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Student Pieces

Discharge Planning for Mentally Ill Inmates in New York City Jails: A Critical Evaluation of the Settlement Agreement of *Brad H. v. City of New York*

Doug Jones*

I. Introduction

People with serious mental illness, especially those who are also poor, homeless or suffering from drug or alcohol addiction, are often unable to obtain the mental health treatment they need.¹ With their illnesses left untreated, many act in ways that precipitate their entrance into the correctional system.² When there is no other way for the poor and seriously mentally ill to obtain treatment, the correctional system becomes the only place where these individuals can receive treatment. As such, prisons and jails are becoming the primary caregiver for the poor and seriously mentally ill in the United States.³

Thousands of mentally ill inmates are released from American prisons every year. Approximately 600,000 men and wo-

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1. HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 16 (2003), *available at* <http://www.hrw.org/reports/2003/usa1003/usa1003.pdf> [hereinafter HUMAN RIGHTS WATCH].

2. *Id.*

3. Brief for National Alliance for the Mentally Ill et al. as Amici Curiae Supporting Respondents, *Brad H. v. City of New York*, 716 N.Y.S.2d 852 (App. Div. 2000) (No. 117882/99), *available at* <http://www.bazelon.org/issues/criminalization/bradh.html> (last visited Oct. 24, 2006).

men are released from prison annually,⁴ and approximately one-sixth of the prison population is mentally ill.⁵ In the New York City jail system alone,⁶ approximately 25,000 mentally ill inmates are released every year, seventy-five to eighty percent of whom additionally suffer from drug or alcohol addiction.⁷ One of the largest problems facing this population of recently released mentally ill inmates is recidivism. Far more than other populations, recently released mentally ill inmates often find themselves quickly re-incarcerated.⁸ A 1991 study performed in New York showed that sixty-four percent of mentally ill offenders were rearrested within eighteen months of their release.⁹

Many correctional systems have attempted to reduce recidivism among mentally ill inmates by implementing discharge planning programs.¹⁰ Generally, the process of helping an inmate connect with social services in order to facilitate reintegration into society and to reduce recidivism is known as discharge planning. These services include, but are not limited to, mental health treatment and the means to pay for it, housing or shelter, employment, gaining access to public assistance and reuniting with friends and family.¹¹

4. PAIGE M. HARRISON & JENNIFER C. KARBERG, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ BULL. NO. 198877, PRISON AND JAIL INMATES AT MIDYEAR 2002 6 (April 2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim02.pdf> (last visited Oct. 24, 2006).

5. Editorial, *The Mentally Ill as "Frequent Flyers,"* N.Y. TIMES, Jan. 15, 2005, at A14.

6. A jail is a local correctional facility that holds people prior to trial for the service of jail time for misdemeanor convictions with a sentence of one year or less. HARRISON & KARBERG, *supra* note 4, at 1.

7. Complaint at 15, 17, *Brad H. v. City of New York*, 712 N.Y.S.2d 336 (Sup. Ct. 2000) (No. 117882/99), available at <http://www.urbanjustice.org/pdf/litigation/BradHcomplaint.pdf> [hereinafter *Brad H. Complaint*].

8. HUMAN RIGHTS WATCH, *supra* note 1, at 192.

9. Lynette Feder, *A Comparison of the Community Adjustment of Mentally Ill Offenders with Those from the General Prison Population: An 18-Month Followup*, 15 LAW & HUM. BEHAV. 5 (1991).

10. HUMAN RIGHTS WATCH, *supra* note 1, at 201.

11. A stipulation of settlement following a case dealing with discharge planning for mentally ill inmates defined discharge planning as including:

(a) an individualized assessment of a person's need for (i) clinically appropriate forms of continuing mental health treatment and supportive services including but not limited to, where clinically appropriate, medication, substance abuse treatment, and case management services, (ii) public benefits,

Empirical studies show that discharge planning reduces recidivism.¹² Without adequate discharge planning, mentally ill inmates are “very likely to revert after release to their former conditions or worse.”¹³ Not providing discharge planning also “makes it more likely that [mentally ill inmates] will become homeless, more likely that they will become crime victims, and less likely that they will be able to obtain proper treatment for any other illness or conditions they may have.”¹⁴ Mentally ill inmates “who are released to the community without adequate discharge planning are more likely than others to act in ways that precipitate their return to jail or to a hospital.”¹⁵

Discharge planning has many benefits. As recidivism decreases, the problem of overcrowding in prisons and jails becomes less severe.¹⁶ Mentally ill inmates benefit greatly from spending less time in jail and from receiving more of the services they need in the community. As a result of receiving these benefits, mentally ill inmates become better integrated into the community. Society as a whole is relieved from the financial burden of cycling the mentally ill in and out of correctional institutions and from the financial burden of the crimes the men-

including but not limited to Medicaid, Public Assistance Benefits and Food Stamps, (iii) appropriate housing or appropriate shelter if housing cannot be located prior to the individual’s release from incarceration in a City Jail, and (iv) transportation to appropriate housing or shelter; and (b) assisting each individual with obtaining the services and recourses set forth in (a), in accordance with each individual’s need for those services and resources and in accordance with the terms of this Settlement Agreement.

Stipulation of Settlement, ¶ 5, *Brad H. v. City of New York*, 729 N.Y.S.2d 348 (Sup. Ct. 2001), available at <http://www.urbanjustice.org/pdf/litigation/BradSettlementMHP.pdf> [hereinafter *Brad H. Settlement*].

12. See, e.g., News Release by Michael Faenza, President and CEO, National Mental Health Association, Statement on the Criminalization of Mental Illness (Sept. 21, 2000), <http://www.nmha.org/newsroom/system/news.vw.cfm?do=vw&rid=228> (last visited Oct. 24, 2006) [hereinafter National Mental Health Association Statement].

13. *Brad H. Complaint*, *supra* note 7, at 4.

14. *Id.* at 4-5.

15. *Id.* at 5.

16. See HARRISON & KARBERG, *supra* note 4, at 1. As of June 2002, the prison and jail population exceeded two million inmates for the first time. *Id.* Specifically, there were 1,344,748 in state and federal prisons and 665,475 in local jails for a total of 2,019,234. *Id.* State prisons operated between 1% and 16% above capacity and federal prisons operated 31% above capacity. *Id.* The inmate population grew an average of 3.8% each year from 1995 to 2002. *Id.* at 2.

tally ill commit when they cannot obtain their needed treatment.¹⁷ Troublingly, despite the obvious benefits of discharge planning, thirty-four percent of adult correctional institutions still do not assist released inmates in obtaining mental health services.¹⁸

Prior to *Brad H. v. City of New York*,¹⁹ the New York City jail system was counted among the correctional institutions that did not provide discharge planning to mentally ill inmates.²⁰ *Brad H.* was the first ever class action lawsuit brought against a correctional system demanding discharge planning for mentally ill inmates.²¹ This article will address the *Brad H.* case in great detail later, but the end result of the case was a stipulation of settlement which laid out a comprehensive discharge planning system. The system was created to effectively reintegrate mentally ill inmates into society and to reduce recidivism.²²

The underlying theory of this comment is that discharge planning is an extremely valuable tool to both the mentally ill inmates who receive its services and to society in general; therefore, discharge planning should be carefully examined so that it may be implemented as effectively as possible. In keeping with this theory, the purpose of this comment is to critically evaluate the stipulation of settlement following *Brad H.* within the context of various theories on the legal duty to provide discharge planning and more specifically, within the context of New York's statutory mandates concerning discharge planning for the mentally ill. Section II will examine various theories on the legal duty to provide discharge planning to mentally ill inmates and will focus on pertinent case law illustrating these theories. Section III will briefly lay out New York statutes concerning discharge planning for the mentally ill, and will examine their legislative histories and intent. Section IV will discuss the facts, ruling and rationale of *Brad H. v. City of New York*. Section V will unpack the specific provisions of the stipulation of

17. See HUMAN RIGHTS WATCH, *supra* note 1, at 201.

18. *Id.*

19. 712 N.Y.S.2d 336 (Sup. Ct.), *aff'd*, 716 N.Y.S.2d 852 (App. Div. 2000).

