCE OF INJURY OR DEATH AS A RESULT OF RESTRAINT DEMONSTRATES THAT THE DANGERS OF PHYSICAL RESTRAINT ARE REAL AND IMMINENT

Because the Parchment School District still permits children to be physically restrained, children with behavioral issues remain in the same danger of death or serious injury that M.R.L. experienced, merely by crossing the school house door.

Protection & Advocacy, Inc. of California (“PAI”) recently investigated a number of deaths and serious injuries sustained while individuals were restrained face down or prone, as in the case of M.R.L. PAI’s medical expert determined that the death and injuries “were most likely caused by positional asphyxiation and, specifically, the prone restraint position.” Protection and Advocacy, Inc., Investigations Unit, The Lethal Hazard of Prone Restraint: Positional Asphyxiation (Apr. 2002) available at <http://www.pai-ca.org/pubs/701801.pdf> (Addendum, Ex. 6). Positional asphyxia is defined as insufficient intake of oxygen as a result of a body position that interferes with one’s ability to breathe:

Restraint asphyxia is a form of positional asphyxia that occurs during the process of subduing and restraining an individual in a manner causing ventilation compromise. As a consequence of the restraint application, respiration is compromised causing insufficient oxygen in the blood to meet the body’s oxygen needs or demands ... which then results in a disturbed heart rhythm.

Id. at 5 (citations omitted). A combination of factors places a person at risk of positional asphyxia, including: position during restraint, especially the prone position; agitated delirium syndrome; prolonged struggle or physical exertion; respiratory syndromes, such as asthma and bronchitis; and pre-existing heart disease. Id. at 5-6.

Indeed, other studies have determined that deaths as the result of restraint-induced asphyxia and other restraint-related causes occur at an alarming rate. In October 1998, The Hartford Courant published a five part series entitled, “Deadly Restraint.” Eric Weiss et al., Deadly Restraint, The Hartford Courant, Oct. 11, 1998, at A1. (Addendum, Ex. 1.) The Courant conducted a 50-state survey (the first of its kind) focused on mental health and mental retardation facilities and group homes and confirmed that 142 deaths occurred “during or shortly after restraint or seclusion” in the prior decade. Eric Weiss et al., Oct. 11, 1998, at A1. According to a statistical estimate commissioned by The Courant and conducted by a research specialist at the Harvard Center for Risk Analysis, 50 - 150 such deaths occur each year across the nation. Id. The actual numbers are probably much higher because many cases go unreported. Id. Because neither the federal government, state regulators nor accreditation agencies collect data on how many patient deaths occur due to restraint, the actual number of such deaths is not known.

Among the deaths uncovered by The Courant’s survey were a disturbing number of children, including:

- 16 year-old Tristan, who suffocated after being restrained face down by seven staff members who wrapped a towel and a bed sheet around his head to prevent him from biting or spitting at a psychiatric hospital in Greensboro, North Carolina.
- 12 year-old Robert Rollins, who died from asphyxiation after being restrained for ten minutes, face down on the floor after a dispute over his missing teddy bear at a school for children with behavioral problems in Rutland, Massachusetts.
- 16 year-old Roshelle Clayborne, who died of cardiac arrhythmia in a residential treatment center in San Antonio, Texas after staff members restrained her in a face-down floor hold, gave her a 50 milligram shot of Thorazine, rolled her in blanket and put her in a seclusion room.
- 15 year-old Edith Campos, who died of asphyxiation when a dispute with an aide at a center for youth and families in Tuscon, Arizona over Edith's looking at a family photo escalated into a face-down floor restraint.

Id. at A11. Of the 142 deaths confirmed by The Courant during its investigation, 47.2% involved physical restraints or therapeutic holds. 32.8% of the deaths were caused by asphyxia, suffocation or strangulation and 25.6% resulted from cardiac-related causes. Id. at A1.

As a result of the publication of The Courant's series on restraint, Congress asked the United States General Accounting Office ("GAO") to conduct a study on the issue. U.S. Gen. Accounting Office, *Mental Health: Improper Restraint and Seclusion Places People at Risk 1* (1999) (Addendum, Ex. 7). The GAO study focused on people receiving services for mental illness or mental retardation in residential facilities that received public funding. Id. at 2. The Report's findings included:

- The use of restraint and seclusion represents a significant risk to individuals with mental illness and mental retardation. Id. at 22.

- Children are subjected to restraint and seclusion at higher rates than adults and also are at greater risk of injury. Id. at 7.
- There was no comprehensive reporting system to track injuries and deaths resulting from improper restraint and seclusion or the rates of restraint and seclusion use by facility. Id. at 3.
- Federal and state regulations governing restraint and seclusion for individuals with mental illness and mental retardation are inconsistent across types of facilities. Id.
- The safeguards currently in place to protect people with mental illness or mental retardation in residential settings are not comprehensive and fail to fully ensure the rights and safety of these individuals. Id. at 22.