20. *Id.*

21. FRED COHEN, THE MENTALLY DISORDERED INMATE AND THE LAW 7-1 (Trends and Dev. Update 2005) [hereinafter COHEN Update].

22. See generally *Brad H. Settlement*, *supra* note 11.

settlement following *Brad H.* and will explain the discharge planning process in detail. Finally, and most importantly, Section VI will critically evaluate the Settlement, discuss its impact on discharge planning in New York, and suggest ways to improve the discharge planning process in New York.

II. Legal Theories on the Duty to Provide Discharge Planning

One commentator has termed the theory underlying the duty to provide discharge planning to mentally ill inmates as the theory of "continuing obligation."²³ Under this theory, once an institution begins a "course of treatment based on the treatment obligation of a custodian, the proffered treatment cannot always be terminated when custody is terminated."²⁴ The theory of continuing obligation is illustrated in the cases *Wakefield v. Thompson*²⁵ and *Lugo v. Senkowski*.²⁶

In *Wakefield*, an inmate suffered from an organic delusional disorder which, if left untreated, leads to violent outbursts.²⁷ While incarcerated, the inmate took psychotropic drugs and was given a prescription for a two week supply to be dispensed on his release.²⁸ Against his doctor's direct orders, however, the inmate was released without any of his medication.²⁹ Not surprisingly, the inmate relapsed within eleven days, engaged in a violent outburst consistent with his disease, and was subsequently arrested.³⁰

The inmate brought an action alleging that his Eighth Amendment rights were violated when he was released without his psychotropic medication.³¹ The *Wakefield* court held that the state must provide an outgoing prisoner who used psychotropic medication while incarcerated with a supply sufficient to ensure that the medication will last long enough for the inmate

23. FRED COHEN, *THE MENTALLY DISORDERED INMATE AND THE LAW* 19-13 (1998) [hereinafter COHEN].

24. *Id.*

25. 177 F.3d 1160 (9th Cir. 1999).

26. 114 F. Supp. 2d 111 (N.D.N.Y. 2000).

27. 177 F.3d at 1164.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 1161.

to consult a doctor and obtain a new supply.³² In reaching this decision, the court relied on two prior cases.³³ In *Estelle v. Gamble*,³⁴ the Supreme Court established a prisoner's Eighth Amendment based claim to medical and mental health care for serious ailments.³⁵ This Eighth Amendment based right to medical and mental health care was subsequently limited by *DeShaney v. Winnebago County Department of Social Services*.³⁶ There, the Supreme Court limited the State's obligation to provide medical and mental health care only to persons in actual physical confinement.³⁷ A literal and strict interpretation of this holding ends the state's obligation to provide care to a prisoner at the moment of that prisoner's release.³⁸

In *Wakefield*, however, the court reasoned that the requirement of care during confinement established in *Estelle* stems from the fact that the state has completely impeded the inmate's ability to secure medical or mental health care for and by himself.³⁹ However, the court went on to say that upon the moment of release, the inmate's ability to provide medical or mental health care for himself is not instantly restored.⁴⁰ It may take days, or even weeks, for the inmate to be able to secure such care.⁴¹ As the state assumed the inmate's ability to care for himself in the first place, its obligation to provide care continues until the inmate is in such a situation as to provide for himself.⁴²

The principle established in *Wakefield* has been applied to other circumstances.⁴³ In *Lugo v. Senkowski*, an inmate had surgery for kidney stones close to his release date.⁴⁴ Subsequent to the release, the inmate required another surgery to re-

32. *Id.* at 1164.

33. *Id.*

34. 429 U.S. 97 (1976).

35. *Id.* at 104-05.

36. 489 U.S. 189 (1989).

37. *Id.* at 199-200.

38. COHEN, *supra* note 23, 19-12.

39. *Wakefield v. Thompson*, 177 F.3d 1160, 1164 (9th Cir. 1999).

40. *Id.*

41. *Id.*

42. *Id.*

43. *See Lugo v. Senkowski*, 114 F. Supp. 2d 111 (N.D.N.Y. 2000).

44. *Id.* at 113.

move a metal stent from his kidney.⁴⁵ Evidence at trial showed that the inmate's parole officer offered no assistance to the inmate in obtaining the required procedure, and that the parole officer may have even actively prevented the inmate from obtaining the procedure.⁴⁶ The *Lugo* court held that *Wakefield* required the state to provide continuing medical care for the reasonable time necessary to permit a released inmate to obtain care on his own.⁴⁷ What is important about this decision is that it again illustrates that the state's have an obligation to provide medical care to inmates extends beyond prison walls.⁴⁸

Both *Wakefield* and *Lugo* extend a state's obligation to provide care to inmates beyond prison walls, but the problem is that this extended obligation does not last for very long.⁴⁹ Indeed, all the state is required to do is to put the inmate in a situation where he would be able to provide medical or mental health care for himself.⁵⁰ If the *Wakefield* court's reasoning is to be taken literally, that task would only take "a number of days, or possibly even weeks."⁵¹ Many mentally ill inmates need longer than days or weeks to achieve self-sufficiency with regard to acquiring their own medical and mental health care. What is so significant about the discharge planning system created in the wake of *Brad H.* is that the obligation to provide treatment is extended not only in time, but is extended in terms of the amount and kind of services provided to mentally ill inmates.⁵² Whereas *Wakefield* and *Lugo* dealt with medical procedures and medications, we will see that the discharge planning system following *Brad H.* additionally deals with, *inter alia*, Medicaid, public assistance, transportation and even housing or shelter.⁵³

45. *Id.*

46. *Id.*

47. *Id.* at 115.

48. COHEN, *supra* note 23, 19-13.

49. COHEN Update, *supra* note 21, 7-9, 7-10.

50. *Wakefield v. Thompson*, 177 F.3d 1160, 1164 (9th Cir. 1999).

51. *Id.*

52. See generally *Brad H. Settlement*, *supra* note 11.

53. *Id.*

III. New York Statutory Provisions Regarding Discharge Planning

In New York, the concepts of mental illness and discharge planning have specific statutory definitions and significance. These concepts have also been developed through pertinent case law which has analyzed these statutes. The New York Mental Hygiene Law defines mental illness as “an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care, treatment and rehabilitation.”⁵⁴

New York Mental Hygiene Law also addresses the concept of discharge planning.⁵⁵ It states that if a patient receives psychiatric inpatient services at a psychiatric center or developmental center subject to licensure by the office of mental health, then that patient shall be released in accordance with “a written service plan” to be prepared by staff familiar with the case history of the patient and in cooperation with appropriate social services and local government units.⁵⁶ The basic idea behind statutory provision, New York Mental Hygiene Law § 29.15(f), is to require that inpatients be discharged only in “accordance with a written discharge plan that provides, among other things, for how the released patient will . . . live and what services will be available to her/him in that setting, and how the patient will get the public benefits [she/he] is entitled to.”⁵⁷ The New York Mental Hygiene Law also goes into greater detail, stating that the written service plan must include, but is not limited to:

- (1) a statement of the patient’s need . . . for supervision, medication, aftercare services, and assistance in finding employment following discharge . . .
- (2) a specific recommendation of the type of residence in which the patient is to live and a listing of the services available to the patient in such residence.
- (3) A listing of

54. N.Y. MENTAL HYG. LAW § 1.03[20] (McKinney 2006).

55. *Id.* § 29.15(f).

56. *Id.* (emphasis added) (a written service plan serves the same functions as a discharge plan).

57. Heather Barr, *New York Agrees to Provide Services for Jail Releasees with Mental Illness*, 5 CORRECTIONAL MENTAL HEALTH REPORT, May/June 2003, at 1 [hereinafter CORRECTIONAL MENTAL HEALTH REPORT].

organizations, facilities . . . and individuals who are available to provide services in accordance with the identified needs of the patient (5) an evaluation of the patient's need and potential eligibility for public benefits following discharge . . . including public assistance, medicaid, and supplemental security income.⁵⁸

Additionally, before discharge, inpatient facilities are required to "provide reasonable and appropriate assistance to the patient . . . in applying for benefits identified in the written service plan."⁵⁹ Section 29.15(f) specifically covers inpatient services, and it is worth noting that inpatient services include situations when a mentally ill inmate is placed in a segregated unit or a New York City hospital psychiatric ward.⁶⁰

One of the biggest problems facing mentally ill inmates once released is homelessness.⁶¹ There is a pertinent line of case law interpreting exactly what the states are required to do in terms of securing housing or shelter for the mentally ill in their discharge plan. *Heard v. Cuomo*⁶² interpreted § 29.15(f) as requiring New York hospitals (a) to take specific steps in the discharge plan to prescribe the type of adequate and appropriate housing that the about-to-be-discharged mentally ill patient requires, (b) to assist the patient in locating such adequate and appropriate housing before the patient is discharged from inpatient care, (c) to discharge patients in accordance with these discharge plans, and (d) to coordinate the effectuation of these efforts among the responsible entities.⁶³ However, *Heard* stops at the point of assisting the homeless and mentally ill with finding housing because the case specifically states that the statute does not impose a duty on hospitals to "build, create, supply or fund such housing."⁶⁴

*Koskinas v. Carrillo*⁶⁵ interpreted § 29.15(f) to require New York hospitals not only to help the homeless and mentally ill to

58. N.Y. MENTAL HYG. LAW § 29.15(g).

59. *Id.*

60. *Brad H. v. City of New York*, 712 N.Y.S.2d 336, 343 (Sup. Ct.), *aff'd*, 716 N.Y.S.2d 852 (App. Div. 2000).

61. CORRECTIONAL MENTAL HEALTH REPORT, *supra* note 57, at 15 (stating that between twenty percent and forty-three percent of inmates in New York City jails who receive treatment for mental illness are homeless).

62. 610 N.E.2d 348 (N.Y. 1993).

63. *Id.* at 351.

64. *Id.*

65. 625 N.Y.S.2d 546 (App. Div. 1995).

obtain housing or shelter, but also that the hospital has an obligation to follow up with the patient to ensure that the discharge plan is adequate and has actually been implemented.⁶⁶

In New York, not only do mentally ill inpatients receive discharge planning, but mentally ill outpatients do as well. Under the New York Statute, “any provider of service which operates . . . a nonresidential outpatient program in which staff are assigned on a regular basis to provide services for the treatment of [patients] with a diagnosis of mental illness”⁶⁷ must provide discharge planning for those patients.⁶⁸ Generally, when a mentally ill inmate receives mental health services while living in the general prison population, that inmate is receiving outpatient services.⁶⁹ Additionally, the New York Statute has specific provisions providing for the mentally ill in correctional facilities.⁷⁰

The legislative history and intent of these statutes reveal a policy in New York regarding the needs of its mentally ill citizens that is progressive and organized to preempt problems. In 1977, New York’s Mental Hygiene Law was recodified and substantially amended.⁷¹ The preamble and legislative findings state that “[p]rotecting the mental health of the people of the state [and] preventing the occurrence of mental illness . . . alcoholism and substance abuse . . . are matters of public concern.”⁷² Additionally, “[i]t is the policy of the state of New York that all of its residents who are disabled will receive services according to their individualized needs. . . .”⁷³ The specific purpose of outpatient programs is to diagnose and treat mentally ill individuals on an ambulatory basis, with the goals of reducing symptoms and maximizing the potential of those persons to recover meaningful social involvement in order to maintain their capacity to function in the community.⁷⁴ Simply put, the goal of

66. *Id.* at 547.

67. N.Y. COMP. CODES. R. & REGS. tit. 14, § 587.3 (McKinney 2005).

68. *Id.* § 587.1.

69. Brad H. v. City of New York, 712 N.Y.S.2d 336, 344 (Sup. Ct. 2000).

70. N.Y. COMP. CODES. R. & REGS. tit. 14, § 587.8(e).

71. 712 N.Y.S.2d at 342.

72. *Id.* (citing N.Y. MENTAL HYG. LAW § 29.15(f) (McKinney 2006); 1977 N.Y. Sess. Laws 2090 (McKinney)).

73. *Id.*

74. N.Y. COMP. CODES. R. & REGS. tit. 14, § 587.1 (McKinney 2005).

the New York statutory scheme regarding the mentally ill is to provide them with individualized treatment so that they can effectively function within the community.

IV. Facts, Holding and Rationale of *Brad H. v. City of New York*

Despite New York's clear statutory mandate to provide discharge planning to the mentally ill who receive inpatient or outpatient service from New York State, New York City jails were not providing any discharge planning to mentally ill inmates that received treatment while in jail.⁷⁵ Not only did the jail system not provide any discharge planning to mentally ill inmates, but the way in which these inmates were released was appalling. When an inmate was released from Rikers Island, they would not be "provided any mental health services, government benefits assistance, housing referrals, or other services, or planning therefor."⁷⁶ Rather all that was done for inmates was that they were taken "by bus to the Queens Plaza subway station between 2:00 and 6:00 AM and given \$1.50 plus . . . a two fare MetroCard."⁷⁷ Even for inmates without mental illness, there is a high rate of recidivism among those who do not receive support services to enable successful reentry into society.⁷⁸ This rate is even higher for inmates with mental illness.⁷⁹ Therefore, it is no surprise that recidivism rates were very high in New York City when no discharge planning was given to recently released, mentally ill inmates.⁸⁰ Presented with the deplorable practice of unceremoniously releasing mentally ill inmates into a subway stop in the middle of the night, and the clear statutory mandate that discharge planning is required for the mentally ill who are treated by New York, a class action lawsuit was filed to require the New York City jail system to provide discharge planning to mentally ill inmates.

The Defendants in the suit were the Mayor of New York City, the Department of Correction, the Department of Health

75. 712 N.Y.S.2d at 339.

76. *Id.*

77. *Id.*

78. HUMAN RIGHTS WATCH, *supra* note 1, at 192.

79. *Id.*

80. *See Feder, supra* note 9.

and Mental Hygiene, the Health and Hospitals Corporation, the Human Resources Administration, Prison Health Services, and the director or commissioner of each entity.⁸¹ The Plaintiff class was defined as inmates “(a) who are currently confined or who will be confined in City jails, (b) whose period of confinement in City jails lasts 24 hours or longer, and (c) who, during their confinement in City jails, have received, are receiving or will receive treatment for mental illness.”⁸² In 1997, when the suit was first filed, there were approximately 33,000 inmates in the New York City jail system, and approximately twenty-five percent of these inmates received mental health treatment while in jail.⁸³ This treatment occurred either on an outpatient basis where the inmate lived in the prison’s general population, or on an inpatient basis where the inmate was placed in a segregated unit or psychiatric ward of a New York City hospital.⁸⁴ At the time the lawsuit was filed, there were 8,250 potential class members.⁸⁵

Because New York has statutes that require New York to provide discharge planning to any mentally ill individual who receives New York state-provided inpatient or outpatient treatment for mental illness,⁸⁶ the court found that all class members who received mental health treatment while in jail are entitled to discharge planning.⁸⁷ This is because an inmate who receives mental health treatment while in jail must be receiving either inpatient or outpatient treatment.⁸⁸ Additionally, the court looked to the legislative history of these statutes in reasoning that it was proper to apply them to prison inmates.⁸⁹ The court specifically quoted the language that “[i]t is the policy of . . . New York that all of its residents who are disabled will

81. *Brad H. Complaint*, *supra* note 7, at 3.