The GAO report highlights the extreme dangers of physical restraint in cases such as the one before this Court, where staff members and volunteers are untrained in the proper use of restraint.

Restraint does not only pose a risk in residential facilities and hospitals, as the case of M.R.L. amply demonstrates. Children with disabilities are also being injured and killed by the use of restraints in schools.⁷ Recent examples of such occurrences include:

⁷ Indeed, a number of states have recognized the serious danger of restraint in schools and have accordingly crafted regulations governing the appropriate use of such restraint. See, e.g., California, Cal. Educ. Code §§ 56520-56521; 56523-56524 (West 2003); Colorado, Colo. Rev. Stat. Ann. §§ 22-2-107(1)(a), (c) 26-20-108 (West 2002); Connecticut, Conn. Gen. Stat. Ann. §§ 46a-150 - 46a-154, 53a-18 (West 2004); Illinois, 105 Ill. Comp. Stat. Ann. 5/10-20.33, 5/34-18.20 (West 2006), Ill. Admin. Code tit. 23 § 1.280 (2006); Maryland, Md. Code Regs. 13A.08.04.05 (2006), Md. Code Ann., Educ. §7-1102 (2004); Massachusetts, 603 Mass. Code Regs 46.01 (2006); Nevada, Nev. Rev. Stat. Ann. §§ 388.5215 - 388.5315, 392.4633, 394.356-394.378; North Carolina, N.C. Gen. Stat. Ann. § 115 - 391.1 (2006); Pennsylvania, 22 Pa. Code §§ 14.133, 12.5 (2005); Rhode Island, R.I. St. § 42-72.9-3 (2005); Texas, Tex. Educ. Code Ann § 37.0021 (Vernon 2006), 19 Tex. Admin. Code §89.1050(g)(2006).

- In Saginaw, Michigan, 12 year-old Calvin Wade, who had Prader-Willi syndrome, died from cardiac arrest at a learning center in 2003 after a staff member restrained him by holding him against a wall and on the floor. Joe Snapper, Report on Death Critical of Millet, The Saginaw News, May 24, 2005 at 1A. (Addendum, Ex. 8).
- A 14-year-old Texas student with a mental illness and other disabilities died in 2002 after being restrained by his teacher in his behavior management class. Jimmie Ferguson, Autopsy Shows Restraint Killed Student, Killeen Daily Herald, Mar. 24, 2002 (Addendum, Ex. 9); Jason Spencer, Police: Restraint of Pupil Met Rules 14-year-old Died After Incident in Killeen Special Education Class, The Austin American Statesman, March 9, 2002 at B1 (Addendum, Ex. 10).
- In April 2005 in Montana, a special education teacher put a 20-year old student with a mental disability in a chokehold from behind, lifting him up in the air and then throwing him onto the floor. The student was choking and gasping for air during the assault and his face turned purple. His fingernails were bleeding from his attempt to hold onto the table during the assault. John Stromnes, Lawsuit Alleges Noxon Teacher Assaulted Special Education Student, Missoulian, Mar. 22, 2006 (Addendum, Ex. 11).⁸

These studies and surveys are more than just troubling. Indeed, they demonstrate the widespread use and dangers of physical restraint and the imminent ongoing threat that children with disabilities, including those at Parchment, face with respect to the use of such restraint.

⁸ Several recent cases also demonstrate that deaths due to restraint are not isolated events. See Patrick v. State, 806 N.Y.S.2d 849 (N.Y. Ct. Cl. 2005) (state found liable for 2001 death of a resident of a state-operated group home who died as a result of physical restraint); Iowa Prot. & Advocacy Servs., Inc. v. Gerard Treatment Programs, LLC, 152 F. Supp. 2d 1150, 1153 (N.D. Iowa) (where child died from cardiopulmonary arrest while being restrained).

III. DENIAL OF STANDING WILL SIGNIFICANTLY IMPAIR P&AS' ABILITY TO EFFECTIVELY REPRESENT THEIR CONSTITUENTS

One of the primary purposes behind the creation of the P&A network was to address the claims of persons who, for a number of reasons, would be unable or unwilling to play a direct role in lawsuits. For instance, potential plaintiffs in institutions may fear that bringing suit against the institution will result in retaliation from those they rely on for care. Others may be reluctant to make public confidential information concerning their disabilities and the stigma associated therewith. Additionally, some individuals with disabilities may not even be aware that their rights are being violated. In these cases and others, the ability of P&As to assert associational standing on plaintiffs' behalf to remedy the violations at hand is critical.