82. *Brad H. v. City of New York*, 712 N.Y.S.2d 336, 339 (Sup. Ct. 2000).

83. *Id.* at 340.

84. *Id.*

85. *Cf. id.* (there were approximately 33,000 inmates in the jail, twenty-five percent of whom were being treated for mental illness).

86. *See* N.Y. MENTAL HYG. LAW § 29.15(f) (McKinney 2006); N.Y. COMP. CODES. R. & REGS. tit. 14, § 587.1 (2005).

87. 712 N.Y.S.2d at 343-44.

88. *Id.*

89. *Id.* at 342.

receive services according to their individualized needs”⁹⁰ From this language, the court concluded that “[t]hese purposes apply as much to people incarcerated in the jails of New York City as [the] other residents of our State.”⁹¹

Having found that class members were entitled to discharge planning services, the court moved on to consider the remedy. Plaintiffs brought the action seeking a preliminary injunction enjoining the defendants from releasing class members without discharge planning.⁹² The court found that the plaintiffs demonstrated “through [the] expert, personal and documentary submissions that irreparable injury will occur to [p]laintiffs and the class if their release occurs from New York City jails without any mental health discharge planning.”⁹³ The court held that “[d]efendants are not providing needed mental health services and other supportive assistance to plaintiffs”⁹⁴ Specifically, the court reasoned that discharge planning is vital for class members because if class members did not get the requested relief, “the expert evidence submitted by [p]laintiffs shows that, without any adequate discharge planning, [plaintiffs] face the immediate threat of psychological relapse, with a greater likelihood of the concomitant return to lives of drug and/or alcohol abuse, homelessness, lawlessness, and danger to themselves and/or others.”⁹⁵ Additionally, the court noted that the benefits of discharge planning would not be bestowed upon class members alone, but that society in general would benefit as well because discharge planning would cause class members to become healthier and more productive members of society.⁹⁶ Therefore, the court granted the injunction and enjoined the defendants from releasing class members without discharge planning.⁹⁷

Given this court ordered injunction, it was then up to the parties to create a system of discharge planning that would al-

90. *Id.* (citing N.Y. MENTAL HYG. LAW § 29.15(f); 1977 N.Y. Sess. Laws 2090 (McKinney)).

91. *Id.*

92. *Id.* at 345.

93. *Id.* at 344.

94. *Id.*

95. *Id.* at 341.

96. *Id.* at 344.

97. *Id.* at 345.

low class members to enjoy the rights that the New York statutes give them, while still operating in a way that the New York City jail system would find logistically and financially feasible. This system of discharge planning would be laid out in the stipulation of settlement following *Brad H.*⁹⁸

The significance of *Brad H.* is clearly displayed when viewed in the light of previous precedent. *Wakefield* and *Lugo* were cases where a court held that a state must provide medical care for a released inmate until it is reasonable for him to be able to provide medical care for himself.⁹⁹ The rationale was simply based on the fact that the state took away the inmate's ability to provide medical care for himself, and the state therefore had an obligation to provide medical care until the inmate could be expected to be self-sufficient.¹⁰⁰ The rationale in *Brad H.* however is markedly different. The purpose is not to return class members to the state they were in before they were incarcerated, but to make them better off than they were before incarceration.¹⁰¹ By improving their overall situation, recidivism is reduced to the benefit of both the inmate and society in general. In this way, *Brad H.* takes a progressive step beyond the "principle of . . . continue[d] obligation"¹⁰² found in *Wakefield* and *Lugo*, and indeed, it is a step in the right direction.¹⁰³

V. The Stipulation of Settlement Following *Brad H. v. City of New York*

In *Brad H.*, the court enjoined the defendants from releasing class members without discharge planning.¹⁰⁴ However, the court left it up to the parties to implement a feasible and effective discharge planning system. The specific workings of the

98. See *Brad H. Settlement*, *supra* note 11.

99. See *Wakefield v. Thompson*, 177 F.3d 1160 (9th Cir. 1999); *Lugo v. Senkowski*, 114 F. Supp. 2d 111 (N.D.N.Y. 2000).

100. 177 F.3d at 1164.

101. *Brad H. v. City of New York*, 712 N.Y.S.2d 336, 344 (Sup. Ct. 2000).

102. See COHEN, *supra* note 23, 19-13.

103. Writing after the *Brad H.* complaint was filed, but before the case reached its settlement, one commentator wrote: "Medication alone would represent an important victory. However, if discharge planning means planning and arranging of the continuation of care, and if it also includes a case management-type of obligation along with independent oversight, then the victory would be stunning." *Id.* 19-19.

104. 712 N.Y.S.2d at 345.

system are enumerated in the stipulation of settlement to which the parties agreed.¹⁰⁵ Fundamentally, the defendants agreed to provide class members access to the treatment that they need to maintain psychiatric stability after their release, including access to outpatient treatment, medication and the means to pay for these services if the inmate is indigent.¹⁰⁶ The specific provisions of the Settlement address the various needs that class members have when they transition from incarceration back to society.

First, the court that imposed the injunction against the defendants specifically held that the discharge planning process, in whatever form it should take, will have to occur in a way that does not hold up the release of class members. Such a delay would violate Constitutional and statutory rights of the class members.¹⁰⁷

Additionally, the Settlement establishes a system where class members have access to the various medication they need to function normally in society.¹⁰⁸ Upon release, all class members are given a seven day supply of pills, except as otherwise ordered by a physician.¹⁰⁹ Class members are given prescriptions for the medications that they require, and they are given the means to fill the prescriptions.¹¹⁰ If necessary, class members will be enrolled in New York's medication grant program where medications are simply given to class members while they wait for their Medicaid and other social benefit programs to be reinstated.¹¹¹ Additionally, the Settlement provides that if New York should discontinue its medication grant program, the defendants will have to create a similar program to fill the void.¹¹²

The Settlement creates a system which attempts to smoothly transition class members from receiving mental health services from a correctional facility to receiving mental

105. See *Brad H. Settlement*, *supra* note 11.

106. *Id.*

107. *Brad H. v. City of New York*, 712 N.Y.S.2d 336, 344 (Sup. Ct. 2000).

108. *Brad H. Settlement*, *supra* note 11, ¶¶ 50-51.

109. *Id.*

110. *Id.* ¶ 69.

111. *Id.*

112. *Id.* ¶ 74.

health services from community providers.¹¹³ Under the Settlement, a comprehensive treatment and discharge plan must be drawn up for every class member released.¹¹⁴ If such a plan cannot be drawn up, for example, if an inmate is incarcerated and released before a plan can be drawn up, then a less comprehensive discharge summary is to be created.¹¹⁵ Additionally, appointments are to be made for class members for mental health and medical aftercare.¹¹⁶

The Settlement provides that class members are to be given assistance in obtaining Medicaid and other public assistance benefits upon their release.¹¹⁷ This is an especially important provision not only because class members need the means to pay for their medical and mental health treatment, but because upon incarceration many benefit programs, such as Supplemental Security Income, are terminated and do not automatically reinstate upon release, requiring the inmate to re-apply.¹¹⁸ In addition to Medicare and Supplemental Security Income, the Settlement provides that the defendants must help eligible class members obtain other public benefit programs, such as food stamps.¹¹⁹

The Settlement also provides for placement in housing or shelters for the many class members that are homeless.¹²⁰ Efforts are made to place class member in supportive housing, and if that is not possible, to place class members in the New York City homeless shelter system.¹²¹

The Settlement requires defendants to release class members during daylight hours.¹²² This sounds like a trivial provision, but it has significant and positive effects on class members. When class members were released at a Queens sub-

113. *Id.* ¶¶ 16, 23, 42.

114. *Id.* ¶ 16.

115. *Id.* ¶ 23.

116. *Id.* ¶ 42.

117. *Id.* ¶¶ 57, 66.

118. Editorial, *The Mentally Ill as "Frequent Flyers,"* N.Y. TIMES, Jan. 15, 2005, at A14.

119. *Brad H. Settlement, supra* note 11, ¶ 75.

120. *Id.* ¶ 88.

121. *Id.* ¶¶ 89, 93.

122. *Id.* ¶ 32.

way stop in the middle of the night, many had no where to go and were re-arrested that very night.¹²³

Class members have the right to refuse all discharge planning, the right to change their mind about this later, and the right to refuse some, but not all services.¹²⁴ If the class member wishes, family members or significant others may become involved in the discharge planning process.¹²⁵ This is an especially important provision considering that thousands of class members are sixteen or seventeen years old, to whom parental involvement is particularly important.¹²⁶

Class members who are released directly from court can receive the same services as those released from jail by visiting a Service Planning Assistance Network (SPAN) office.¹²⁷ The SPAN system is a non-profit organization that maintains offices near courthouses in all five boroughs. SPAN offices can provide the same discharge planning services that class members would receive if they were released from jail.¹²⁸ The SPAN offices serve not only class members released directly from court, but also any class member that has been released and wants to "drop in" to receive services.¹²⁹

The Settlement distinguishes between class members who are seriously and persistently mentally ill (SPMI) and those who are not.¹³⁰ This is an important distinction because certain services and benefits are available only to class members who are SPMI.¹³¹ Defendants determine if a class member is SPMI according to criteria created by the New York State Office of Mental Health; where to be SPMI, an individual must:

meet criteria for a DSM-III-R diagnosis other than alcohol or drug abuse, organic brain syndromes, developmental disabilities, or social conditions, and satisfy at least one of the following requirements: (1) [r]eceives [Supplemental Security Income] or [Social Security Disability] due to mental illness; (2) [h]as extended im-

123. CORRECTIONAL MENTAL HEALTH REPORT, *supra* note 57, at 15.

124. *Brad H. Settlement*, *supra* note 11, ¶ 8.

125. *Id.* ¶ 10.

126. CORRECTIONAL MENTAL HEALTH REPORT, *supra* note 57, at 15.

127. *Brad H. Settlement*, *supra* note 11, ¶¶ 36-37.

128. *Id.*

129. *Id.* ¶ 55.

130. *See, e.g., id.* ¶ 30.

131. *See, e.g., id.*

pairment in functioning due to mental illness, operationalized as a Global Assessment of Functioning score of 50 or less or at least two of the following – difficulties in self-care, restrictions of daily living, difficulties in maintaining social functioning, and/or deficiencies in concentration, persistence, or pace; or (3) [reliance] on psychiatric treatment, rehabilitation, or supports to avoid the functional impairments previously listed.¹³²

Additionally, the Settlement states that class members who take anti-psychotic or mood-stabilizing drugs while in jail will be presumed to be SPMI.¹³³ Once a class member is determined to be SPMI, that member is eligible for transportation to all discharge planning services.¹³⁴ This is a benefit not available to general class members.¹³⁵ Additionally, SPMI inmates have the right to file applications for public assistance and have the applications processed while the inmate is still incarcerated so that the public assistance benefits will be available to the SPMI inmate as soon as possible after release.¹³⁶

One of the most significant aspects of the Settlement is that it provides for compliance monitors.¹³⁷ Under the Settlement, both plaintiffs and defendants are to hire compliance monitors whose job will be to monitor the defendants' compliance with the Settlement.¹³⁸ The compliance monitors must have at least a Masters degree in psychology or social work.¹³⁹ To monitor and measure the compliance of the defendants, the compliance monitors are to establish performance goals which are to be expressed as a percentage of the class for whom each goal is achieved.¹⁴⁰ The compliance monitors may establish any performance goals they deem appropriate, but the Settlement specifically enumerates the following:

- (a) Timely assessment of Class Members for inclusion in the Class;
- (b) Appropriate assessment of whether class members are Seriously and Persistently Mentally Ill (SPMI);
- (c) Appropriate

132. CORRECTIONAL MENTAL HEALTH REPORT, *supra* note 57, at 15.

133. *Brad H. Settlement*, *supra* note 11, ¶ 27.

134. *Id.* ¶ 30.

135. *Id.*

136. *Id.* ¶ 75.

137. *See, e.g., id.* ¶ 108.

138. *Id.*

139. *Id.* ¶ 109.

140. *Id.* ¶ 142.

assessment of whether individuals assessed at the Initial Assessment as needing further mental health assessment and/or treatment are likely [SPMI]; (d) Completion of clinically appropriate Comprehensive Treatment and Discharge Plans for Class Members; (e) Completion and procession of Medicaid prescreening for Class Members; (f) Enrollment of eligible Class Members in MGP [Medication Grant Program] and submission of Medicaid applications; (g) Activation and re-activation of Class Members Medicaid benefits; (h) Provision of medications and/or prescriptions to Class Members; (i) Making appropriate community referrals and/or appointments for Class Members; (j) Submission and processing of SNA [Safety Net Assistance] and TANF [Temporary Assistance to Needy Families] applications for potentially eligible Class Members who are deemed to be SPMI; (k) Provision of transportation to Class Members who are deemed to be SPMI or likely to be SPMI; (l) Follow-up with Class Members who are deemed to be SPMI in the areas of housing placement and community referrals or appointments; and (m) Arranging appropriate housing placements for eligible Class Members.¹⁴¹

Importantly, should the compliance monitors find that the defendants are not meeting the performance goals, the Settlement authorizes the compliance monitors to apply for a court order requiring the defendants to comply with the performance goals.¹⁴²

Some provisions of the Settlement require defendants to use “reasonable efforts” to achieve some goal, and one of the compliance monitors most important jobs is to ensure that the efforts made by the defendants are in fact reasonable.¹⁴³ For example, defendants must make a reasonable effort to determine the release date of each class member housed at a specific facility, and the compliance monitors will determine if the efforts are sufficient.¹⁴⁴ Additionally, defendants are to use reasonable efforts to explore the feasibility of establishing a system where applications for food stamps, Supplemental Security Income and Social Security Disability are filled out and submitted for all class members before they are released.¹⁴⁵ These mea-

141. *Id.*

142. *Id.* ¶ 145.

143. *See, e.g., id.* ¶¶ 34-35, 86-87.

144. *Id.* ¶¶ 34, 35.

145. When the settlement was first drafted, this service was only to be given to class members who were SPMI. *Id.* ¶¶ 86, 87.

asures would effectively ensure that benefits are available immediately upon release.¹⁴⁶ In addition to setting performance goals, the compliance monitors also created quarterly reports which examine the successes, failures and overall progress of the defendants also creates a discharge planning system and ensuring that every class member receive all the discharge planning services to which he/she is entitled.¹⁴⁷

The myriad of specific provisions discussed in the Settlement all revolve around the general goal of successfully transitioning class members from receiving mental health services in jail to receiving mental health services from general society. Most of the services that class members require to function in general society already exist and are available. The challenge is transitioning class members from jail to general society so that they reliably receive these services.¹⁴⁸ In providing discharge planning, the hope is that class members make this transition successfully and are prevented from retuning to the harmful cycle of “substance abuse, mental and physical health deterioration, homelessness, indigence, crime, rearrest and reincarceration.”¹⁴⁹

VI. Critical Evaluation of the Stipulation of Settlement Following *Brad H. v. City of New York*

Brad H. is a landmark case that will shape the landscape of mental health services provided to inmates in New York and other states for years to come. The Settlement sets the framework for a discharge planning system that is proactive, progressive and beneficial to inmates and general society alike. However, despite the praises that the Settlement truly deserves, it is, like most things, imperfect.¹⁵⁰

146. *Id.*

147. To date, October 24, 2006, the compliance monitors have produced nine of these reports and they are available at <http://www.urbanjustice.org/ic/litigation/mental.html>.