Another crucial purpose of P&As is to facilitate systemic reform that would not be accomplished by an individual plaintiff's lawsuit. Oftentimes, a plaintiff's specific situation may make it impossible for his or her individual case to redress a larger systemic problem. For example, in Doe v. Rowe, 156 F. Supp. 2d 35, 39 (D. Me. 2001), a case brought by three plaintiffs challenging Maine's denial of their right to vote under a statute prohibiting persons with "mental illness" from voting, the P&A both represented the individual plaintiffs and was a named plaintiff in order to challenge Maine's voting restriction on behalf of all persons with mental illness, which resulted in the court's invalidation of the statute. Similarly, in Unzueta v. Schalansky, No. 99-4162, 2002 WL 1334854, at *1 (D. Kan., May 23, 2002) (Addendum, Ex. 12), a case involving the death by restraint of an adolescent

in the defendant's hospital, the individual plaintiffs asserted damages claims and the Kansas Advocacy & Protective Services ("KAPS") brought claims for injunctive and declaratory relief on behalf of all persons with disabilities in Defendant's care. KAPS's involvement in the suit enabled the pursuit of systemic relief in the form of limiting and implementing alternatives to the use of restraints against adolescents in a state hospital setting. Id. at *2-4.

A. Children With Autism Are Precisely the Constituents Whom P&As Are Designed to Defend

In order to fulfill their purposes, NDRN believes that P&As generally should be given broad latitude by courts when evaluating their assertion of associational standing. Courts should take into account the nature of P&As' claims in determining whether P&As have adequately identified the constituents on whose behalf they raise the claims.

For example, P&As oftentimes will only be able to identify a few individual constituents; this does not mean that only a handful of constituents are injured:

The mentally ill are vulnerable to abuse and neglect because many mentally ill individuals have difficulty recognizing the concept that they have rights and will not necessarily identify even the most egregious abuse as a violation of their rights. Even if cognizant of their rights, many of these individuals have difficulty assessing whether their rights have been violated....In addition, both the effects of medications and of mental illness may cause confusion and problems with memory, making it difficult to remember and explain possible rights violations....

Robbins v. Budke, 739 F. Supp. 1479, 1486 (D.N.M. 1990). Thus, constituents with valid claims frequently fail to come forward at the pleading stage.

Additionally, those constituents inclined to come forward may hesitate to do so if courts require P&As asserting their claims to explicitly reveal the constituents' identities in the complaint. Although Stincer held that P&As are not required to name the individual on whose behalf they are suing, it did not define the level of specificity required when identifying constituents. 175 F.3d at 886. Further clarification on this issue is necessary in order to prevent the dismissal of P&As' valid claims for failure to properly identify constituents in accordance with associational standing requirements.

In the present case, the children and their guardians on whose behalf MPAS brings suit provide a perfect example of the challenges of identifying constituents. Children with disabilities who are restrained by school officials may be unaware that their rights are violated, particularly in light of the fact that the restraint occurs at the hand of authority figures to whom the children feel compelled to submit. Furthermore, these children's guardians also find themselves in a vulnerable situation, as they may fear retaliation from those school officials in whose care they entrust their children and on whom they rely on for their children's education.

Because the claims raised by P&As, as illustrated by the facts of the present case, are too significant to ignore, courts should, at the very least, clarify the constituency pleading requirements so that P&As can successfully assert claims on their constituents' behalf.

CONCLUSION

MPAS has adequately identified constituents who face the ongoing, actual and imminent threat of injury through the use of physical restraint by Parchment staff. For the foregoing reasons, NDRN respectfully requests that the Court overrule the decision of the District Court and hold that MPAS has standing to bring suit in this matter.

Dated: New York, New York
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Respectfully submitted,

Of Counsel:

Joan Magagna
Deputy Executive Director for
Legal Services

Jane Hudson
Senior Staff Attorney

Elizabeth Greczek
Staff Attorney

NATIONAL DISABILITY RIGHTS
NETWORK

900 Second Street, N.E., Suite 211
Washington, D.C. 20002

Of Counsel for Amicus Curiae
National Disability Rights Network

Miriam G. Bahcall
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive
Sixth Floor
Chicago, Illinois 60601
(312) 324-1135

Rachelle Barstow*
Julia Miller*
Adriana Martinez*
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, New York 10178
(212) 309-6000

Attorneys for Amicus Curiae
National Disability Rights Network

*not admitted in the Sixth Circuit

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B), as well as the limitation on length set forth in the Federal Rule of Appellate Procedure 29(d). This brief contains 6,876 words of 14 point Times New Roman font, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). The word processing software used to prepare this brief was Microsoft Office Word 2003.

Date: August 28, 2006

Miriam G. Bahcall

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August 2006, I caused two copies of the foregoing Brief of the *Amicus Curiae* to be served by pre-paid Federal Express on the following counsel:

Stacy A. Hickox
Michigan Protection & Advocacy Service, Inc.
4095 Legacy Parkway, Suite 500
Lansing, MI 48911
Counsel to Plaintiffs-Appellants

Gary P. Bartosiewicz
Early Lennon Crocker & Bartosiewicz PLC
151 S. Rose St., Ste. 900
Kalamazoo, MI 49007
Counsel to Defendants-Appellees

In addition, on August 28, 2006, I caused an original and six copies of the Brief of the *Amicus Curiae* to be served by prepaid Federal Express on the Clerk of the Court.

Date: August 28, 2006

Rachelle Barstow