148. *Brad H. v. City of New York*, 712 N.Y.S.2d 336, 344-45 (Sup. Ct. 2000).

149. *Id.* at 345.

150. The American Psychiatric Association has stated that an effective discharge planning system must include five essential elements:

(1) Appointments should be arranged with mental health agencies for all inmates with serious mental illness; (2) Arrangements should be made with local mental health agencies to have prescriptions renewed or evaluated for

A. *Integration*

One of the most important aspects of a discharge planning system is the actual range of services that are offered to inmates; the more numerous and comprehensive, the better. A less obvious aspect, but equally as important, is a collaboration between the various agencies and service providers involved in implementing the discharge plan. Agencies such as corrections, parole, mental health, housing, employment, health and welfare, and private providers of support services must all be able to communicate with each other and act in unison if the class member is to receive a comprehensive range of discharge planning services that truly meets all of the class member's needs. The Human Rights Watch is an organization that has dealt with this very issue in one of its publications, such issue could be referred to as the problem of integration.¹⁵¹

If a discharge planning system is to be truly integrated, separate agencies providing separate services must be able to view their individual services as part of an integrated whole.¹⁵² Doing so helps to ensure that all of a class members' needs are met. For example, the agency responsible for finding a class member housing or shelter should not only be concerned with finding a class member a place to sleep, but also with finding a location that will provide the class member access to transportation to and from other vital services. Without an integrated view, one need may be met while others may go unfulfilled.

An example of how a discharge planning system can be integrated can be found in the position of Social Work Program Director at the North Carolina Department of Corrections.¹⁵³ This director attends meetings with all of the agencies providing services to released inmates to make sure that the various agencies understand how their decisions will affect the larger

renewal; (3) Discharge and referral responsibilities should be carried out by specifically designated staff; (4) Inmates should be assessed for appropriateness of a community referral; and (5) Prison administrative mental health staff should participate in the development of service contracts to ensure access to community-based case managers to provide continuity of service.

AMERICAN PSYCHIATRIC ASSOCIATION, *PSYCHIATRIC SERVICES IN JAILS AND PRISONS* 46 (2d ed. 2000).

151. HUMAN RIGHTS WATCH, *supra* note 1, at 195.

152. *Id.* at 194-95.

153. *Id.* at 195.

picture of providing a complete range of services to inmates.¹⁵⁴ Placing the responsibility of case management upon a single person or entity helps to ensure that all the individual service providers act in a way that furthers the goal of meeting all of the needs of class members. Additionally, the American Association of Community Psychiatrists has stressed the importance of integration by stating that discharge planning should be multidisciplinary and comprehensive and that the individual or agency responsible for case management should be clearly recognized.¹⁵⁵

The Settlement following *Brad H.* has an integration problem. This problem is best illustrated by the process the Settlement establishes for when a class member must be released before housing can be arranged for the class member. When such a situation arises, the Settlement provides that “the “Discharge Planning Staff shall ensure that the individual who has primary responsibility for ongoing coordination of the Class Member’s care following his or her Release Date. . . secure[s] appropriate housing for the Class Member.”¹⁵⁶ The Settlement defines the individual who has primary responsibility for securing housing as any one of the following:

- (a) a staff member at the community-based mental health care program to which the Class Member has been referred, (b) the Class Member’s [intensive case management], [supportive case management], [assertive community treatment] or LINK worker, (c) SPAN Officer Staff, provided the Class Member presents himself or herself to a [department of homeless services] shelter or SPAN Office[r] within thirty days after being released from incarceration at a City Jail, and/or (d) appropriate staff at a Program Shelter where the Class Member resides while awaiting a housing placement.¹⁵⁷

According to the above quote, the individual with primary responsibility for a class member’s case management could be a worker at one of at least four different organizations. At best, figuring out who has primary responsibility for a class mem-

154. *Id.*

155. Position Statement, American Association of Community Psychiatrists, Position Paper on Post-Release Planning, <http://www.comm.psych.pitt.edu/finds/postrelease.html> (last visited Oct. 24, 2006).

156. *Brad H.* Settlement, *supra* note 11, ¶ 90.

157. *Id.* ¶ 91.

ber's housing is confusing, and in the worst case scenario, this confusion will lead to class members slipping through the cracks in the discharge planning system. Interestingly, the Settlement itself recognizes how difficult it is to determine who the individual with primary responsibility for housing is and accordingly contains a provision detailing what to do, if despite the defendants' best efforts, the person with the primary responsibility for securing housing cannot be identified.¹⁵⁸

As it stands now, the Settlement details what to do when, despite the defendants' best efforts, the individual with primary responsibility for a class member's housing cannot be located. The better practice would be to make it simple for service providers and class members to identify who has primary responsibility for a class member's services. One way to achieve this is to require a single entity, the jail's discharge planning staff, to take primary responsibility for class member's housing. Under this system, class members and all other service providers in the discharge planning process will know who to contact when a housing problem arises, thus making the system more effective and efficient.

Not surprisingly, the problem of integration was addressed a number of times in the compliance monitor's quarterly reports. In the first compliance report, the monitors noted that "there is no single point of responsibility for discharge planning."¹⁵⁹ The monitors noted that there is a diffusion of responsibility, where within the multiple discharge planning units, there is the incorrect view that the different discharge tasks could be isolated or performed in a vacuum.¹⁶⁰ To make matters worse, the monitors observed that "there is inadequate and unreliable communication" between the distinct discharge planning units."¹⁶¹ Wisely, the monitors suggested that "defendants completely restructure the discharge planning staff model as well as the overall service-delivery model, move all discharge planners into the jails, and hire as many clinically trained dis-

158. *See id.*

159. Henry A. Dlugacz & Erik Roskes, Special Report of the Compliance Monitors at 15, *Brad H. v. City of New York*, 716 N.Y.S.2d 852 (App. Div. Nov. 17, 2003) (No. 117882/99), available at <http://www.urbanjustice.org/pdf/litigation/compliancemonitors.pdf>.

160. *Id.* at 16.

161. *Id.*

charge planners as possible.”¹⁶² These suggestions are aimed at creating a more integrated system that could provide a smoother and more continuous service delivery process.

One of the major problems associated with a disjointed, non-integrated discharge planning system is that the lack of integration harms the therapeutic relationship between class members and service providers.¹⁶³ A consequence of a weak therapeutic relationship is that many class members refuse to accept discharge planning services. Therefore, improving integration of the discharge planning system would not only increase the quality of service, but would also increase the amount of services provided.

In an effort to integrate the discharge planning system, the compliance monitors and the defendants began to implement what they termed the “new model.”¹⁶⁴ Under this new model, all discharge planning services are “provided to class members by a single discharge planning team which included masters and bachelor level personnel who will divide tasks based on their expertise and training.”¹⁶⁵ This was an important improvement over the old system where discharge planning tasks were divided up between four separate divisions.¹⁶⁶ Also, according to the compliance monitors, a vital element to implementing the new model is adequate staff.¹⁶⁷ The monitors recommend that the defendants hire more discharge planners and that these discharge planners be educated to either the Bachelor or Masters level.¹⁶⁸ In addition to adequate staff, another vital element of an integrated discharge planning system is the maintenance of accurate and confidential records to ensure continuity of care as prisoners are transferred from service provider to service provider.¹⁶⁹

162. *Id.*

163. See Henry A. Dlugacz & Erik Roskes, Fourth Quarterly Report of the Compliance Monitors, *Brad H. v. City of New York*, 716 N.Y.S.2d 852 (App. Div. June 7, 2004) (No. 117882/99), <http://www.urbanjustice.org/pdf/litigation/FQR.pdf> (last visited Oct. 24, 2006) [hereinafter Report of 6/6/05].

164. *Id.*

165. *Id.*

166. Report of 6/6/05, *supra* note 163.

167. *Id.* at 2.

168. *Id.*

169. HUMAN RIGHTS WATCH, *supra* note 1, at 4.

The end goal of the new model of integration is that all the individual tasks required to be performed in a discharge plan are viewed not in isolation, but in a holistic manner.¹⁷⁰ The hope is that the increase of integration of the discharge planning system will enhance the effectiveness of the system and eventually reduce recidivism.

B. *Public Assistance Programs*

Integration is not the only area in which the Settlement stands to improve. There are some services required under the Settlement which are carried out in a less than optimal way. One such service is helping class members apply for and receive public benefits. One of the most important aspects of discharge planning is giving financial assistance to class members. Many class members need medication and mental health services to function normally, and without the means to pay for these services, class members will decompensate, commit crimes and end up back in jail.¹⁷¹ The best of all situations would be if applications for public assistance programs are filed before a class member is released. If this were the case then the benefits could be available as soon as the class member is released or as soon thereafter as possible. The Settlement however, does not require defendants to do this. Instead, it requires them to “explore the feasibility” of creating a system where application for various Social Security and Veterans Administration benefits are completed before a class member is released.¹⁷² The compliance monitors have specifically found that it is feasible for the defendants to create a system where defendant’s assess the eligibility of class members for various benefit programs and then submit applications on behalf of class members.¹⁷³ The language of the Settlement requires defendants to implement such a system if found feasible.¹⁷⁴ Without a doubt, setting up this system will cause defendants to incur some costs. However, in the long run it will reduce recidivism rates among class mem-

170. Report of 6/6/05, *supra* note 163, at 122.

171. Editorial, *The Mentally Ill as “Frequent Flyers,”* N.Y. TIMES, Jan. 15, 2005, at A14.

172. *Brad H. Settlement*, *supra* note 11, ¶ 87.

173. Report of 6/6/05, *supra* note 163, at 28.

174. *Brad H. Settlement*, *supra* note 11, ¶ 87.

bers and prove a worthwhile investment because it is more cost effective to keep someone out of jail than it is to deal with the cost of their crime and incarceration.¹⁷⁵

C. *Housing and Shelter*

When interviewed about what their discharge planning needs are, class members frequently ranked where they would live and how they would eat as more important than medication and mental health appointments.¹⁷⁶ Between twenty and forty-three percent of class members are homeless, and this figure may be even higher considering those class members who lose whatever housing they had while they were incarcerated.¹⁷⁷ Housing or shelter are basic human needs and providing adequate housing or shelter to class members is one of the most important aspects, if not the most important aspect, of a comprehensive discharge plan. Indeed, without a stable living situation, class members “self-medicate their illness with illegal drugs or commit other criminal acts as a result of poverty, desperation, or psychiatric symptoms.”¹⁷⁸

Even for the general population, there is a shortage of affordable housing in New York City, but the problem becomes even worse for class members who require housing or shelter with supportive services such as on-site medical or mental health staff.¹⁷⁹ In New York City, there is housing that offers such supportive services, but the vacancy rates of these programs are on average only around two percent.¹⁸⁰ Therefore, these pre-existing supportive housing programs can only support a fraction of the class members released from jail. The situation is even grimmer considering that class members must compete for these vacancies with other mentally ill people in need of housing who have not been recently released from incarceration.¹⁸¹ Additionally, many class members are precluded

175. HUMAN RIGHTS WATCH, *supra* note 1, at 201.

176. CORRECTIONAL MENTAL HEALTH REPORT, *supra* note 57, at 15.

177. *Id.*

178. Heather Barr, *Connecting Litigation to a Grass Roots Movement: Monitoring, Organizing, and Brad H. v. City of New York*, 24 PACE L. REV. 721, 729 (2004).

179. CORRECTIONAL MENTAL HEALTH REPORT, *supra* note 57, at 15.

180. *Id.*

181. *Id.*

from acquiring these supportive housing services because many programs require that the recipient be “homeless.”¹⁸² Many of these programs use a definition of homelessness that excludes class members.¹⁸³ Lastly, most supportive housing programs require potential residents to come for an in-person interview.¹⁸⁴ This is obviously a requirement class members cannot fulfill while they are incarcerated.¹⁸⁵ Unfortunately, in light of the great difficulties in obtaining housing, many class members are transferred to New York City’s shelter system.¹⁸⁶

One commentator has argued that a vast improvement to the Settlement would be to “compel New York City to develop a substantial stock of affordable and/or supportive permanent housing for *Brad H.* class members.”¹⁸⁷ Under this system, all class members could transition directly from jail to their new housing. Regrettably, prior case law precludes this result. In *Heard v. Cuomo* the New York Court of Appeals overturned a lower court’s order that New York City had to develop housing for homeless psychiatric inpatients, and held that discharge planning under New York Mental Hygiene Law § 29.15(f)¹⁸⁸ requires only the use of existing resources and does not require the institution providing treatments to create new resources.¹⁸⁹

In light of the problems class members face in acquiring housing and in light of precedent holding that New York’s discharge planning statutes do not require the City to build more housing, one of two things must happen if the housing problem that class members face is to improve. Considering the precedent set by *Heard*, litigation forcing the City to create more supportive housing programs for class members is unlikely to be successful. Therefore, the City should take it upon itself to create more supportive housing programs for class members. This scenario is not as far fetched as it may seem considering that advocates are currently lobbying to create a Public Safety Demonstration Project to house two hundred homeless seriously

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. N.Y. MENTAL HYG. LAW § 29.15(f) (McKinney 2006).

189. *Heard v. Cuomo*, 610 N.E.2d 348 (N.Y. 1993).

mentally ill ex-prisoners.¹⁹⁰ Also, the empirical results showing how discharge planning reduces recidivism may prompt the City to create the needed housing.¹⁹¹ If the City does not take the initiative to create new supportive housing programs, then the New York State Legislature should enact a new law requiring an institution providing treatment to the mentally ill to perform discharge planning services that provide the patient not only with shelter and a temporary place to sleep, but also with permanent housing. The new law should include a provision requiring these institutions to, if necessary, develop new supportive housing programs.

Realistically, the goal of increasing the amount of supportive housing to meet the needs of all class members may be a bit ambitious. However, simply dumping class members into the City's shelter system is not an acceptable solution because many of these shelters do not provide the types of supportive services that class members require.¹⁹² A reasonable compromise would be to implement a set of shelters specifically designed and reserved for class members. These shelters should offer on-site services including the dispensing of medications. Such shelters would be much better alternatives to general shelters or homelessness. In fact, such shelters already exist, but to meet the needs of all, or even most of the class members, more will have to be created.¹⁹³ An example of one such pre-existing shelter is New York Presbyterian Hospital's Department of Psychiatry on-site day treatment program for men with severe mental illness living at the Ft. Washington Men's Shelter.¹⁹⁴ This program can serve up to seventy-five shelter residents at a time, providing psychiatric treatment, case management, substance abuse rehabilitation, and psychiatric rehabilitation. The ultimate goal is to place individuals in per-

190. HUMAN RIGHTS WATCH, *supra* note 1, at 201.

191. *See, e.g.*, National Mental Health Association Statement, *supra* note 12.

192. *See* Alan Felix, Charles Barber & Michael Lesser, *Serving Paroled Offenders with Mental Illness Who are Homeless—Collaboration Between the Justice and Mental Health Systems*, in FORENSIC MENTAL HEALTH: WORKING WITH OFFENDERS WITH MENTAL ILLNESS 11-1 (G. Landsberg & A. Smiley eds., 2001).

193. *Id.*

194. *Id.*

manent housing and to transfer care from the shelter team to community providers and supports.¹⁹⁵

A key feature to the success of these shelters is to transport class members from jail to the shelters to ensure they do not end up on the street. Currently, the Settlement only requires defendants to give this transportation service to class members that are designated as SPMI.¹⁹⁶ It would be an improvement to provide this service to all class members. Additionally, the Settlement states that if a class member has not been in a shelter before, then the class member must first go to an Intake and Assessment shelter where the class member will be assessed for the need to be placed in a mental health shelter, and then transferred to a mental health shelter.¹⁹⁷ Especially for class members who are SPMI, the trip to the Intake and Assessment shelter is unnecessary. Instead, class members should be assessed for the need to be placed in a mental health shelter before leaving jail. This will reduce the strain on the City's Intake and Assessment Shelters and will benefit class members because they will not have to transfer from one shelter to another.

While the Settlement has problems in the area of housing, it is still progressive to the extent that it goes beyond providing medications and outpatient treatment to providing a way for class members to eat, sleep, clothe themselves and obtain transportation.¹⁹⁸

D. *Job Placement and Training*

To successfully reenter society, a class member must first get their illness under control. Once the symptoms of the illness are mitigated, if a class member is truly to become a full and productive member of society, then they will have to get a job. Indeed, studies have shown that job placement or training is very important for released inmates because unemployment is highly correlated with recidivism.¹⁹⁹ Despite the proven im-

195. *Id.*

196. *Brad H. Settlement, supra note 11, ¶ 97.*

197. *Id.*

198. CORRECTIONAL MENTAL HEALTH REPORT, *supra note 57*, at 15.

199. Leroy D. Clark, *A Civil Rights Task: Removing Barriers to Employment of Ex-Convicts*, 38 U.S.F. L. REV. 193 (Winter 2004).

portance of job placement and training, the Settlement deals with the subject only in a very cursory manner. The Settlement states that if a class member wishes to apply for Safety Net Assistance (SNF) or Temporary Assistance for Needy Families (TANF) the class member must undergo an evaluation to determine if he is able to participate in work or work related activities.²⁰⁰ This is the only time the Settlement mentions job placement or training and it is wrongheaded. Under the Settlement, a class member receives job assessment only if he applies for certain kinds of public assistance. Thus, the job assessment is only an attempt to keep ineligible class members from receiving public assistance to which they are not entitled. Instead, the discharge planning system should include job assessment and training as an integral part of the discharge plan. To be sure, some class members may not be able to function in the work environment, at least not immediately after their release. However, once a class member has a place to stay, and their symptoms are under control, then they will need to get a job to fully assimilate into society. The Settlement, as it stands, does not provide for this integral part of a complete discharge plan.

E. *The SPMI Distinction*

The Settlement distinguishes between class members who are seriously and persistently mentally ill (SPMI) and those who are not. Those class members determined to be SPMI are entitled to services that other class members are not.²⁰¹ If a class member is SPMI then the Settlement requires defendants to follow-up on the class member to ensure that the class member goes to all scheduled medical and mental health appointments.²⁰² If the class member has not gone to all the appointments, then the defendants are required to use their best efforts for thirty days following the class member's release date to contact the class member and schedule other appointments.²⁰³ The problem with this Settlement provision is two-fold. First, the follow-up service should be performed for all class members and not just those who are SPMI. This is partic-

200. *Brad H. Settlement*, *supra* note 11, ¶ 83.

201. *Id.* ¶ 30.

202. *Id.* ¶ 49.

203. *Id.*

ularly important in the case of class members with substance abuse problems or developmental disabilities. Under the definition of SPMI that the Settlement uses, an inmate who is mentally retarded, addicted to drugs or alcohol, or both is not SPMI²⁰⁴ and not entitled to the follow-up service. However, one could argue persuasively that a drug addicted and mentally retarded inmate would need the follow-up service as much as, if not more than, a SPMI class member. Second, the duty to follow up on class members (SPMI or not) should be extended beyond thirty days.

F. *Economic Analysis of Discharge Planning*

The problem of recidivism is not exclusive to mentally ill inmates. Many inmates with clean bills of mental health are reincarcerated after release.²⁰⁵ The costs that recidivism tolls on society, offenders, and the jail system are just as high for non-mentally ill inmates as they are for inmates with mental illness.²⁰⁶ Given these costs and the proven reducing effect that discharge planning has on recidivism,²⁰⁷ it would be beneficial to extend discharge planning services to the general jail population. In a way, the Settlement requiring the New York City jail system to provide discharge planning to class members may be presenting the jail system with a golden opportunity. In providing discharge planning to class members, the jail system is learning valuable lessons about how to create and implement a discharge planning system that reduces recidivism. If these lessons can be applied to the general jail population, then the jail system may be able to further reduce recidivism and the high costs associated with it. In order to carry out this goal, copious amounts of data must be recorded. Already, the Settlement provides for compliance monitors to set and record performance goals, but this does not go far enough. Along with performance goals and records, there should be a very specific accounting of all costs associated with implementing the discharge planning system as well as an accounting of all the costs saved as result of a reduction in recidivism. Indeed, the Settlement should

204. CORRECTIONAL MENTAL HEALTH REPORT, *supra* note 57, at 15.

205. HUMAN RIGHTS WATCH, *supra* note 1, at 192.

206. *Id.*

207. *See, e.g.*, National Mental Health Association Statement, *supra* note 12.

have provided not only for compliance monitors who could measure performance goals, but accountants and statisticians who could record all costs expensed and saved.

Interestingly, the Cook County Jail in Chicago, the largest in Illinois, performed an economic study of a similar discharge planning system and reported fascinating and encouraging results.²⁰⁸ The study followed the jail's "bridge" program which provided discharge planning services to felony offenders with serious mental illness.²⁰⁹ Participants in the program were followed over a two year period, and the study found an *eighty to ninety percent reduction* in jail time, arrests and hospital stays for the participants.²¹⁰ This reduction resulted in more than \$1,000,000 in savings for state hospitals and over \$250,000 in savings for the Cook County Jail.²¹¹ Further, the study found that the cost of enrolling one person in the bridge program was twenty-six dollars per day while the cost of keeping a person in jail is seventy dollars per day.²¹² The economic effect of the reduction of hospital stays is even more impressive considering that a conservative estimate of the cost of a one day hospital stay is \$500.²¹³

Of course, if discharge planning services are to be extended to the general jail population there must be an increase in funding given to the jail system. If the jail system can demonstrate that the money used to provide discharge planning is a prudent investment that saves money in the long run by reducing recidivism, then the prospect of receiving this extra funding is more likely.

VII. Conclusion

Brad H. is truly a landmark case. The Settlement that followed in its wake created a discharge planning system that reduces recidivism and is beneficial to inmates, society at large, and the jail system. However, despite all the benefits that the discharge planning system bestows, it is not perfect and there

208. COHEN, *supra* note 23, 19-32.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

are areas in which it stands to improve. For example, the system is not as integrated as it should be, and as a result, many class members may not receive the continuity and depth of services that they require; the system could be organized to help class members apply for public benefits more efficiently; the job placement and training is almost completely absent in the Settlement; the system by which class members are matched with housing or shelter is inadequate; and economic data recording and analysis is not as thorough as it should be. However, despite the various faults present in the discharge planning system, the fact that *Brad H.* caused the system to be implemented is a huge victory for mentally ill jail inmates and should be commended as such.